

NO. A09-1410

State of Minnesota
In Court of Appeals

LEANN TAYLOR,

Appellant,

vs.

LSI CORPORATION OF AMERICA,
A MINNESOTA CORPORATION,

Respondent.

RESPONDENT'S BRIEF

Michael L. Puklich (#0260661)
NEATON & PUKLICH, PLLP
7975 Stone Creek Drive, Suite 120
Chanhassen, MN 55317
(952) 258-8444

Attorneys for Appellant

Thomas E. Marshall (#155597)
V. John Ella (#249282)
JACKSON LEWIS LLP
225 South Sixth Street, Suite 3850
Minneapolis, MN 55402
(612) 341-8131

Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF LEGAL ISSUES	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	2
I. The Parties	2
II. The Promotion	3
III. The School Specialty Initiative.....	5
IV. Better Everything.....	6
V. Appellant’s Interactions with Other Employees.....	7
VI. The Reduction in Force.....	9
STANDARD OF REVIEW	11
ARGUMENT	12
I. Appellant’s Job was Eliminated	12
II. Appellant Must Show a “Direct Attack” on the Institution of Marriage.....	13
III. Minnesota Law is Consistent with the Law of other States.....	16
IV. Appellant Cannot Point to Any Actions by or Beliefs of Her Spouse that were Imputed to Her	19
V. Appellant Cannot Establish a <i>Prima Facie</i> Case.....	20
VI. Appellant Cannot Establish Pretext	24
CONCLUSION	25

TABLE OF AUTHORITIES

	Page No.
FEDERAL CASES	
<i>Barnes v. GenCORP, Inc.</i> , 896 F.2d 1457 (6 th Cir. 1990)	22
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548 (1986)	12
<i>Cronquist v. Minneapolis</i> , 237 F.3d 920 (8 th Cir. 2001).....	23
<i>Davis v. KARK-TV</i> , 421 F.3d 699 (8 th Cir. 2005)	21
<i>Holley v. Sanyo Mfg.</i> , 771 F.2d 1161 (8 th Cir. 1985).....	22
<i>Matsushita Elec. Indus. Co. v. Zenith Radio Corp.</i> , 475 U.S. 574, 106 S. Ct. 1348, 1356 (1986)	11
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	20, 21, 24
<i>Pleau v. Centrix, Inc.</i> , 08-cv-4895, 2009 U.S. App. LEXIS 19131, (2 nd Cir. 2009)	18
<i>Riser v. Target, Inc.</i> , 458 F.3d 817 (8 th Cir. 2007)	23
<i>Twymon v. Wells Fargo & Company</i> , 462 F.3d 925 (8 th Cir. 2006).....	21
STATE CASES	
<i>Bob Useldinger & Sons, Inc. v. Hangsleben</i> , 505 N.W.2d 323 (Minn. 1993).....	11
<i>Carlisle v. City of Minneapolis</i> , 437 N.W.2d 712 (Minn. App. 1989)	12
<i>Chen v. County of Orange</i> , 96 Cal. App. 4 th 926, 116 Cal. Rptr. 2d 786 (Cal. Ct. App. 2002).....	16, 17, 18
<i>Cybyske v. Independent School Dist. No. 196</i> , 347 N.W.2d 256 (Minn. 1984)	13, 14, 19
<i>Danz v. Jones</i> , 263 N.W.2d 395 (Minn. 1978)	21
<i>Dietrich v. Canadian Pacific Ltd.</i> , 536 N.W.2d 319 (Minn. 1995)	21, 22
<i>DLH, Inc. v. Russ</i> , 566 N.W.2d 60 (Minn. 1997)	11

<i>Freeman v. Ace Telephone Assoc.</i> , 404 F.Supp.2d 1127 (D. Minn. 2005), <i>aff'd</i> 467 F.3d 695 (8th Cir. 2006)	1, 15, 20
<i>Funchess v. Cecil Newman Corp.</i> , 632 N.W.2d 666 (Minn. 2001)	11
<i>Gunnufson v. Onan Corp.</i> , 450 N.W.2d 179 (Minn. App. 1990)	1, 14, 20
<i>Hubbard v. United Press Int'l</i> , 330 N.W.2d 428 (Minn. 1983).....	20
<i>Kepler v. Kordel, Inc.</i> , 542 N.W.2d 645 (Minn. App. 1996).....	passim
<i>Kraft, Inc. v. State</i> , 284 N.W.2d 386 (Minn. 1979)	14
<i>Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board</i> , 415 N.E.2d 950 (N.Y. 1980).....	18
<i>Miller v. C.A. Muer Corporation</i> , 362 N.W.2d, 650 (Mich. 1984)	17
<i>Muller v. BP Exploration (Alaska) Inc.</i> , 923 P.2d 783 (Alaska 1996)	17
<i>Savoren v. LSI Corp. of Am., Inc.</i> , No. A08-0674, 2009 Minn. App. Unpub. LEXIS 199 (Minn. App. Feb. 24, 2009, <i>rev. denied</i> , 2009 Minn. LEXIS 303 (Minn. 2009)	1, 10, 15, 21
<i>Smith v. Fair Employment & Housing Com.</i> (1996) 12 Cal. 4 th 1143	17
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990)	11
<i>W.J.L. v. Bugge</i> , 573 N.W.2d 677 (Minn. 1998)	11
CALIFORNIA CODE	
Cal. Gov. Code 12940, Subd. (a)	16
MINNESOTA RULES AND STATUTES	
Minn. R. Civ. P. 56	2, 11
Minn. Stat. § 363A.03, subd. 24	13, 19
Minnesota Human Rights Act.....	passim

STATEMENT OF LEGAL ISSUES

1. Did the District Court appropriately dismiss Appellant's claim of marital status discrimination because she did not allege a direct attack on the institution of marriage?

