

NO. A09-1410

State of Minnesota
In Supreme Court

LSI CORPORATION OF AMERICA,
A MINNESOTA CORPORATION,

Appellant,

vs.

LEANN TAYLOR,

Respondent.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF LEGAL ISSUES

1. Did the Court of Appeals err by reversing the dismissal of Respondent'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. Did the Court of Appeals err by creating a form of employment discrimination without a protected "class" or "classification?"

Most Apposite Law:

LaBore v. Muth, 473 N.W.2d 485, 489 (S. D. 1991).

Hubbard v. United Press Int'l., 330 N.W.2d 428 (Minn. 1983).

3. Did the Court of Appeals err by reversing the dismissal of Respondent's claim of marital status discrimination where she did not provide any evidence of discrimination based on the actions or identity of her spouse?

4. Alternatively, should the Court of Appeals have affirmed dismissal of Respondent's claim of marital status discrimination on summary judgment because she failed to establish a *prima facie* case or demonstrate pretext under the *McDonnell Douglas* test, instead of remanding to the District Court?

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).

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

STATEMENT OF THE CASE

Respondent LeAnn Taylor (“Taylor”)¹ brought suit against LSI Corporation of America, Inc. (“LSI”) in Hennepin County District Court in November of 2006 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 District Court heard Oral Argument on February 26, 2009 and issued its Memorandum and Order on April 21, 2009, dismissing Taylor’s claim because she did not allege a “direct attack on the institution of marriage” as required by Court of Appeals precedent at the time. Because it ruled on the threshold question, the District Court did not review Taylor’s claim under the *McDonnell Douglas* balancing test. The judgment was filed on June 23, 2009. Taylor then appealed to the Minnesota Court of Appeals which issued its decision on April 27, 2010, reversing the District Court’s decision and remanding for further

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

consideration under *McDonnell Douglas*. LSI petitioned the Supreme Court for review, and review was granted on July 20, 2010.

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. APP 0492.²

Taylor began work for LSI on January 18, 1988 as a receptionist/secretary. APP 0027. She divorced her first husband in 1999. APP 0020. Respondent, then known as LeAnn Braden, had financial difficulties after her divorce. APP 0149. Gary Taylor joined the company as its President in September of 1999. APP 0018. He separated from his wife in December of 1999. *Id.* Respondent and Gary Taylor began dating “soon thereafter” in January of 2000. *Id.*

Respondent reported to Mary Ausen, who in turn reported to President Gary Taylor. APP 0027. Gary Taylor resigned on August 18, 2006. APP 0041. LSI eliminated Respondent’s position effective August 21, 2006.

II. The Promotion.

Respondent’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.” APP 0036.

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

On February 19, 2001, Gary Taylor promoted Respondent to “Sales and Marketing Coordinator.” APP 0042. Ausen, Gary Taylor’s executive secretary,³ communicated this promotion to Respondent as directed by Respondent’s husband, Gary Taylor. 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 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). Respondent does not deny Ausen’s account. APP 0044. When asked whether Ausen may have felt “uncomfortable” being placed between the President

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. APP 0347-48.

and his wife, Respondent responded that Ausen could have “spoken to the board of directors.” APP 0055.

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

After her promotion, Respondent says she received “more money” and “her duties changed” because she “started going on trips.” 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. APP 0490. Wrobel testified as follows:

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. APP 0069. She does not recall if she *ever* spoke to Wrobel about the topic of her duties. 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.” APP 0070. Unfortunately, the school specialty initiative “kind of phased out.” 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?’” APP 0072.

IV. “Better Everything.”

In March of 2002, Taylor took the first of two company-sponsored trips to Orlando, Florida. APP 0050-51. Pursuant to Gary Taylor’s directive, LSI paid her for this trip. APP 0227-231. She brought her children on both occasions. *Id.*⁴ At least one

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

of the trips involved a visit to Disneyworld. APP 0052. Respondent also took company-sponsored trips with her husband to Germany, Arizona, Alabama, Chicago, New Jersey, and Washington, DC. 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. 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.

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.

