

NO. A10-1558

State of Minnesota
In Supreme Court

KIM HANSEN,

Appellant,

v.

ROBERT HALF INTERNATIONAL, INC.,

Respondent.

APPELLANT'S BRIEF AND ADDENDUM

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

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STATEMENT OF LEGAL ISSUES

A. Does an Employee Lose her Minnesota Parenting Leave Act (“MPLA”) Rights if She Fails to Ask for Leave Specifically?

The District Court held that Appellant has no rights under the MPLA because an employee must specifically request a leave under the MPLA.

Apposite Authority:

Minn. Stat. § 181.941, subd. 1

Kobus v. College of St. Scholastica, 608 F. 3d. 1034 (8th Cir. 2010)

B. If an Employer Extends Leave Under the MPLA, Does That Extension Also Extend the Right to Reinstatement?

The Court concluded that even if Appellant did not need to specifically request leave, Respondent’s written consent to extend Appellant’s maternity leave did not extend Appellant’s right to reinstatement.

Apposite Authority:

Minn. Stat. § 181, 941, subd. 1

Duty v. Norton-Alcoa Proppents, 293 F. 3d. 481 (8th Cir. 2002)

C. Does an Employee Lose the Right to Reinstatement if an Employee’s Position Was Eliminated as Part of a *Bona Fide* Reduction in Force?

The Court referenced Minn. Stat. § 181.942, subd. 1(b), which provides that if, during leave, the employee would have lost a position as the result of a *bona fide* layoff and recall system, including a system under a collective bargaining agreement, she does not have a right of reinstatement. The Court then concluded, as a matter of law, that Respondent had engaged in reduction in force, and held that Appellant’s termination after her return from leave caused her to lose her reinstatement rights.

D. Does the MPLA Require an Employer to Reinstate a Returning Employee Into Her Position or a Comparable Position?

The Court held that Appellant had no right to a comparable position because she did not have any MPLA rights. Alternatively, the Court held the position of recruiting legal temporary staff is not comparable to the position of recruiting permanent legal staff, because the hours are different (p. 19, n. 12).

Apposite Authority:

Minn. Stat. § 181.942, subd. 1

E. Was the Appellant Entitled to Summary Judgment on her Reinstatement Claim?

The District Court determined that Appellant had no right to reinstatement because she had not requested leave using the correct language, and denied Appellant's motion for summary judgment.

F. Did the District Court Err in Dismissing Appellant's MPLA Retaliation Claim?

The Court held the claim was not properly before the Court, and alternatively, that Respondent was entitled to summary judgment because, as a matter of law, Appellant was terminated for legitimate business reasons (p. 19, n. 11).

Apposite Authority:

Minn. Stat. § 181.941, subd. 3

Wilson v. Ramacher, 352 N.W. 2d 389 (Minn. 1984)

G. Did the District Court Err in Summarily Dismissing Appellant's Minnesota Human Rights Act Sex Discrimination Claim?

The District Court held that there was no genuine issue of material fact and that Appellant was terminated as the result of a reduction in force.

Apposite Authority:

Minn. Stat. § 363A

Hamblin v. Alliant Techsystems, Inc., 636 NW 2d 1501 (Minn. Ct. App. 2001)

STATEMENT OF THE CASE

This is an employment case. Appellant Kim Hansen brought suit against her employer, Respondent Robert Half International, Inc., in Hennepin County District Court.

In 2008, Appellant became pregnant, requested leave, and in August 2008 was granted leave. Respondent extended her leave, in writing, to December 1, 2008.

Appellant returned to work on December 1, 2008, and was fired the morning of December 2.

Appellant brought claims under the MPLA (Minn. Stat. § 181.941). She contended Respondent violated MPLA by failing to reinstate her into her position or a comparable position. Appellant contended that Respondent retaliated against her as a result of her leave and leave request. Also, Appellant contended that she was discriminatorily terminated because of her sex (pregnancy) in violation of the Minnesota Human Rights Act (“MHRA”).

At the close of discovery, Respondent moved for summary judgment on all counts. Appellant moved for partial summary judgment on her failure to reinstate claim.

The District Court, the Honorable Denise D. Reilly, granted Respondent’s motions in full and denied Appellant’s motion.

The Court concluded that Appellant had no rights under the MPLA, because the MPLA requires that such leave be requested in specific language. The Court further found that Appellant was terminated as a result of a *bona fide* reduction in force, which eliminates her reinstatement rights by operation of Minn. Stat. § 181.942, subd. 1(b)

Accordingly, the Court concluded that Appellant did not have a right to reinstatement as she had not requested leave properly. She also had no claim of retaliation as she had not requested leave. The Court denied Appellant's motion for summary judgment on the reinstatement claim as she had not requested leave in specific language. The Court also questioned whether the retaliation claim had been properly pled.

The Court also found that Appellant did not have the right to be placed in a comparable position. The Court ruled that Appellant did not have any MPLA rights and, in any event, the position of placing temporary employees was not comparable to the position of placing permanent employees. Appellant also brought a claim of sex (pregnancy) discrimination under the MHRA. The Court dismissed that as well, finding no genuine issue of material fact and accepting Respondent's proper reason for termination.

Appeal was taken to the Minnesota Court of Appeals, which affirmed the District Court in all regards. Appellant's petition to this Court followed.

STATEMENT OF FACTS

Appellant, Kim Hansen, began employment with Respondent on April 6, 2004. (A-APP 0028.) She began on the Robert Half Office Temporary Team. Appellant worked as a Staffing Manager, recruiting and placing individuals for temporary office employment. As with Robert Half Legal, Robert Half Office defines its employees between permanent placement and temporary placement. Employees on the permanent team would locate and place employees in permanent employment positions, while the temporary team recruited candidates for temporary placement positions. Appellant was on the temp team. (Hansen Dep. 11, attached to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment).

Her supervisor was Jim Kwapick. He testified that Appellant's performance under his supervision was good. (Kwapick Depo., pp. 19-20, attached to Appellant's Memorandum in Opposition to Summary Judgment).

In March 2006, Appellant transferred to Robert Half Legal doing permanent placements. The Minneapolis office is within the Central Zone. Until June 2008, the Regional Manager was Jackie Moes (A-APP 0023-24). The Branch Manager, who reported to Moes, was Amber Hennen. (Id.) Individuals who place permanent candidates are called Recruiting Managers, while those that recruit temporary employees are Account Executives (Affidavit of Marilyn Bird, ¶ 11, attached Defendant's Brief in Support of Summary Judgment). Under the Branch Managers are the Division Directors "who supervise teams and Recruiting Managers or Account Executives within the Minneapolis office..." (A-APP 0024.) Both the perm and temp teams are "fast-moving, high-stress environments" (A-APP 0025.)

Kwapick felt Appellant was a "go-getter" and Moes agreed. (Moes Dep. 12.) Sometimes, Appellant had to work extended hours, which she routinely did without question. (Id.)

Moes promoted Appellant to Team Leader as a means of testing her to see if Appellant could succeed as a Division Director. (A-APP 0058.) She succeeded, and with input from Hennen, Moes promoted Appellant to Division Director. (Id.) Moes did so because she felt that Appellant had the performance, drive, and leadership abilities to succeed. (A-APP 0059.)

Appellant learned she was pregnant in January of 2008, and in January or February informed Hennen. (A-APP 0061.) In April 2008, Appellant was demoted. She was no longer Division Director, but returned to her position as Recruiting Manager. Hennen and Moes met with Appellant, and told her they "needed to do something differently." (A-APP 0032.)

Appellant was advised that she was doing a “great job” but they were no longer going to have a Division Director. (A-APP 0062.) However, in June 2008, Jessica Kuhl was appointed Division Director. (A-APP 0032.) From April until August 2008, Appellant continued in her position as Recruiting Manager. However, she began to experience some complications relating to her pregnancy. Respondent has a leave form on its website. Kuhl filled out the form, and Appellant signed it. (Hansen Dep. 65.) Appellant did not expressly ask for leave under either the State or Federal leave act. “I just went with what they told me.” (Hansen Dep. 29.)

Respondent offers various types of leave including, for example, workers’ compensation leave and military leave. Pertinent to this appeal, is Respondent’s short-term medical and pregnancy leave, and FMLA leave. Short-term medical and pregnancy disability leave is available for employees who are unable to work due to conditions “related to pregnancy/child birth.” (A-Add. 0047.) Secondly, Respondent provides FMLA leave. (Id., at Part II, 2.) The manual further provides that an employee may be “covered by both the FMLA and by the RHI Short-Term Medical Disability Policy.” (A-Add. 0042.) Further, Respondent recognizes its reinstatement obligation as follows:

9. Position Reinstatement.

Upon completion of an approved leave of absence, an employee will be reinstated to the employee’s former position or a position that is substantially similar to the employee’s former position without reduction in pay, benefits, or service. The exception is if the position or substantially similar position ceases to exist because of legitimate business reasons unrelated to the employee’s leave.

(A-Add. 0045.) , emphasis added.)

In order to request any type of leave, employees were required to fill out a Leave of Absence Request Form (“LOA Request”). This form gave employees the option of designating their leave as one of three types: Option “A” was Pregnancy Leave; Option “B” was FMLA

Leave; and Option “C” was Personal Leave. The form specifically instructed employees to “[o]nly select one type of leave per form – section A, B, or C. (A-Add. 0036.) Box A was filled out. Boxes B and C were left blank.

