

NO. A09-1410

State of Minnesota
In Supreme Court

LSI CORPORATION OF AMERICA,
A MINNESOTA CORPORATION,

Appellant,

vs.

LEANN TAYLOR,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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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 CASE

Respondent, LeAnn Taylor (“Respondent” or “Ms. Taylor”), brought suit against Appellant, LSI Corporation of America, Inc. (“Appellant” or “LSI”) asserting that LSI terminated Respondent’s employment because of her marital status—more specifically, Respondent alleged that LSI fired her because she is married to LSI’s former President, Gary Taylor.

At the Trial Court, LSI moved for summary judgment and, on April 21, 2009, the Trial Court granted LSI’s request for summary judgment because Respondent did not prove a “direct attack on the institution of marriage” as required by Court of Appeals precedent at the time. Respondent 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 consideration. LSI petitioned the Supreme Court for review, which was granted on July 20, 2010.

STATEMENT OF FACTS

A. THE PARTIES AND INDIVIDUALS INVOLVED.

1. **Respondent, LeAnn Taylor.** From January 18, 1988 through August 21, 2006, Ms. Taylor worked for Appellant. Respondent is married to Gary Taylor and has two children (Resp.’s A-1; APP 019-021, 035, 0202).¹

¹ References to Respondent’s Appendix are indicated by “Resp.’s A-__”; references to Appellant’s Appendix are indicated by “APP __.”

2. **Gary Taylor.** Gary Taylor is Respondent's husband and was previously employed as LSI's President (Resp.'s A-1). Mr. Taylor resigned from LSI on August 18, 2006—three days before LSI eliminated Respondent's position.

3. **Appellant, LSI Corporation of America.** Appellant is a Minnesota corporation, which manufactures cabinetry and casework primarily for schools and health care facilities. Appellant is a wholly owned subsidiary/business unit of Sagus International (APP 0365).

4. **Darryl Rosser.** Darryl Rosser is the CEO of Sagus and made the decision to fire Appellant (APP 0365, 0381).

B. RESPONDENT'S TENURE WITH APPELLANT.

Respondent Taylor began employment with LSI in January 1988. During the course of her employment with LSI, Respondent held multiple positions; at the time of her termination, Respondent Taylor was LSI's Sales and Marketing Coordinator (APP 042). According to Mary Ausen, Respondent's direct supervisor for 18 years, Respondent received good performance reviews and did not have any performance problems (APP 0351). Mr. Taylor, Appellant's former President and Respondent's spouse, testified that Respondent was a "very good and valued employee of LSI." (Resp.'s A-2). Ms. Ausen believes that she and the President of LSI (Gary Taylor) were the only people in a position to accurately evaluate Respondent's job performance. (APP 0356). Ms. Ausen was not contacted prior to Respondent's termination to discuss Respondent's job performance, job duties or other job related functions (APP 0352).

C. GARY TAYLOR RESIGNS AND RESPONDENT IS FIRED.

On August 18, 2006, Gary Taylor resigned his employment with Appellant. (Resp.'s A-1). Appellant fired Respondent on August 21, 2006. Prior to Respondent's termination, Darryl Rosser talked to Gary Taylor about Respondent's continued employment with Appellant. During this conversation, Mr. Rosser asked Mr. Taylor if he wanted to announce Respondent's departure from LSI at the same time that Mr. Taylor was going to announce his own departure from LSI. Mr. Taylor was surprised by Mr. Rosser's statement as Respondent did not quit her job and there was no reason to terminate her employment. In response to Mr. Rosser's question about Respondent's termination announcement, Mr. Taylor alleges he told Rosser that Respondent had her own rights and he was not going to get involved. According to Mr. Taylor, Mr. Rosser replied that since Mr. Taylor was leaving LSI, "it would probably be uncomfortable or awkward for LeAnn [Respondent] to stay." (Resp.'s A-2). It was made clear to Mr. Taylor that Respondent lost her job because she is married to Mr. Taylor and he was "no longer going to be working at LSI." (Resp.'s A-2). Mr. Rosser reiterated a similar rationale for termination to Respondent. Respondent alleges that Mr. Rosser told her "Due to Gary's [Mr. Taylor's] position, he going [sic] to be – we – he probably will be relocation, [sic] which means you'll be relocating as well. So we just decided to eliminate your position." (APP 0104, 0194, 0197).

