

NO. A10-1558  
STATE OF MINNESOTA  
IN COURT OF APPEALS

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Kim Hansen,

Plaintiff/Appellant,

v.

Robert Half International Inc.,

Defendant/Respondent.

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**RESPONDENT'S BRIEF AND APPENDIX**

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## STATEMENT OF LEGAL ISSUES

- I. Did the District Court correctly conclude that Plaintiff/Appellant Kim Hansen failed to meet her burden of showing that Defendant/Respondent Robert Half International Inc. discriminated against her based on her gender in violation of the Minnesota Human Rights Act?

Apposite Authorities:

*Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319 (Minn. 1995)

*Hayes v. U.S. Bancorp Piper Jaffray, Inc.*, 2004 WL 2075560 (D. Minn. 2004)

*Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150 (Minn. Ct. App. 2001)

*Back v. Danka Corp.*, 335 F.3d 790 (8th Cir. 2003)

- II. Did the District Court correctly conclude that Plaintiff was not entitled to reinstatement to her previous position upon her return from leave?

Apposite Authorities:

*Eklind v. Cargill Inc.*, 2009 WL 2516168 (D. N.D. 2009)

*Grosenick v. Smithkline Beecham Corp.*, 454 F.3d 832 (8th Cir. 2006)

*Reed v. Lear Corp.*, 556 F.3d 674, 680 (8th Cir. 2009)

*Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 973 (8th Cir. 2005)

- III. Did the District Court correctly conclude that Plaintiff failed to plead a claim of retaliation under the Minnesota Parenting Leave Act, and in the alternative, that Plaintiff failed to meet her burden of showing that RHI retaliated against her for taking leave under the Minnesota Parenting Leave Act?

Apposite Authorities:

*Hayes v. U.S. Bancorp Piper Jaffray, Inc.*, 2004 WL 2075560 (D. Minn. 2004)

*Krueger v. Speedway Superamerica, LLC*, 2005 WL 1475368 (D. Minn. 2005)

## STATEMENT OF THE CASE

This case arises from Plaintiff's unfounded and unsupported belief that Defendant Robert Half International Inc. ("RHI") discriminated against her, and that she was entitled to reinstatement upon her return from leave. First, Plaintiff claims that RHI discriminated against her because of her gender (pregnancy) under the Minnesota Human Rights Act ("MHRA") by terminating her employment in December 2008. Plaintiff makes this claim though she presented no admissible evidence to support her beliefs. Plaintiff was terminated from her position due to a bona fide and non-discriminatory reduction-in-force ("RIF") that led to RHI eliminating all but one Recruiting Manager position in Plaintiff's department.

Similarly, Plaintiff is unable to support her second claim under the Minnesota Parenting Leave Act ("MPLA") for failure to reinstate her upon return from leave. Plaintiff did not even take leave under the MPLA – rather she took leave under the Family Medical Leave Act ("FMLA"), the more generous federal statute. As such, Plaintiff was not entitled to reinstatement under the MPLA or that she presented a dispute of fact as such, and her claims under that statute should be dismissed.<sup>1</sup> Even if this Court were to find that Plaintiff took leave under the MPLA, she had no right to reinstatement because she took 13 weeks of leave, far more than the six weeks of leave allowed under the statute. Finally, even if Plaintiff were entitled to reinstatement, that right to

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<sup>1</sup> Plaintiff failed to assert any claims under the FMLA, so all of her arguments for failure to reinstate and retaliation rely on Plaintiff's unsupported claim that she took leave under the MPLA.

reinstatement is not absolute, and RHI was entitled to eliminate Plaintiff's position and terminate her due to the bona fide RIF it implemented during and after Plaintiff's leave.

Finally, Plaintiff now asserts a claim for retaliation under the MPLA, though she never pled such a claim in her Complaint. Plaintiff should be barred from arguing a retaliation claim because she failed to put RHI on notice that she intended to pursue such a claim. Additionally, even if Plaintiff had properly pled a retaliation claim, it is clear that RHI had a legitimate, non-retaliatory reason for terminating Plaintiff's employment, and any claim for retaliation by Plaintiff must be dismissed. The District Court correctly reached all of the above conclusions in considering RHI's Motion for Summary Judgment, and RHI respectfully requests that this Court affirm the District Court's judgment in all respects.

## STATEMENT OF FACTS<sup>2</sup>

### I. RHI'S BUSINESS.<sup>3</sup>

Defendant RHI is an international staffing service registered to do business in Minnesota. Affidavit of Marilyn Bird (“Bird Aff.”)<sup>4</sup>, ¶ 4. RHI conducts its business through a number of distinct divisions, including OfficeTeam and Robert Half Legal (“RHL”).<sup>5</sup> Deposition of Amber Hennen (“Hennen Depo.”) 8:14-18. RHL places lawyers, paralegals, law clerks and legal support professionals on a temporary, project, or full-time basis in law firms and other organizations throughout the United States. Bird Aff., ¶ 5.

Within the United States, RHL is divided into three zones: the Eastern Zone, the Central Zone, and the Western Zone. Hennen Depo. 9:3-9. The Minneapolis, Minnesota office of RHL is in the Central Zone. *Id.* The other offices in the Central Zone are in Chicago, Illinois; Dallas, Texas; Houston, Texas; and Denver, Colorado. *Id.* 88:23-89:5. Prior to the RIF, there were also offices in Columbus, Ohio and St. Louis, Missouri. *Id.* 9:9.

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<sup>2</sup> RHI urges this Court to carefully review the record and Plaintiff’s purported “facts,” in her brief as many of them are entirely unsupported or fail to cite to any portion of the record that actually supports that “fact.” RHI requests that the Court strike any “facts” set forth by Plaintiff that are not supported by a citation to the record. *See* Minn. R. Civ. App. P. 28.03.

<sup>3</sup> This is an accurate description of RHI’s business during Plaintiff’s employment. The internal corporate structure of RHI has subsequently changed.

<sup>4</sup> The Affidavit of Marilyn Bird is attached at RA-013.

<sup>5</sup> At all relevant times, Plaintiff worked as a Recruiting Manager for the RHL division. Bird Aff., ¶ 10.

The Central Zone is headed by the Zone President, Bob Clark, who manages all lines of business for RHI. Bird Aff., ¶ 6. Marilyn Bird, the District Director for RHL – Central Zone, reports to Mr. Clark. *Id.*, ¶ 7. Ms. Bird has been the District Director for RHL – Central Zone since October 2008. *Id.*, ¶ 3. Prior to June 2008, the Regional Manager, Jackie Moes, reported to Ms. Bird. Hennen Depo. 18:6-10. Ms. Moes' position was eliminated in June 2008, and Amber Hennen the Branch Manager at RHL Minneapolis since approximately September 2007 now reports directly to Ms. Bird. *Id.* 19:7-9; 14:15-18. Finally, the Division Directors, who supervise teams of Recruiting Managers or Account Executives within the Minneapolis office, report to Ms. Hennen. Bird Aff., ¶ 7.

The Branch Manager and Division Directors serve in both supervisory and production roles. Bird Aff., ¶ 8. As such, they are responsible for marketing to clients and placing candidates, as well as supervising the employees who report to them. *Id.* In general, a Division Director's supervisory administrative job duties include leading daily, weekly, monthly and quarterly meetings regarding production; managing her team's production and activity numbers; and acting as a coach for her team members. *Id.*, ¶ 9. A Division Director's primary duty is generally her own personal production – because a Division Director serves as a leader and coach to her team, her personal production is particularly important because she serves as an "example." *Id.*, ¶ 10.

**A. Division of Permanent Placement and Temporary Placement Teams.**

The permanent and temporary placement teams operate separately, and employees are assigned to either the permanent placement or temporary placement team.<sup>6</sup> Bird Aff., ¶ 11. Within these teams, employees are responsible for either attorney placements or support staff placements. *Id.*

Plaintiff's appeal implies that the permanent and temporary placement teams operate as one interchangeable "team." Plaintiff claims (without support) that these teams provide the same services to clients; that the positions on the teams involve the same job duties; and that the teams regularly transfer employees back and forth. These claims are false and have no support in the record. While both teams are fast-moving, high-stress environments, there are significant differences between the permanent placement and temporary placement teams. Deposition of Jackie Moes ("Moes Depo.") 55:18-24. Indeed, the only thing the two teams have in common is that they both place candidates in legal positions. *Id.* The temporary placement team moves much more quickly than the permanent placement team, due to the urgency of clients' needs. Bird Aff., ¶ 14. The work hours on the temporary placement team are less flexible than on the permanent placement team, as employees need to be available to receive orders from clients at any time and identify candidates on an expedited basis. *Id.*, ¶ 14. RHL requires temporary placement team members to be present during normal office hours (from 7:30

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<sup>6</sup> Recruiting Managers are responsible for placement of permanent candidates, while Account Executives place temporary employees into law firms and other organizations. Bird Aff., ¶ 10.

a.m. until 5:30 p.m.) and to stay after 5:30 p.m. if client needs necessitate it. *Id.* ¶ 15. The “sales” that the team members must make to clients are also different on the permanent and temporary placement teams. Moes Depo. 56:1-2. Success is measured quite differently between the two teams, and the salary structures are significantly different between the teams. *Id.*, 56:17-57:1.

**B. Performance of Permanent Placement Team Members.**

When RHL successfully places a candidate with a client, it receives a placement fee based on the salary of the filled position. Hennen Depo. 28:17-18. In general, 50 percent of the fee is attributed to the RHL employee who obtains the job order from the client, and 50 percent is attributed to the employee who identifies the successful candidate. *Id.* 28:20-24. An employee who both obtains the placement and identifies the successful candidate is credited with the entire placement fee. Bird Aff., ¶ 16.