Respondent approved Appellant’s leave request on a Leave of Absence Personnel Action Form (“PAF Form”). The PAF Form, like the LOA Request, provided options which must be checked to indicate the type of leave the employee will be taking. The PAF form lists six options in order to designate the leave type, including “Maternity” and “FMLA” listed as separate categories, just as in the LOA Request.

Appellant’s LOA Request was approved by Respondent’s management on a PAF Form dated August 29, 2008. The PAF Form included an “X” marking the leave type as “Maternity” leave. The boxes indicating FMLA and personal leave were left blank (A-Add. 0037.)

The Court further found that “[i]n all communications between Plaintiff and Defendant regarding her leave, the parties referred to the leave as being taken under the FMLA.” The only communication the District Court refers to is a letter sent by Respondent to Appellant on September 11, 2008 shortly after her leave began. (A-ADD 0039.) This communication was drafted *by Respondent* and indicated that the leave which Appellant was on was “Short Term Disability/FMLA Leave.” That is, this piece of correspondence (as opposed to the leave forms themselves) essentially states that Appellant is receiving leave under both boxes A and B, pregnancy and FMLA.

On October 29, 2008, Amber Hennen signed a PAF form extending Appellant’s maternity leave to December 1, 2008 (“PAF Change Form”). (A-ADD. 0038.) Under Leave Type, Respondent checked the box for maternity, leaving blank the box for FMLA or personal leave. Under the caption of Action Code, Respondent selected the box “extend existing leave”

as opposed to the box “change leave type.” The “Box A” pregnancy leave was extended to December 1, 2008. It was not changed. The PAF followed the express written approval of Bird, via email. *Id.* Nowhere in the record does Appellant refer to her leave as “FMLA” leave. In fact, the September 11, 2008 letter is the only portion of the record in which the leave is referred to as FMLA leave *at all, by either party.*

While Appellant was on leave, a number of employees were hired both into the permanent and temporary side of RHL-Minneapolis, and a number of employees transferred from permanent to temporary. Jennifer Hedin was hired on October 13, 2008, into the position of “Recruiting/RHL Perm.” (i.e. the position recently vacated by Appellant) (A-Add. 0033).

While Appellant was on leave, Hedin and another employee, Katie Miller, transferred from permanent staffing to temporary staffing. (A-APP 0062.) Hedin was sent an offer letter on September 30, 2008 (one month after Appellant began her leave). (*Id.*) On October 13, 2008, she began her position as a Recruiting Manager for RHL-Permanent-Minneapolis; i.e., the Appellant’s position. (*Id.* at pp. xiii-xiv.) Hedin was then transferred from permanent staffing to temporary staffing. The document indicates that this transfer occurred on December 1, 2008 (i.e., the very day Appellant returned to work). (A-Add. 0034.) Respondent is not sure of the date of transfer but believes it might have happened a few days before Appellant’s return.

Respondent contends that it was downsizing in the Fall of 2008, and Appellant was fired on December 2, 2008 as a result of an alleged reduction in force (“RIF”). Respondent argued that it was undergoing a RIF on the temporary side of RHL within the Central Zone. Respondent presented evidence as to the total number of temporary employees reduced in the last quarter of 2008 and the first quarter of 2009. Respondent produced evidence as to Appellant’s performance in comparison to some of the other permanent employees in RHL –

Minneapolis. Respondent did not produce evidence of Appellant's performance in comparison to the other permanent employees in RHL – Central. Bird testified that she made the reduction decisions based on the instructions from her superior Bob Clark. Bird testified she was never told to eliminate from a specific office, but was told to make reductions from any position involved in permanent recruiting in any of the offices within the Central Zone. (A-APP 0062.) Respondent argued that Appellant's production was the lowest on the permanent team of Minneapolis "given her tenure." (Bird Affidavit, ¶ 27.)

Appellant presented evidence, and Respondent acknowledged, that Appellant's performance in fact was higher than a number of employees on the permanent team. However, Respondent argued that was irrelevant. That is, Respondent contends that they consider tenure. Because many of the lower performer employees had worked for Respondent for a shorter time than Appellant had, that low performance was discounted or ignored. As to performance amongst the permanent team and the entire Central Zone (which was the pool of candidates), Respondent represented evidence that Appellant was "among the lowest" but presented no substantive evidence as to the performance of any one outside of the Minneapolis office. (Bird Affidavit ¶41.) In addition to the multiple hires referenced above, Appellant provided evidence that Respondent hired Michael Minnick in February 2008 and promoted him on November 1, 2008. (A-APP 0069.) Two weeks before Appellant's anticipated return to work date, Respondent provided an offer letter to another employee, Lisa Brieland, for an Account Executive position. (Id.) Four months after Appellant was fired, Respondent hired another employee into RHL on the temporary side. (A-ADD 0049.) Brieland began working six days after Appellant was fired. Id.

As promised, Appellant returned to work on December 1, 2008. She was enthusiastic, and wanted to begin making phone calls to reestablish her connections. Hennen, however, was hesitant to authorize Appellant to actually begin working, as a result of which Appellant “really didn’t get to do much.” (Hansen Dep. 88.) The next morning she was fired. Hennen told Appellant that her job had been eliminated, and Appellant started crying. (Id. at 75:23-25.)

Appellant asked if there were any other openings and she was told there were not. (Id. at 76.) Appellant specifically inquired about a temporary team position. She reminded Hennen that “I have done temporary before. I’m qualified for that. And she said there was nothing else.” (Hansen Dep. 77:20-24.)

Not only did she know she was qualified, but she knew there were openings. She knew, for example, that Hedin had been hired to work in permanent staffing during Appellant’s leave, and had been transferred from the permanent team to the temporary team the day Appellant returned. (Id. at 78-79.) Appellant also knew another employee had been hired in her absence, and was soon to start on the temporary team, (presumably in reference to Brieland). (Id. at 78:21-79:7.) Respondent instead simply reconfirmed that there were no openings anywhere at Robert Half Legal, and terminated Appellant.

ARGUMENT

I. THE MPLA DOES NOT REQUIRE ANY MAGIC WORDS TO IMPLEMENT ITS REINSTATEMENT AND RETALIATION PROVISIONS

A. Summary of Argument and Standard of Review

The MPLA is silent as to any specifics as to how a leave is to be requested. However, the statute is clear as to the employer’s obligation – “an employer must grant an unpaid leave of absence to an employee who is a natural or adoptive parent in conjunction with the birth or

adoption of a child.” Minn. § 181.941 The District Court concluded, based upon the “plain language” of the statute that an employee has no right to such leave unless the leave is requested with specific reference to the statute. This calls for the interpretation of a statute, subject to *de novo* review by this court. Kolton v. County of Anoka, 645 N.W. 2d 403, 407 (Minn. 2003).

B. Argument

The District Court erred as a matter of law in concluding that, unlike the FMLA, the MPLA is not triggered unless the employee specifically asks for it by name. In reaching this conclusion, the Court failed to follow FMLA, and fundamentally misinterpreted the statute.

The District Court concluded that Appellant had no MPLA rights, not based upon the substantive provisions of the Act, but instead upon the definitional provisions of the act. That is, the Court referenced the definition of employee as “a person who performs services for hire for an employer from whom a leave is requested under section 181.94[1].” See Minn. Stat. 181.940, subd. 2 (2010). The Court found this to be unambiguous, i.e., “the plain language of the MPLA states that the employee must request leave under the Act.” (A-Add. 0014-15.)

We disagree. By this logical reasoning, the Court should have concluded instead that the Appellant was not, in fact, an employee, an absurd result. Such a strained interpretation of the definitional section stands the statute on its head and ignores the substance.

The substantive question should have been viewed as to whether an employee is required to request MPLA leave expressly. The Act is silent as to how such leave must be requested. The Act is not silent as to the employer’s obligation. Such leave “must” be granted. (Minn. Stat. § 181.941, subd. 1.) The Court’s only other support is its reference to Schramm v. Village Chevrolet Co., 203 W.L. 1874753 (Minn. Ct. App. April 15, 2003). That case is not on point. In that case, while the plaintiff was pregnant, she did not tell anybody. Not only did she not

request leave, she did not inform her employer of the conditions requiring a leave. The latter is all that is necessary under the FMLA, and should be all that is necessary under the MPLA.

This is borne out by the Court of Appeals analysis.

Oddly, the Court of Appeals began by a correct analysis of parallel Federal cases interpreting FMLA. See Hansen v. Robert Half Intern., Inc., 796 N.W.2d 359, 386-69 (Minn. Ct. App. 2011) (decision below). The Court noted that the employer's obligation to provide leave is triggered by the mere act of the employee providing sufficient information to "put employer on notice that employee may be in need of FMLA leave." Id. (citing Kobus v. College of St. Scholastica, 608 F. 3d 1034, 1036-1037 (8th Cir. 2010)). The Court further noted that the employee is "not required to understand when she may take FMLA leave, or to state explicitly that she intends to take FMLA leave or, indeed, even know that the FMLA exists." Id., (citing Rask v. Fresenius Medical Care N. Am., 509 F. 3d 466, 474 (8th Cir. 2007)). The Court noted that under the FMLA, the employee merely must "apprise her employer of the specifics of her health condition" in a way that makes it "reasonably plain" that it is serious, and tell her employer "why she will be absent." Id. Conveying that simple information passes on to the employer "the duty to investigate whether she is entitled to FMLA leave." Id. That is a correct statement of the law. The FMLA requires only that the employee "give notice of need for FMLA leave." Price v. City of Fort Wayne, 117 F.3d 1022, 1026 (7th Cir. 1997) (emphasis in original). There are no "magic words" to trigger FMLA leave. See, example, McFall v. BASF Corp., 406 F. Supp.2d 763, 768 (E.D. Mich. 2005); Sieger v. Wisconsin Personnel Commission, 512 N.W.2d 220, 224 (Wis. Ct. App. 1994).