1. The second reason given for firing Respondent.

It is undisputed that Mr. Rosser made the decision to terminate Respondent's employment. Both Mr. Taylor and Respondent have testified as to what Mr. Rosser

stated was the reason for Respondent's termination, to wit: Respondent was married to Gary Taylor, Gary Taylor was no longer going to be employed by LSI, it would be awkward for Respondent to continue to work at LSI, and Respondent and Gary Taylor were probably going to have to relocate (Resp.'s A-1 & A-2; APP 0102 & 0103).

Mr. Rosser did, however, express a different recollection for Respondent's termination. According to Mr. Rosser, Respondent lost her job after an economic review of the company was conducted (APP 0374). The facts relevant to Mr. Rosser's "economic rationale" are as follows:

1. Mr. Rosser asked Mr. Taylor to make a proposal to increase business at LSI (APP 0372).

2. Gary Taylor made a proposal that Mr. Rosser did not believe would work. Following some discussion of the proposal, Mr. Taylor resigned his employment (APP 0372)

3. Mr. Taylor resigned in August of 2006 and prior to that time Mr. Rosser had not conducted any economic analysis for LSI (APP 0373).

4. Mr. Rosser estimates that there was about 2-4 weeks between the time that Mr. Taylor resigned and Respondent was fired (APP 0373). During this period of time, Mr. Rosser claims he conducted an analysis of the business and economic condition of LSI (APP 0373). It is, however, a bit unclear as to what Mr. Rosser did or how much time he spent conducting the analysis. Mr. Rosser stated that during this 2-4 week period of time he may have been at LSI "an extra day or so than the two to three days that I said

that I normally spent.”² (APP 0373). Although the amount of time Mr. Rosser allegedly spent conducting the “economic analysis” is unclear, Mr. Rosser did testify that during the period of the economic review, he remained engaged with LSI customers—which accounted for 20 to 25 percent of his time—he continued to run two other Sagus business units, and he was closing down a plant in Tennessee (APP 0373 & 0374).

5. After purportedly conducting this economic analysis, Mr. Rosser allegedly decided to fire Respondent and one other person, Mark Hager (APP 0374). According to Mr. Rosser, Respondent and Mr. Hager were the only people let go in connection with the economic review (APP 0374). Mr. Hager was, however, fired one week prior to Respondent and was, in fact, let go by Mr. Taylor (APP 0379). According to Gary Taylor, Mr. Hager’s position was not eliminated as a result Mr. Rosser’s economic review but rather because of the “closure and sale of a sister casework company in Tennessee named Mohon International and was unrelated to the economics at LSI.” (Resp.’s A-2). Mr. Rosser admitted that Mr. Taylor did, in fact, terminate Mr. Hager (APP 0379).

6. Defendant has annual sales of somewhere between \$26 to \$32 million (APP 0374).

7. Plaintiff was a part time employee making approximately \$35,000 - \$40,000 per year (APP 0374).

² Mr. Rosser testified that he spent two to three days *a month* at LSI. (APP 0370).

2. The third reason for Respondent's termination.

In the course of the litigation, Appellant's counsel advanced other reasons for Respondent's termination such as: "Respondent served no function that benefitted the company; there was not enough work for three people in the front office; and Plaintiff had a toxic relationship with almost every other coworker." (Appellant's Brief at p. 29). Although argued by Appellant's counsel, the record is undisputed that Appellant's identified sole decision maker (Mr. Rosser) claims he did not consider Respondent's job performance in making the termination decision. (APP 0374).

ARGUMENT

I. STANDARD OF REVIEW.

In this appeal from summary judgment, this Court must examine whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law. *Cummings v. Koehnen*, 568 N.W. 2D 418 (Minn. 1997). The role of the court is not to weigh the evidence but to determine whether, as a matter of law, a genuine factual conflict exists. *Agristor Leasing v. Farrow*, 826 F.2d 732, 733 (8th Cir. 1987). The Court must "view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W. 2d 2, 4 (Minn. 1990). The construction of a statute is a question of law and is fully reviewable by this Court. *Cummings*, 568 N.W.2d at 421.

II. MARITAL STATUS DISCRIMINATION.

A. The Minnesota Human Rights Act.

The Minnesota Human Rights Act protects employees from discrimination based

on marital status. Minn. Stat. § 363A.08, Subd. 02 provides: (“[e]xcept when based on a bona fide occupational qualification, it is an unfair discriminatory practice for an employer, because of marital status to discriminate against a person with respect to his hire, tenure, compensation, term, upgrading, conditions, facilities or privileges of employment”). The statute defines “marital status” as “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 the *identity, situation, actions, or beliefs of a spouse or former spouse.*” Minn. Stat. § 363A.03, Subd. 24 (emphasis added).

