

NO. A10-1558

State of Minnesota
In Supreme Court

KIM HANSEN,

Appellant,

v.

ROBERT HALF INTERNATIONAL, INC.,

Respondent.

**APPELLANT'S REPLY BRIEF AND
SUPPLEMENTAL ADDENDUM**

Thomas A. Harder (#158987)
Greta Bauer Reyes (#039110)
FOLEY & MANSFIELD, PLLP
250 Marquette Avenue
Suite 1200
Minneapolis, MN 55401
(612) 338-8788

Attorneys for Appellant

Dayle Nolan (#121290)
Susan E. Tegt (#387976)
LARKIN, HOFFMAN, DALY &
LINDGREN, LTD.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Bloomington, MN 55431-1194
(952) 835-3800

Attorneys for Respondent

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 FACTS

In our opening brief we set out more than six pages of facts. Respondent does not specifically contest any of them.

They do not deny Appellant was advised she was doing a “great job” at the time of her demotion. Instead, Respondent seeks to dispense with all of the damning testimony of its Regional Manager, Jackie Moes, by suggesting it is irrelevant because she was not employed “during the last half of 2008.” (Respondent’s Brief p. 7). This ignores the fact that for all intents and purposes, neither was (she worked only reduced hours in August and none for the rest of year). Respondent contends Appellant’s performance was inadequate. Their Regional Manager testified it was stellar. That establishes there is at least a genuine issue of material fact as to Appellant’s performance.

Respondent contends the hiring of Hedin into the same perm team and into the same job “had nothing to do with Kim Hansen’s position.” (Respondent’s Brief p. 14). For this, they relied primarily on Bird’s proclamation of this. They also make note of the fact Appellant’s leave commenced in August, but claimed Hedin was ultimately hired as a result of a requisition form initiated in May. This presents at least a question of fact.

First, it must be noted again Respondent was aware of Appellant’s pregnancy and ultimate need for leave by at least February, 2008. The balance of their argument on this point is simply illogical. Respondent identifies three other individuals that later quit, and claims, citing nothing, that Hedin instead was hired to replace “them” (Respondent’s Brief pp. 14-15, n.15). The problem with the contention Hedin was instead hired to replace three other people (initiated on May 1, 2008), is the three other individuals left in July, 2008, August 15, 2008, and October 9, 2008. (Id.).

Thus, by Respondent's (il)logic, Hedin was hired to replace three individuals, all of whom were still employed at the time. The admitted fact is that regardless of when the hiring process was initiated, Hedin began her job in the perm team on October 13, 2008, while Appellant was on leave (A-ADD-0033) and then transferred from that to the temp team on approximately the day Appellant was fired. (Id., p. 0034). She started with the same job title as Appellant (Bird depo., p. 41, l. 2-5) and presumably doing exactly the same job Appellant had been doing. (Id., p. 42, l. 3-20). On that note, we argued at length Appellant's entitlement for summary judgment. She is entitled to reinstatement in her position (perm team), or failing that, a similar position (temp team). Respondent does not meaningfully respond to that argument other than to suggest the positions were different because the temp team moved "more quickly" than perm (disregarding the fact Respondent has argued "both the permanent placement and temporary placement teams are fast moving, high stress environments.") (A-APP-0025).

Finally, Respondent's position is premised upon one central core argument, which in turn is an utter misrepresentation of the record.

Respondent of course cannot concede Appellant was entitled to MPLA leave, in that Respondent failed to comply with the reinstatement obligations of the MPLA. Therefore they have to call it something else. Until now, Respondent's position, consistently and unambiguously, was that "Plaintiff sought, and RHI granted, Plaintiff leave under its Voluntary Short Term Disability policy and the FMLA." (A-APP-0236). This was true at the court of appeals (Id.) and the district court ("the leave Plaintiff was granted in this case was FMLA leave...") (A-APP-0041, 0116). In yet another reversal, Respondent now refers to the leave, or

at least a portion of it, as a personal leave.¹ Respondent contends the final week of leave “was personal leave.” (Id. pp. 0032 and 0024). This new story is fiction, as Respondent well knows. The leave was always designated as maternity leave and never FMLA or personal.