However, immediately after correctly stating the standard of the FMLA, the Court leaps to the inverse conclusion that:

The record does not reflect that Appellant specifically informed Respondent at any time that she was taking leave under the MPLA. Therefore, the District Court correctly concluded that Appellant's claim for reinstatement under the MPLA fails as a matter of law.

(A-APP 0302.)

Some sister states have parenting leave acts that, to varying degrees, parallel the FMLA. Where those states have considered the issues raised in this appeal, they have uniformly followed FMLA precedent, and concluded that the state act similarly requires no magic words, but instead requires only that the employee put the employer on notice of the need for leave, thus placing the burden on the employer to identify and grant the appropriate leave. For example, in JICHA v. State Department of Industry, Labor, and Human Relations, Equal Rights Division, 473 N.W.2d 578 (Wis. Ct. App. 1991), affirmed 485 N.W. 2d 256 (Wis. 1992), Plaintiff brought a claim under the Wisconsin Family Medical Leave Act, W.S.A. § 103.10 (12)(b). The Court rejected the argument that an express request must be made:

[W] FMLA, however, does not require that the employee utter magic words or make a formal application to invoke [W] FMLA's protections (holding that a phone call with the employee's spouse suggesting that employee was unable to work was sufficient to give "a reasonable employer notice of a serious health condition...").

(473 N.W.2d at 580.)

A leave request is adequate if the request was "reasonably calculated to advise [employer] that she was requesting medical leave under DHSS because of her serious health condition." Sieger v. Wisconsin Personnel Commission, 512 N.W. 2d 220, 224 (Wis. Ct. App. 1994).

In D'Alia v. Allied Signal Corp., 614 A.2d 1355 (N.J. Super. Ct. 1992), the appellate court considered the issue of request for leave under the New Jersey Family Leave Act

(“NJSA”) 34: 11B-1. The District Court determined that the plaintiff’s request for disability did not constitute adequate notice. The Appellate Court reversed.

In our view, the judge focused too narrowly on the question of Plaintiff’s intention in determining whether the notice she provided to Defendant was sufficient to invoke her rights under the Act. Instead, the appropriate inquiry was whether the information given was sufficient to alert Defendant of Plaintiff’s plan to take time off for a purpose delineated by the Act. We deem the notice provision satisfied, where the employee requests a leave of absence for any of the reasons identified in [the New Jersey Act]...

The precise form in which the information is conveyed is not dispositive and there are no magic words that must be used. Rather the critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee’s request to take time off for reasons specific in [the Act].”

(Id. at 1359.)

That is, the New Jersey Act, “like the FMLA, does not impose rigid content requirements on the employee” and “there are no magic words that must be used.” Zawadowicz v. CVS Corp., 99 F. Supp.2d 518, 532 (D.N.J. 2000). We suggest that is the rule that should be adopted here. The District Court’s strained reasoning mandating a specific request under the definition of “employee” is untenable, as is the Court of Appeals’ conclusion. The employee need only employer on notice of a condition that would qualify for leave. It is then the employer’s obligation to determine applicability of leave. As will be seen below, this entire evaluation is unnecessary because the employer expressly and uniformly selected, applied, and granted pregnancy leave, not FMLA leave. Respondent’s contentions to the contrary clearly and consistently misstate the record.

C. Appellant Did Request Maternity Leave Under The MPLA

As set out in the Statement of Facts, Respondent’s Leave Manual is very clear. Respondent provides pregnancy leave relating to the birth of a child. It provides FMLA leave,

and it separately provides personal leave. As set out in the Facts, we provided to the District Court the Personnel Action Forms and Change Forms involved in this leave. Each form identified pregnancy leave (box A), FMLA leave (box B), and personal leave (box C). In each and every one of those documents, box A is selected. In none of those documents is box B or C selected. When Appellant's leave was extended to December 1, 2008, Respondent's form allowed them to identify whether it was a change in leave. Respondent indicated it was not a change in leave, but an extension of the existing leave. When indicating the type of leave, Respondent again checked pregnancy leave, and again did not check personal or FMLA leave. See A-ADD 0036-38.

How then do we explain the District Court's conclusion that the only the leave requested by Appellant was under the FMLA? The Court relied exclusively on the September 11, 2008 letter, which referred to both short-term disability and FMLA leave. (A-ADD 0039.) This letter is the *only* document that even references the FMLA (or addressed the FMLA at all other than to leave it blank). Thus, the letter in question advises Appellant that she is receiving "pregnancy leave / FMLA leave" or, put differently, both box A *and* box B leave. The only way the District Court could reach the conclusion it did is to misinterpret that one letter, and utterly ignore every other relevant document. In reaching that conclusion, the Court clearly erred. Respondent's contentions, and the Court's conclusions, were clearly wrong. It is true that the form did not specifically reference the Minnesota Parenting Leave, but simply referred to pregnancy leave. In Gangnon v. Park Nicollet Methodist Hospital, 2011 WL 291848 (D. Minn. January 2011), the Court considered an employee who had applied on the employer's form for "non-FMLA medical leave." While not addressing the issue before this Court, the District Court found that to be a sufficient application for leave under the MPLA. The same should be the result here.

Not only does the act not require any “magic words” but assuming, *arguendo*, it does, Appellant used the “magic words”. The District Court was in error, and should be dismissed.

D. Appellant’s MPLA Leave Was Further Extended To December 1, 2008

The District Court further assumed, “for the same of argument” that the statute does not require any magic language. The Court then concluded that Appellant nonetheless lost her continuing rights of reinstatement at some point in time because the “Plaintiff’s 13-week maternity leave far exceeded the length of leave protected by the [Minnesota Parenting Leave] Act,” and that Respondent never agreed to extend Appellant’s leave under the MPLA to December 1, 2008. (A-ADD 0015.) The Court relied further on the notorious September 11 letter to bolster its erroneous conclusion. That letter further stated that “[a]t the conclusion of your short term disability / FMLA leave, a personal leave may be granted at the discretion of your manager for up to four weeks. An employee on personal leave has no guarantee of job reinstatement to any position at the conclusion of a personal leave.” The Court concluded that this was sufficient “as a matter of law” to establish that Appellant had no right to reinstatement at the end of that 13 weeks. Again, the Court clearly failed to take the facts in the light most favorable to Appellant. Personal Leave is an entirely different type of leave. It is box C. It was *never* identified as the leave type taken, and Bird expressly testified that Appellant was never granted a personal leave. (Bird Dep. 87-88.) The Court was clearly in error.

In reaching the conclusion that the extension eliminated Appellant’s (hypothetical) leave rights, the Court further purported to rely on the “plain language” of Minn. Stat. § 181.941. The Court quoted the language that provides that the leave “may not exceed six weeks, unless agreed to by the employer.” The Court underlined the first five words, suggesting that the six words following the comma are mere surplusage. That is contrary to well-established rules of

statutory construction. “A statute should be interpreted, whenever possible, to give effect to all of its provisions; ‘no word, phrase, or sentence should be deemed superfluous, void, or insignificant.’” Am. Family Ins. Grp. v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000) (quoting Amaral v. St. Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999)). Instead, the Court should have read the statute in such a way as to give affect to all of its elements, which would obviously lead to the conclusion that the leave is of whatever duration that the employer agrees to. Employer agreed to extend the leave to December 1. With that, the employer “must” extend the leave.

II. THE PURPORTED RIF DID NOT ELIMINATE APPELLANT’S RIGHT OF REINSTATEMENT

The District Court found, as an alternative grounds to dispose of Appellant’s claim, that she lost her right to reinstatement by operation of Minn. Stat. § 181.942, subd. 1(b). Respectfully we suggest that, again, there was a clear misreading of the statute.

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, pursuant to the good faith operation of a bona fide layoff and recall system, including a system under a collective bargaining agreement, the employee is not entitled to reinstatement in the former or comparable position (emphasis added).

A. *Respondent Did Not Eliminate Appellant’s Position During The Time She Was On Leave*

The text of Minn. Stat. §181.942, subd. 1(b) applies only if the employee loses his or her position during the employee’s leave. Appellant did not lose her position during her leave. If, in fact, Appellant’s position was eliminated as Respondent contends (and Appellant contests), it occurred on December 2, 2008, the day after she had returned from leave. She did not lose her position “during a leave.” The statute does not apply, on its face.

B. Respondent Was Not Operating Under A Bona Fide Layoff And Recall System

Respondent never claimed that Appellant lost her job as a result of a *bona fide* layoff and recall system. Indeed, the Court seemed to recognize this. After citing and quoting the statute, the Court determined that Appellant had lost her job as the result of a RIF (not a layoff system). The RIF is not the same as a layoff and recall system, and Respondent presented zero evidence that there existed a *bona fide* layoff and recall system.