RHL evaluates its team members based almost entirely on their production and the revenue they bring to the business. Moes Depo. 16:19-20 (“At the end of the day, at Robert Half, it’s based on numbers.”). Each month, permanent placement team members set and attempt to achieve their “target goals.” The “target” or “target goal” is a number that is established each month by Recruiting Managers in conjunction with their managers, and fluctuates based on the production each Recruiting Manager thinks they can achieve in a given month. Supplemental Affidavit of Amber Hennen (“Supp. Hennen Aff.”)<sup>7</sup>,” ¶ 6; Moes Depo. 19:12-20:4.

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<sup>7</sup> The Supplemental Affidavit of Amber Hennen is attached at RA-022.

Recruiting Managers set their target goals each month in an attempt to achieve a per desk average (“PDA”), of \$25,000.00.<sup>8</sup> Bird Aff., ¶ 18; Hennen Depo. 59:23-60:1; Deposition of Kim Hansen (“Hansen Depo.”) 21:19-25; Moes Depo. 67:24-68:2. The PDA is the most significant basis on which permanent placement team members’ performance is evaluated. Bird Aff., ¶ 18. While an employee’s monthly target and total monthly production could and does vary from month to month, all Recruiting Managers at RHL are expected to have average production (i.e., have a PDA) of \$25,000 a month. Supp. Hennen Aff., ¶ 8; Moes Depo. 21:3-14. RHL evaluates employees based on their PDA, rather than their actual monthly production, because it recognizes that the nature of its business means that employees may have a “good month,” followed by a “bad month.” Supp. Hennen Aff., ¶ 9; Bird Depo. 20:1-5. Accordingly, while an employee’s monthly target goal may change as the month progresses, the overall PDA expectation rarely fluctuates from \$25,000. Supp. Hennen Aff., ¶ 10; Moes Depo. 16:19-23, 21:7-14.

Permanent placement team members are not expected to achieve a monthly PDA of \$25,000 starting with their first day of work. RA-026; Bird Depo. 88:14-18. Rather, RHL provides a “ramping up” period for new members of the team. New permanent placement recruiters are expected to make only \$30,000 in total billings during their first three months on the team (\$10,000 a month), then \$20,000 per month for the next 4-8 months of their employment. Supp. Hennen Aff., ¶ 11; RA-026; Bird Depo. 103:13-20. Recruiting Managers are only expected to reach the \$25,000 monthly PDA goal after they

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<sup>8</sup> PDA represents the total monthly production of each team member, averaged over two or more months. Bird Aff., ¶ 18.

have been on the permanent placement team for nine months. RA-026. An employee's tenure on the permanent placement team is therefore a key factor in evaluating that employee's performance. Bird Aff., ¶ 21.

**C. RHI's Leave of Absence Policies.**

RHI has established policies regarding leaves of absence set out in its Leave of Absence Manual ("LOA Manual"). AA-0162. The LOA Manual is available upon request, and is provided to all employees who take a leave of absence.<sup>9</sup> *Id.* There are several types of leave discussed in the LOA Manual, though the only ones applicable in this case are RHI's Short Term Medical and Pregnancy Disability Leave and FMLA Leave.

First, RHI voluntarily provides a leave that it characterizes as Short Term Medical and Pregnancy Disability Leave ("Short Term Disability Leave"), described in Part II, Section 1 of the LOA Manual.<sup>10</sup> AA-0162, p. 8. This leave is available to all full-time RHI employees starting on their first day of work at RHI. *Id.* Employees are eligible for leave if they are medically disabled and unable to work for more than five business days due to an illness, injury, or disability. *Id.* The maximum amount of leave available under this policy is 12 weeks or the length of the employee's disability. *Id.*

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<sup>9</sup> The LOA Manual is also available via RHI's intranet. Hansen Depo. 148:8-11.

<sup>10</sup> While Plaintiff claims that this leave is the same as leave under the MPLA, she is incorrect. This is type of leave RHI voluntarily provides to its employees that exceeds any obligations it has under state or federal law.

RHI also provides leave under the FMLA, a description of which is set forth in Part II, Section 2 of the LOA Manual. *Id.* In order to qualify for FMLA leave, employees must meet the requirements established by federal law and regulations.

Part III of the LOA Manual, which addresses the inter-relation of the various types of leave, states that if an employee is eligible for leave under the Short Term Disability Leave and FMLA, the employee's leave will be charged under both policies. *Id.*, p. 18. This section of the LOA Manual makes clear that Short Term Disability Leave and FMLA leave run concurrently, and that an employee is not entitled to more than 12 weeks of leave total under these policies in any given 12 month period. *Id.*, pp. 18-19.

Part I, Section 9 of the LOA Manual clearly advises employees that their right to reinstatement expires at the earlier of (a) the maximum time allowed for the applicable leave of absence; or (b) the date of release for return to work set forth in a doctor's note. *Id.* Reinstatement is not available if "the position or a substantially similar position ceases to exist because of legitimate business reasons unrelated to the employee's leave." *Id.*

## II. PLAINTIFF'S EMPLOYMENT WITH RHI.

### A. **Plaintiff's Hiring and Move to RHL.**

Plaintiff was hired into the OfficeTeam division on April 6, 2004. Hansen Depo. 11:4-7. Plaintiff held that position until approximately March 2006, after her first FMLA leave when she requested a transfer to RHL, where she was assigned to the permanent placement team. *Id.* 11:15-19; Hennen Depo. 22:7-10.

Upon moving, Plaintiff was granted, at her request, a reduced schedule. Affidavit of Amber Hennen (“Hennen Aff.”)<sup>11</sup>, ¶ 5. Plaintiff worked from approximately 8:00 a.m. until 3:00 or 3:30 p.m., but was still expected to meet the same production levels as other employees. Hennen Depo. 40:13-15, 40:20-23; Hennen Aff., ¶ 5.

**B. Plaintiff’s Performance Issues.<sup>12</sup>**

After her transfer to RHL, Plaintiff was initially a good performer and maintained good production throughout much of 2006 and 2007. As such, Plaintiff was promoted from her Recruiting Manager position to the Division Director position effective January 1, 2008. Hennen Depo. 24:2-9. Plaintiff’s performance began to suffer soon after this promotion, however. Bird Aff., ¶ 25; Hennen Aff., ¶ 8.

Throughout the first quarter of 2008, Ms. Bird had frequent discussions about Plaintiff’s underperformance with Bob Clark and with Plaintiff’s managers. Hennen Depo. 41:15-42:2, 93:17-22, 94:13-18; Moes Depo. 37:10-17; Bird Aff., ¶ 26. Plaintiff’s managers were concerned that Plaintiff did not have enough time, due her reduced work schedule and the additional administrative duties associated with her new position, to reach her minimum personal production goals. Hennen Depo. 42:5-15. During the first quarter of 2008, Plaintiff’s PDA (\$17,133.12) was the lowest on the permanent placement team in the Minneapolis office for her tenure. Bird Aff., ¶ 27.

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<sup>11</sup> The Affidavit of Amber Hennen is attached at RA-010.

<sup>12</sup> Plaintiff conflates her production numbers in various years; makes unsupported claims that managers at RHI tried to undermine her production; and attempts to compare herself to employees with less tenure than her. RHI asks that the Court carefully review the

Plaintiff's managers believed that Plaintiff would be able to increase her personal production if her administrative duties were reduced. Hennen Depo. 107:24-108:7; Hansen Depo. 33:24-34:5. As such, in March 2008, RHL reduced the number of employees supervised by Plaintiff. Bird Aff., ¶ 28. Plaintiff remained the Division Director, but rather than supervising both attorney and support staff teams, she was only responsible for supervising the support staff Recruiting Managers. Hennen Depo. 107:12-23.

Plaintiff's production numbers continued to be unacceptable even after the reduction in her responsibilities as Division Director. Plaintiff's production for the months of March and April was \$19,900 and \$18,087, respectively, below the expected \$25,000 PDA. Bird Aff., ¶ 29; Hansen Depo. 26:22-27:7, 27:18-25. Based on Plaintiff's failure to increase her personal production numbers, Jackie Moes decided to remove Plaintiff as Division Director and return her to her previous position as a Recruiting Manager.<sup>13</sup> Moes Depo. 66:5-24; Hennen Depo. 58:3-7, 58:13-15, 59:14-17. Ms. Moes and Ms. Hennen met with Plaintiff on April 30, 2008 to relay this decision to Plaintiff. Hennen Depo. 48:8-13; Hansen Depo. 37:18-24. In June 2008, Jessica Kuhl became the Division Director. Hennen Depo. 49:4-8.

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record to determine which (if any) of Plaintiff's claims are actually supported by the evidence.

<sup>13</sup> Amber Hennen did not make the decision to demote Plaintiff in April 2008, which Plaintiff does not dispute. Moes Depo., 65:20-23; Bird Aff., ¶ 29; Hansen Depo. 39:25-40:7.

While Plaintiff's personal production improved somewhat in May 2008 after her transfer back to the Recruiting Manager position, her PDA continued to be below what was expected of a Recruiting Manager at her level of experience. Bird Aff., ¶ 30. Ms. Hennen and Ms. Kuhl held a Personal Activity Review ("PAR") meeting with Plaintiff in mid-July 2008 to address these performance deficiencies. Hansen Depo. 23:1-5. Plaintiff was told that she needed to continuously increase her activity numbers on a weekly basis and achieve a minimum production of at least \$27,000 for the month of August 2008. *Id.* 23:1-9, 24:1-7, 24:25-25:18; Affidavit of Dayle Nolan ("Nolan Aff."), Exs. E – F. Despite the clear expectations set during that meeting, Plaintiff's production was approximately \$18,007.50 in July, and \$8,050.00 in August. Nolan Aff., Ex. R.

Plaintiff refuses to acknowledge what the undisputed production numbers clearly establish (that her performance was lacking), instead arguing that Jackie Moes' mixed testimony can somehow overcome what the production figures clearly establish. Plaintiff makes this argument even though Ms. Moes was not even employed by RHL during the last half of 2008. Moes Depo. 9:1-3. Additionally, the testimony that Plaintiff relies on (a statement by Ms. Moes that Plaintiff's performance was "stellar") was later retracted by Ms. Moes.<sup>14</sup> The testimony of Jackie Moes does not create a fact issue as to Plaintiff's performance during 2008.