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

V. Respondent's Interactions with Other Employees.

Respondent admitted 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.” APP 0076. She acknowledges that she became “catty” toward some employees. APP 0079. Respondent 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. APP 0076. Proving the point, Taylor concedes that she “may have” complained to her husband about Baker. APP 0077. She admits there was an “us and them” feeling in the office. APP 0117. When asked, she did not deny that she had an “obsessive need to control the mail” at LSI. APP 0124.

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. APP 0081-84 and 0232-233. Respondent also brought her children to the office and allowed them to sit in the President’s office during the workday. APP 0064. She was the only employee to do this. *Id.* Respondent spent time at work planning “part” of her vacations. APP 0054.

Respondent had a history of sending ill-advised e-mails or making phone calls when upset, although she did not necessarily do this “all the time.” APP 0091. For example, she left a voicemail for Ausen accusing her of being a “backstabbing, hypocritical, two-faced fake.” 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. APP 0092, 0304. She also called Wrobel a “red-necked snitch” APP 0095, and sarcastically told Ausen to “have a nice life.” APP 0094.

Wendy Stoll, an LSI payroll clerk, who sat across from Respondent at the LSI office and observed her frequently left the company out of frustration with Respondent’s lack of work ethic. She described Respondent’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.

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.

For several years, Gary Taylor and his confederates ran LSI as a personal fiefdom. Eventually, however, the corporate parent company started looking into operations. In 2006, Darryl Rosser, the CEO of Sagus (LSI's owner) noticed that LSI was not achieving positive financial results. 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. APP 0368. As a result of this review, six 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 Respondent. APP 0170, 0368 and 0374. Some, like the HR Manager, were replaced. Others, like the Regional Salesperson and Respondent, had their positions eliminated. 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. The Court of Appeals 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). This Court denied review. *Savoren v. LSI Corp. of Am., Inc.*, 2009 Minn. LEXIS 303 (Minn. 2009).

The decision to eliminate Respondent's position was ultimately that of Rosser. 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. APP 0368-369 and 0370-371. Respondent claims that Rosser told Gary Taylor that Respondent would probably have to relocate and then asked him if she wanted to resign. APP 0194. Rosser disputes this, and states that Gary Taylor asked to resign instead of being terminated, in order to “save face.” APP 0372. About three weeks after that discussion, Rosser determined that Respondent’s position would be eliminated and informed Gary Taylor of the pending job elimination by telephone, asking if Respondent also wanted to resign like Gary Taylor to “save face.” *Id.*

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, Respondent 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. Respondent Must Show a “Direct Attack” on the Institution of Marriage.

A. Legislative and Judicial History.

In *Cybyske 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 against retaliation based on the political activity of her husband, who was involved with

the teacher's union and had been elected to a neighboring school board. *Id.*, p. 59. This Court in *Cybeske* carefully considered the legislative intent of the statute as it existed then, and concluded that the Minnesota Legislature did not intend to protect employees from discrimination based on a particular political posture, whether of an employee or of the employee's spouse, as part of the Human Rights Act. *Id.* at 261.

After *Cybeske*, the Minnesota Legislature amended the Human Rights Act. The current language states as follows:

Marital status means whether a person is single, married, remarried, divorced, separated, or a surviving spouse *and*, in employment cases, *includes* protection against discrimination on the basis of identity, situation, actions, or beliefs of a spouse or former spouse.

Minn. Stat. § 363A.03, subd. 24 (emphasis added). A careful reading of Subdivision 24 reveals that the conjunctive “and” requires both (1) discrimination based on the person's marital *status* (single, married, etc.) *and* (2) “includes” within that definition marital status discrimination based on the identity, situation, actions, or beliefs of a spouse or former spouse. *See also* Minn. Stat. § 645.08, subd. 3 (in canons of construction, “general words are construed to be constricted in their meaning by preceding particular words”).

It is apparent, from what little legislative history is available, that the Legislature was reacting to the decision in *Cybeske* and wanted to protect an employee from being singled out and retaliated against for her spouse's political speech simply because she is married to him. In this case, however, Respondent's husband did not engage in any protected activity or political speech.

Since the amendment and until this case, 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). The Court of Appeals has also 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).