The record reveals that the termination of Appellant was far from part of a layoff under a detailed *bona fide* layoff system. Marilyn Bird testified that upper management would unexpectedly, and sometimes at the last minute, decide that a certain number of people needed to be eliminated. There was no pre-determined criteria or written policy directing which employees were to be eliminated, and in what order. Which employee to eliminate and from which office was left completely up to Bird, at her individual discretion. Bird testified that she had the “ability to choose who was released from their position” and that she was “given independence to make those decisions.” (Bird. Dep. 20:11-12; 22:13-14.) Further, Bird testified that she was never instructed by management to evaluate any specific criteria to determine who would be eliminated. (Bird Dep. 22:3-7.)

The termination of Appellant in this case was at the discretion of management. Therefore, Respondent was not under the operation of a *bona fide* layoff and recall system, and Minn. Stat. § 181.942, subd. 1(b) does not apply. If Appellant was “laid off” on December 2, she should have been “recalled” on December 8 when Lisa Brieland, a new hire, began her employment (A-ADD 0049.)

III. THE EXTENSION OF THE LEAVE CARRIES WITH IT THE EXTENSION OF THE RIGHT OF REINSTATEMENT

A. *Standard of Review*

This, again is purely a question of statutory construction, subject to *de novo* review.

B. *The Plain Language Of The Statute Provides An Extension Of The Right Of Reinstatement*

i. **The Plain Language of the Statute Says So.**

The Court concluded, as a matter of law, that even if the leave had been extended, that did not extend the right of reinstatement. Specifically, the Court refused to hold that Respondent's "consent to [Appellant] taking a maternity leave longer than the statutorily protected amount under either the MPLA or the FMLA constitutes Defendant's agreement to extend the reinstatement protections of those statutory schemes to Plaintiff." (A-ADD 0016-17.) In reaching this conclusion, the Court relied exclusively on FMLA cases.

In this regard, the Court overlooked an obvious and clear distinction between the State and Federal Acts. The Federal Act provides that FMLA leave is 12 weeks, and contains no provision allowing the employer to extend the leave. In contrast, the Minnesota Statute expressly provides that the leave is six weeks "unless agreed to by the employer." The statute is also clear as to an employer's obligation at the expiration of that leave. "[a]n employee returning from a leave of absence under § 181.941 is entitled to return to employment in the employee's former position or in a position of comparable duties..." Minn. Stat. § 181.941, subd. 1(a). The statute clearly and unequivocally states that where the employer extends the leave, it must reinstate the employee upon return from that extended leave. While there is no case law on this proposition, we suggest the conclusion is self-evident and the plain language of the statute allows for no other conclusion.

The Federal statute is different, and this Court uniformly chooses not to follow Federal cases where the statutory language is different. See Cummings v. Koehnen, 568 N.W.2d 418,

422 n. 5 (Minn. 1997).; Minnesota Mining & Manufacturing Co. v. State, 289 N.W.2d 396, 398-99 (Minn. 1979); Carlson v. Independent School District No. 623, 392 N.W.2d 216, 222 (Minn. 1986); Ray v. Miller Meester Advertising, Inc., 684 N.W.2d 404, 469 (Minn. 2004). Moreover, here under the FMLA (which expressly provides no provision for extension), Courts uniformly estop Respondents from denying reinstatement where it has expressly extended leave. The Court, however, expressly rejected the argument that Defendant is “somehow estopped” (A-ADD 0017 n. 10.) The Court reached this conclusion by the misapplication of FMLA law.

The Court relied upon Highlands Hospital Corp. v. Preece, 323 S.W.3d 357 (Ky. Ct. App. 2010). In that case, the employer failed to inform the employee of the method of calculating FMLA leave. Id. at 360. The employer thereafter argued that the employee’s leave had expired before she returned, and was terminated. Id. The Court determined that the employer was required to “inform the employee of leave designated as FMLA.” Id. at 362. The Court rejected the employer’s defense:

“An employer’s ‘selection’ of a calculated method must be an open rather than a secret act, necessarily carrying with it an obligation to inform its employees thereof.” We agree with this common-sense approach. An employee is not fully informed of her available FMLA leave can unknowingly be lured into absences beyond that to which she is entitled and suffer termination. Such an adverse consequence cannot flow from the exercise of a statutory right.

Id. at 362-63.

This decision hardly supports the Court’s conclusion.

The Court also relied upon Manns v. ArvinMerritor, Inc., 291 F. Supp.2d. 655 (N.D. Ohio 2003). That case is easily distinguishable. There, the employer asked the employee to provide advance notice and a doctor’s note to confirm the need for FMLA leave, which the employee did not provide. Id. The Court dismissed the case because the plaintiff failed to

provide evidence as to a medical need for leave. In contrast, Respondent has never contended that Appellant was not pregnant, or that pregnancy does not qualify for leave under the MPLA. The Manns case is irrelevant to the issues before this Court.

In a footnote (note 9) the Court then briefly addressed Appellant's argument that an employer who expressly extends the leave is estopped from then denying the right of reinstatement at the end of that leave. The Court addressed one of the cases cited by Appellant, Santosuosso v. NovaCare Rehabilitation, 462 F. Supp.2d. 590 (D.N.J. 2006)¹. The Court rejected that case for two reasons. Ironically, the Court rejected the case in part because it was a case interpreting the FMLA, an issue "not before this court." We say ironically because every case the Court cited to support its reasoning was an FMLA case.

The Court then rejected the case on the grounds that it is not in line with precedent from the Eighth Circuit, citing Grosenick v. SmithKline Beecham Corp., 454 F. 3d. 832, 836 (8th Cir. 2006). The Grosenick case, however, is again easily distinguishable. In that case, took leave under the FMLA, and the employer sent a notice expressly advising that if the FMLA leave extended more than 12 weeks, the employer may "fill or eliminate your position." Id. at 833. In that interim, the employee's position was filled.

The right to reinstatement in Grosenick was expressly conditional. The condition was met, and the right to reinstatement was lost. In contrast, Respondent at no time advised Appellant of any condition, other than that she return to work on December 1 – which she did. Grosenick is easily distinguished. As to the law of the 8th Circuit on the relevant issue –

¹ This case was very recently overruled, and Appellant no longer relies upon it.

estoppel – the law is well set-out in Duty v. Norton-Alcoa Proppents, 293 F. 3d. 481 (8th Cir. 2002).

In Duty, the employee suffered a work-related injury for which he was placed on short-term disability. The employer specifically advised him that the entire thirty-four week period of short-term disability would qualify as FMLA leave. Id. at 493. At the end of the initial twelve week period, the employee was unable to perform the essential functions of his job and did not return to work. The employer considered this a voluntary termination. The employee argued that the employer should be estopped from honoring the entire thirty-four week period as FMLA. District Court agreed, and the Eighth Circuit affirmed. The Court first defined the principle as follows:

“The principle of [equitable] estoppel declares that a party who makes a representation that misleads another person, who then reasonably relies on that representation to his detriment, may not deny the representation.”

(Id. at pp. 493-494, quoting Farley v. Benefit Trust Life Insurance Co., 979 F. 2d. 653, 659 (8th Cir. 1992)). The court concluded that it was “not unreasonable for him to rely on the amount of leave time designated by” employer. Id. at 494.

The Eighth Circuit cited a number of cases to affirm the application of equitable estoppel principles in like circumstances. See Kosakow v. New Rochelle Radiology Associates, 274 F. 3rd. 706 (2d. Cir. 2001); and Dormeyer v. Comerica Bank – Illinois, 223 F. 3d. 579 (7th Cir. 2000). The Dormeyer decision, in turn, referenced a number of prior decisions for the well-established proposition that “an employer who by his silence mislead an employee concerning the employee’s entitlement to family leave might, if the employee reasonably relied and was harmed as a result, be estopped to plead the defense of ineligibility to the employee’s claim of

entitlement to family leave.” (Id. at p. 582.) See also Woodford v. Community Action of Greene County, Inc., 268 F.3d 51 (2d Cir. 2001); and Minard v. ITC Deltacom Comm., 447 F.3d 352, 358 (5th Cir. 2006).

Respondent makes no contention that it ever advised Appellant that her right to reinstatement had been lost. It appears to be Respondent’s contention that Appellant was entitled to 12 weeks of FMLA leave, but with one extra week, she was forfeiting her reinstatement rights. If this was in fact Respondent’s intent, it was a secret plan, unrevealed to Appellant (expressly rejected in Highlands Hospital). If she had been advised that she needed to come back one week earlier, it is reasonable to assume that she would have (obviating the need to transfer Hedin). If Appellant had been there one week earlier, she would have been in a position to transfer from her own position to the temporary team, and there would have been no pretext to then fire her on December 2.

Finally, the Court relied upon Hearst v. Progressive Foam Technologies, Inc., 647 F. Supp. 2d. 1071 (E.D. Ark. 2009). In Hearst, the employee was injured on the job on December 3, 2006. On January 3, 2007, the employer advised the employee of her right to FMLA leave, and she subsequently submitted a request for leave for “personal medical reasons.” On March 16, she was advised that her FMLA leave would be exhausted by March 28, but would be extended by an additional 30 days. Her anticipated return to work date was pushed forward on three separate occasions, and she was terminated on May 1 because her FMLA leave had been exhausted and she had no certain return to work date.