Most Apposite Law:

Gunnufson v. Onan Corp., 450 N.W.2d 179, 182 (Minn. App. 1990).

Kepler v. Kordel, Inc., 542 N.W.2d 645, 648 (Minn. App. 1996).

Savoren v. LSI Corp. of Am., Inc., No. A08-0674, 2009 Minn. App. Unpub. LEXIS 199 (Minn. App. Feb. 24, 2009, *rev. denied*, 2009 Minn. LEXIS 303 (Minn. 2009).

2. Alternatively, should the dismissal of Appellant's claim of marital status discrimination on summary judgment be affirmed because she failed to establish a *prima facie* case?

Most Apposite Law:

Savoren v. LSI Corp. of Am., Inc., No. A08-0674, 2009 Minn. App. Unpub. LEXIS 199 (Minn. App. Feb. 24, 2009), *rev. denied*, 2009 Minn. LEXIS 303 (Minn. 2009).

Freeman v. Ace Telephone Assoc., 404 F.Supp.2d 1127, 1138 (D. Minn. 2005), *aff'd* 467 F.3d 695 (8th Cir. 2006).

3. Should the dismissal of Appellant's claim of marital status discrimination on summary judgment be affirmed because she failed to establish that the reason for her termination was a pretext?

Most Apposite Law:

Kepler v. Kordel, Inc., 542 N.W.2d 645, 648 (Minn. App. 1996).

STATEMENT OF THE CASE

In November 2006, Appellant LeAnn Taylor (“Taylor”)¹ brought suit against LSI Corporation of America, Inc. (“LSI”) in Hennepin County District Court alleging gender and marital status discrimination. Following discovery, Taylor voluntarily dismissed her gender discrimination claim. LSI then moved the Court, the Hon. Stephen Aldrich, to dismiss the remaining count of marital status discrimination on Summary Judgment pursuant to Rule 56 of the Minnesota Rules of Civil Procedure. The Court heard Oral Argument on February 26, 2009 and issued its Memorandum and Order on April 21, 2009. The judgment was filed on June 23, 2009. This Appeal followed.

STATEMENT OF FACTS

I. The Parties.

LSI designs and manufactures laminated cabinetry for use primarily in schools and hospitals. It was founded nearly 40 years ago by a local entrepreneur, Gerry Wellik. In 1999, Wellik sold LSI to a company which ultimately became known as Sagus International. (R APP 0492).²

Taylor began work for LSI on January 18, 1988 as a receptionist/secretary. (R APP 0027). She divorced her first husband in 1999. (R APP 0020). Appellant, then known as LeAnn Braden, had financial difficulties after her divorce. (R APP 0149).

¹ Sometimes alternatively referred to as “Appellant” to avoid confusion with Gary Taylor.

² References to Respondent’s Appendix are indicated by “R APP”

Gary Taylor joined the company as its President in September of 1999. (R APP 0018). He separated from his wife in December of 1999. (*Id.*). Appellant and Gary Taylor began dating “soon thereafter” in January of 2000. (*Id.*).

Appellant reported to Mary Ausen, who in turn reported to President Gary Taylor. (R APP 0027). Appellant’s job initially consisted of answering the phone, typing, incoming and outgoing mail and faxes, and copying sales literature to put them “together in the order that Keith Wrobel [Vice President of Marketing] would want them.” (R APP 0036). Gary Taylor resigned on August 18, 2006. (R APP 0041). LSI eliminated Appellant’s position effective August 21, 2006.

II. The Promotion.

On February 19, 2001, Appellant became the “Sales and Marketing Coordinator.” (R APP 0042). Ausen, Gary Taylor’s executive secretary,³ communicated this promotion to Appellant as directed by Appellant’s husband, Gary Taylor. (R APP 0485). Specifically, Ausen testified:

Attached hereto as Exhibit A is a true and correct copy of a memorandum dated February 19, 2001, that Mr. Taylor asked me to sign. I did not write, type, author or create the memorandum attached as Exhibit A. It was written by Gary Taylor. At the time, LeAnn Taylor was his fiancée and her name was LeAnn Braden.

Exhibit A states that I had discussions with Ms. Taylor about a promotion, job title and raise. I had no such discussions and the assertions made in Exhibit A are

³ Mary Ausen has loyally served the company for decades as executive secretary to the President, starting with the founder, Gerry Wellik and continuing in this role to this day. (R APP 0347-48).

untrue. I did not recommend to Mr. Taylor that Ms. Taylor should receive a promotion, different job title, or raise.

I signed the memorandum attached as Exhibit A because Mr. Taylor told me to, and he was my boss and the President of the company at the time.

Mr. Taylor and Ms. Taylor were married a few months later.