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. *Cybyske 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 *Cybyske 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 (emphasis added). 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 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 Judge recognized the consistent message from the appellate courts on this issue and acknowledged that he was “bound by the precedent set by the appellate courts of this state.” Addendum p. 0006. Absolutely nothing in the record 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, and the Court of Appeals erred by holding that a direct attack was not necessary.

B. Respondent's Job was Eliminated.

It is undisputed that LSI eliminated Respondent's job as Sales & Marketing Coordinator. APP 0122-123. It should be noted that on February 2, 2005, approximately a year before Respondent's job was eliminated, President Gary Taylor, *her own husband*, issued a memorandum 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.*

APP 0174 and 0234 (emphasis added). Gary Taylor requested that each of the three front office staff, including Respondent, prepare a job description. *Id.* Respondent could not remember whether she bothered to comply with this directive. *Id.*

Ausen testified that she assumed full responsibility for Respondent's former "marketing" duties. 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"). Respondent admits that Ausen had the capacity to absorb her duties. APP 0174. Respondent admits LSI did not replace her and that "they just have other people doing [her work] now." 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." 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.

APP 0490. Respondent does not dispute that her former cubicle remains empty to this day. 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. APP 0029-30, 0492 and 0494. Reductions in force were thus not unprecedented at LSI. Accordingly, no evidence suggests that an attack on the institution of marriage remotely influenced Taylor's job elimination.

C. The Court of Appeals Decision is Inconsistent 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 at issue here 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, 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, 343 Fed. Appx. 685, (2nd Cir. 2009). *See also*, *Gilmore v. Union Pacific Railroad Co.*, No. 09-CV-02180 (JAM/DAD), 2010 U.S. Dist. LEXIS 50470 (E. D. Cal. May 21, 2010) (dismissing marital discrimination claim).

D. The Legislature's Intent can be Reconciled with Appellant's Position, and the Alternative is an Absurd Result.

The best reading of the Legislature's intent when it modified the language of the statute in 1987 is that in order to constitute employment discrimination, an adverse action must be based on the "identity or actions of spouse" and an attack on the institution of marriage. Both the District Court ruling and the Court of Appeals ruling have one thing in common—both agree that there is no suggestion here of any attack on the "institution" of marriage. There is no argument that Appellant discriminated against married employees *per se*. If Respondent has a case at all, it is tied to the "identity" of her spouse. There can simply be *no question*, based on a review of all of the facts in record, that Respondent's job was unnecessary, however. Nor can there be any question whatsoever that she would have been terminated had she been the girlfriend, niece, sister, platonic friend or ex-wife of the President, and not his wife. It is therefore an absurd

result to allow her to claim illegal “discrimination” under the peculiar language of the MHRA. *See, e.g., Milbank Mut. Ins. Co. v. Kluver*, 225 N.W.2d 230, 232 (Minn. 1974) (holding that one principle of statutory construction is that an absurd or unreasonable result should not be reached).

In this case, Taylor was terminated because her job position was eliminated. Even presuming, however, that her termination was related to the identity of Gary Taylor, the person who created her unnecessary position in the first place,⁵ there is nothing in the record to suggest that the company would have acted differently had LeAnn Taylor been Gary Taylor’s loyal lieutenant without any romantic involvement whatsoever. Respondent’s marriage *qua* marriage was simply irrelevant to the action taken by Appellant LSI. Under this analysis, the dismissal of Respondent’s claim should be affirmed, and the Court of Appeals decision should be reversed.

II. The Court of Appeals Decision Illogically Creates “Discrimination” without a “Classification.”

In order for a plaintiff to assert a *prima facie* case of employment discrimination, of any type, Minnesota law requires membership in a protected “class” or “classification.” *See e.g. Hubbard v. United Press Int’l*, 330 N.W.2d 428 (Minn. 1983) (stating: “The crux of a disparate treatment claim involving an employer’s decision to discharge an employee is that the employer is treating that employee less favorably than others *on the basis of an impermissible classification*.” The discharged employee carries