The employee’s position was that the first weeks of FMLA leave should not have been counted as FMLA leave, because she was not initially qualified for FMLA leave. The Court rejected that argument, stating that the employer had clearly stated when FMLA was running

and was allowed to waive the eligibility requirement. The court refused to allow the employee to claim the right to additional FMLA leave on the grounds that the first weeks should not have counted. It was on that basis that the Court refused to “punish” the employer.

More significant to the issue before this Court, is the Hearst recognition of the inverse: i.e., its indication of its perspective of the equity of an employer doing to Appellant what Respondent has done here:

It is well settled that equitable estoppel is an available remedy in FMLA cases. However, the typical situation involves an employer designating an employee’s leave as FMLA leave, the employee’s reliance on the employer’s representations, and the employer’s later argument that the employee did not qualify for FMLA leave. Just as employers are prevented from granting FMLA leave and then recanting it later arguing that the leave was not under the FMLA, an employee, for the same equitable reasons, cannot take leave – that all parties believe to be FMLA leave – only later to recant its position and demand twelve additional weeks.

Hearst, at 1073.

Here, Appellant requested leave, and all forms indicate it was maternity leave and not FMLA leave. She asked that the leave be extended to December 1, and Respondent did so, in writing. Respondent now wants to recant that position and contend that leave was only extended for twelve weeks. Respondent cannot be allowed to do so.

C. Appellant Was Not Returned To Her Position Upon Her Return

The above sections show Appellant was entitled to the protections of the MPLA throughout her entire leave period. Therefore, as provided under the statute, she was “entitled to return to employment in the employee's former position or in a position of comparable duties, number of hours, and pay.” Minn. Stat. § 181.942, subd. 1.

Plaintiff was effectively denied reinstatement to her former position or any other position upon her return from leave. While she returned to work for a little over one day, she was told

not to contact any of her clients and was not able to access her computer. She “didn’t get to do much” the first day and, on day two, she went to a couple of meetings and was then fired.

Respondent has never argued – in any of its briefing – Appellant was in fact returned to her position in fulfillment of the requirements under the MPLA. Respondent’s failure to dispute Appellant was not “reinstated” under the Act shows it is uncontroverted Plaintiff was denied that right. Because Appellant was entitled to the protections of the MPLA upon her December 1, 2008 return, as shown above, there are no material facts in dispute Appellant was denied her right of reinstatement under the MPLA. Summary judgment in favor of Appellant is proper on this issue.

D. A Comparable Position Was Available, To Which Appellant Was Not Returned Upon Her Return

i. Standard of Review

The district court erred when it determined – as a matter of law – the Legal Temp and Legal Perm positions were not comparable, and Appellant had presented no genuine issue of material fact as to that issue. The standard of review when determining whether there was a genuine issue of material fact is de novo. STAR Ctrs., Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002) (“we review de novo whether a genuine issue of material fact exists”).

ii. Argument

If Appellant’s position was no longer available, Respondent had an absolute obligation under the MPLA to return her to comparable position. Indeed, as noted previously, Respondent’s leave manual expressly provides Appellant is entitled to reinstatement unless her “position or substantially similar position ceases to exist because of legitimate business reasons...” The temp position is comparable to the perm position and Respondent has never alleged the temporary position “ceased to exist”. Indeed, it would be quite difficult for them to

say so in light of the fact Hedin was transferred from Appellant's position into a temporary position approximately the day Appellant returned to work. Indeed, Hedin should have been hired as a temporary employee.² Respondent had no right to hire a replacement, and then tell Appellant there was no position for her on her return, because her position had been filled.

The District Court found Appellant was not entitled to a position on the Legal Temp team, because the positions on the Legal Temp team were not "comparable." Specifically, the District Court found Appellant "had no right of reinstatement to a position she never before held." (A-ADD 0019.)

If employees are only entitled to be reinstated to a position which they have held prior, then there is no need for the language "or a comparable position" in the statute. Indeed, the very definition of "comparable" implies such a position would be *like* the position the employee held before, but not *the same*. Clearly, the MPLA's requirement that an employee be reinstated to a "comparable" position does not require that a "comparable" position be one in which the employee has been employed prior.

The MPLA provides "an employee returning from leave under section 181.941 is entitled to return to employment in the employee's former position or in a position of *comparable duties, number of hours, and pay.*" Minn. Stat. §181.942. (emphasis added). Similarly, under the FMLA, and employee is entitled to "be restored to an equivalent position with equivalent employment benefits, pay and other terms and conditions of employment."

[A]n equivalent position is one that is virtually identical to the employee's former position in terms of pay, benefits and working conditions, including privileges,

² To be clear, Hedin was hired as a permanent employee on the permanent team. Our contention is that if she was, in fact, going to be hired into the permanent team to replace the Appellant, then she should have been hired as a temporary employee in the temporary team.

perquisites [sic] and status. It must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.

29 C.F.R. § 825.215(e)(4).

The Court made no attempt to analyze any factors other than the fact the hours may be less flexible. Further, the Court ignored the testimony that on the perm. side, while Appellant's scheduled hours ended at 3:00 p.m., she routinely worked from 4:30 p.m. or 5:00 p.m., and routinely worked from home. The Court ignored the testimony from the regional manager that, when the job required additional hours past the normal stop time, Appellant always stayed and did the job, without complaint, or question. If the Court had made any effort to analyze the factors set out in the statute and federal regulations, the Court should have reached a conclusion that, as a matter of law, the positions were comparable. Kwapick testified the positions were only slightly different, the only difference being the slight disparity in flexibility. (Kwapick Dep. 15.) The fact an alternative position may have a different schedule does not mean the position is not "equivalent" as a matter of law. Womack v. RCA Technologies (USA), Inc., 2008 W.L. 5382318 (D. Minn. Dec. 23, 2008).

The Court ignored further testimony from the regional manager that the positions are comparable:

Q Do they both engage in identifying and interviewing candidates to be placed?

A Absolutely.

Q Do they both make contact with law firms to try to identify job openings?

A Yes, they do.

Q Do the job skills that serve one well also serve that employee well in the other?

A Yes.

(Moes Dep. 56.).

The suggestion the positions are not comparable is simply wrong, and the Court should have concluded as a matter of law they were. Appellant herself had previously worked placing temporary employees for RHO. She smoothly transferred into placing permanent employees for RHL. Hedin was hired with zero experience on either side, and hired into the permanent team. Within days of Appellant's return to work, she was transferred to the temporary team. Respondent at no time has presented any evidence either of these employees required as much as five minutes of training in order to divine the differences, if any, of locating, finding, recruiting and placing employees for temporary positions in law firms as opposed to finding, locating, recruiting and placing permanent employees. The Court should have concluded, as a matter of law, the Respondent violated the MPLA by failing to reinstate Appellant into the same or comparable position, and the Court should have granted the Appellant's motion for summary judgment.

IV. RESPONDENT RETALIATED AGAINST APPELLANT IN VIOLATION OF THE MPLA BY REFUSING TO TRANSFER HER TO ANOTHER POSITION UPON HER RETURN FROM LEAVE

Respondent argues Appellant lost her job due to a reduction in force, and therefore lost her right to reinstatement under the MPLA. Even if Respondent did experience a bona fide reduction in force which resulted in the elimination of Appellant's position, Appellant presented evidence Respondent's refusal to transfer her to a position in Legal Temp was done in retaliation for taking leave under the MPLA.

A. Standard of Review

On an appeal from a summary judgment, this Court asks two questions: “(1) whether there are any genuine issues of material fact; and (2) whether the District Court erred in its application of law.” State by Cooper v. French, 460 N.W. 2d 2, 4 (Minn. 1990). These issues are reviewed *de novo*. STARR Centers, Inc. v. Faegre & Benson, LLP, 644 N.W. 2d 72, 77 (Minn. 2002). On appeal, “we must view the evidence in the light most favorable against whom judgment was granted.” Fabio v. Bellomo, 504 N.W. 2d 758, 761 (Minn. 1993).

B. The District Court Erred In Finding That Appellant Failed To Properly Plead A Claim For Retaliation Under The MPLA

In addition to providing for reinstatement after leave, the MPLA provides:

Subd. 3. No employer retribution.

An employer shall not retaliate against an employee for requesting or obtaining a leave of absence as provided by this section.

Minn. Stat. § 181.941, subd. 3.

In her Amended Complaint, Appellant alleges in relevant part as follows under Count II (Violation of Parenting Leave Act):

34. The Minnesota Parenting Leave Act, *Minn. Stat. § 181.941*, mandates that an employee be granted a leave of absence in connection with the birth of a child.

...

36. Upon her return from leave, Plaintiff was not returned to her former position or a comparable position. *Instead, she was returned to work for one day, allowed to perform no duties during that day, and then terminated the following day under the pretext that her position had been eliminated.*

37. Defendant’s actions above violates the Minnesota Parenting Leave Act.

(A-APP 0008.) Appellant’s Amended Complaint could not be more straightforward with respect to its allegations under the MHRA, including retaliatory discharge, and is sufficient

to meet this state's requirements of notice pleading. See e.g., Swenson v. Holsten, 783 N.W.2d 580 (Minn. Ct. App. 2010) (citing Donnelly Bros. Constr. Co. v. State Auto Prop. & Cas. Ins. Co., 759 N.W.2d 651, 660 (Minn. Ct. App. 2009) (stating Minnesota is a notice-pleading state, requiring only "information sufficient to fairly notify the opposing party of the claim against it"), review denied (Minn. Apr. 21, 2009)).