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<sup>14</sup> When Ms. Moes was presented with Plaintiff's actual 2008 performance numbers, she stated that "those wouldn't be stellar numbers." Moes Depo. 72:4-10. Ms. Moes also clarified that she was talking about Plaintiff's 2007 performance when she had previously referred to Plaintiff's "stellar" production. *Id.* 72:4-5.

Plaintiff also inexplicably claims that the rolling reports indicate that her PDA was not the lowest in the Minneapolis office. First, Plaintiff's assertion ignores a key factor (as stated above) – PDAs are evaluated based on an employee's tenure in their position, and new employees have lower production expectations than existing employees.<sup>15</sup> Bird Aff., ¶¶ 27, 38; RA-026. While there were other employees in the Minneapolis with lower PDAs, Plaintiff had the lowest PDA in 2008 given that she had been on the permanent placement team of RHL since spring 2006. Indeed, a review of the spreadsheet prepared by Plaintiff's paralegal (Wyman Ex. A)<sup>16</sup> demonstrates that the monthly production for the similarly situated employees (those of similar tenure to Plaintiff) of the Minneapolis office of RHL were as follows:

<b>Month</b>	<b>Kim Hansen</b>	<b>Sarah Dunn</b>	<b>Jessica Kuhl</b>
<b>January</b>	\$16,600.00	\$24,000.00	\$18,350.00
<b>February</b>	\$14,899.36	\$50,106.25	\$60,178.11
<b>March</b>	\$19,899.99	\$46,875.00	\$31,826.00
<b>April</b>	\$18,087.50	(\$4,100.00)	\$42,136.25
<b>May</b>	\$25,809.00	\$0	\$19,075.00
<b>June</b>	\$23,671.25	\$15,810.00	\$51,090.55

<sup>15</sup> Indeed, Plaintiff compares her PDA to those of Melissa Zollman and Katie Miller, but these two employees are not similarly situated to Plaintiff because they did not begin working on the permanent placement team of RHL until January 2008 and June 2008 respectively. RA-026.

<sup>16</sup> Some of these figures appear to be inaccurate as compared to the rolling reports for this time period, but RHI will assume Plaintiff's figures are true for the purposes of this Brief.

<b>July</b>	\$18,007.50	\$8,950.00	\$21,358.25
<b>August</b>	\$8,050.50	\$47,628.00	\$34,204.50
<b>Average (PDA) January - August</b>	<b>\$18,128.14</b>	<b>\$23,658.66</b>	<b>\$34,777.33</b>

While both Sarah Dunn and Jessica Kuhl had some months during this time period that they did not reach monthly production of \$25,000, they also had several months where their production was far above \$25,000. Plaintiff, in contrast, only had one month where her production was (barely) above \$25,000, and the remaining months were below that level. Plaintiff's PDA was clearly below expectations and below other employees in her office of similar tenure.

Finally, Plaintiff makes much of the (irrelevant) fact that other employees were not discharged in previous years for their subpar performance, and that she never went below a "minimum expectation" of \$16,000. See Plaintiff's Brief, pp. 21-22. Whether employees were discharged for poor performance in previous years, when RHL was not suffering financially due to the economic downturn, is irrelevant to the question before this Court (whether Plaintiff's discharge pursuant to a RIF was non-discriminatory). Likewise, Plaintiff's claim that her production never dropped below the \$16,000 "minimum" is both false (as set forth in the chart above, which is based on the chart prepared by Plaintiff) and irrelevant to the question of whether she was meeting the PDA expectations discussed above. Plaintiff confuses the record in several aspects about her performance in 2008, but one fact remains true throughout – the numbers do not lie.

III. PLAINTIFF'S PREGNANCY AND REQUEST FOR LEAVE UNDER THE FMLA.

Plaintiff learned that she was pregnant with her second child in late January 2008. Hansen Depo. 81:11-25. She told Ms. Hennen and others at RHL about her pregnancy sometime in January or February 2008. Hennen Depo. 64:12-15.

During her third trimester, Plaintiff began to experience health issues as a result of her pregnancy. Hansen Depo. 91:18-92:2. Plaintiff shared these issues with Ms. Hennen and other RHL employees in June, July, and August 2008. Hennen Depo. 64:21-24; Hennen Aff., ¶ 10. Plaintiff raised the issue of her health during the July 16, 2008 PAR meeting with Ms. Hennen and Ms. Kuhl. Hennen Depo. 125:14-21; 123:25-124:12; Hansen Depo. 23:1-3, 23:18-21. Ms. Hennen told Plaintiff during that meeting that she was concerned about Plaintiff's health, as well as the health of Plaintiff's baby, and that Plaintiff had the option of taking an early maternity leave to address her health issues. Hennen Depo. 125:14-21; 123:25-124:12; Hansen Depo. 25:19-26:2. Plaintiff ultimately decided to work part-time for the last 2-3 weeks of August 2008. Hennen Aff., ¶ 11.

Plaintiff delivered her second child on August 29, 2008 (a month early). Bird Aff., Ex. B. Her leave under RHI's Short Term Disability Leave and the FMLA began that same day. *Id.* Plaintiff was granted 12 weeks of leave. *Id.* RHI sent Plaintiff a letter dated September 11, 2008 confirming her Short Term Disability/FMLA leave and expressly stating that Plaintiff had "no guarantee of reinstatement" if she took more than 12 weeks of leave.<sup>17</sup> RA-025; Hansen Depo. 67:11-22.

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<sup>17</sup> RHI enclosed a copy of the LOA Manual with this letter. Hansen Depo. 148:1-11.

Plaintiff claims that while she was out on leave, RHI hired an employee (Jennifer Hedin) to “replace” Plaintiff. This claim is false and is contradicted by the undisputed evidence on this issue. Marilyn Bird, the individual responsible for making hiring decisions, testified unequivocally that “[h]iring Jennifer Hedin had nothing to do with Kim Hansen's position.” *See* Bird Depo. 32:19-33:7. Furthermore, the personnel requisition form for the position that was eventually filled by Jennifer Hedin was dated May 21, 2008, long before Plaintiff went on leave. *Supp. Hennen Aff.*, Ex. 4. Finally, Ms. Hedin was hired at a time when multiple other employees had recently left the permanent placement team, and she was in fact hired to replace them (not Plaintiff).<sup>18</sup>

Plaintiff returned to work on December 1, 2008, after 13 weeks leave. *Hennen Aff.*, ¶ 12. She met with Amber Hennen that day to discuss what had happened at work while she was gone, and to create a plan to achieve her production numbers in December. *Hennen Depo.* 101:19-21, 102:1-3, 9-11. Ms. Hennen asked Plaintiff what hours she expected to work going forward. *Id.* 102:12-15. Ms. Hennen did not know during that meeting that Plaintiff’s position would be eliminated the next day. *Id.* 104:18-24, 130:3-14; *Bird Depo.* 126:6-21.

#### IV. RHI IMPLEMENTS A RIF AND OTHER COST-SAVING MEASURES.

Like many companies throughout the United States, RHL was severely and negatively affected by the economic downturn in 2008 and 2009. *Hennen Depo.* 51:7-10;

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<sup>18</sup> Specifically, Melissa Zollman left the Minneapolis office of RHL in approximately July 2008; Cassandra Hoffman quit her position on the permanent placement team on August 15, 2008; and John Nilsen was terminated from the permanent placement team on October 9, 2008, right after Ms. Hedin’s hire. *Supp. Hennen Aff.*, ¶ 13, Exs. 2 and 3.

Bird Aff., ¶ 33; Hansen Depo. 28:15-19. Law firms and other organizations (RHL's clients) were significantly affected by the economic downturn. Bird Aff., ¶ 33; Hennen Depo. 86:14-87:4. The needs of those companies for RHL's staffing services, and its permanent placement services in particular, decreased dramatically beginning in the 4th quarter of 2008.<sup>19</sup> Hennen Depo. 85:2-8. Monthly sales from permanent placements in the Central Zone of RHL decreased more than 90 percent between August 2008 and December 2008. Bird Aff., ¶ 35. Both the Minneapolis office and the Central Zone as a whole experienced more than a 50 percent decrease in sales between the 3rd and 4th Quarters of 2008. *Id.*

Due to this downturn, and recognizing that a recovery was not likely until sometime in 2009 at the earliest, RHI instituted several cost-reduction measures throughout its offices starting in November 2008. Hennen Depo. 84:22-85:1; Deposition of James Kwapick ("Kwapick Depo.") 32:8-13. Throughout the 4th Quarter of 2008 and 1st Quarter of 2009, Bob Clark, the Central Zone President, directed Ms. Bird to reduce the number of permanent placement employees at RHL from approximately 20 to a total of 8 throughout the Central Zone. Bird Aff., ¶ 36; Hennen Depo. 85:9-17, 89:10-17. Mr. Clark issued directives on several occasions between approximately October 2008 and March 2009, and Ms. Bird was usually required to accomplish the headcount reduction within, at most, 2 days of each of Mr. Clark's directive. Bird Aff., ¶ 37.

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<sup>19</sup> While the temporary placement area also saw a decrease in sales, it was not as dramatic as the downturn in permanent placements because many law firms and organizations hired temporary employees to save costs. Bird Aff., ¶ 34.

In determining which positions would be eliminated, Ms. Bird reviewed total production from individual offices within the Central Zone, as well as the lowest performing employees within each of the offices.<sup>20</sup> *Id.*, ¶ 38. In comparing the performances of the relevant employees, Ms. Bird considered their production numbers for 2008, given their relative tenure with RHL. *Id.* While Ms. Bird kept Ms. Hennen updated throughout this time period on RHL's general plans to reduce headcount in the Minneapolis office, Ms. Hennen was not involved in the decisions to reduce headcount or eliminate particular positions. *Id.*, ¶40; Hennen Depo. 91:3-15, 92:2-7, 98:4-21.