In every document, the leave request form (A-ADD-0036), the approval form (Id. at 0037), or the extension form (Id. at 0038), Respondent had the option of identifying the leave as personal leave, and in each and every one of those documents the box for personal leave is blank. Respondent’s contention Appellant took a personal leave is false.

Respondent seeks to dispose of that evidence by declaring it to be irrelevant. It suggests that since Appellant didn’t see some of them (except for the ones she signed), they could not possibly constitute a request, and since an express request is the only thing that matters (per Respondent), they are meaningless. This position cannot be accepted. How Respondent designated the leave is relevant to the question as to how respondent designated the leave.

Declaring their forms irrelevant, Respondent then declares Appellant requested “short term medical disability pay” during her leave. (Respondent’s brief, p. 23). The forms do not identify the leave as short term disability leave. The leave request form identifies the leave as short term medical pregnancy or workers’ compensation disability leave. On the one and only line filled out (A-ADD-0036), it states “pregnancy-related disability. My expected date of delivery of 9/24/08.” The approval form titles the leave as “medical/maternity” and under leave type, it is identified only as maternity, not medical. (A-ADD-0037). The extension form is the same. (A-ADD-0038). Contrary to Respondent’s representation, the leave is not identified solely (or at all – ever) as “medical disability.”

¹Respondent contends that Appellant had 12 weeks of FMLA leave and “an additional unprotected leave.” (Respondent’s Brief p. 25).

Respondent further misconstrues their own policy. They contend that short-term disability is allowed only to employees who are “medically disabled,” unlike the MPLA, which relates to the birth of a child (Respondent’s Brief p. 23). This is a misstatement of the policy, which expressly defines the leave as short-term medical and “pregnancy disability leave” as applicable to an employee with disability “related to pregnancy/childbirth.” (A-ADD-0047). While Respondent wants to now proclaim this as somehow unique and separate from state mandated pregnancy leave, the policy says otherwise:

State law may extend disability leave for disabilities related to pregnancy and childbirth. In such instance, RHI will extend the leave of absence to parallel the requirements of the applicable state law.

(A-ADD-0047). (Emphasis added).

Finally, Respondent’s claim that Appellant was not on maternity leave is grossly inconsistent with the person who approved the leave, the individual who is “well familiar both with company policy and the laws that effect return to work rights from pregnancy” – Marilyn Bird. (Bird depo., p. 122, l. 14-18). She testified Hedin was offered a job on September 30, 2008, when Appellant was on “a maternity leave.” (Bird depo., p. 30, l. 1-20). Further, her testimony as to the approval form is not equivocal.

Q: Can you tell me what Exhibit 9 [A-ADD-0037] is?

A: It’s a leave of absence PAF for Kim Hansen.

Q: Approving a maternity leave?

A: Maternity leave.

Q: Is that your signature on the bottom?

A: Yes it is.

(Id., p. 74, l. 10-16).

This same misrepresentation forms the foundation for the suggestion Respondent's letter of September 11, 2008 (A-ADD-0039) "clearly informed" Appellant she had no right of reinstatement (Respondent's Brief pp. 32 n. 24). The letter (A-ADD-0039) referred to Appellant's then-current "short-term disability/FMLA leave," states she may be entitled to a personal leave "at the conclusion of your short-term disability/FMLA leave" and that an employee returning from a "personal leave has no guarantee of job reinstatement..."

Respondent's contention that somehow the leave was converted into a personal leave again is false. The extension document (A-ADD-0038) expressly checks the maternity box, not the medical box, and not the FMLA box. It expressly states it is extending the existing leave.

Respondent again argues that because the Appellant did not personally review this document, this Court can't either. We believe the document is relevant, and clearly and unequivocally confirms it has further extended the maternity leave initially granted in August.² The contemporaneous documents confirm the same, and Bird's testimony is similarly direct and directly contrary to Respondent's position.

Q: Identify Exhibit 12 [A-ADD-0038] for us, please, if you would.

A: It's a leave of absence PAF for Kim Hansen.

Q: Extending her maternity leave to December 1 of 2008?