After Ms. Taylor's promotion, she often accompanied Mr. Taylor on business trips.

Ms. Taylor spent a lot of time at work planning vacations and often left for non-work related appointments or took long lunches.

(Id.)(emphasis added). Appellant does not deny Ausen's account and states that she has no knowledge regarding the circumstances of her promotion. (R APP 0044). When asked whether Ausen may have felt "uncomfortable" being placed between the President and his wife, Appellant responded that Ausen could have "spoken to the board of directors" if she felt uncomfortable. (R APP 0055).

Appellant claims she did not discuss her promotion with Gary Taylor beforehand, even though they were engaged at the time. (R APP 0046-48) (Q: "So you were engaged when you got the promotion?" A: "I believe so"). Appellant and Gary Taylor were married on June 15, 2001 in Hawaii. She concedes that Gary Taylor at least "participated" in her promotion. (R APP 0159).

After her promotion, Appellant says she received "more money" and "her duties changed" because she "started going on trips." (R APP 0068). At that point, she

reported in part, to Keith Wrobel, Vice President of Marketing. Wrobel, however, was not consulted about her promotion or new job duties. (R APP 0490). Wrobel testified:

LeAnn Taylor was first hired as a secretary in 1988. At that time she sometimes assisted me with mailing brochures or catalogues. She also helped me keep track how many catalogues we had and when we had to order more. This only required a couple hours a week and was the extent of her assistance in my marketing. Her duties did not require any actual skills in sales or marketing.

I was very surprised to hear that she was promoted to "Sales and Marketing Coordinator" in 2001. **Despite the fact that I was Vice President of Marketing, no one consulted with me about this change or even discussed it with me, either before or after the decision was made. Despite her promotion, her duties that interacted with me did not change except she often traveled with her husband, Gary Taylor, when he attended trade shows. Her position was created by Gary Taylor, who was then President of LSI. Her new position had no actual meaning to the company in terms of sales and marketing.**

(*Id.*) (emphasis added).

For her part, Taylor does not remember if she ever spoke to Wrobel after the promotion about her duties, and does not know whether anyone consulted him ahead of time. (R APP 0069). She does not recall if she *ever* spoke to Wrobel about the topic of her duties. (R APP 0075).

III. The School Specialty Initiative.

Taylor testified that she performed some marketing activities prior to her promotion, but in terms of new duties, "a lot of it had to do with this new school specialty company" that she was "going to be doing" and she was "going to be a lot more involved with working specifically with school specialty." (R APP 0070). Unfortunately, the

school specialty initiative “kind of phased out.” (R APP 0071). It had been “her responsibility to manage that relationship” but she said, “It just ended up not really—they didn’t generate the sales and all the things that they had originally said that they could do for us.” (*Id.*). When asked if she inquired at the time whether her position would be affected by the failure of the program, she responded rhetorically as follows: “Would you turn around and then say, ‘Well, I guess I shouldn’t have this promotion because I’m not doing as much as I thought I would be doing?’” (R APP 0072).

IV. “Better Everything.”

In March of 2002, Taylor took the first of two company-sponsored trips to Orlando, Florida. (R APP 0050-51). Pursuant to Gary Taylor’s directive, LSI paid her for this trip. (R APP 0227-231). She brought her children on both occasions. (*Id.*)⁴ At least one of the trips involved a visit to Disneyworld. (R APP 0052). Appellant also took company-sponsored trips with her husband to Germany, Arizona, Alabama, Chicago, New Jersey, and Washington, DC. (R APP 0032-35, 0056-61 and 0130-0134).

During these trips, LSI ostensibly paid Taylor, in part, to staff the company booth at trade shows. (R APP 0052). But Taylor did not exactly have a deep understanding of what differentiated LSI products:

Q: Okay. If you’re at a booth in Orlando and someone comes up and says, “I’ve got the Chicago school district. What – What makes your product different than CaseWorks [a direct competitor]? what do you tell them?”

A: The quality – I mean, I don’t know exactly what I would say word for word.

⁴ Taylor was unable to state whether or not LSI also paid for the travel costs of her children. (R APP 0127-132).

Q: Did you then have knowledge as to what was different? Is there anything that separates them? Was it just –

A: Yeah, quality.

Q: Like, meaning what?

A: Just the whole cabinet was better quality.

Q: In what sense? Better materials?

A: **It was put together better, better materials, better everything.**

Q: Did you use different materials than Case Works?

A: I -- I don't know.

(R APP 0164). Appellant volunteered that she did not really handle “sales” and perhaps her title should have been limited to “Marketing Coordinator.” (R APP 0170). The company did not actually do any advertising. (R APP 0166). It sometimes provided free golf balls or sweatshirts to dealers, but Wrobel or Gary Taylor selected these items. (R APP 0167). Appellant did not draft or assist with layout, color or design of brochures. (R APP 0169). Basically, she kept track of which brochures “they were running low on.” (R APP 0170).

V. Appellant's Interactions with Other Employees.

Appellant admits that “there were some people I didn't get along with, because sure, I'm, you know, personalities are different. . . and I know that after Gary and I started having a relationship, a lot of people resented that and were jealous.” (R APP 0076). She acknowledges that she became “catty” toward some employees. (R APP 0079). Appellant soon learned that new employees were warned by other employees, including Barb Baker, to “stay away from her” because of her relationship with the President. (R APP 0076). Proving the point, Taylor concedes that she “may have” complained to her husband about Baker. (R APP 0077). She admits there was an

“us and them” feeling in the office. (R APP 0117). When asked, she did not deny that she had an “obsessive need to control the mail” at LSI. (R APP 0124) (stating, “I guess—I took my job seriously”).