In construing the MHRA, the goal of the courts is to ascertain and effectuate the intention of the legislature. *Bahr v. Capella University*, A08-1367, dissenting opinion at p. 5 (Minn. 2010), citing, Minn. Stat. § 645.16 (2008). When possible, the MHRA should be construed to give effect to all its provisions. *Id.* If the words of the MHRA are unambiguous, Courts must apply their plain meaning. *Id.* Citing Minn. Stat. § 645.16.

Here, as the Court of Appeals held in this matter: “By its clear terms, Minn. Stat. § 363A.03, Subd. 24, prohibits an employer from discriminating against an employee based on the identity or situation of the employee’s spouse [Respondent’s] claim falls squarely within the statutory definition of “marital status.””

In an effort to avoid the plain language of the statute, Appellant asserts that this Court should require an additional legal element regarding what constitutes marital discrimination under the MHRA. Specifically, Appellant requests that this Court construe the MHRA so as to require a party asserting a claim of marital discrimination to

prove a “direct attack on the institution of marriage.” For the reasons set forth herein, Respondent’s argument should be rejected.

B. Direct Attack on the Institution of Marriage.

The thrust of Appellant’s argument is that in order to succeed on a claim for marital status discrimination, the party asserting the claim must show a “direct attack” on the institution of marriage. The “direct attack” element is not found in the Minnesota Human Rights Act but rather, has been discussed and referred to in caselaw considering how to define “marital status” in the context of the anti-discrimination statutes. See, *Savoren v. LSI Corp. of Am., Inc.*, No. A08-0674, 2009 Minn. App. Unpub. LEXIS 199 (unpublished) (Minn. App. Feb. 24, 2009) (APP 0506).

Appellant’s argument is not novel, many courts across the United States have looked at this issue when considering whether to adopt a broad or narrow construction of the term “marital status.” See, *Donato v. American Telephone and Telegraph Company*, 146 F.3d 1329, 1331 (11th Cir. 1998). Interestingly, the issue of broad or narrow construction typically arises when courts are considering the issue of whether or not to include the “identity or situation” of a spouse within the marital status protection. *Id.* See also, Annotation, *What Constitutes Employment Discrimination on Basis of “Marital Status” for Purposes of State Civil Rights Laws*, 44 A.L.R.4th 1044 (1986). Some courts have found that a prohibition on marital status discrimination does not extend to the identity of a person's spouse. See, e.g., *Whirlpool Corp. v. Civil Rights Comm’n* (1986), 425 Mich. 527, 390 N.W.2d 625; *Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Board* (1980), 51 N.Y.2d 506, 434 N.Y.S.2d 961, 415 N.E.2d 950;

Thomson v. Sanborn's Motor Express (1977), 154 N.J.Super. 555, 382 A.2d 53. Other states, however, have concluded that the proscribed conduct does include discrimination based on the spouse's identity. See, e.g., *Ross v. Stouffer Hotel Co. (Hawaii) Ltd., Inc.* (Haw.1991), 816 P.2d 302; *Thompson v. Board of Trustees, School District No. 12* (1981), 192 Mont. 266, 627 P.2d 1229; *Kraft, Inc. v. State* (Minn.1979), 284 N.W.2d 386; *Washington Water Power Co. v. Washington State Human Rights Comm'n* (1978), 91 Wash.2d 62, 586 P.2d 1149. Two scholarly comments on the subject have also opined that marital status discrimination does include discrimination based on the identity of one's spouse. Wexler, *Husbands and Wives: An Uneasy Case for Antinepotism Rules*, 62 B.U.L.Rev. 75 (1982); Note, *Challenging No-Spouse Employment Policies as Marital Status Discrimination: A Balancing Approach*, 33 Wayne L.Rev. 1111 (1987).

Here, while a discussion of how courts in other jurisdictions interpret "marital status" may be an interesting political or academic undertaking, we do not need to have that discussion because the Minnesota Legislature has already defined the term "marital status." See, Minn. Stat. § 363A.08. Additionally, we also have the advantage of having previous Court consideration and responsive legislative action to the issue of defining "marital status."