²By email dated October 29, 2008 [A-SUPP-ADD-002], Bird was expressly asked to approve "Kim Hansen's current LOA to be extended until 12/1?" She approved the extension of that current leave that same day. (Bird Ex. 15 attached as Ex. Z to the Affidavit of Thomas A. Harder filed in opposition to plaintiff's motion for summary judgment.). Also, and contrary to Respondent's current position that the extension of that leave did not carry with it an extension of a right to reinstatement, Marilyn Bird was asked on December 1, 2008 to "approve Kim Hansen to return from LOA effective 12/1/08." She again approved the same day. (Bird Ex. 16, attached as Ex. AA to the same affidavit.) [A-SUPP-ADD-003].

A: Yes.

(Bird depo., p. 77, l. 22 - p. 78, l. 9).

Q: And you would agree that Bob Clark – Bob Clark’s signature on that document constitutes Robert Half’s approval of Kim Hansen’s maternity leave being extended to December 1 of 2008?

A: I can tell that it says that her maternity leave was extended, yes.

Q: And Bob Clark’s position as of that date was what?

A: The zone president.

Q: Your boss?

A: Yes.

(Id., p. 82, l. 16 – p. 83, l. 1). Respondent’s prior argument, that Appellant’s leave was not maternity leave, is unfounded. Their new theory, that the leave was first a disability leave, at some time converted to a personal leave, is contemptuous of this Court.

Q: As you sit here, you don’t have any knowledge of her ever going on a discretionary personal leave?

A: I’m not aware of that.

(Bird depo., p. 88, l. 4-7). Nor was Appellant ever advised that she had lost her right to return to work from maternity leave.

Q: Did anybody ever tell Kim Hansen that her return to work rights had in any way been lost or that she did not have the right to return to work on December 1?

A: No, not that I’m aware of.

(Bird depo., p. 83, l. 2-6).³

Respondent has thus far been successful in mischaracterizing, misquoting, and misrepresenting testimony and documents to two lower courts. We trust that will stop here.

Beyond that, Respondent does not contest Appellant's statement of the facts. They do not contest the fact that when Hennen told Appellant she was fired, Appellant asked specifically if there were any other openings and she was told there was not. They don't deny Appellant reminded Hennen she had done temporary placement before, and was qualified for that, and she was expressly told "there was nothing else." (*Id.*). Nor do they bother to deal with the findings from the courts below that there were in fact openings available at the time – Respondent instead would simply brush away the obvious and extreme significance of that fact by suggesting the other openings can be ignored because they were in a position that "moved faster." Appellant is entitled to summary judgment.

ARGUMENT

I. THE MPLA DOES NOT REQUIRE ANY MAGIC WORDS

Finding no requirement of express request in the substance of the statute, Respondent resorts to the definition of employee. In what is not the most precise language, the legislature has chosen to define an employee as "a person who performs services for hire for an employer from whom a leave is requested under Sections 181.940 to 181.944..." Minn. Stat. §181.940, subd. 2.

³Ignoring all of this, Respondent argues that extension "could not possibly be" an extension of MPLA leave, because MPLA leave (unless extended) is only 6 weeks, and extension occurred "8 weeks after Appellant's original request for leave." (Respondent's Brief p. 25). This, of course, ignores the fact that when the maternity leave was first granted, it was granted for eight and one-half weeks. (A-ADD-0036-37). From the inception, it was granted as maternity leave in excess of 6 weeks, and then the same leave was extended to December 1.

From this, Respondent conjures up the argument that the legislature has thereby mandated that a pregnant woman seeking leave has no right to such leave unless she expressly asks for it by name. Following on that premise, Respondent looks to those similarly situated sister states, specifically to those state's definition of an employee and finds, lo and behold, those states did not use the same odd phrasing to define an employee.

Next, to address the massive and contrary weight of the FMLA, Respondent points out correctly the Federal Department of Labor has promulgated regulations that the FMLA leave need not be expressly requested. Accordingly, it is apparently Respondent's position that because the Minnesota Department of Labor did not pass a regulation that parallels the federal regulation, by default this Court must read the legislative definition of employee to mean that if an employee does not say "I would like MPLA leave please," she has no right to leave or reinstatement.

If the legislature was going to mandate this, we think it obvious the legislature would have said so in clear and unambiguous language. "Where Congress wanted explicit notice provisions with significant consequences, it provided for them." McGregor v. Auto Zone, Inc., 180 F.3d 1305, 1308 (11th Cir. 1999). "If the legislature had intended to substantively terminate" parental rights "it surely would have done so in language of greater clarity than we find here." In the Matter of Paternity of J.A.V., 547 N.W.2d 374, 377 (Minn. 1996).