⁵ At a minimum, this Court should create a judicial exception to the MHRA which would exempt plaintiffs where the facts conclusively show, as here, that they owe their job to their spouse in the first place. This is fully consistent with Minn. Stat. § 363A.20 which exempts any individual who is employed “by” the individual’s spouse.

the initial burden of establishing a *prima facie* case by showing (1) *he is a member of a protected class*; (2) he was qualified for the job from which he was discharged; (3) he was discharged; and (4) the employer assigned a nonmember of the protected class to do the same work.”) *See also, LaBore v. Muth*, 473 N.W.2d 485, 489 (S.D. 1991) (stating that South Dakota laws against discrimination, including the South Dakota Human Relations Act in general, “were intended to address discrimination because of *class membership*” not an individual situation).

Respondent argues, and the Court of Appeals ruled, that the MHRA protects an employee against adverse employment action based solely upon the identity of his or her spouse, even if there is no attack on the institution of marriage or discrimination based on marital status. But that interpretation takes the concept of “discrimination” well outside its basic definition. To constitute discrimination, an action must, as a matter of law, involve a class, not a single individual. According to Black’s Law Dictionary, “Discrimination” means “the effect of a statute or established practice which confers particular privileges on a *class* arbitrarily selected from a large number of persons, all of whom stand in the same relation to the privileges granted and between whom and those not favored no reasonable distinction can be found.” Black’s Law Dictionary, Sixth ed., p. 467, citing *Baker v. California Land Title Co.*, 349 F. Supp. 235, 238-239 (D. C. Cal. 1972) (emphasis added). Black’s defines “class” as “a *group* of persons . . . having common characteristics or attributes” *Id.* at p. 249 (emphasis added). In the absence of polygamy, 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 person.

The concept of at-will employment allows a private employer to terminate someone for any reason or no reason at all. *E.g., Hedglin v. City of Willmar*, 582 N.W.2d 897, 901 (Minn. 1998) An employer is therefore free to terminate someone's employment based on their individual "identity," which is another way of saying who that person is, so long as the decision is not based on their membership in a protected class. By extension, it cannot be "discrimination," as a matter of law, for an employer to take adverse action because of the identity of a person's spouse any more than it is discrimination to take adverse action because of the Identity of the employee herself. As the Alaska Supreme Court noted, "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 [an] "individual factor." *Muller*, 923 P.2d at 783 (Alaska 1996) (emphasis added).

III. Respondent Cannot Point to Any Actions by or Beliefs of Her Spouse that were Imputed to Her.

The Legislature 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 *Cybyske*, 347 N.W.2d 256 (Minn. 1984). In *Cybyske*, 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. Respondent has not pointed to any similar actions or beliefs of her husband in this case.

The Court of Appeals stated that “the crux of appellant’s claim is that LSI terminated her based on the identity and situation of her spouse, a co-employee whose forced resignation was occurring at the same time. This claim falls squarely within the statutory definition of ‘marital status.’” Addendum, p. 0016. But the Court of Appeals made an assumption which is not supported by the record. Respondent never actually linked her termination to the “identity” or “situation” of her spouse. Even under the standard established by the Court of Appeals, therefore, her claim still fails.

Respondent, in her answer to Interrogatory 10, also claims that she was terminated based on the “actions or beliefs” of her husband. 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.” APP 0293-294. Thus, unlike the teacher in *Cybyske*, whom the Legislature supposedly had in mind while amending the statute, Respondent 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

⁶ Respondent’s version of the law creates the absurd result of legitimizing a “spoils system,” under which a manager could hire his or her spouse for an imaginary position and, once hired, that spouse would instantly have immunity from termination or discipline by the company. This violates the right of a private employer to hire and fire at will, so long as the decision is not otherwise illegal.