Taylor once refused to answer the door for a group of Hispanic job applicants, instead choosing to shout through the intercom that the company was not accepting applications, until Gary Taylor himself had to come out and open the door for them. (R APP 0081-84 and 0232-233). Appellant also brought her children to the office and allowed them to sit in the President’s office during the workday. (R APP 0064). She was the only employee to do this. (*Id.*). Appellant spent time at work planning “part” of her vacations. (R APP 0054).

Appellant had a history of sending e-mails or making phone calls when upset, although she did not necessarily do this “all the time.” (R APP 0091). For example, she left a voicemail for Ausen accusing her of being a “backstabbing, hypocritical, two-faced fake.” (R APP 0116, 0306). She also “drunken dialed” a customer in the middle of the night, waking the person up, and then later sent an e-mail confessing she had been drunk and suggesting she would get “paid back” for what she did. (R APP 0092, 0304). She also called Wrobel a “red-necked snitch” (R APP 0095), and sarcastically told Ausen to “have a nice life.” (R APP 0094).

Wendy Stoll, an LSI payroll clerk, who sat across from Taylor at the LSI office and observed her frequently, described Appellant’s work habits as follows:

[Taylor] came and went as she pleased and was short and rude to other employees who tried to work with her. She spent much of her time setting up medical appointments,

planning vacations, performing personal grooming, or taking naps on the couch in Gary Taylor's office. She was supposed to help answer phones, respond to the front door and assist with marketing, but she passed off most of her work to Mary Ausen. We were afraid to say anything because she was married to the president.

* * *

LeAnn Taylor either left early, came in late, or took a long lunch almost every day * * * on one occasion, I attempted to discuss the unfairness of the lack of support provided by Ms. Taylor with Gary Taylor and the HR Manager. After I raised the issue, Gary Taylor reprimanded me for the minor issue of requesting another manager to respond to a holiday payroll request "ASAP." I decided to leave LSI after this event.

(R APP 0427, ¶¶ 3-7). Stoll resigned due to the unsatisfactory working environment caused by Taylor and returned to LSI after Taylor's termination. Stoll also testified that Taylor instructed her "not to record her vacation or that of her husband and two other senior managers and not allow access to the calendar by other employees, as had been the company practice." (*Id.* ¶ 8).

VI. The Reduction in Force.

In 2006, Darryl Rosser, the CEO of Sagus (LSI's corporate parent) determined that LSI was not achieving results. (R APP 0366). Among other things, the company had been missing customer delivery dates, margin performance was not meeting plan, and the morale was poor. (*Id.*). Rosser and other executives from Sagus therefore reviewed the entire LSI operation. (R APP 0368). As a result of this review, 6 people out of the 25 employees in the management or office side of the business were terminated or resigned. These were Gary Taylor (President), Joseph Savoren (Vice President of Production), Scott Drost (AutoCad Manager), Patricia Savoren (HR Manager), Mark

Hager (Regional Salesperson) and Appellant. (R APP 0170, 0368 and 0374). Some, like the HR Manager, were replaced. Others, like the Regional Salesperson and Appellant, had their positions eliminated. (R APP 0368). Joseph and Patricia Savoren, who are married to each other, both asserted claims of employment discrimination based on marital status. Both claims were dismissed on summary judgment by Judge Robert Blaeser in 2008. This Court affirmed the dismissal of Patricia Savoren's claims on February 24, 2009. *Savoren v. LSI Corp. of Am., Inc.*, No. A08-0674, 2009 Minn. App. Unpub. LEXIS 199 (Minn. App. Feb. 24, 2009). The Minnesota Supreme Court denied review. *Savoren v. LSI Corp. of Am., Inc.*, 2009 Minn. LEXIS 303 (Minn. 2009).

The decision to eliminate Appellant's position was ultimately that of Rosser. (R APP 0371). He reached the decision after consulting with Wrobel, LSI CFO Dan Brown, and other executives at Sagus, and based on his first-hand observations from visiting the business. (R APP 0368-369 and 0370-371). Appellant claims that Rosser told her husband, Gary Taylor, that Appellant would probably have to relocate and then asked him if she wanted to resign. (R APP 0194). Rosser disputes this, and states that Gary Taylor asked to resign instead of being terminated, in order to "save face." (R APP 0372). About three weeks after that discussion, Rosser determined that Appellant's position would be eliminated and informed Gary Taylor of the pending job elimination by telephone, asking if Appellant also wanted to resign like Gary Taylor to "save face." (*Id.*). Soon after she was terminated, Appellant sent an e-mail to a list of all of LSI's dealers inviting them to contact her regarding the facts of her departure. (R APP 0099).