We suggest that in the absence of a clear mandate of an express request, the statute should be read to unambiguously not require such a request. At a minimum, the statute is ambiguous. This then allows the Court to examine the occasion and necessity of the law, the object to be attained, and other laws on same or similar subjects. This Court can evaluate the consequences of a particular interpretation. See generally, Minn. Stat. § 645.16. The occasion

of the law is to provide a right to leave, and protected reinstatement, to pregnant women. Respondent's position is repugnant to that. The laws on same or similar subjects uniformly reject the magic word theory, and the consequence of Respondent's interpretation would be to deny uninformed women their statutory rights. In ascertaining legislative intent, this Court is guided by the presumption the legislature did not intend a result that is absurd, or unreasonable, that the legislature intended the statute to be effective and certain. Minn. Stat. § 645.17. Finding that the definition of employee somehow creates an obligation of specific action by employee is absurd, and unreasonable, and renders the statute ineffective and uncertain. Laws uniform with those of other states shall be interpreted to give effect to their general purpose and make uniform the laws of those several states. Minn. Stat. § 645.22. Respondent's interpretation would leave Minnesota as the only jurisdiction in the union that requires such a request. Respondent's position is contrary to all of these principles, and must be rejected.

A. Appellant Did Request Maternity Leave Under The MPLA

Premised on the "magic words" theory, Respondent then argues Appellant never requested MPLA leave (or at least didn't request it correctly).

As set out in our facts, it is clear Respondent's new theory that Appellant was on personal leave is fabricated.

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

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

The district court, relying upon Minn. Stat. § 181.942, determined Appellant's right to reinstatement was lost, assuming, *arguendo*, she had such a right in the first place. That statutory provision provides that if "during a leave" the employee would have lost the position

as a result of a “bona fide layoff and recall system”, the right to reinstatement in the former or comparable position is no longer in place. Ironically, Respondent now contends this issue cannot be addressed because it was not raised until “long after Appellant’s Petition” to this Court. (Respondent’s brief, p. 33). In light of the fact Respondent’s entire theory of defense is newly created, this is an ironic position. It is also wrong.

The district court, on its own initiative, found this irrelevant subdivision, and concluded Appellant lost her recall rights because after her return from leave (not during), she was terminated as a result of a RIF (not a layoff and recall system).

Thus, Respondent’s suggestion now is that even though it was an alternative basis of the district court’s ruling, we can’t respond to it because we didn’t respond to it earlier (for the simple reason that no one raised it to the district court). The cases relied upon by Respondent both center on the concern of an appellate court addressing issues never addressed by the district court. See Hamann v. Park Nicollet Clinic, 792 N.W.2d 468, 472 (Minn. App 2010), citing Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. App. 1988) (stating appellate courts generally will not consider matters not argued to and considered by the district court). The application of that principle suggests the opposite result. That is, this Court should not consider the argument Appellant lost her reinstatement rights by operation of Minn. Stat. § 181.942, in that Appellant never had the opportunity to argue the issue to the district court. If it is considered, it obviously must be rejected. Appellant did not lose her job during a leave, and Respondent has never argued it was operating a bona fide layoff and recall system.⁴

⁴The FMLA has an analogous provision providing that if the employee would have lost her job during the leave, she need not be restored to her position at the completion of that leave. However, it is the employer’s burden to prove it would have made the same decision “had the

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

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

Respondent contends vaguely “no language in the MPLA” suggests that an agreement to extend the leave extends the right to reinstate. (Respondent’s Brief p. 28). That is simply not true. Minn. Stat. § 181.941 expressly states the length of the leave shall be as “agreed to by the employer,” and Minn. Stat. § 181.942 states an employee “returning from a leave of absence under § 181.941 is entitled to return to employment in the employee’s former position or a position of comparable duties...” (emphasis added). The statute is clear and unambiguous on that point.