When Mr. Clark issued another directive to eliminate another permanent placement position in December 2008, Ms. Bird chose Plaintiff's position for elimination. Bird Aff., ¶ 41; Deposition of Jessica Kuhl ("Kuhl Depo.") 54:25-55:1; Bird Depo. 64:6-8 ("Q: Whose decision was it to terminate Kim Hansen, A: Mine."). Plaintiff's position was chosen for elimination because her PDA was consistently the lowest of all employees on the permanent placement team in the Minneapolis office during 2008, based on her tenure. Bird Aff., ¶ 41. Plaintiff's PDA was also among the lowest in the Central Zone as a whole. *Id.*

Ms. Bird informed Ms. Hennen of her decision to eliminate Plaintiff's position during a telephone conference on December 2, 2008. *Id.*, ¶ 43; Hennen Depo. 100:12-21. Ms. Hennen held a meeting with Plaintiff shortly after her telephone conference with

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<sup>20</sup> Employee production figures are the primary criteria RHL management evaluates when deciding whether to terminate an employee. Hennen Depo. 112:2-7.

Ms. Bird, during which she informed Plaintiff of RHL's decision to eliminate her position. Hennen Depo. 134:19-21; Hansen Depo. 75:20-24.

RHL eliminated a total of 12 permanent placement positions in the Central Zone as part of the RIF. Bird Aff., ¶ 44. Minneapolis' permanent placement team was reduced from a total of four employees in August 2008 to one, Jessica Kuhl, between December 2008 and February 2009.<sup>21</sup> Bird Aff., ¶ 44. Ms. Kuhl was retained on the permanent placement team because she had the highest PDA for 2008. Bird Aff., ¶ 45. The Minneapolis office of RHL operated with only one permanent placement Recruiting Manager until October 2009, when two permanent placement employees were hired.<sup>22</sup> Hennen Depo. 79:19-80:6; 80:21-81:10. One of these employees was hired to replace Ms. Kuhl, the only remaining Recruiting Manager, who voluntarily left RHL in October 2009. *Id.*

RHI implemented several other cost-saving measures starting in November 2008. The permanent placement teams in the Columbus, Ohio and St. Louis, Missouri RHL offices were eliminated entirely in January 2009. Bird Aff., ¶ 46. The company reduced the salaries of almost all employees. *Id.*, ¶ 47. Finally, RHI eliminated several administrative positions and significantly decreased all discretionary spending. *Id.*, ¶ 48.

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<sup>21</sup> Another permanent placement employee, Sarah Dunn, began maternity leave on approximately December 1, 2008. She was reinstated to her previous position when she returned from leave in early March 2009 but left RHL the same month. Hennen Depo. 46:3-12.

<sup>22</sup> Plaintiff makes the unsupported statement in her brief that RHL hired other permanent placement employees after her discharge. Plaintiff's Brief, p. 26. This claim is false.

Plaintiff attempts to argue that the RIF on the permanent placement team was not genuine because temporary positions were being filled during the same time period. As set forth above, the permanent placement team (of which Plaintiff was a member) and the temporary placement team (of which Plaintiff was never a member), have always operated as two different units. Furthermore, Ms. Bird testified that the temporary placement team did not lay off employees in late 2008 because that team was not as severely affected by the economic downturn as the permanent placement team. Bird Aff., ¶ 34. RHI has never suggested that there was a freeze in hiring or RIF on the temporary placement team, and such hiring on a completely separate team does not mean that the RIF on the permanent placement team was not genuine.

V. PLAINTIFF'S "EVIDENCE" OF DISCRIMINATION.

Plaintiff's "evidence" of discrimination is based almost exclusively on the timing of her discharge and allegedly discriminatory comments made by Amber Hennen, a non-decisionmaker. The primary basis of Plaintiff's discrimination and retaliation claims is that she was terminated on her second day back from leave. Hansen Depo. 152:20-153:5.

Plaintiff also bases her claims on allegedly discriminatory statements made by Ms. Hennen regarding pregnancy. Specifically, Plaintiff relies on the following statements in support of her claims:

- An alleged comment by Amber Hennen that she needed to get rid of an employee who was undergoing fertility treatments, because Ms. Hennen would be “stuck with her” if she became pregnant.<sup>23</sup> Hansen Depo. 40:8-17, 41:6-17.
- An alleged comment by Ms. Hennen, in the context of considering a potential hire by RHL, that it was “too bad” they couldn’t hire her because she was pregnant.<sup>24</sup> *Id.* 44:14-20.

Plaintiff acknowledges that Ms. Hennen hired several women, including one with children, while Plaintiff was employed by RHL. *Id.* 96:15-16, 97:18-98:6, 98:20-23.

Notably, Plaintiff cannot provide any detail regarding when these allegedly discriminatory statements were made, and cannot identify any potential witnesses to the alleged comments. *Id.* 95:17-96:1.

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<sup>23</sup> Plaintiff acknowledges that she does not know the circumstances under which this employee left RHL. Hansen Depo. 43:3-9. That employee’s PDA was below expectations for a significant period of time before her termination, and Jackie Moes made the decision to terminate her employment. Hennen Aff., ¶ 13. Furthermore, Ms. Adrian was terminated on November 2, 2007, more than a full year before Plaintiff’s termination. *Id.*

<sup>24</sup> Ms. Hennen made this statement because the candidate volunteered that she was pregnant and did not want to begin working until after she had her child. Hennen Aff., ¶ 14. Ms. Hennen was disappointed that the candidate could not begin work immediately, because RHL had an immediate need to fill the position. *Id.* In any case, Ms. Hennen made this comment in October 2007, long before Plaintiff’s termination. *Id.*

There is no dispute that any alleged comments made by Ms. Hennen were made more than a full year before Plaintiff's termination. Amber Hennen testified that the comment she made about the pregnant candidate (for which RHI has provided a non-discriminatory explanation that Plaintiff did not dispute) was made in September 2007. Hennen Aff., ¶ 14. Any comment made by Ms. Hennen regarding Molly Adrian (which RHI disputes) must have been made before Ms. Adrian was terminated by Jackie Moes on November 2, 2007. *Id.*, ¶ 13. Plaintiff was not terminated until December 2, 2008, long after these alleged comments were made, and in direct contradiction of her assertions.

#### LEGAL STANDARD

This Court reviews *de novo* the district court's grant of summary judgment. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 77 (Minn. 2002). Summary judgment is appropriate where there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A genuine dispute requires that the evidence be such that it could cause a "reasonable jury" to return a verdict for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). In other words, summary judgment is proper even where there exists "a fact issue for the jury, [but] viewing the facts in a light most favorable to [Plaintiff], no reasonable jury could find" in favor of the non-movant. *Culberson v. Chapman*, 496 N.W.2d 821, 826 (Minn. Ct. App. 1993).

"One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317,

323-24 (1986). The party opposing a motion for summary judgment “may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response . . . must set forth specific facts showing that there is a genuine issue for trial.” Minn. R. Civ. P. 56.05. Conclusory and unsupported allegations or beliefs are not sufficient to defeat a motion for summary judgment. *Dyrdahl v. Golden Nuggets, Inc.*, 689 N.W.2d 779, 783 (Minn. 2004).

## ARGUMENT

### I. PLAINTIFF CANNOT SHOW THAT RHI DISCRIMINATED AGAINST HER BASED ON HER GENDER (PREGNANCY).

Even in the context of summary judgment, the burden of establishing that the employer’s conduct was based on unlawful discrimination remains on Plaintiff at all times. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001). In this case, Plaintiff cannot establish a *prima facie* case of discrimination in the context of a RIF. Even if Plaintiff could meet her burden of establishing a *prima facie* case of discrimination, RHI has offered a legitimate, non-discriminatory reason for eliminating Plaintiff’s position. Finally, Plaintiff cannot prove that RHI’s reason for eliminating her position is pretextual. The District Court’s decision should be affirmed, and Plaintiff’s claims under the MHRA should be dismissed.

#### A. **Plaintiff Cannot Establish a Prima Facie Case of Discrimination Under the MHRA.**

To establish a *prima facie* case of discriminatory discharge, an employee must demonstrate that she (1) is a member of a protected class; (2) was qualified for the job that she was performing; (3) was discharged; and (4) was replaced by a non-member of

the protected class, or that other similarly-situated non-protected employees were not discharged for the same behavior. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 442 (Minn. 1983).

When an employee is discharged pursuant to a RIF, however, “some additional showing [is] necessary to make a *prima facie* case.” *Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319, 324 (Minn. 1995); *Holley v. Sanyo Mfg.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985); *LaBonte v. TEAM Industries, Inc.*, 2007 WL 2106787, \*2 (Minn. Ct. App. 2007)(Nolan Aff., Ex. M); *Jordan v. Jostens, Inc.*, 1998 WL 901769, \*5 (Minn. Ct. App. 1998)(Nolan Aff., Ex. N); *Chambers v. Metro. Prop. & Cas. Ins. Co.*, 351 F.3d 848, 855-56 (8th Cir. 2003). The Minnesota Supreme Court has stated that in the context of a RIF, “[t]he mere termination of a competent employee” or the fact that an employee outside of the plaintiff’s class is retained, are not sufficient to establish a *prima facie* case of discrimination. *Dietrich*, 536 N.W.2d at 324-25. A plaintiff also must do more than show that she was qualified for the position she held or had good performance reviews. *Munshi v. Alliant Techsystems, Inc.*, 2001 WL 1636494, \*4 (D. Minn. 2001)(Nolan Aff., Ex. O); *Hayes v. U.S. Bancorp Piper Jaffray, Inc.*, 2004 WL 2075560, \*6 (D. Minn. 2004)(Nolan Aff., Ex. L).