Respondent argues that Rosser made a comment to her that, since her husband was being terminated, she would probably be relocating and bases her entire case on her own self-serving, unsupported testimony. Respondent mischaracterizes the record, however. Respondent actually testified as follows:

And Darryl [Rosser] called me at 1:00 on Friday, the 18th, in the afternoon - - I normally leave at 1:30 - and he says, **“your job is going to be eliminated.”** So how do you go from - - well actually, what he said was --- first he said - he called me and said, “Well, we decided to” - - we - - we What he said was “Due to Gary’s position, he’s going to be - we - - he probably will be relocating, which means you’ll be relocating as well. **So we just decided to eliminate your position.”**

APP 104 (LeAnn Taylor Depo. p. 102) (emphasis added). In other words, even according to Respondent’s own testimony, she was told that her position was being “eliminated,” which it was. Rosser’s testimony makes clear, since the company had no need for her position, he tried to allow Respondent to “save face” by asking her husband if she wanted to resign as he was, and couched the news in this context. APP 378 (Rosser Depo., pp. 59-63.) Respondent therefore has no evidence that Rosser linked her termination to that of her husband sufficient to survive summary judgment.

IV. Respondent Cannot Establish a *Prima Facie* Case.

Even if this Court were to affirm the Court of Appeals and hold that the scope of the amended MHRA is as broad as Respondent asserts, she still fails to establish a *prima facie* case of discrimination. 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. The Court of Appeals reversed dismissal as to the “direct attack”

requirement, but declined to rule further as to whether Taylor had sufficiently pled a *prima facie* case, even though the issue was fully briefed by both sides, and remanded that issue back to the District Court for a determination. This Court, however, also has a sufficient record before it to affirm the District Court's dismissal on summary judgment, thus ending the litigation, rather than requiring remand to the District Court. This Court should do so, to bring finality to the case and prevent the unnecessary expenditure of further judicial resources.

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

Under the *McDonnell Douglas* test, Respondent 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 Respondent 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, Respondent 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).

This 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 in that case 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 Respondent 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, Respondent alleges simply, “Defendant’s decision to terminate Plaintiff’s employment was based, at least in part, on Plaintiff’s marital status.” APP 498. As previously noted, Respondent 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, Respondent 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.” APP 0293.

But many LSI employees who are married have not been not terminated, and Respondent 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. APP 0493. The other two front office employees who were not terminated, Ausen and Stoll, are married just like Respondent. *Id.* Rosser, the person who made the decision to terminate Respondent, 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, Respondent 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). Respondent 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 Respondent cannot do so, she cannot establish a *prima facie* case of discrimination, and her claim should be dismissed.⁷

V. Respondent Cannot Establish Pretext.

Finally, based on the undisputed facts as set forth above, even if Respondent 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. APP 0174 and 0234. Second, Wrobel testified that he had no need for someone to fill her position. APP 0490. Third, Respondent admits that Ausen had the ability and capacity to take over her duties. APP 0174. Fourth, she admits no one has been hired to replace her. APP 0196. Fifth, as the record amply demonstrates, Respondent 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. APP 0485. Sixth, it is undisputed that the company suffered financial difficulties at the time. APP 0492. Seventh, Respondent had a toxic relationship with almost every other co-worker except her husband. Because Respondent cannot adduce any evidence that would

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

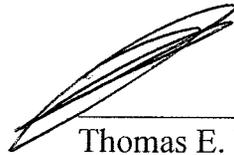
create a genuine dispute on this point, she cannot meet the *McDonnell Douglas* test and she cannot prevail on her claim as a matter of law.

CONCLUSION

For the reasons set forth, the decision of the Court of Appeals should be reversed and Respondent's Complaint should be dismissed with prejudice.

Dated: August 19, 2010.

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ATTORNEYS FOR APPELLANT

Case No. A09-1410

STATE OF MINNESOTA
IN SUPREME COURT

LSI CORPORATION OF AMERICA
A MINNESOTA CORPORATION,

Appellant,

vs.

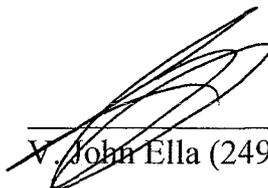
LEANN TAYLOR,

Respondent.

I, V. John Ella, counsel for Appellant, hereby certify that the word count of the herewith-filed Appellant's Brief complies with the Minnesota Rules of Appellant Procedure. I certify that Microsoft Windows XP Professional software word count function was applied and that the Memorandum contains 8,214 words.

Dated: August 19, 2010.

JACKSON LEWIS LLP



V. John Ella (249282)