B. *The FMLA Cases are Inapposite*

Ignoring the fact that unlike the MPLA, the FMLA is “noticeably bereft” of any extension provision (Ragsdale v. Wolverine Worldwide, Inc., 218 F.3d 933, 937 (8th Cir. 2000)), Respondent relies upon a series of FMLA cases for the proposition an extension of leave terminates the right to reinstatement. However, in each and every one of the cases cited, the employee was unable to return to work upon the expiration of the initial leave, and the courts reached the unremarkable conclusion that where the employee subsequently asked to return to work long after the leave expired, the right to reinstatement was lost.

employee not exercised the employee’s FMLA rights.” The employer “must be able to show that an employee would not otherwise have been employed at the time reinstatement is requested in order to deny restoration to employment.” Throneberry v. McGehee Desha County Hospital, 403 F.3d 972, 977-978 (8th Cir. 2005). Respondent has not even attempted to carry that burden of proof.

C. Estoppel

The district court dismissively dealt with Appellant's claim that Respondent is "somehow estopped" from denying Appellant the right to reinstatement upon her return from extended leave. We have already addressed the two cases relied upon by the district court, Highland Hospital Corp. v. Preece, 323 S.W.3d 357 (Ky. Ct. App. 2010) and Manns v. ArvinMeritor, Inc., 291 F. Supp. 2d 655 (N.D. Oh. 2003). In Highland, the employer had failed to advise the employee as to when her leave started and stopped. In affirming a jury verdict for the plaintiff, the court criticized the employer's "secret" plan which "unknowingly lured" the employee into overstaying her leave. Respondent now claims that case lies in "stark contrast" to the current case as Respondent, allegedly, "clearly articulated that Appellant's leave had been designated as FMLA leave." (Respondent's Brief, p. 30).

In support of this, they again refer to the highly misrepresented letter of September 11, 2008, which in fact referred to disability/FMLA leave and advised Appellant that a right to reinstatement was lost only if her leave was converted to a personal leave "at the conclusion of the short-term disability/FMLA leave." (A-ADD-0039). Appellant was never on personal leave, and Respondent's new claim her leave was converted to a "personal leave" is false.

Beyond that, we cited a great number of cases (Appellant's Brief, pp. 26-29) for the principle "it is well settled that equitable estoppel is an available remedy in FMLA cases." Hearst v. Progressive Foam Technologies, Inc., 647 F.Supp.2d 1071, 1073 (E.D. Ark. 2009). The response again is the disingenuous argument that Appellant's leave had, at some unidentified point in time, been converted to personal leave, with no right of reinstatement, and Appellant had been "clearly informed" of this conversion. (Respondent's brief, p. 32, n. 24). This is not true.

IV. RESPONDENT BREACHED ITS PRESCRIPTIVE OBLIGATION TO REINSTATE APPELLANT INTO HER POSITION OR A COMPARABLE POSITION, AND APPELLANT WAS THEREFORE ENTITLED TO SUMMARY JUDGMENT

As established above, Appellant was not bound to use any “magic words” or special phrases in order to enjoy the protections of the Act. Therefore, as long as Appellant’s position or a comparable position was available, Respondent was obligated to place her in that position. It can’t be made “unavailable” simply because Respondent chose to fill it while Appellant was on leave (as did Respondent here). The analysis is as simple as that.⁵

A. Respondent Failed To Reinstatement Appellant To Her Previous Position

Appellant was effectively not returned to her previous position upon her return from leave. She was returned to do nothing for one day, and fired the next. Effectively, she was not reinstated at all. This failure to reinstate Appellant is a blatant violation of the requirements of the MPLA, and Appellant is entitled to summary judgment on this issue.⁶

⁵To analogize to the FMLA, the MPLA contains “two distinct types of provisions.” Hodgens v. General Dynamics Corp., 144 F.3d 151, 159 (1st Cir. 1998). Both contain the right to leave and the statutory right of reinstatement upon return from leave. The prescriptive right of reinstatement sets a “‘substantive floor’ for conduct by employers, in creating ‘entitlements’ for employees. As to these rights, therefore, the employee need not show that the employer treated other employees less favorably, and an employer may not defend its interference with the FMLA’s substantive rights on the grounds that it treats all employees equally poorly without discriminating. In such cases, the employer’s subject intent is not relevant. The issue is simply whether the employer provided its employees with the entitlement set forth in the FMLA – for example, a 12-week leave or reinstatement after taking medical leave. Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer.”