For the purposes of this Brief, RHI acknowledges that Plaintiff is a member of a protected class based on her gender (pregnancy), was minimally qualified for the position in which she was working, and was discharged as part of its RIF. But Plaintiff cannot make the additional showing necessary to show that she was discharged pursuant to the RIF because of her gender (pregnancy), and her claims must be dismissed.

1. Plaintiff was discharged pursuant to a genuine RIF.

The District Court correctly found that Plaintiff was discharged pursuant to a bona fide RIF. In determining whether a RIF occurred, the Minnesota Supreme Court has stated that “[a] work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company.” *Dietrich*, 536 N.W.2d at 324.

Plaintiff cites three cases from outside of Minnesota, none of which are binding on this Court, in support of her claim that the District Court should not have found as a matter of law that RHI’s RIF was genuine. *See* Plaintiff’s Brief, p. 16. Plaintiff ignores the fact that courts in this jurisdiction, including the Minnesota Supreme Court and this Court, have concluded as a matter of law that a RIF was genuine. *Dietrich*, 536 N.W.2d at 325; *Holley*, 771 F.2d at 1165; *Jordan*, 1998 WL 901769, \*5. Clearly it is proper for a court determine whether a RIF is genuine.

In this case, Plaintiff’s contentions notwithstanding, it is undisputed that the RIF implemented by RHI was necessary and genuine. As set forth in more detail above, RHL, and the permanent placement team in particular, was significantly affected by the downturn in the economy in 2008 and 2009. *See* Statement of Facts, Section IV, *supra*. In order to address this sharp decline, RHI eliminated a total of 12 of 20 permanent placement positions throughout the Central Zone, reducing the Minneapolis office from four permanent placement employees to only one in December 2008. *Id.* There can be no question that RHI’s economic situation necessitated a RIF.

Even in light of the undisputed decrease in sales, Plaintiff puts forth irrelevant and unsupported arguments in support of her claim that the RIF was not genuine. Plaintiff first claims that the RIF could not have been genuine because RHI was hiring on the temporary placement team during the 4th Quarter of 2008. Specifically, Plaintiff argues that the promotion of Mike Minick, the hiring of Lisa Breiland, and the transfer of Jennifer Hedin – all on the temporary placement team – constitute evidence that RHI did not need to implement a RIF on the permanent placement team. Plaintiff ignores the fact that the permanent placement and temporary placement teams operate as wholly separate teams. She also disregards the undisputed testimony of Marilyn Bird that the permanent placement team was more significantly affected by the downturn in the economy than the temporary placement team. RHI has always maintained that it needed to reduce headcount on the permanent placement team due to a downturn in sales on that team, and Plaintiff has not presented any evidence to dispute this.

Finally, Plaintiff claims that the hiring of Jennifer Hedin in October 2008 (allegedly to replace Plaintiff) necessitates a finding that the RIF was not genuine. As set forth above, Ms. Hedin's hiring had nothing to do with Plaintiff being on leave. Statement of Facts, Section III, *supra*. Plaintiff has not presented any evidence to support her claim that the RIF was not genuine.

2. Plaintiff cannot show that she was discharged because of her gender.

Because Plaintiff's discharge occurred pursuant to a RIF, she must make an additional showing to establish a *prima facie* case of discrimination. Courts have held that such a showing can be made by providing, for example, statistical evidence that a

factor such as age, race, or gender played a part in the RIF; evidence of systematic discrimination by the employer; or evidence of discriminatory comments by decisionmakers in the context of the RIF. See, e.g., *LaBonte*, 2007 WL 2106787; *Hamblin v. Alliant Techsystems, Inc.*, 636 N.W.2d 150, 153 (Minn. Ct. App. 2001); *Holley*, 771 F.2d at 1166. Stray remarks by a non-decisionmaker and outside the context of the termination are not sufficient to meet the additional showing necessary by a plaintiff in a RIF case. *Spencer v. Stuart Hall Co., Inc.*, 173 F.3d 1124, 1130-31 (8th Cir. 1999); *Hitt v. Harsco Corp.*, 356 F.3d 920, 925 (8th Cir. 2004). In this case, Plaintiff has failed to present any supported evidence that her gender or pregnancy played a part in her termination, and her claims should be dismissed.

a. *Plaintiff cannot rely on timing alone to establish a prima facie case of discrimination.*

Plaintiff claims that RHI retaliated against her by demoting her in late April 2008, three months after learning that she was pregnant, then terminating her in December 2008, three months after she gave birth (and was no longer pregnant) and nearly a full year after she informed RHI that she was pregnant.<sup>25</sup> While the fact that an employer took an adverse employment action shortly after it became aware of the employee's protected status can constitute some "evidence of causation," that time period is too

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<sup>25</sup> Plaintiff also implies that she was involuntarily transferred after becoming pregnant the first time (in 2006), suggesting that RHI discriminated against her at that time because of her pregnancy. Plaintiff's Brief, p. 18. Plaintiff requested the transfer to RHL in 2006 because she wanted to work a reduced schedule, and any claim that this transfer was discriminatory is false. Complaint, ¶¶ 9-10.

attenuated in this case. *See Back v. Danka Corp.*, 335 F.3d 790, 792 (8th Cir. 2003); *Quick v. Wal-Mart Stores, Inc.*, 2006 WL 738165, \*3 (8th Cir. 2006)(Nolan Aff., Ex. P).

Furthermore, *Podkovich v. Glazer's Distributors of Iowa*, 446 F.Supp.2d 982 (N.D. Ia. 2006), a case from outside this jurisdiction, does not support Plaintiff's *prima facie* case. *Podkovich* did not arise in the context of a RIF, which sets forth a higher burden of proof for a plaintiff. *Id.* Additionally, the *Podkovich* court applied a lower standard (because it was a retaliation claim) to determine whether the plaintiff had met her burden. *Id.* at 1008. Finally, *Podkovich* can be distinguished on its facts, as the employee in that case was terminated immediately after returning from leave (and claimed retaliation under the FMLA). *Id.* at 1008-1009. In this case, nearly a full year passed between when Plaintiff notified RHI that she was pregnant (January 2008) and when she was terminated in December 2008, which is too long a time period to sustain Plaintiff's claim of discrimination.

b. *Stray remarks by Amber Hennen, a non-decisionmaker, cannot establish a prima facie case of discrimination.*

The alleged remarks Plaintiff attributes to Ms. Hennen cannot meet Plaintiff's burden, either, because even if true (which Robert Half disputes, except for purposes of this Brief), they were made by a non-decisionmaker outside of the context of the termination process.

First, Ms. Hennen was not involved in the decision to terminate Plaintiff's employment. Hennen Depo. 91:3-15, 92:2-7, 98:4-21; Bird Aff., ¶¶ 36, 37 and 41. Comments by a non-decisionmaker that are unrelated to the decisional process cannot

establish a *prima facie* case of discrimination. *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. Ct. App. 1997); *Smith v. DataCard Corp.*, 9 F.Supp.2d 1067, 1079 (D. Minn. 1998). Even if Ms. Hennen had made these comments, they are unrelated to the decisional process and cannot establish Plaintiff's *prima facie* case.<sup>26</sup>

Additionally, Plaintiff acknowledges that she does not know what Ms. Hennen meant by the remarks, but that she "assumed" they were discriminatory. Hansen Depo. 45:10-13. Yet Ms. Hennen has provided a non-discriminatory explanation for the remark regarding the pregnant applicant. Hennen Aff., ¶ 14. Moreover, the employee who was terminated in November 2007 was terminated by Jackie Moes due to her low production. *Id.*, ¶ 13. These stray remarks, allegedly made by someone who was not involved in the process of eliminating Plaintiff's position, are not sufficient for Plaintiff to meet the burden of showing some additional evidence of discrimination.

**B. RHI has Presented a Legitimate Business Reason for Terminating Plaintiff's Employment.**

Even if Plaintiff could prove a *prima facie* case of discrimination, RHI has presented legitimate, non-discriminatory reasons for terminating Plaintiff's employment.

First, even Plaintiff cannot dispute that discharging an employee to reduce costs pursuant to a layoff is a legitimate business reason. *Rademacher v. FMC Corp.*, 431 N.W.2d 879, 883 (Minn. Ct. App. 1988); *Schlemmer v. Farmers Union Cent. Exch., Inc.*,

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<sup>26</sup> In addition to the fact that these comments were allegedly made outside the hiring process, they were made more than a full year before Plaintiff's termination, and any connection between the remarks and Plaintiff's termination is much too attenuated to establish a *prima facie* case.

397 N.W.2d 903, 908 (Minn. Ct. App. 1986); *Holley*, 771 F.2d at 1168; *Matson v. Cargill, Inc.*, 618 F.Supp. 278, 281 (D. Minn. 1985); *Chambers*, 2002 WL 1332797, \*3-4. And an employee's low performance is a legitimate reason for dismissal. *Hamblin*, 636 N.W.2d at 153; *Hayes*, 2004 WL 2075560, \*6-7.

The cost-saving measures implemented by RHI, including the RIF, were necessary to address the steep decline in the national economy in late 2008 and throughout 2009. *See* Statement of Facts, Section IV, *supra*. As set forth above, Plaintiff's position was chosen for elimination because her performance was the lowest in the Minneapolis office based on her tenure. *Id.* RHI has presented a legitimate, non-discriminatory reason for the elimination of Plaintiff's position.

**C. Plaintiff Cannot Show that RHI's Stated Reason for Eliminating her Position is Pretextual.**

When the employer meets its burden of presenting a legitimate, non-discriminatory reason for its employment action, the burden returns to the plaintiff to demonstrate that employer's stated reasons are pretextual. *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978). Plaintiff must do so by a preponderance of the evidence, and she must come forward with specific facts that create a genuine issue for trial; mere allegations are not sufficient. *Id.*; *Hayes*, 2004 WL 2075560; *Hamblin*, 636 at 153. The District Court correctly concluded that Plaintiff cannot meet her burden of showing that the reasons for her layoff are pretextual.