The non-retaliation provisions of the Act are set out in Minn. Stat. § 181.941, which is the provision cited in Paragraph 34 of Appellant's Complaint. Paragraph 36 expressly alleged Appellant's termination was pretextual. As is set out directly below, pretext is an essential element of Appellant's retaliation claim. Respondent argued at length that Appellant was terminated due to a reduction in force, and that Appellant presented no evidence of pretext. Respondent can (and does not attempt) to claim any prejudice from its alleged misreading of the Complaint³. The Amended Complaint was sufficient to put Respondent on notice that she sought relief under the MPLA for both Respondent's failure to reinstate her and for retaliating against her. The Court erred in determining that a retaliatory discharge claim was not before the Court.

C. Appellant's Retaliation Claim

Retaliation claims under the MPLA are analyzed under the McDonnell Douglas burden-shifting scheme. See Gangnon v. Park Nicollet Methodist Hosp., --- F. Supp.2d ---, Civil No. 09-2582, 2011 WL 291848, at *4 (D. Minn. Jan. 27, 2011) (citing Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 444 (Minn. 1983)).

³ We are aware of recent modifications to pleading standards as it relates to the sufficiency of the facts alleged. See, generally, Ashcroft v. Iqbal, 129 Supp. Ct. 1937 (2009). The pleading standards have not been modified as they relate to identification of the cause of action. A specific legal theory does not need to be stated if the pleading gives the Defendant notice of the claim and contains a request for relief. Wilson v. Ramacher, 352 N.W.2d 389 (Minn. 1984).

D. Prima Facie Case

In order to establish a prima facie case of retaliation under the MPLA, Appellant needs to show that she 1) engaged in statutorily protected activity; 2) she experienced an adverse employment action; and 3) there was a causal connection between the two. Gangnon, 2011 WL 291848, at *4.

i. Statutorily Protected Activity

Appellant engaged in statutorily protected activity when she requested or obtained leave under the MPLA. The courts below erred when they found that Appellant did not request leave under the MPLA.

ii. Adverse Employment Action

Respondent fired Appellant, obviously an adverse employment action. Respondent subjected Appellant to an adverse employment action when it refused to transfer her to the temporary team, causing her to be the only member of the Perm Team to lose her job. A denial of a transfer constitutes an adverse employment action when the denial created a material disadvantage to the employee. Beyer v. County of Nassau, 524 F.3d 160, 165 (2d Cir. 2008). Obviously, Respondent's failure to transfer Appellant to the temporary team resulted in a material disadvantage to Appellant – the loss of her job.

iii. Causal Connection

Because retaliation cases seldom present direct evidence of the retaliation, the causal connection between the protected activity and the adverse action may be satisfied “by evidence of circumstances that justify an inference of retaliatory motive, such as a showing that the employer has actual or imputed knowledge of the protected activity and the adverse employment action follows closely in time.” Dietrich v. Canadian Pac., Ltd., 536 N.W.2d 319, 327 (Minn.

1995); Podkovich v. Glazer's Distributors of Iowa, Inc., 446 F. Supp.2d 982 (N.D. Iowa 2006) (“a reasonable juror could conclude from such very close temporal proximity [four days] that [the employer] was simply waiting for the expiration of Podkovich’s FMLA leave to terminate her in retaliation for taking FMLA leave.”).

The causal connection in this case is clear, as the denial of the transfer followed extremely close in time. Where, as here, an employee’s job responsibilities are “changed as soon as she returned from leave”, a “reasonable jury could infer a causal connection between [employee’s] leave of absence and her termination from the “close proximity in time between her leave of absence and the adverse employment action she suffered.” Voorhees v. Time Warner Cable, International Division, 1999 W.L. 673062 (Ed. Penn. 1999). See also McClendon v. Indiana Sugars, Inc., 108 F. 3d 789, 797 (7th Cir. 1997) (holding that the timing between the protected activity and the adverse employment action was alone sufficient to satisfy a prima facie showing of causation under the FMLA).

In addition to the temporal proximity of the adverse employment action, Appellant presented facts that she was foreclosed from transferring, and thereby keeping her job, *because* she went on leave. Hedin was hired to work in Appellant’s position, and was transferred to Temp, allowing her to keep her job. Miller (whose numbers were far weaker than Appellant’s) was allowed to transfer. Sarah Dunn (whose numbers were also weaker than Appellant’s) went on leave on December 1, and subsequently returned to perm. (Bird Dep. 54:20-23; 72-73.) Appellant was the only employee on the permanent team who was not either transferred (like Hedin and Miller) or allowed to keep her job on the permanent team (like Kuhl and Dunn). In the second and third quarters of 2008, Katie Miller’s PDAs were \$5,920.20, and \$17,600.42, respectively, for an average of \$11,590.21. Appellant’s were \$22,555.92 and \$15,371.00,

respectively, for an average of \$18,963.82. Despite this dramatic difference favoring the Appellant, Miller was allowed to transfer to the temporary team, while Appellant was not.

Had Appellant not taken leave, Hedin would not have been hired, and a position on the permanent team would have been available to Appellant upon her return. Just as Hedin was transferred from the permanent team to the temporary team in order to keep her job, Appellant would have been transferred in her place, had she not gone on leave. The simple fact is this: Appellant would have been transferred to the temporary team had she not taken leave. The causal connection is abundantly clear.

E. Respondent's Proffered Business Reasons

Upon Appellant's showing of a *prima facie* case, Respondent has the burden to articulate a legitimate, nondiscriminatory reason for the adverse action. Hubbard v. United Press Intern., Inc., 330 N.W.2d 428, 445 (Minn. 1983).

Respondent has offered numerous reasons for not transferring Appellant to a temporary position. First, on the day she was terminated, Appellant was told by Hennen that there were no temporary placement positions. This stated reason is obviously false, as the court found that there *were* open temporary placement positions around and during the time Appellant took her leave and returned from her leave. (A-ADD 0030).

Because there were in fact open positions, the District Court found three alternative "legitimate business reasons" for not transferring Appellant. First, the Court found that Appellant was not transferred because of her "underperformance." (A-ADD 0031). Alternatively, the Court offered that Appellant "was unable to meet the hours required of employees on the temporary team," and that for this reason she was not transferred. (A-ADD 0031). As a further alternative, the Court found that Appellant was not transferred to the

temporary team because it was a very different position from the permanent team, and Appellant had no experience in the temporary team. (A-ADD 0019; 0031).

i. That Appellant Was Underperforming Is False And Pretext For Retaliation

Appellant was a satisfactory performer, if not one of Respondent's better performers. First of all, Respondent alleges throughout that employees are evaluated on their per desk average (PDA). Respondent has argued that an absolute minimum of \$25,000.00 PDA is necessary, and Appellant, on occasion, failed to maintain that average.

Respondent's position as to this \$25,000.00 as a mandatory minimum is simply based on some of the testimony of Respondent's employees, and ignores all evidence to the contrary. Appellant testified that the true "bottom line" was a \$16,000.00 per month PDA, and that \$20,000.00 was considered average. (A-APP 0063.) She had the foundation to testify to this, and the Court simply ignored it. The regional vice president testified that she had, in fact, advised Appellant that a PDA of \$16,000.00 to \$17,000.00 per month was sufficient to avoid any threat of termination. (Id.) Moes also testified that she had conversations with both Bird and Clark that the \$16,000.00 to \$17,000.00 was a figure below which the topic of conversation might be discussed. Further, the alleged \$25,000.00 minimum was seldom met. Per the testimony of Moes, only a handful of people consistently performed at a \$25,000.00 PDA. Conversely, Moes testified that Hansen's numbers were "stellar" in 2007 and 2008. (A-APP 0061-62.)

Appellant presented evidence that as of February 2008, only 15 out of the 23 permanent staffing employees in the Central Zone had hit their threshold. (A-APP 0062.) More than half had failed to meet that number two months in a row. (Id.) Appellant presented substantial

evidence that, in comparison to both the Minneapolis office and the Central Zone, her performance was better than most. Moes testified that Appellant's average of \$23,000.00 PDA is considered good. (A-APP 0063.) Respondent contends that Appellant was demoted from her district director position in April 2008 because they determined her combined obligations of performing as a recruiter and as a division director were affecting her numbers. The proper analysis, therefore, is to review her numbers for the months after she was returned to full time recruiting, and before she went on half-time work, and then no work in August. In May, June and July of 2008, Appellant ranked either number one or number two amongst all Minneapolis permanent staffing employees. (A-APP 0075.)⁴ Her performance obviously was good throughout 2007, as it led to her promotion to Divisional Director. Indeed, Respondent concedes that Appellant's position was sufficiently satisfactory that she would not have been terminated but for the alleged RIF. (A-APP 0112, n. 4.)

However, Respondent argued, based upon highly disputed evidence, that Appellant was selected to be terminated because of her performance. The District Court ignored all of the evidence presented by Appellant, accepted all of the evidence suggested by the Respondent, and concluded, as a matter of law, that Appellant's stated reason was true.

Respondent acknowledged that Appellant's performance was in fact higher than a number of people, both in Minneapolis and in the Central Zone. Instead, the simply contend that hers was the "lowest in Minneapolis office for 2008 based on Appellant's tenure." (A-APP

⁴ In addition, Respondent's evidence as to Appellant's production (information and documents totally within their control) were highly inconsistent. For example, the documents produced by Respondent showed alternatively that, in the first quarter of 2008, Appellant's PDA was \$18,070.61. Another document identified her performance in the very same quarter as \$34,999.36. (A-APP 0064.)