In *Cybyске v. Independent School Dist. No. 196*, 347 N.W.2d 256 (Minn.1984) the Supreme Court considered the issue of whether a teacher was entitled to protection under the MHRA because of the political activity of her husband. *Id. at p. 259*. This Court considered the legislative intent of the statute, as it then existed, and concluded that the

Minnesota Legislature did not intend to protect employees from discrimination based on the political views of a spouse.

In response to the *Cybyske* decision the Minnesota Legislature amended the Minnesota Human Rights Act. As detailed in *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990), the legislative response to the *Cybyske* decision was to expand the definition of “**marital status**” in employment cases 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 the **identity**, situation, actions, or beliefs of a **spouse** or former **spouse**.

State by Cooper v. French, 460 N.W. 2d, 2, 6 (Minn. 1990) (Emphasis added).

The legislative history of this subdivision indicates that the legislature specifically made a decision to expand the definition of marital status in employment cases. In a legislative hearing on a Bill for an act to clarify the definition of “marital status,” State Human Rights Commissioner Cooper explained the Bill as being a response to the *Cybyske* case. See, *French*, 460 N.W.2d 2, 6, citing Hearing on H.F. 2054, H. Civil Law Subcomm. of Jud. Comm., 75th Minn.Leg., Feb. 26, 1988 (audiotape). Representative Quist objected to the broad language of the Bill, as the initial Bill did not contain the language “in employment cases,” and referred to a hypothetical scenario in which a landlord would be forced to rent to a person whose spouse was a polygamist. *Id.* at p. 6. Representative Quist indicated that employment and housing were different situations and that the Bill’s language was much too broad, at least as to housing. *Id.* at pp. 6-7. Commissioner Cooper stated that he would reconsider the impact of the Bill in the housing area and report back to the subcommittee. *Id.* at p. 7. At the next hearing on the

Bill, an amendment to the Bill was offered that confined the extremely broad language to employment cases only. *Id.* at p. 7, citing Hearing on H.F. 2054, H. Civil Law Subcomm. of Jud. Comm., 75th Minn.Leg., Feb. 26, 1988 (audiotape). *State by Cooper v. French*, 460 N.W.2d at p. 6.

Contrary to the plain language of the statute and history of the amendment, Appellant argues for the inclusion of a new “direct attack on the institution of marriage” element. Appellant’s argument should be rejected for a number of reasons. First, the statute is unambiguous and there is no “direct attack” element. *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 701 (Minn. 1996) (If a statute, construed according to the ordinary rules of grammar, is unambiguous, Courts may not engage in further statutory construction and must apply its plain meaning.) Second, Appellant’s interpretation does not give effect to all of the provisions of the MHRA. Under Appellant’s interpretation of the law, how would a divorced, single or surviving spouse be able to show an attack on the institution of marriage, as they are, by definition, not married? For example, assume an employer adopts a policy whereby they will only hire married people—and will not hire divorced, widowed or single people—the institution of marriage is clearly being defended not attacked; therefore, under Appellant’s construction, there would be no claim for such a policy. Such an interpretation is, of course, contrary to the plain language of the statute and must be rejected.

Appellant also argues that “a careful reading of Subdivision 24 requires both (1) discrimination based on the person’s marital status; *and* (2) includes within that definition status discrimination based on the identity, situation, actions, or beliefs of a spouse or

former spouse.” (Appellant’s Brief at p. 13). Although Appellant’s argument is a bit unclear, it appears that Appellant believes that, in employment cases, an employee has to meet additional elements and prove: (1) discrimination of the basis of marital status (presumably including the “direct attack” element); and (2) that the discrimination was based on the identity, situation, actions or beliefs of a spouse. *Id.* This interpretation of the statute is not supported by either legal or grammatical canons of construction and should be rejected by the Court.³

The plain language of the statute, as well as the legislative history, demonstrates that Respondent is afforded protection under the Act as she was fired because of the identity and/or situation of her spouse. Moreover, Appellant’s argument for a “direct attack” on the institution of marriage element is not supported by the plain language of the statute or the canons of statutory construction and should therefore be rejected by this Court.