STANDARD OF REVIEW

On an appeal from a grant of Summary Judgment under Minn. R. Civ. P. 56 for claims of marital status employment discrimination and retaliation, this Court must determine: (1) whether there are any genuine issues of material fact, and (2) whether the District Court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). While appellate courts view the evidence in the light most favorable to the nonmoving party, the burden still rests on the nonmoving party to present evidence sufficiently probative of all the claim's essential elements to allow reasonable minds to reach different conclusions. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn. 1997). There is no genuine issue of material fact when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH*, 566 N.W.2d at 69 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986)). Furthermore:

[t]o forestall summary judgment, the nonmoving party must do more than rely on unverified or [conclusory] allegations in the pleadings or postulate evidence which might be produced at trial. The nonmoving party must present specific facts which give rise to genuine issues of material fact for trial."

W.J.L. v. Bugge, 573 N.W.2d 677, 680 (Minn. 1998); accord, *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 672 (Minn. 2001); *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (finding that the summary judgment standard of review requires that an opposing party provide more than mere speculation, general assertions, unverified and conclusory allegations, or promises to produce evidence at trial). Failure to produce sufficient evidence of a genuine fact issue on just one essential

element of a claim means that the evidence on all of the other essential elements become immaterial, and summary judgment should be granted to the moving party on the claim. *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1989) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552 (1986)).

In the present case, as the argument below makes plain, Appellant failed to show genuine issues of material fact regarding her claim of discrimination based on marital status under the Minnesota Human Rights Act (“MHRA”).

ARGUMENT

I. Appellant’s Job was Eliminated.

As a threshold matter, the parties do not dispute that LSI eliminated Appellant’s job as Sales & Marketing Coordinator. Appellant claims her position was “wrongfully eliminated,” but this is not a recognized concept under Minnesota law. (R APP 0122-123). It should be noted that, on February 2, 2005, approximately a year before her job was eliminated, President Gary Taylor, *her own husband*, issued a memo stating:

It has become increasingly apparent that when the 3 front office staff are all here, *there is not enough work load to keep everyone busy.*

(R APP 0174 and 0234)(emphasis added). Mr. Taylor requested that each of the three front office staff, including Appellant, prepare a job description. (*Id.*). Appellant could not say whether she complied with this directive. (*Id.*).

Ausen testified that she assumed full responsibility for Appellant’s former marketing” duties. (R APP 0485) (stating, “After Ms. Taylor left her employment, I took on all of her duties involved with marketing, which consisted primarily of sending and

ordering brochures. Her position has not been replaced”). Appellant admits that Ausen had the capacity to absorb her duties. (R APP 0174). Appellant admits LSI did not replace her and that “they just have other people doing [her work] now.” (R APP 0196). Stoll avers, “[t]o my knowledge, Ms. Taylor’s position was not necessary to support sales and marketing, and she was not replaced by anyone.” (R APP 0427). Wrobel agrees. As he noted:

The fact that we had no need for a Sales and Marketing Coordinator has been confirmed since she left. After her position was eliminated in August 2006, her minor duties sending marketing literature were easily absorbed by Mary Ausen, and we have not replaced Ms. Taylor or otherwise filled the position.

(R APP 0490). Appellant does not dispute that her former cubicle remains empty to this day. (R APP 0177). Finally, it should be noted that a previous front office employee, Kris Sofie, (who was single) also had her job eliminated in 2001 by Gary Taylor. (R APP 0029-30, 0492 and 0494). Reductions in force were thus not unprecedented at LSI.

II. Appellant Must Show a “Direct Attack” on the Institution of Marriage.

In *Cybyrke v. Independent School Dist. No. 196*, 347 N.W.2d 256 (Minn. 1984) the Minnesota Supreme Court held that a teacher was not protected under the MHRA for the political status of her husband. *Id.*, p. 261. After *Cybyrke*, the Minnesota Legislature amended the Human Rights Act to define “marital status” in employment cases as including “protection against discrimination on the basis of identity, situation, actions, or beliefs of a spouse or former spouse.” Minn. Stat. § 363A.03, subd. 24. Since the

amendment however, the Court of Appeals has consistently held that to be actionable, alleged marital status discrimination must still be “directed at the marital status itself.” *Gunnufson v. Onan Corp.*, 450 N.W.2d 179, 182 (Minn. App. 1990). More recently, the Court of Appeals has stated that this type of claim must constitute a “**direct attack on the institution of marriage.**” *Kepler v. Kordel*, 542 N.W.2d 645, 648 (Minn. App. 1996) (emphasis added). Here, the record is bereft of any suggestion that LSI took any employment action that constituted a “direct attack on the institution of marriage.” *Id.*

The *Kepler* decision came well after the amendment to the MHRA’s definition of “marital status” and is closest in terms of its factual scenario among any reported cases on this issue, involving as it did a decision to terminate a husband and wife. In that case, the Court of Appeals affirmed the trial court’s judgment dismissing their claims, holding:

We do not condone discrimination against a portion of a protected class, i.e. part time employees already married to full time employees, because to do so would ignore the broad prohibition against arbitrary classifications embodied in the Human Rights Act. *Kraft, Inc. v. State*, 284 N.W.2d 386, 388 (Minn. 1979). The alleged discrimination, however, must be directed at the marital status itself to violate the MHRA. *Cybyrke v. Independent School Dist. No. 196*, 347 N.W.2d 256, 261 (Minn. 1984). . . Kepler’s claim is based on the presumption that he was fired because he hired his wife as a store employee. This claim fails. . . In addition, the record shows that Kepler was fired due to poor job performance. Nothing in the record implicates Kepler’s marital status as a factor in his discharge. Therefore Kordel’s act of discharging Kepler does not constitute a direct attack on the institution of marriage. See *Cybyrke v. Independent School Dist. No. 196*, 347 N.W.2d 256, 261 (Minn. 1984) (holding that a claim under the MHRA for marital status discrimination will not be given effect unless the alleged discrimination is directed at the institution of marriage).