First, it is undisputed that Plaintiff's production was far below RHI's \$25,000 PDA expectation for all of 2008. Even if Plaintiff's performance had been adequate

(which she claims, and which the undisputed numbers contradict), that would be irrelevant in light of the fact that Plaintiff was discharged pursuant to a RIF. As the court in *Hayes* stated, “[e]ven capable employees are released when an employer is downsizing and therefore evidence of competence is not particularly probative.” 2004 WL 2075560, \*6.

Plaintiff also claims that she should not have been discharged because her performance was satisfactory as compared to other RHI employees. She ignores the undisputed production figures demonstrating that she was underperforming, instead blindly asserting that she was “ranked either first, or second in the entire office every month.” This argument fails to account for the fact that Recruiting Manager production is evaluated based on their tenure, with employees who have been in their positions held to higher production requirements than new hires or transfers.<sup>27</sup> Nonetheless, Plaintiff attempts to compare herself to new employees who had been in the permanent placement division for only a short period of time. Such a comparison is inaccurate and misleading.

Plaintiff further argues that the \$25,000 PDA expectation is not really the minimum expectation, and that few employees ever actually met that number in a given month. This argument ignores the distinction, discussed above, between PDA and the “monthly target.” While an employee’s monthly target may fluctuate during a month,

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<sup>27</sup> Plaintiff entirely misinterprets the tenure issue, claiming that because she had longer tenure with RHI than some of the employees who were retained, she should not have been terminated. RHI has never stated that it considers tenure in retention and termination decisions, except to the extent that new employees are held to a lower performance standard than longstanding employees.

permanent placement employees are expected to maintain a PDA of \$25,000. A review of Plaintiff's production figures for 2008 demonstrates that she was well below the \$25,000 PDA in all but one month (May 2008), and that her production was also below those permanent placement employees to whom she was compared (i.e., those with similar tenure to hers).

Finally, Plaintiff again confuses the permanent placement and temporary placement divisions, arguing that the fact that temporary placement team was hiring means that RHI's reasons for Plaintiff's termination are pretextual. As discussed above, the permanent placement and temporary placement teams operate separately, and the fact that the temporary placement team was hiring in late 2008 does not mean that RHI's reason for terminating Plaintiff's position on the permanent placement team was pretextual. Argument, Section I.A.1, *supra*. There is simply no evidence that RHI's stated reasons for terminating Plaintiff's employment were pretextual, and Plaintiff's claims under the MHRA must be dismissed.

## II. PLAINTIFF CANNOT SHOW THAT SHE WAS ENTITLED TO REINSTATEMENT UNDER THE MPLA.

Plaintiff also claims that she is entitled to reinstatement to her previous position under the MPLA. Plaintiff's claim fails for three reasons. First, Plaintiff did not request or receive leave under the MPLA, and she is therefore not entitled to the statute's protections. Even if Plaintiff had taken leave under the MPLA, she took 13 weeks of leave, far more than is allowed under the statute, and she is not entitled to reinstatement. Finally, Plaintiff is not entitled to reinstatement because her position was eliminated

pursuant to a bona fide RIF. Accordingly, Plaintiff's claim for reinstatement under the MPLA should be dismissed.

**A. Plaintiff did Not Take Leave Under the MPLA.**

First, Plaintiff did not request or receive leave under the MPLA, so she is not entitled to reinstatement under the statute. Minn. Stat. § 181.940, subd. 2 defines an "employee" as a person who requests a leave under the MPLA. Plaintiff took leave under RHI's Short Term Disability Leave and the FMLA concurrently, not the MPLA, and thus does not even meet the definition of "employee" under the statute.

It is clear that Plaintiff sought leave under RHI's Short Term Disability Leave and the FMLA, and that is the leave that Plaintiff was granted. First, Plaintiff stated during her deposition that she requested 12 weeks of leave, the total amount she was entitled to under the Short Term Disability Leave and the FMLA. Hansen Depo. 60:5-6.

Furthermore, the letter sent to Plaintiff by RHI on September 11, 2008 confirms that Plaintiff was on Short Term Disability and FMLA leave, stating that her "Short Term Disability/FMLA Leave of absence has been processed..."<sup>28</sup> RA-025 (emphasis added). RHI enclosed a Leave of Absence Manual, "which includes your rights under the Family Medical Leave Act." *Id.* (emphasis added). The Letter also advises Plaintiff that she was eligible for up to 12 weeks of "Short Term Disability/FMLA Leave in a 12 month period." *Id.* (emphasis added). Nowhere in this letter does it state that Plaintiff sought or

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<sup>28</sup> Plaintiff admitted that she received a copy of this letter. Hansen Depo. 67:11-18.

received leave under the MPLA. The letter is unambiguous – Plaintiff sought, and RHI granted, Plaintiff leave under its voluntary Short Term Disability policy and the FMLA.

Plaintiff claims that the LOA Manual establishes that she sought leave under the MPLA. Specifically, Plaintiff claims that RHI’s Short Term Disability Leave is the “same” as MPLA leave, and that she therefore received leave under the MPLA. Plaintiff is incorrect. RHI’s Short Term Disability Leave is leave that RHI voluntarily provides to employees separately from any obligations it has under the FMLA or state laws. A comparison of these two types of leave clearly demonstrates that they are different.<sup>29</sup> Short Term Disability Leave is available to employees from their first day of employment with RHI, while the MPLA is only available to employees who have worked at their employer for at least 12 months. Short Term Disability leave is only allowed to employees who are medically disabled and unable to work for at least five business days, while the MPLA is available to all employees in conjunction with the birth or adoption of a child (it is a parenting leave, and there is no requirement that the employee be disabled). Finally, the maximum time available under Short Term Disability leave is the shorter of either 12 weeks or the period of disability, as established by a doctor’s note. The MPLA only allows up to six weeks of leave, and is not limited by the period of disability of the employee. Clearly there are significant differences between RHI’s Short Term Medical and Pregnancy Disability Leave and the MPLA, and Plaintiff’s claim that she requested

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<sup>29</sup> A detailed description of Short Term Disability Leave is set out on page 8 of the LOA Manual. AA-0162. The requirements for leave under the MPLA are set forth in Minn. Stat. § 181.940, subd. 2.

and was granted leave under the MPLA because RHI voluntarily granted her leave under its more generous Short Term Disability Leave policy (and the mandatory 12 weeks under the FMLA) is unpersuasive.

Plaintiff also points to RHI's Leave of Absence Request Form, the Personnel Action Forms ("PAF") completed for Plaintiff's leave, and the e-mails regarding her leave. Bird Aff., Ex. B; Harder Aff., Exs. W, X, Z and AA. None of these forms or e-mails mention MPLA leave anywhere or indicate that Plaintiff sought leave under the MPLA – they only refer to FMLA leave and RHI's Short Term Disability Leave (which, as set forth above, is not the same as leave under the MPLA).<sup>30</sup> Furthermore, the PAFs are internal payroll management forms completed by RHI management, and the e-mails are internal personnel management documents – none of which Plaintiff ever saw before this litigation commenced (when they were produced to Plaintiff in discovery). See Harder Aff., Exs. W, X, Z, and AA (containing RHI's Bates numbers). None of these forms demonstrate that Plaintiff requested leave under the MPLA.

It is clear that Plaintiff did not take leave under the MPLA, is not an "employee" for the purposes of the statute, and cannot seek relief under the statute.

**B. Plaintiff is Not Entitled to Reinstatement Because she Took More Leave than is Allowed Under the Statute.**

Even if this Court were to decide that there was a dispute of fact whether Plaintiff requested leave under the MPLA, she was not guaranteed reinstatement to her previous

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<sup>30</sup> Plaintiff acknowledged during her deposition that the Leave of Absence Request Form does not contain any reference to the MPLA. Hansen Depo. 64:7-21.

position because she took more leave than is allowed under the statute. Plaintiff began her leave on August 29, 2008 and returned on December 1, 2008 – taking a total of 13 weeks of leave. RHI made clear to Plaintiff that she was not entitled to reinstatement if she took more than 12 weeks of leave. Plaintiff nonetheless took more than 13 weeks of leave, in excess of the leave allowed under either the FMLA, the MPLA, and even RHI’s own Short Term Disability Leave policy. Plaintiff therefore was not entitled to be reinstated to her previous position upon her return from leave under the MPLA, and her claims under the MPLA fail.

1. The authority is clear that there is no right to reinstatement if the employee takes more leave than is allowed under the statute.

This unambiguous interpretation of the MPLA is supported by decisions interpreting the analogous federal statute, the FMLA.<sup>31</sup> It is well-established under the FMLA that there is no obligation to return an employee to her previous position when she has taken more leave than is allowed under the statute. *See, e.g., Mondaine v. American Drug Stores, Inc.*, 408 F.Supp.2d 1169, 1206 (D. Kan. 2006); *Standifer v. Sonic-Williams Motors, LLC*, 401 F.Supp.2d 1205, 1221-22 (N.D. Ala. 2005); *Hunt v. Rapides Healthcare System, LLC*, 277 F.3d 757, 763-64 (5th Cir. 2001); *Daley v. Wellpoint Health Networks, Inc.*, 146 F.Supp.2d 92, 99-100 (D. Mass. 2001); *McGregor v.*

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<sup>31</sup> Minnesota courts have held that state statutes are to be interpreted in accordance with equivalent federal statutes “when statutory text and purposes are aligned.” *Friend v. Gopher Co., Inc.*, 771 N.W.2d 33 (Minn. Ct. App. 2009). Because the language and purpose of the MPLA is nearly identical to the FMLA, this Court has and may look to cases interpreting the FMLA for guidance in interpreting the MPLA.

*Autozone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999); *Mentch v. Eastern Sav. Bank, FSB*, 949 F.Supp. 1236, 1247 (D. Md. 1997).