III. MCDONNELL DOUGLAS TEST.

Although the Trial Court never analyzed Appellant’s claims within the typical “McDonnell Douglas” framework, Appellant is required to make such a showing to survive summary judgment and we will, therefore, provide the Court with the argument

³ The use of the conjunction “and” within the statute is used to set off the clauses; not create a list. The conjunction is being used to connect grammatical units. The lack of a comma before the word “and” establishes that “and” is used to link an independent clause to a phrase. The list established by the Legislature within the subdivision consists of: “single, married, remarried, divorced, separated, or surviving spouse.” The Legislature signified the end of the list because a comma proceeds “or” in the independent clause. The grammatical structure—together with the legislative history—demonstrates the Legislature was creating extra protection in employment cases, not extra hurdles.

made at summary judgment.

Marital discrimination cases, like all employment discrimination cases, follow the three-part test set forth in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 93. S.Ct. 1817 (1973): (1) the plaintiff must first establish a prima facie case of discrimination; (2) the burden then shifts to the employer to show a legitimate nondiscriminatory reason for the termination; and (3) if that burden is met by the employer then the burden shifts back to the plaintiff to prove that the employer's reason for termination was pretextual. See, *Kepler v. Kordel, Inc.*, 542 N.W.2d 645, 647-48 (Minn.App.1996) (applying *McDonnell Douglas* to marital discrimination case).

For MHRA claims, the first step of the *McDonnell Douglas* framework varies according to the type of evidence the plaintiff offers. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319 at 323-24 (Minn. 1995); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 720 (Minn. 1986). A plaintiff may prove discriminatory intent, satisfying her prima facie case, either with direct evidence or by raising the inference of discriminatory intent. *Goins*, 635 N.W.2d at 723-24; see also, *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001); *Gee v. Minn. State Colls. and Univs.*, 700 N.W.2d 548, 552 (Minn. Ct. App. 2005). By offering direct evidence of discriminatory motive, the plaintiff "may establish a prima facie case without resort to the test that is used to appraise inferential evidence." *LeBlond v. Greenball Corp.*, 942 F. Supp. 1210, 1216 (D. Minn. 1996) (referring to the prima facie case of age discrimination).⁴ A Plaintiff lacking

⁴ As the result of the substantial similarities existing between Title VII and the MHRA, Minnesota courts frequently apply principles which have evolved in the adjudication of claims

direct evidence of discrimination must satisfy the elements of her prima facie case. *Sigurdson* at 720; see also, *Dietrich* at 323-24 (prima facie case of employment discrimination may be established by direct evidence of discrimination or by satisfying elements of prima facie case of discrimination).

The term “direct” in “direct evidence” refers to the causal strength of the proof. *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004). Direct evidence shows “a specific link between discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated’ the employer’s adverse action.” *Id.* (quoting *Thomas v. First Nat’l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997)). Otherwise stated, direct evidence reveals that the employer’s discrimination was “purposeful, intentional, or overt.” *Goins v. West Group*, 635 N.W.2d 717, at 722 (Minn. 2001).

Respondent provided evidence that Mr. Rosser made statements in the context of Appellant’s decision to fire Respondent that expressed discriminatory animus towards Respondent because of her marital relationship with Gary Taylor. Specifically, Respondent presented evidence that Mr. Rosser told Gary Taylor that Respondent would be fired because it would be uncomfortable for her to continue to work at LSI and told Respondent she was losing her job because she would have to relocate because Mr. Taylor no longer worked at LSI. Accordingly, Respondent satisfied her prima facie case burden of discrimination under the *McDonnell Douglas* framework.

under the federal act. *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619, 623 (Minn. 1988).

A. Appellant's Statements were Directly Related to the Decisional Process.

An employer's statement that is discriminatory on its face constitutes direct evidence of discriminatory motive. *Goins* at 722. A common example is where an employer states that he will not consider women for an open position. *Sigurdson* at 720. A plaintiff who proffered evidence that a supervisor "virtually announce[d] that he did not consider women" for open positions established her prima facie case of discriminatory treatment. *Hardin v. Stynchcomb*, 691 F.2d 1364, 1369 (11th Cir. 1982), cited with approval in *Goins* at 722.

The factors courts consider in evaluating workplace statements include whether the statements were made by a decision maker (such as a supervisor), whether they related to the decisional process, and whether they express discriminatory animus. *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991). The Eighth Circuit distinguishes "comments which demonstrate a discriminatory animus in the decisional process . . . from stray remarks in the workplace, statements by non-decision makers, or statements by decision makers unrelated to the decisional process." *Id.* at 1205 (quoting *Mohr v. Dustrol, Inc.*, 306 F.3d 636, 640-41 (8th Cir. 2002), overruled on other grounds by *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)). Discriminatory comments made during the decisional process by individuals responsible for the very employment decisions in controversy are not stray remarks. *Beshears*, 930 F.2d at 1354.