⁶In Brenlla v. Lasorsa Buick Pontiac Chevrolet, 2002 W.L. 1059117 (S.D. N.Y. 2002), the plaintiff returned from her FMLA leave on a less than full-time basis for one week. She then returned full-time the following week. On her first day on the job, she was advised that she was going to be terminated and her job consolidated with two other employees. In that Brenlla was otherwise entitled to reinstatement, the only question was whether “defendants denied her benefits to which she was entitled...” *4. The defendant argued that the Brenlla could not be reinstated because her position no longer existed and there were no other comparable positions

B. Respondent Failed To Reinstate Appellant To A Comparable Position

Respondent argues the reinstatement right does not apply because no comparable position was available. Not true. As noted previously, Hedin transferred into the temp team on or about the day Appellant was fired because “we had an opening on the temp team.” (Bird depo., p. 42, l. 12-24). Respondent argues it was *within its own discretion* to view the temp and perm positions as “separate” and not “comparable.” (Respondent’s brief, pp. 39–40). This argument is a brazen misreading of the statute. The MPLA demands reinstatement to a position of “comparable duties, number of hours, and pay.” Minn. Stat. §181.942, subd. 1. Therefore, the extent to which a position is “comparable” is defined by the statutory language. If a position with similar duties, hours, and pay is available, the employer must reinstate the employee to it.

Respondent’s suggestion it may read the statute to its own liking, and make its own determination as to when to “view [the positions] separately from each other, which is in its discretion to do,” would allow each and every employer to escape liability simply by a self-serving declaration that an open position was not comparable *simply because the employer decided it did not want the positions to be comparable*. (Respondent’s brief, p. 40).⁷ The positions were comparable.

available. Defendant argued, as does Respondent here, that they had “legitimate business concerns” motivating their decision. The court affirmed the determination that Brenlla had not been reinstated in her position.

⁷Respondent does not even bother attempting to support the trial court’s determination, which is that Appellant had no right to be placed in the opening on the temp team because the duties of the temp team are more “time sensitive,” and that Appellant had never held that position before. (A-ADD.-0019, n.12). This Court should make clear that it is not a prerequisite of the MPLA that an employer need consider only comparable positions if the employee had previously held that position. That is clearly not what the statute provides and the district court was clearly wrong.

Respondent easily and without hesitation moved employees – all but Appellant – from the perm side to the temp side in order for them to retain their jobs.⁸ (Id.).

Respondent made no effort whatsoever, at the time it chose to fire Appellant, or in its brief to this Court, to address the statutory requirements that the positions involved “comparable duties, number of hours, and pay.” Appellant has submitted uncontroverted evidence the jobs were comparable. The duties were identical. The pay was comparable. While the hours could be different, Respondent has not contested our evidence that Appellant was always ready, willing and able to work whatever hours were required of her. As to her availability for these hours, Respondent didn’t bother to ask – instead falsely telling her there were no open positions in temp and running her out of the building. When she asked specifically about Hedin (who had just started and then transferred) or Breiland (who was to start six days subsequent), she was simply told she could not have those jobs.

In light of this uncontradicted evidence, this Court should determine as a matter of law that the position was comparable, and determine as a matter of law that Respondent violated Appellant’s absolute prescriptive rights to reinstatement. Appellant is entitled to summary judgment.

⁸The same employees, so inexperienced they could not even be compared to Appellant, are the ones who are allowed to move with no additional training, into the positions in a “vastly different department.” It remains a mystery why Respondent considers the positions too different to compare, but similar enough to allow multiple inexperienced members of the perm team to work one day in perm and the next in temp – apparently without missing a beat.

V. APPELLANT PRESENTED GENUINE ISSUES OF MATERIAL FACT THAT RESPONDENT RETALIATED AND DISCRIMINATED AGAINST HER

As to the Appellant's claims of retaliation and discrimination,⁹ Respondent does not differentiate between the two. Instead, Respondent lumps the issues together, arguing "[t]o survive summary judgment on her claims for discrimination under the MHRA or MPLA," Appellant either has to meet her burden of establishing, or showing a material question of fact regarding a *prima facie* case of discrimination; or has to establish, at a minimum, a material question of fact that Respondent's reason for eliminating her position is pretextual." Respondent's Brief, p.. 38.