0261) Respondent admits that others in Minneapolis were lower (A-APP 0262), but simply tosses that off with the mere suggestion that that can be ignored because they had not been there as long as the Appellant. Considering the fact that Appellant has worked for Respondent since 2004, and considering the turnover in this company, it is hard to find anybody that had been there longer than Appellant. Nonetheless, Respondent unilaterally declared all lower performers to be irrelevant and unworthy of discussion, because their tenure was less. The Court allowed them to do so, and found their reason to be legitimate as a matter of law⁵.

Even if we use the cherry picked numbers offered by Respondent, we can compare Appellant's numbers in the months of May, June and July to that of Sarah Dunn. By that calculation, Appellant's average was approximately \$22,333.00 per month. Dunn's average was \$8,661.00 per month. Notwithstanding that tremendous disparity in the favor of Appellant, Appellant was fired and Dunn was maintained. If the Court had viewed the facts in the light most favorable to Appellant, the Court should have concluded at a minimum that there was a genuine issue of material fact as to whether or not Appellant's performance was indeed the cause of her termination⁶.

Respondent transferred Katie Miller. Her PDA during the relevant period was approximately \$6,000.00. (A-APP 0064.) Respondent presented no evidence as to Hedin's performance. Hedin, with no experience in temporary staffing, and no numbers to speak of, was

⁵ As an example of this, Respondent's Reply Brief at the District Court included a chart, which compared Appellant to two of the five employees in the Minneapolis Perm. Team. By a simple footnote, they declared the balance of the team to be irrelevant as they had not been there as long.

⁶ As of September 2008, every employee in the Central Zone's permanent staffing was below their projected monthly reports, with only two exceptions. One of those two was Appellant. (A-APP 0075.)

transferred. Miller, with little to no experience in temporary staffing, and numbers one-third of Appellant's, was also transferred. Dunn, whose numbers at some of the times relevant were far less than Appellant's, was allowed to stay. Appellant, who had two years experience in temporary staffing, who had performed well enough to be promoted to Team Leader and then Division Director, who performed very well in the few months between her demotion from division to director at initiation of leave was fired.

There was at least a genuine issue of material fact as to pretext.

ii. That Appellant Was Not Qualified To Work In Temp Is False And Evidence Of Pretext

As yet another alternative, Respondent argued – and the District Court found – that Respondent had a legitimate business reason in refusing to transfer Appellant because Appellant was not qualified to work on the temporary team. The District Court found that Appellant was not qualified to work in on the temporary team for two main reasons: 1) she had never worked on that team before; and, 2) she could not adhere to the schedule necessary for an employee on that team. (A-Add. 0019).

Appellant in fact presented evidence that she was qualified for a positions placing temporary legal staff . Further, there is no evidence that Appellant could not work the hours required of an employee on that team – any suggestion that she could not is merely an assumption of Respondent. An employer's misconceptions and misjudgments of an employee's qualifications and abilities can be probative of whether the articulated "legitimate business reason" is merely pretext for discrimination. Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248, 259 (1981) ("The fact that a court may think that the employer misjudged the

qualifications of the applicants . . . may be probative of whether the employer's reasons are pretexts for discrimination.”).

See also Ryther v. Kare 11, 108 F.3d 832, 840 (8th Cir. 1997); O'Connor v. Peru State Coll., 781 F.2d 632, 637 (8th Cir. 1986) (“An employer's misjudgment of an employee's qualifications and misconceptions as to the facts surrounding her job performance may be probative of whether the reasons articulated for an employment decision were merely pretexts for discrimination.”)

(a) That Appellant Was Not Qualified Because She Had Never Worked In Legal Temp Before Is Pretext

The Court concluded the temporary team was “a wholly separate team”, ignoring the fact that, with few exceptions, everyone else on the permanent team transferred easily onto the temporary team. (A-ADD 0019, n.12.) On the same note, the Court concluded Appellant “has no experience whatsoever in temporary legal placements.” This of course ignores the uncontested fact Appellant had two years of experience in temporary office placements, and ignores Kwapick’s testimony they are, essentially, the same job. This is a misconception and misjudgment of Appellant’s qualifications, and is probative of pretext under Burdine and O'Connor.

The Court disposed of yet another issue in the same footnote, noting the “urgent” nature of the temporary placements and, therefore, concluding Appellant “cannot meet” the hour demands, so her claim “fails as a matter of law.” In order to reach this legal conclusion of this factual issues, the Court cited two things: Bird’s Affidavit at ¶¶ 14 -15, and Hennen’s Dep. at p. 102 lines 14-17. Bird’s Affidavit merely states the temporary job can be urgent, and that the normal office hours are 7:30 to 5:30. In the three lines of Hennen deposition testimony cited, she testified merely that she had asked Appellant what hours she intended to work on her return

and Appellant said “the same, 8:00 a.m. to 3:30 p.m.” Startling is the absence of any evidence that Respondent bothered to ask Appellant what hours she was able and willing to work. Equally startling is the Court’s omission of the evidence that, despite the fact that Appellant’s scheduled hours were until 3:30 p.m., she routinely stayed until 5:00 or 5:30. The Court omitted any reference to Moes’s testimony that Appellant routinely stayed much later than expected, and always did so without question or complaint. Indeed, the Court even ignored Respondent’s confession that “both the permanent placement and temporary placement teams are fast-moving, high stress environments.” (A-APP 0025.) The District Court found the facts to be undisputed in the Respondent’s favor, even where the Respondent conceded them in the Appellant’s favor. There was at least a genuine issue.

F. Respondent’s Reasons For Refusing To Transfer Appellant Are Pretext

“Pretext may be shown with evidence that the employer's reason for the termination has changed substantially over time.” Loeb v. Best Buy Co., Inc., 537 F.3d 867, 873 (8th Cir. 2008) (citing Morris v. City of Chillicothe, 512 F.3d 1013, 1019 (8th Cir. 2008)). Respondent has given an abundance of reasons.

With respect to each individual reason offered by Respondent, Appellant “may sustain the burden to establish pretext . . . by showing that the employer's proffered explanation is unworthy of credence.” Hamblin v. Alliant Techsystems, Inc., 636 N.W.2d 150, 153 (Minn. Ct. App. 2001) (quoting Sigurdson v. Isanti County, 386 N.W.2d 715, 720 (Minn. 1986) (internal quotations omitted)).

i. That There Were No Open Positions In Legal Temp Is False And Pretext For Retaliation

The first explanation for Respondent’s refusal to transfer Appellant is that there were no positions available at that time. This contention is very simply unsupported by any fact in the

record. In fact, it is explicitly contrary to the evidence in the record, and contrary even to the District Court's finding.

Hennen notified Appellant that she was being terminated on December 2, 2008 – one day after Appellant had returned from her Pregnancy Leave. (Hansen Dep. 75.) Immediately, and in the same conversation in which Appellant was told she was terminated, Appellant told Hennen that she “had done temporary before” and was “qualified for that.” (Hansen Dep., p. 77) and then asked to speak with Jim Kwapick in order to determine whether there were any. Hennen told her “there is nothing else. . .” (Hansen Dep., p. 76.)

Hennen's representation to Appellant that there were no positions available on the temporary team is false. There was obviously an “opening” in into which Hedin transferred, as shown by the testimony of Marilyn Bird:

Q: Why did [Jennifer Hedin] transfer?

A: We had an opening on the temporary team.

(Bird Dep. 42:23-24.)

Even Jim Kwapick testified that at the time Appellant was eliminated, he had identified an opening in Office Temp, and was willing to offer that position to Appellant. (Kwapick Dep., p. 30:5-10.) Yet, Hennen vehemently advised Appellant *not* to contact Kwapick and represented that there was definitively “*nothing else available.*”

ii. That It Was Necessary To Terminate Appellant Instead of Transfer Her Is Pretext For Retaliation

Respondent's second explanation is that it had experienced a reduction in force which necessitated a termination of Appellant. The District Court relied heavily on evidence presented by Respondent that the Minneapolis Legal Perm team was reduced from 4 employees to 1 employee, and that therefore Appellant's termination was explained by a legitimate business

reason. (A-Add. 0011; 0030). What the District Court overlooked is that while the available positions in Legal Perm were reduced from 4 positions to 1 position, Respondent has identified no other employee in Minneapolis that was terminated due to the claimed reduction in force. In fact, the District Court found that each and every legal perm employee besides Appellant was “afforded the opportunity to transfer to an open position on the Temp Team,” *because of the collapsing demand and elimination of positions on the perm team.* (A-Add. 0030).

Given the above, that Respondent experienced a “reduction in force” in the Minneapolis office, it did not mean that multiple employees lost their jobs and that Appellant just happened to be one of them. It meant that Respondent took the effort to make sure that all employees on the permanent team were “afforded the opportunity to transfer to an open position on the temporary team” – all except Appellant, of course. Respondent’s contention that the claimed reduction in force provided a legitimate reason to *terminate* Appellant is unworthy of credence in that what it really shows is that Respondent singled Appellant out as the only employee not offered a transfer. This is strong evidence of pretext, and is sufficient to overcome summary judgment.

iii. The Close Proximity of the Return and Termination is Evidence of Pretext.