Because Respondent demonstrated direct evidence of discriminatory motive, she need not demonstrate the individual elements of a prima facie case of gender

discrimination.⁵ Mr. Rosser told both Respondent and her husband that Respondent would be fired because Mr. Taylor was no longer going to be working at LSI. These remarks are discriminatory on their face. The decision maker made these statements, they were directly related to the decisional process, and they clearly expressed a discriminatory animus toward Respondent's status of being married to Gary Taylor. The statement was not an isolated workplace comment or a stray remark in the workplace made by a coworker. Moreover, the temporal nexus between the statements and the termination decision is immediate as Respondent worked for the Appellant for over 18 years and was fired immediately after her husband resigned. Thus, Respondent produced more than sufficient evidence to establish a prima facie case of discrimination.

B. Appellant's Proffered Reasons for Terminating Respondent were Pretext for Discrimination.

By providing direct evidence of discriminatory motive, the Plaintiff [Respondent] raises the presumption that the Defendant [Appellant] improperly discriminated against her. *Sigurdson* at 720. The Defendant may rebut that presumption by articulating a legitimate, nondiscriminatory reason for the decision at issue. *Id.* However, the Plaintiff

⁵ Although Respondent need not establish the "indirect" prima facie elements, she met them in this case. To establish a prima facie case, Respondent must create a genuine issue of material fact regarding each of the following: (1) Respondent is a member of a protected class; (2) Respondent is qualified for the position from which Respondent was discharged; (3) Respondent suffered an adverse action; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination. *Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 944 (8th Cir. 1994). In order to set forth a prima facie case, only a minimum evidentiary showing is required to satisfy this burden of production. *Pope v. ESA Services, Inc.*, 406 F.3d 1001, 1006-07 (8th Cir. 2005). Here, Respondent is (1) married and, therefore, a member of a protected class; (2) she was qualified for the position, performing it well for over 18 years; (3) she suffered an adverse employment action and; (4) the stated reason for terminating her employment was because she is married to Gary Taylor.

may still prevail at summary judgment by demonstrating that the employer's proffered reasons were merely pretext for discrimination. *Id.* The plaintiff may do so “. . . directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.” *Burdine*, 450 U.S. at 255, quoted in *Sigurdson* at 720.

Evidence of discriminatory comments creates a material question of fact as to whether the Appellant's explanation is pretextual. *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779 (8th Cir. 2004). A plaintiff can discredit the employer's explanation without producing additional evidence beyond that in her prima facie case. *Haglof v. Northwest Rehab., Inc.*, 910 F.2d 492, 494 (8th Cir. 1990); *Peterson v. Scott County*, 406 F.3d 515, 521 (8th Cir. 2005); see also, *Elliott v. Montgomery Ward & Co.*, 967 F.2d 1258, 1263 (8th Cir. 1992) (statement bordering on direct evidence was support for establishing pretext).

Here, Respondent submitted direct evidence of discrimination and in doing so provided the Trial Court with sufficient evidence to raise a fact issue as to whether the decision to terminate Respondent was discriminatory.

C. Appellant's Reasons for Termination are Pretext.

Although providing direct evidence is enough to preclude summary judgment, Respondent will address the Appellant's proffered reasons for terminating Respondent.

a. Married to Gary Taylor.

The first reason Appellant gave for firing Respondent was based on the fact she is married to Gary Taylor and it would be uncomfortable for her to remain employed at LSI

and she would probably have to relocate.⁶ As discussed *infra*, this reason is discriminatory and, at a minimum, should preclude the granting of summary judgment.

b. The Economic Necessity Defense.

Respondent also proffered a second reason for Respondent's termination—the “economic necessity” defense. Here, it is undisputed that Mr. Rosser made the decision to fire Respondent. When questioned about why he made that decision, the following exchange occurred:

- Q. How would LeAnn Taylor's position have a direct impact on satisfying customer concerns?
- A. It did not in that regards. Hers [sic] was purely a matter of looking at we were not meeting the economic goals of the business unit, so how can we cut expenses.
- Q. So you weren't looking at eliminating her job from a position of we've got to make some dramatic changes to satisfy the customers?
- A. Right.
- Q. You were looking at it from how can we shave off some of the expenses?
- A. Correct.

(APP 0374).