Kepler, 542 N.W.2d at 647–648. See also, *Freeman v. Ace Tel. Ass’n*, 404 F. Supp. 2d 1127, 1138 (D. Minn. 2005) (claim of marital discrimination dismissed on summary judgment.)

Finally, in *Savoren v. LSI Corp. of Am., Inc.*, *supra*, a case decided this year involving the same defendant, LSI, in this case, the Minnesota Court of Appeals again addressed this issue, stating “[s]ince the amendment, this court has held that to be actionable, the alleged marital status discrimination must be ‘directed at the marital status itself.’” *Id.* at *5. That court found that “appellant has failed to create a genuine issue of marital fact demonstrating that respondent’s action was a direct attack on the institution of marriage . . . and the district court did not err in granting summary judgment in favor of respondent on this claim.” *Id.*

In this case, the District Court recognized the consistent message from the appellate courts on this issue and acknowledged that it was “bound by the appellate courts of this state.” (A-98)⁵. Absolutely nothing in the record below suggests, much less establishes, that LSI terminated Taylor because she was married, or that it acted in a manner that would indicate an animus against the institution of marriage. Therefore, because the record lacks any suggestion that LSI took any employment action that constituted a “direct attack on the institution of marriage,” *Kepler* 542 N.W.2d at 648, the District Court properly dismissed Taylor’s claim.

⁵ References to Appellant’s Appendix are designated with an “A.”

III. Minnesota Law is Consistent with the Law of other States.

Approximately 21 other states and the District of Columbia prohibit discrimination based on marital status in some form. Each statute is different, however, and the specific language of the MHRA is likely *sui generis*. Nevertheless, a survey of the leading cases yields a common theme—to be actionable, discrimination must be connected to the institution of marriage.

A comprehensive review of marital status discrimination laws in the various states is found in *Chen v. County of Orange*, 96 Cal. App. 4th 926, 116 Cal. Rptr. 2d 786 (Cal. Ct. App. 2002). *Chen* involved facts and allegations similar to those in this case. The plaintiff was an assistant county attorney. *Id.* at 96 Cal. App. 929. In late 1990, about five months after her hire, she began dating a high-level management attorney, Devallis Rutledge, who was not in the “good graces” of the elected Orange County District Attorney, Michael Capizzi. *Id.* at 930, 932. In 1993 she married Rutledge. *Id.* In her lawsuit, she alleged that her unfavorable assignments manifested Capizzi’s lack of approval of Rutledge in violation of California’s marital status discrimination statute. Cal. Gov. Code 12940, Subd. (a).

The California Court of Appeals, in affirming the trial court’s dismissal, noted that:

the salient fact is that the origin of any animus was the political disfavor Rutledge was in at the time, not any antipathy toward Chen’s status as a married or single person. There was not even any antipathy toward her being married to (or even romantically involved with) a coworker. Any “adverse action” taken by her employer (which mostly consisted of not getting plum assignments) was, at most only the result of antipathy toward a particular coworker with whom she had, married or not, a relationship.

Chen, 96 Cal. App. 4th at 930-931. The *Chen* court reviewed the history of marital status discrimination litigation. First it listed “clear” examples of marital status litigation, such as a landlord who refused to rent to unmarried couples considering it a “sin for her to rent her units to people who will engage in nonmarital sex on her property.” *Id.* at 939-940 (citing *Smith v. Fair Employment & Housing Com.* (1996) 12 Cal. 4th 1143). Other clear examples included “a refusal to hire unwed mothers because they were unwed, a refusal to hire single people because they were single, or the granting of maternity leave to married teachers only.” *Id.* at 940.

The *Chen* court then addressed anti-nepotism laws, and noted that the high courts of Alaska, Illinois, Michigan, New York and West Virginia “have all upheld varieties of anti-nepotism rules” reasoning that marital *status* is independent of the *identity* of one’s spouse.” *Id.* at 941-942 (citing cases). For example, the Supreme Court of Alaska held that “extending the reach of the anti-discrimination law to employment decisions based on to whom a person is married **would change the focus of the law from discrimination based on broad categories, which can give rise to demeaning stereotypes and biases, to a highly individual factor.**” *Muller v. BP Exploration (Alaska) Inc.*, 923 P.2d 783, 785-786 (Alaska 1996) (emphasis added). Similarly, the Michigan Supreme Court said that, “the relevant inquiry is *if* one is married rather than *to whom* one is married.” *Miller v. C.A. Muer Corporation*, 362 N.W.2d, 650, 653 (Mich. 1984). Finally, the New York high court said that the “ordinary meaning of ‘marital status’ is the social condition enjoyed by an individual by reason of his or her having

participated or failed [sic] to participate in a marriage.” *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board*, 415 N.E.2d 950, 953 (N.Y. 1980).