Rather than acknowledging that the overwhelming majority of courts have held that an employee has no right to reinstatement after taking excessive leave, Plaintiff continues to reference the one case that appears to support her position. *Santosuosso v. NovaCare Rehabilitation*, 462 F.Supp.2d 590 (D. N.J. 2006). Plaintiff ignores the fact that the *Santosuosso* holding was specifically rejected as being contrary to the Eighth Circuit's approach to the FMLA in *Eklind v. Cargill Inc.*, 2009 WL 2516168, \*6 (D. N.D. 2009)(AA-0186). Additionally, *Santosuosso* is inapposite because the employer allegedly did not tell the employee that she was not entitled to reinstatement at the end of her leave, while RHI made clear in this case that Plaintiff would not be entitled to reinstatement if she took more leave than is allowed under the statute.

Finally, Plaintiff attacks the cases cited by the District Court in support of its decision on this issue, claiming that the holdings in those cases are limited to situations where an employee was unable to return to work upon the expiration of leave (rather than just unwilling). This claim by Plaintiff is patently untrue – a review of the cases does not reveal a single holding that was based on the fact that the employee could not return to work at the end of his or her leave.<sup>32</sup> Plaintiff's attempt to distinguish the overwhelming and undisputed authority on this issue is unconvincing.

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<sup>32</sup> Only one of the four cases cited by Plaintiff even mentions an employee who could not return to work after her leave expired (*Eklind*, 2009 WL 2516168).

2. RHI did not “agree to” extend Plaintiff’s right to reinstatement.

Plaintiff next claims that because the MPLA allows an employer to “agree to” extend an employee’s leave under the statute,<sup>33</sup> *ipso facto* the employer must also have “agreed” to extend the right to reinstatement. Plaintiff’s argument is ineffective.

First, RHI never “agreed” to extend Plaintiff’s MPLA leave.<sup>34</sup> Plaintiff requested 12 weeks of leave, the amount she was entitled to under the FMLA. As an employer with more than 50 employees, and given that Plaintiff had worked the requisite number of hours in the previous year, RHI had no choice but to grant Plaintiff’s request for 12 weeks of leave. Any claim by Plaintiff that RHI “agreed” to extend Plaintiff’s leave beyond the six weeks she was entitled to under the MPLA is false – RHI was required to grant Plaintiff 12 weeks of leave, and there was no agreement to extend her alleged MPLA leave. Plaintiff’s suggested interpretation of the “agreed” to language would lead to nonsensical (and unintended) results, as all employers with more than 50 employees (i.e., those subject to the FMLA) would automatically have “agreed” to extend an employee’s MPLA leave and the employee’s right to reinstatement under that statute. This unsupported analysis must be dismissed.

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<sup>33</sup> Minn. Stat. § 181.942, subd. 1 states that “[t]he length of the leave shall be determined by the employee, but may not exceed six weeks, unless agreed to by the employer” (emphasis added).

<sup>34</sup> As stated above, RHI maintains that Plaintiff did not request leave under the MPLA. Nonetheless, RHI will assume, only for the purposes of this argument, that this Court may find that there is a genuine dispute as to whether Plaintiff requested and received leave under the MPLA.

Furthermore, there is nothing in the MPLA to suggest that an agreement to extend the length of leave also extends the right of reinstatement. Indeed, the FMLA contains analogous language stating that an employer may provide more generous benefits than those set out in the statute. *See* 29 U.S.C. § 2653. Even in light of this analogous language, the cases cited above (by RHI) have held that the right to reinstatement expires at the end of the 12 weeks required by federal law – even if the employer has voluntarily given more than 12 weeks of leave (i.e., “agreed to” extend the leave). Employers should not be punished for granting extended leave to their employees, and an absolute right to reinstatement would chill employers’ willingness to grant extended leaves. *See Eklind*, 2009 WL 2516168, \*5-7; *Slentz v. City of Republic, Mo.*, 448 F.3d 1008, 1010 (8th Cir. 2006); *Grosenick v. Smithkline Beecham Corp.*, 454 F.3d 832, 836 (8th Cir. 2006).

Finally, any suggestion that RHI agreed to extend Plaintiff’s right to reinstatement – either explicitly or implicitly – is false. All documents sent by RHI to Plaintiff relating to her leave clearly advised her that her right to reinstatement expired at the end of the 12 weeks of FMLA leave granted to her. AA-0162; RA-025. Plaintiff cannot demonstrate that RHI “agreed” to extend her right to reinstatement.

3. RHI is not estopped from arguing that Plaintiff is not entitled to reinstatement.

Finally, Plaintiff appears to argue that RHI is estopped from denying her reinstatement, based apparently on some action (or inaction) of RHI.

First, Plaintiff has never demonstrated that she actually and reasonably relied on a statement (or lack thereof) by RHI, which is a key element of an estoppel claim. *See*

*Duty v. Norton-Alcoa Proppants*, 293 F.3d 481, 494 (8th Cir. 2002); *Reed v. Lear Corp.*, 556 F.3d 674, 680 (8th Cir. 2009); *BankCherokee v. Insignia Development, LLC*, 2010 WL 948753 (Minn. Ct. App. 2010)(Affidavit of Julia Halbach (“Halbach Aff.”), Ex. D). An employee must show that she has relied on statements (or a lack of statements) made by her employer, and that she has been harmed as a result of that reliance.

In this case, Plaintiff has never established that she actually relied on any statements (or lack thereof) made by RHI regarding her return from leave. While Plaintiff states in her Brief (without any support) that RHI failed to inform Plaintiff that her right of reinstatement was not extended, she has never testified, either via deposition or affidavit, that she actually relied on statements made by RHI (or RHI’s silence) in deciding when to return from leave. Nor can Plaintiff claim that she relied on the PAFs completed in connection with her leave or the internal e-mails from Marilyn Bird, as these are internal personnel documents that Plaintiff did not receive until they were produced to her by RHI in this litigation. Exs. W, X, Z, and AA (containing RHI’s Bates numbers). It is incumbent on Plaintiff to demonstrate that she actually relied on a representation (or lack thereof) made by RHI in deciding when to return from leave. To the contrary, the September 11, 2008 letter and LOA Manual communicated clearly to Plaintiff that her right to reinstatement expired at the end of her 12 weeks of leave. AA-0162; RA-025. She cannot now claim that RHI did not inform her of her rights.

Finally, Plaintiff does not cite to any authority to support her estoppel claims. The majority of the cases relied on by Plaintiff address the issue of an employee’s eligibility for leave under the FMLA. *See* Plaintiff’s Brief, p. 44. These cases did not address the

issue before this court, namely whether an employer is estopped from arguing that its employee could not return from an excessive leave because of alleged misrepresentations made by the employer. The two remaining cases cited by Plaintiff are easily distinguishable on their facts. *See Duty*, 293 F.3d 481 and *Fry v. First Fidelity Bank Corp.*, 1996 WL 36910 (E.D. Pa. 1996)(AA-0197).

The employer in *Fry* published an employee handbook that explicitly gave employees more than 12 weeks of leave, and did not contain any language stating that reinstatement was limited. *See Fry*, 1996 WL 36910 at \*5. Similarly, the employer in *Duty* sent the employee a letter stating he was entitled to reinstatement, though he had already exhausted his FMLA leave as of the date of the letter. *Duty*, 293 F.3d at 493.

In contrast to the employers in *Fry* and *Duty*, RHI provided Plaintiff with clear and unequivocal documents notifying her that she was not entitled to reinstatement if she took more than 12 weeks of leave. The September 11, 2008 Letter states that she is eligible for “up to 12 weeks of Short Term Disability/FMLA Leave in a 12 month period.” RA-025 (emphasis added). The LOA Manual states that the right to reinstatement expires at the “maximum time allowed for the applicable leave of absence.” AA-0162, p. 6. Plaintiff has not identified any statements by RHI that would have led her to believe she was entitled to reinstatement after taking 13 weeks of leave.

**C. Plaintiff is Not Entitled to Reinstatement Because her Position was Eliminated Pursuant to a Bona Fide RIF**

Even if the Court were to find that there is a genuine dispute regarding whether Plaintiff took leave under the MPLA and was entitled to reinstatement despite having

taken 13 weeks of leave, RHI is entitled to offer up a defense to her claim of reinstatement because her position was eliminated pursuant to a bona fide RIF.

1. The right to reinstatement under the MPLA is not absolute.

Plaintiff implies throughout her Brief that the right to reinstatement upon a return from leave is absolute, and that RHI is not allowed to offer a defense to her MPLA claim. Plaintiff is wrong. The MPLA, like the FMLA, is not a “strict liability” statute, and an employer may offer a defense that the employee would not have otherwise held her position upon return from leave. *See Estrada v. Cypress Semiconductor*, 616 F.3d 866, 871 (8th Cir. 2010); *Throneberry v. McGehee Desha County Hosp.*, 403 F.3d 973, 977 (8th Cir. 2005); *Bacon v. Hennepin County Med. Ctr.*, 2007 WL 4373104, \*11 (D. Minn. 2007)(Halbach Aff., Ex. F). RHI has put forth undisputed evidence that it would have taken the same action against Plaintiff had Plaintiff not been on leave.

2. Plaintiff was not entitled to reinstatement upon return from leave because her position was eliminated pursuant to a bona fide RIF.

The plain language of the MPLA gave RHI the right to terminate Plaintiff’s employment because Plaintiff’s position was eliminated pursuant to a RIF. Minn. Stat. § 181.942, subd. 1(b) states:

If, during a leave under sections 181.940 to 181.944, the employer experiences a layoff and the employee would have lost a position had the employee not been on leave ... the employee is not entitled to reinstatement in the former or comparable position.

This language tracks with analogous language in the FMLA, which states that an employee has no more rights while on leave than she would have, had she continued to

be employed during that leave period. 29 C.F.R. § 825.216. This has been interpreted to mean that an employee is not entitled to return to her previous position if she would have otherwise been terminated during her leave. *See Hayes*, 2004 WL 2075560, \*11-12.