Mr. Rosser contends that Respondent and one other individual, Mark Hager, were the only people who lost their jobs as a result of his economic review (APP 0374). However, as testified to by Gary Taylor—and tacitly admitted by Mr. Rosser—Mr.

⁶ Mr. Rosser testified that he does not remember if he had that conversation with Mr. Taylor (APP 0378). However, for the purposes of summary judgment, the Court was required to assume that Mr. Rosser made the statements attributed to him. *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991) (where supervisor testified that he did not recall making discriminatory statements, it was for the fact finder to judge the credibility of the witnesses who heard the statement); *Beckman v. KGP Telecomms., Inc.*, No. Civ.02-1261(JNE/JGL), 2004 WL 533943, at *3 (D. Minn. March 16, 2004) (Appellant denied making discriminatory statements, but the Court assumed that the statements were made for the purposes of summary judgment).

Hager's job was not eliminated as part of this "economic review." In fact, Mr. Hager lost his job because Appellant closed a plant in Tennessee—it had nothing to do with an economic review—in fact, it occurred prior to Mr. Rosser conducting his economic review (APP 0373 & 0379; Resp.'s A-2). Appellant's economic defense is thus based on the elimination of one part-time position. Given the facts and circumstances involved in this case the "economic defense" is highly suspect.

At the time of her termination, Respondent was part-time earning approximately \$35,000 - \$40,000 per year. Appellant's annual sales are around \$26 to \$34 million (APP 0374). Appellant employs approximately 48 people in the "management" side of the business and about 100 people on the "labor" side (APP 0375 & 0383). It strains logic to see how, after an extensive economic review of the company, Appellant determined that it simply needed to terminate one part-time employee.⁷ Oddly, the one person Appellant targeted for termination just happened to be the wife of the soon to be former President, AND the termination just happened to occur at the same time the President resigned. Adding to the susceptibility of the "economic defense" is the fact that people similarly situated to Respondent were not let go as part of the economic review. Mr. Rosser testified as follows when questioned as to why Respondent was let go and not other similarly situated employees:

Q. How much money—I mean did you do an economic analysis to see how much money it saved you from terminating Ms. Taylor instead

⁷ According to Gary Taylor, it is simply not believable that LSI would conduct an economic analysis of the entire company and decide it simply needed to eliminate one part-time employee in order to cut costs (Resp.'s A-2).

- of Ms. Baker or Ms. Ausen?
- A. It is not our practice in any of our companies that indirect positions would have bumping rights, that you would take a person from one position and move it to a less senior person in another position. If the senior position was being eliminated, that typically is the reduction that is made.
- Q. I understand that may be the case, but if the focus is primarily economic, aren't you looking at individuals with the same salaries and making a determination which position to eliminate?
- A. I was looking at this particular position, was [sic] the duties that were being performed by this particular individual duties that could be absorbed easily within the organization without replacing the position.
- Q. But wasn't that also the case with respect to Ms. Baker's job, Ms. Ausen's job and maybe some other jobs there as well?
- A. Each of those individuals, you know, were performing, you know, jobs that themselves were considered an integral part of the operations.
- Q. What was Ms. Baker doing?
- A. I don't remember exactly.

(APP 0370).

c. The Poor Performance Defense.

The final defense raised by Appellant was that Respondent was a "poor performer." Appellant argued that Respondent lost her job because she was a poor performer and not qualified. This "defense" is not supported by the record. Mr. Rosser—the person who made the decision to fire Respondent—specifically admitted that performance was NOT a reason for Respondent's termination:

- Q. So it's your contention it wasn't a job performance issue for Ms. Taylor, it was an economic decision?
- A. Correct.
- Q. And in connection with your decision to terminate Ms. Taylor, you didn't receive any information about negative job performance, it was strictly an economic analysis?
- A. Correct.

(APP 0371).

Respondent established a prima facie case of marital status discrimination and demonstrated Appellant's purported reasons for the termination were nothing more than a pretext for discrimination.

CONCLUSION

The real issue in this case is "what is the definition of marital status?" As discussed herein, Respondent believes the Legislature has already answered that question and, based on the plain language of the statute, Respondent has established a claim for marital status discrimination. Further, Respondent has presented evidence of discrimination and further established, at a minimum, pretext for Appellant's purported reason for Respondent's termination. Based on the foregoing, Respondent respectfully requests that this Court affirm the Appellate Court's granting of summary judgment.

Respectfully submitted,

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