The *Chen* court then analyzed “conduit” cases, described as cases where “the plaintiff is the object of adverse action because of something about his or her spouse, independent of whether the spouse works for the same employer, as such.” 96 Cal. App. 4th at 943. It further divided conduit cases into those which involved unlawful animus against the spouse, such as race discrimination, and those, like this case, which did not. *Id.* The conclusion of its survey was as follows:

Conduit cases not based on some wrongful animus, however – simple politics is the typical example – **have been universally met with rejection as valid marital status discrimination claims.** Perhaps the best explanation for that is this: In such cases, **the marriage *qua* marriage is irrelevant to the adverse action taken by the employer. What the employer really cares about is the substantive relationship between the plaintiff and someone else, be he or she spouse, romantic partner, or even “just a friend.”**

Id. at 943 (emphasis added).

Similarly, the Second Circuit Court of Appeals, interpreting the Connecticut Fair Employment Practices Act earlier this year, upheld the dismissal of a marital status claim based on the identity of a spouse, noting:

though the soundness of defendant’s conclusion that plaintiff would no longer be able to perform effectively after his wife’s termination may be questionable, it does not imply an unlawful stereotype about married individuals as compared with those who are single, divorced, or widowed. Accordingly, plaintiff’s marital status discrimination claim is without merit.

Pleau v. Centrix, Inc., 08-cv-4895, 2009 U.S. App. LEXIS 19131, (2nd Cir. 2009).

In this case, LeAnn Taylor was terminated because her job position was eliminated. Even presuming, however, that her termination was in any way related to Gary Taylor, the person who created her unnecessary position, there is nothing in the record to suggest that the company would have acted differently had LeAnn Taylor been Gary Taylor's girlfriend, or even if she had been "just a friend" without any romantic involvement whatsoever. Plaintiff's marriage *qua* marriage was irrelevant to the action taken by Defendant LSI. Under this analysis, Plaintiff's claim should be dismissed.

IV. Appellant Cannot Point to Any Actions by or Beliefs of Her Spouse that were Imputed to Her.

The Legislature purportedly amended the MHRA to include "protection against discrimination on the basis of identity, situation, actions, or beliefs of a spouse or former spouse" in Minn. Stat. § 363A.03, subd. 24 in response to the Minnesota Supreme Court's decision in *Cybyrke*, 347 N.W.2d 256 (Minn. 1984). In *Cybyrke*, however, the plaintiff linked the fact that she was not hired for a teaching position to the actions and political beliefs of her husband, who was a member of the school board of a neighboring district and known for his "pro-teacher" stance. *Id.* at 259.

Appellant, in her answer to Interrogatory 10, also claims that she was terminated based on the "actions or beliefs" of her husband. (R APP 0293). But in her answer to Interrogatory No. 11, asking her to "describe each and every action or belief of your spouse that you believed caused you[r] termination," her response was "unknown." (R APP 0293-294). Thus, unlike the teacher in *Cybyrke*, whom the Legislature supposedly had in mind while amending the statute, Appellant cannot identify any

actions or beliefs of her husband, and therefore the law, even as amended, does not protect her from having her job eliminated. All she rests on is the “identity” of her spouse, and the coincidence that, after he resigned as president, the company had no need for her position.⁶

V. Appellant Cannot Establish a *Prima Facie* Case.

The District Court dismissed Taylor’s claim of discrimination based on the lack of any attack on the institution of marriage and therefore stopped short of conducting an analysis of whether she was otherwise able to establish a *prima facie* case. This Court, however, has the record before it sufficient to affirm the dismissal on this basis as well. Even if the scope of the amended MHRA is as broad as Appellant asserts, she still fails to establish a *prima facie* case of discrimination.

It is well established that the three-step burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is applicable to claims of marital discrimination under Minnesota law. *Freeman v. Ace Telephone Association*, 404 F. Supp. 2d 1127, 1136 (D. Minn. 2005), *aff’d* 467 F.3d 695 (8th Cir. 2006), citing *Gunnufson v. Onan Corp.*, 450 N.W.2d 179, 182-183 (Minn. Ct. App. 1990). *See also*

⁶ In order for a plaintiff to assert a *prima facie* case of discrimination, Minnesota law requires membership in a protected “class.” *See, e.g., Hubbard v. United Press Int’l*, 330 N.W.2d 428 (Minn. 1983). In the absence of polygamy, however, there could never be a group of persons married to the same person, and therefore there cannot be a “class” defined by the identity of one’s spouse. Appellant’s version of the law creates the absurd result of legitimizing a “spoils system,” under which a manager could hire a spouse for an imaginary position and, once hired, that spouse would instantly have immunity from termination or discipline by the company.

Kepler v. Kordel, Inc., 542 N.W. 2d 645, 647-48 (Minn. App. 1996) and *Savoren v. LSI*, *supra*.