The *Hayes* case is particularly illustrative, as it contains facts that are nearly identical to the instant case.<sup>35</sup> The employee in *Hayes* was terminated on the same day she returned from a twelve week maternity leave. *Id.* The court held that the employee was not entitled to reinstatement because the company eliminated her position during her leave pursuant to a bona fide RIF. *Id.* The plaintiff's position had been chosen for elimination because she was "among the least profitable" of the remaining employees. *Id.* at \*12.

In this case, and as set forth in more detail above, it is undisputed that RHI underwent a bona fide RIF throughout late 2008 and early 2009. Plaintiff's position was chosen for elimination during RHI's RIF because she, like the plaintiff in *Hayes*, consistently had the lowest PDA within the Minneapolis office, and was among the lowest performers in the Central Zone in general. Plaintiff was not entitled to reinstatement upon return from leave.

Finally, Plaintiff argues that she should have been restored to a comparable position upon her return from leave, i.e., a position on the temporary placement team. First, the language of the MPLA does not entitle Plaintiff to be returned to a comparable position if her position was eliminated pursuant to a RIF. Minn. Stat. § 181.942, subd.

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<sup>35</sup> The *Hayes* court analyzed the plaintiff's claims under the FMLA and the MPLA.

1(b)(“the employee is not entitled to reinstatement in the former or comparable position.”)(emphasis added). Because Plaintiff’s position was eliminated pursuant to a RIF, she was not entitled to reinstatement into any position.

Even if Plaintiff had been entitled to restoration to a comparable position, she has failed to identify an open comparable position to which she could have been returned. An employee does not have a right to “bump” an existing employee from a position in which she is working (or a position for which she has already been hired) upon her return from leave. 29 C.F.R. § 825.216. Plaintiff has not established that there was an open position to which she could have been transferred when she was terminated on December 2, 2008. The temporary placement positions to which she points (Lisa Breiland and Jennifer Hedin) had been filled before December 2, 2008, when Plaintiff was terminated. Marilyn Bird did not decide until the morning of December 2, 2008 that Plaintiff’s position would be eliminated, and there were not any positions open as of that date. Bird Depo. 126:6-21. There is no evidence that there was a comparable position to which Plaintiff could have been transferred when she was terminated, and her claims under the MPLA must be dismissed.

III. PLAINTIFF CANNOT DEMONSTRATE THAT RHI RETALIATED AGAINST HER BECAUSE SHE TOOK LEAVE UNDER THE MPLA.

Plaintiff claimed for the first time at summary judgment that RHI retaliated against her for taking leave under the MPLA. Plaintiff cannot sustain a claim because she failed to plead a retaliation claim in her Complaint. Even if Plaintiff had pled such a claim, she

cannot demonstrate that RHI retaliated against her for taking leave under the statute, and her claim should be dismissed.

**A. Plaintiff did Not Plead a Retaliation Claim.**

Plaintiff's Complaint is devoid of any reference to retaliation under the MPLA, and Plaintiff should not be allowed to maintain a claim under that statute now. The notice pleading requirements in Minnesota require that the complaint at least put the opposing party on notice as to the plaintiff's claims. Clearly RHI was not on notice that Plaintiff intended to claim retaliation under the MPLA.

A review of the plain language of Plaintiff's Complaint demonstrates a complete lack of any reference to retaliation under the MPLA. Indeed, all of the language quoted by Plaintiff in her Brief refers to her right to reinstatement under the statute:

- “An employee returning from such leave is entitled to return to employment...”
- “Upon her return from leave, Plaintiff was not returned to her former position or a comparable position.

(emphasis added). All of this language refers to an entitlement to reinstatement or a right to be returned to a position – rights that are only referenced in Minn. Stat. § 181.942.

There is no reference to the fact that RHI failed to reinstate her because of or in retaliation for exercising her rights under the MPLA. The prohibition against retaliation is set out in a different statutory section from the right to reinstatement, further demonstrating that the right to reinstatement and the right to be free from retaliation

create two separate causes of action.<sup>36</sup> See *Langehaug v. Mary T., Inc.*, 1999 WL 31182, \*3 (Minn. Ct. App. 1999)(dismissing Plaintiff’s claims for retaliation under the MHRA because she had not sufficiently pled them, though she had pled claims for discrimination and harassment under the MHRA)(RA-027).

This Court need only compare of Count II of Plaintiff’s Complaint (setting forth her MPLA claim) with Count I of Plaintiff’s Complaint (setting forth her MHRA claim) to conclude that Plaintiff did not sufficiently plead a MPLA retaliation claim. In Count I, Plaintiff used language to indicate that RHI had taken action against Plaintiff because of her gender (“Hansen was demoted, reduced in pay, returned to a dissimilar position, and then terminated because of her sex (pregnancy).”)(emphasis added) – the type of language that would have notified RHI of a retaliation claim. Plaintiff did not include such language under Count II, her MPLA claim, and she cannot now assert such a claim.

**B. Plaintiff Cannot Maintain a Retaliation Claim Because She did Not Take Leave Under the MPLA.**

Minn. Stat. § 181.941 prohibits an employer from retaliating against an “employee” for taking leave under the statute. As set forth in more detail above, Plaintiff did not request leave under the MPLA, she is not an employee under the statute, and she cannot now invoke the statute’s protections.

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<sup>36</sup> While the automatic right to reinstatement is addressed in Minn. Stat. § 181.942, the retaliation provisions are set forth in Minn. Stat. § 181.941.

**C. Plaintiff cannot Demonstrate that RHI Retaliated Against her for Taking Leave Under the MPLA.**

Even if Plaintiff had properly pled a claim under the MPLA, she cannot demonstrate that RHI retaliated against her for taking leave under the statute. As Plaintiff has stated, retaliation claims are evaluated under the burden-shifting framework set out in *McDonnell Douglas*.

1. Plaintiff cannot establish a *prima facie* case of retaliation.

Plaintiff fails to even address the *prima facie* analysis, apparently believing this Court will automatically find that she has established one. Plaintiff has not offered any evidence to suggest that RHI retaliated against her, however. The fact that Plaintiff believes her termination was due to her requesting leave is not sufficient to meet her burden of showing a causal connection between her termination and her seeking leave, necessary to establish a *prima facie* case.

2. RHI has offered a legitimate, non-retaliatory reason for Plaintiff's termination.

Even if the Court were to find that Plaintiff had established a *prima facie* case of retaliation, RHI has provided a legitimate, non-discriminatory reason for its elimination of Plaintiff's position and termination of Plaintiff's employment. The reasons provided by RHI have been consistent, namely that Plaintiff's position was eliminated due to a RIF and her poor performance in 2008. *See* Argument, Section I.B, *supra*.

3. Plaintiff cannot show that RHI's stated reason for her termination is pretextual.

Finally, Plaintiff fails to address the issue of pretext, and provides no evidence that RHI's stated reasons for her termination were pretextual. Nonetheless, RHI assumes that

Plaintiff will rely on similar arguments to those set forth in her support of her MHRA claim above, namely the timing of her termination.

Plaintiff again relies solely on *Podkovich*, 446 F.Supp.2d 982, in support of her claim that RHI discriminated against her. This case does not establish pretext. Even the language cited by Plaintiff notes that states that while proximity in time is a factor to be considered, it is generally not sufficient by itself to show a causal connection. *Id.* at 1008-09. Additionally, Plaintiff ignores cases from within this jurisdiction that contradict her argument. The plaintiff in *Hayes* was terminated under similar circumstances to those set forth in this case (one day after returning from maternity leave, and discharged for poor performance), and the court found that the timing alone was not sufficient to show that the employer's reason for the plaintiff's termination was pretextual. *See, e.g., Hayes*, 2004 WL 2075560, \*6. Similarly, the court in *Krueger v. Speedway Superamerica, LLC*, 2005 WL 1475368, \*3 (D. Minn. 2005)(RA-032) held that the question of temporal proximity should be measured from the date of the protected activity, i.e., the day that the plaintiff requested leave under the FMLA. In this case, given that Plaintiff requested leave sometime during the summer of 2008 (and in any case no later than August 29, 2008), and was not terminated until December 2, 2008, there is not sufficient temporal proximity to show by itself that Plaintiff was retaliated against. Finally, the Minnesota Supreme Court in considering this issue has held that temporal proximity cannot establish pretext, especially if the employer has provided a non-retaliatory explanation for the timing of its adverse action. *Hubbard*, 330 N.W.2d at 445-46.

In order to show pretext to reverse summary judgment, Plaintiff must at least submit some disputed fact that RHL's reasons for terminating Plaintiff are false, and she has not done so. The District Court correctly concluded that Plaintiff cannot maintain a claim for retaliation under the MPLA, and her claims should be dismissed.

### CONCLUSION

The District Court correctly determined that Plaintiff could not sustain the claims she asserted against RHI. Plaintiff failed to demonstrate that RHI discriminated against her because of her gender (pregnancy). First, Plaintiff's termination occurred pursuant to a bona fide RIF, and Plaintiff has failed to present any evidence to meet her heightened burden of establishing a *prima facie* case of discrimination. Even if Plaintiff could demonstrate a *prima facie* case of discrimination, RHI has provided a legitimate, non-discriminatory business reason for its decision to eliminate Plaintiff's position, and Plaintiff cannot show that those reasons are pretextual. Similarly, Plaintiff has failed to show that she was entitled to reinstatement under the MPLA. Plaintiff did not take leave under the statute, and therefore is not entitled to its protections. Even if Plaintiff had taken leave under the MPLA, she lost any right to reinstatement by taking 13 weeks of leave. Finally, Plaintiff cannot show that RHI retaliated against her because she took

leave. Plaintiff cannot establish that RHI violated any statutes, and the District Court's judgment should be affirmed.

Dated: 11/2/10



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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a 13 point font. The length of this brief is 13,323 words. This brief was prepared using Microsoft Word 2007, version 12.0.

Dated: 11/2/10

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