Pretext can be established “by showing that the movant’s stated justifications could be regarded by the fact finder as specious because they are weak, implausible, inconsistent and contradictory, or perhaps even incoherent.” Brown v. Hartt Transportation Systems, Inc., 725 F. Supp. 2d. 210, 231 (D. Me. 2010). In the Brown case, the employee was terminated three weeks after he returned from FMLA leave. The Court noted that “evidence of close temporal

proximity between two events is also probative of a causal connection”, and that the short three week proximity here is evidence of “a very strong temporal proximity.” Id. at 232.

All of the employees that had not been recently pregnant were allowed to stay. All of the employees that were recently pregnant were fired. (Neither Hennen nor Kuhl have any children.) (Hennen Depo. pp.11, 104.)

iv. Respondent Made Other Comments Evidencing Pregnancy Animus

“Comments within a company can be used to show pretext.” Holtzman v. HealthPartners Servs., Inc., No. C7-02-375, 2002 WL 31012186, at *4 (Minn. Ct. App. Sep. 10, 2002) (citing Hamblin v. Alliant Techsystems, Inc., 636 N.W.2d 150, 153 (Minn. Ct. App. 2001)). Hansen has testified that Hennen – upon learning that a female employee was on fertility drugs – stated “if she was going to become pregnant she had to get rid of her or she was going to be stuck with her because she was pregnant.” (Hansen Dep. 40:11-17.) The employee, Molly Adrian, was involuntarily terminated just days after Hennen made that remark to Hansen. (Id., 42:2-17.)

Hansen also recalls Hennen stating, after interviewing a potential female employee, “too bad we can’t hire her, because she is great, because she is pregnant.” (Hansen Dep. 44:17-20.) Hennen made this comment several times. (Id., 45:1-2.) Hansen also recalls Hennen telling Sarah Dunn not to talk about her pregnancy. (Id., 45:8-13.) Hansen understood that Hennen did not “like pregnancy if it affected – if she thought it was going to affect her business.” (Id.)

For every argument supporting pretext, the District Court relied exclusively upon evidence presented by Respondent. The District Court’s finding that Appellant had failed to present a genuine issue of material fact as to pretext is error and must be reversed.

V. RESPONDENT DISCRIMINATED AGAINST APPELLANT IN VIOLATION OF THE MINNESOTA HUMAN RIGHTS ACT WHEN IT TERMINATED HER INSTEAD OF TRANSFERRING HER LIKE ALL OTHER PERM EMPLOYEES

A. *Standard of Review*

The Court granted summary judgment on this count. The standard again is whether there was any genuine issue of material fact, or whether the Court misapplied the law. Those two issues are reviewed de novo. STAR Ctrs., 644 N.W.2d at 77.

B. *Argument*

The District Court found that Appellant had failed to establish a *prima facie* case in support of her sex discrimination claim. Again, the court erred in this determination.

As the District Court found, the McDonnell Douglas burden-shifting analysis applies to Appellant's sex discrimination claim under the Minnesota Human Rights Act.

C. *Prima Facie Case*

In order to establish a *prima facie* case of sex discrimination, Appellant must show that she 1) is a member of a protected class; 2) was qualified for her position; and 3) was discharged despite her qualifications. Sigurdson, 386 N.W.2d at 720. Respondent conceded that Appellant had successfully established those three elements. However, the Court then erroneously concluded that Appellant had been eliminated due to a legitimate reduction in force, and that therefore Appellant had the additional burden of showing that her pregnancy was a factor in Respondent's decision to terminate her.

i. **Respondent's Claimed Reduction In Force Was Not Legitimate**

In determining that Appellant had the additional burden of showing an additional factor in order to establish her *prima facie* case, the District Court relied on Dietrich v. Canadian Pac. Ltd., 536 N.W.2d 319, 324 (Minn. 1985) (citing Holley v. Sanyo Mfg., 771 F.2d 1161, 1165-66 (8th Cir.1985)). "The 'additional showing' requirement established in Holley is limited to cases involving a *bona fide* reduction-in-force, however." Id. (emphasis added). Further, whether or

not a Defendant has actually engaged in a RIF is generally a question of fact which precludes summary judgment. See Krause v. Bobcat Co., 297 F. Supp.2d 1212, 1217 (D.N.D. 2003) (whether an employee is included in a RIF is a question of fact); Vanderhoof v. Life Extension Institute, 988 F. Supp. 507, 516 (D.N.J. 1997) (whether or not Defendant engaged in a RIF is a question of fact). When the plaintiff has raised a genuine issue of material fact as to the legitimacy of the RIF, the “additional showing” requirement does not apply. Rabe v. City of Bemidji, No. Civ. 02-1698, 2004 WL 741758, at *4 (D. Minn. March 17, 2004) (citing Peters v. Beaulieu, No. Civ. 00-1700, 2002 WL 1949751 (D. Minn. Aug. 12, 2002)).

As presented above, the Court’s finding – as a matter of law – that Respondent was engaged in a bona fide, legitimate reduction in force was erroneous. Appellant presented strong evidence that the reduction in force was not legitimate, as no employee from the Minneapolis permanent team was eliminated as a result of the reduction in force. As to other employees allegedly RIFed in the Central Zone, Respondent never provided so much as their name or basic employment information, much less a comparison of their rolling PDAs over their (allegedly all important) tenure. Further, employees were being hired during the time in which Respondent claims to have been experiencing a reduction in force. Indeed, Hedin, Nilsen and Breiland were hired while Appellant was on leave. Most significantly, all employees on the permanent team, except Appellant, were “afforded the opportunity” to transfer to the temporary team instead of being eliminated. Ironically, the only employee that was not afforded this opportunity is the only employee that had a right of reinstatement. Appellant has at least raised a question of fact as to whether a *bona fide* reduction in force occurred.

- ii. **Even If The Reduction In Force Was Legitimate, Appellant Showed That Her Pregnancy Was A Factor In Respondent’s Decision To Terminate Her**

Assuming, *arguendo*, that this Court finds Respondent did engage in a *bona fide* reduction in force, Appellant has offered sufficient evidence that her pregnancy was a factor in her termination. As established in Dietrich, “the ‘additional showing’ may take many forms and is not intended to be overly rigid.” 536 N.W.2d at 325.

All of the evidence presented above in support of Appellant’s arguments for pretext make an “additional showing” that Appellant was terminated because of her pregnancy. Appellant was terminated directly after returning from leave to have her second child. Respondent assumed that Appellant could not work the hours required of an employee on the temporary team *because of her children* and therefore refused to offer her a job on that team (among other stated reasons for refusing to offer her the job). Appellant was the *only* employee on the permanent team who was not given the opportunity to transfer instead of losing her job.

Respondent misrepresented its performance standards in order to make it appear that Appellant was a poor performer, and then argued that Appellant was discharged for performance reasons. In reality, Appellant consistently met the performance standards established by Respondent, and was a better performer than a number of the other employees on the permanent team. Respondent argued that Appellant was not qualified to work on the temporary team because she did not have any experience, yet transferred a brand new employee to the temporary team who had absolutely no experience whatsoever. The only factor setting Appellant apart from all of the other employees who were allowed to keep their jobs was the fact that she had just had a baby and had just returned from pregnancy leave. Appellant satisfies the “additional showing” requirement of a *prima facie* case.

D. Legitimate Business Reason

As presented above, Respondent offers various business reasons for “affording the opportunities of allowing all other members of the permanent team to transfer to temporary team, except Appellant. Appellant continues to note that the offer of various alternative reasons for an employee’s termination can be evidence of pretext in and of itself. Loeb, 537 F.3d at 873.

E. Pretext

Appellant reiterates the pretext arguments made in support of her retaliation claim. Given the arguments above, there is at least a fact question as to whether Respondent’s reasons were pretext, and instead acted on the basis of her sex (pregnancy).

VI. APPELLANT WAS ENTITLED TO SUMMARY JUDGMENT ON HER REINSTATEMENT CLAIM

The MPLA does not require any “magic words”. Assuming it does, Appellant used them. Appellant was entitled to reinstatement into her position, or a comparable position. Respondent did neither. McDonnell Douglas does not apply to this claim. Assuming she is qualified, Respondent must reinstate her. Failure to do so is a violation of the MPLA, as a matter of law. Appellant properly moved for summary judgment in her favor, asking the Court to determine that Respondent violated the MPLA by failing to reinstate her upon return from the leave extended by Respondent.

There were no genuine issues of material fact – these were purely questions of law. Summary judgment should have been granted to Appellant.

CONCLUSION

The District Court should be reversed. The District Court should be ordered to direct Entry of Judgment in favor of Appellant as to the reinstatement claim, with direction to determine the amount of damages. The District Court should be reversed on all other grounds.

Respectfully submitted,
FOLEY & MANSFIELD, PLLP

Dated: 7/28/11

By:  _____

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STATE OF MINNESOTA
IN SUPREME COURT

Karen Hansen

Appellant,

v.

CERTIFICATION OF BRIEF LENGTH

Robert Half International, Inc.

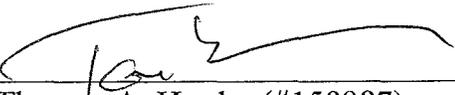
Appellate Court Case No.: A10-1558
Trial Court File No.: 27-CV-09-21440

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subdivisions 1 and 3, for a brief produced with a proportional font, using a 13-point font. The length of the brief is 13,884 words, exclusive of the Table of Contents, Table of Citations, Addendum and Appendix. This brief was prepared using Word 2007.

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