Under the *McDonnell Douglas* test, Appellant bears the initial burden of proving a *prima facie* case of discrimination. *Id.* If she meets this initial burden, it shifts to LSI to articulate a legitimate non-discriminatory reason for her termination. *Id.* Once LSI merely articulates a non-discriminatory reason for its action, the burden shifts back to Appellant to *prove* that the proffered reason is simply a pretext and that the real reason is intentional discrimination. *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978). To demonstrate a *prima facie* case of discrimination, Appellant must prove by a preponderance of the evidence that (1) she is a member of a protected class; (2) she was meeting LSI's legitimate job expectations; (3) she suffered an adverse employment action; and (4) similarly situated employees who were not members of the protected class were treated differently. *Twymon v. Wells Fargo & Company*, 462 F.3d 925, 935 (8th Cir. 2006), *Davis v. KARK-TV*, 421 F.3d 699, 704 (8th Cir. 2005).

The Minnesota Supreme Court has held that “the requirements of a *prima facie* test” for employment discrimination may “vary depending on the circumstances involved.” *Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319, 324 (Minn. 1995). The court went on to explain:

For example, here the claim is discrimination associated with a reduction in force program. It may therefore be impossible for the aggrieved employee to meet the fourth requirement of the *McDonnell Douglas* *prima facie* test—that her job was given to someone else with equal qualifications—because presumably her job would not have been filled. To address this analytical breakdown, the Eighth Circuit Court of

Appeals, in *Holley v. Sanyo Mfg.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985) developed a modified version of the test which we believe fairly accommodates situations involving employee reductions in force.

In *Holley* analysis, when a plaintiff's discharge takes place within the context of a reduction in force, some *additional* showing should be necessary to make a *prima facie* case because the employer's reason for discharging the employee is not otherwise unexplained.

Id. The *Dietrich* court also addressed the definition of "reduction in force" noting "a work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions in the company." *Id.*, citing *Barnes v. GenCORP, Inc.*, 896 F.2d 1457, 1465 (6th Cir. 1990). In this case, LSI terminated Appellant as part of a reduction in force when it eliminated her admittedly unnecessary position. To establish her *prima facie* case, therefore, she must make "some additional showing" of discrimination. She has not done so.

In her Complaint, Appellant alleges simply, "Defendant's decision to terminate Plaintiff's employment was based, at least in part, on Plaintiff's marital status." (R APP 498). As previously noted, Appellant was married at the time of her termination. But she does not make any allegation of anti-marriage bias, does not point to comments that somehow denigrate the institution of marriage, and does not proffer any other direct evidence. When asked in an interrogatory to identify all similarly situated non-married employees who were treated differently than she was, Appellant answered as follows: "Defendant did not terminate any non-married employees because they were married.

Therefore all non-married employees were treated differently than Plaintiff.” (R APP 0293).

But many LSI employees who are married have not been not terminated, and Appellant is not able to identify any specific single employee who was “similarly situated” and treated differently. In fact, the last front office employee to have her position eliminated, Sofie, was single. (R APP 0492). The other two front office employees who were not terminated, Ausen and Stoll, are married just like Appellant. (*Id.*). Rosser, the person who made the decision to terminate Appellant, is married. (*Id.*). In fact more than half of all LSI employees are married, including Bill Bowman, Keith Wrobel, Dan Brown, David Eberhardt and Laura Parnell, among many others who were not terminated. (*Id.*).

Furthermore, Appellant must show that the employees she believes were treated more favorably are “similarly situated in all *relevant* respects.” *Cronquist v. Minneapolis*, 237 F.3d 920 (8th Cir. 2001) (emphasis added). Appellant must present evidence that non-married employees who held her *same position* and engaged in the *same conduct*, were not terminated. *Riser v. Target, Inc.*, 458 F.3d 817, 822 (8th Cir. 2007). Because Appellant cannot do so, she cannot establish a *prima facie* case of discrimination, and her claim should be dismissed.⁷

⁷ Appellant also fails to establish a *prima facie* case because she cannot show that she was meeting the legitimate expectations of her position.

VI. Appellant Cannot Establish Pretext.

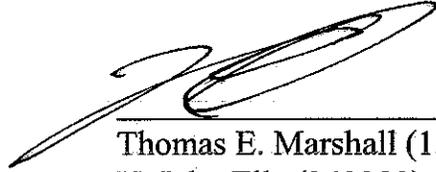
Finally, based on the undisputed facts as set forth above, even if Appellant were able to establish a *prima facie* case, she cannot show that the decision to eliminate her position was pretext. First, her own husband issued a memorandum stating that there was not enough work for three people in the front office. (R APP 0174 and 0234). Second, Wrobel testified that he had no need for someone to fill her position. (R APP 0490). Third, Appellant admits that Ausen had the capacity to take over her duties. (R APP 0174). Fourth, she admits no one has been hired to replace her. (R APP 0196). Fifth, as the record amply demonstrates, Appellant served no real function that benefitted the company, other than to monitor the supply of marketing literature and order more brochures when the stack was low, a task now easily handled by Ausen. (R APP 0485). Sixth, it is undisputed that the company suffered financial difficulties at the time. (R APP 0492). Because Appellant cannot adduce any evidence that would create a genuine dispute on this point, she cannot meet the *McDonnell Douglas* test and she cannot prevail on her claim as a matter of law.

CONCLUSION

For the reasons set forth, the decision of the Court below should be affirmed.

Dated: September 30, 2009.

JACKSON LEWIS LLP



Thomas E. Marshall (155597)

V. John Ella (249282)

225 South Sixth Street, Suite 3850

Minneapolis, MN 55402

(612) 341-8131

ATTORNEYS FOR RESPONDENT