A. *Prima Facie Case – MPLA Retaliation and MHRA Discrimination*

Respondent does not argue Appellant failed to establish any of the three required elements of a *prima facie* case for either claim. Rather, Respondent offers that it engaged in a RIF, thereby forcing Appellant to bear the more onerous burden of establishing discriminatory animus as part of her *prima facie* case. (Respondent's Brief, p. 35).

i. Appellant presented a genuine issue of material fact as to whether the RIF was bona fide

Respondent contends Appellant raised no genuine issue of material fact to create a dispute regarding the genuineness of the purported RIF. (Respondent's Brief, p. 35). That is incorrect. Respondent has at all turns of this litigation twisted the facts to hide one simple truth: Appellant was the *only* person in the Minneapolis office who lost her job in the purported "RIF." Considering this, there is at least a question of material fact that the plaintiff was terminated due to a RIF.

⁹The right to be free of retaliation is the separate, proscriptive right of the MPLA. Hodgens, supra, at 160. Sex (pregnancy) discrimination is a violation of the MHRA.

Whether or not a defendant has engaged in a RIF is generally a question of fact which precludes summary judgment. 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). Appellant presented facts that all of the legal perm employees (besides Appellant), were not terminated, but instead were, as the court put it, “offered the opportunity to transfer to an open position on the Temp Team.” (A-ADD-30).

The only response Respondent offers is to convolute the issue by stating the Minneapolis legal perm department was reduced from 4 to 1 employee, hoping the court will not realize this statement does not mean 3 people lost their jobs. What this statement really means is that one person kept her job in perm, two were transferred to temp, and only Appellant – who was on protected leave – was terminated.

When Appellant went on leave, three employees were left on that team. Soon thereafter, Hedin was hired – bumping the number again back to 4. Sarah Dunn went on leave the day Appellant was fired – but returned to the perm team one month later. Breiland began her job six days after Appellant was fired. It is absurd to argue Hedin did not fill the void left by Appellant. Regardless of in which employee’s “chair” Respondent argues Hedin was placed upon her arrival, the effect is the same: the vacancy left by Appellant was filled by a new person coming in. Appellant was replaced.

There is at least a genuine issue of material fact the RIF was not bona fide. Therefore, it was error for the district court to hold Appellant had the additional burden of showing discriminatory animus to establish a *prima facie* case.

ii. Even if an “additional showing” is necessary, Appellant has met that burden

Even assuming, *arguendo*, this Court finds no fact question as to whether Respondent engaged in a bona fide RIF and an additional showing of discriminatory animus was necessary, Appellant has met that burden. “[T]he ‘additional showing’ may take many forms and is not intended to be overly rigid.” Dietrich v. Canadian Pac. Ltd., 536 N.W.2d 319, 324 (Minn. 1985). Respondent suggests Appellant offers only three arguments to make the additional showing. These are that Hedin was hired to the permanent placement team while Appellant was on leave; that Appellant was a good performer; and the RIF did not extend to the temp team. With no discussion and without citation, Respondent states in conclusory fashion these three arguments are insufficient to show discriminatory animus. These facts, however, *are* sufficient to show discriminatory animus.

Respondent states that the mere termination of a competent or qualified employee, or the fact an employee outside of plaintiff’s class is retained are insufficient to establish a prima face case. (Respondent’s Brief, p. 37) (citing Dietrich, 536 N.W.2d at 324-25; Munshi v. Alliant Techsystems, Inc., 2001 WL 1636494, at *4 (D. Minn. 2001); and Hayes v. U.S. Bancorp Piper Jaffray, Inc., 2004 WL 2075560, at *6 (D. Minn. 2004)).

These cases hold the retention of an employee outside the plaintiff’s class are insufficient to establish the heightened burden of a *prima facie* case *if presented alone*. However, when presented along with additional evidence, including circumstantial evidence or evidence of discriminatory comments, such evidence is sufficient. Dietrich, 536 N.W.2d at 324; Munshi, 2001 WL 1636494, at *4.

As set out above, Appellant has presented such additional evidence. Bird alleges she was directed by her boss to eliminate one employee from the perm team, in any position, in any office within the central zone. She claims it was just circumstantial timing she waited for Appellant to come back from her maternity leave in order to fire her. The fact Appellant had previously transferred due to daycare concerns (A-APP-0029), that she was questioned about daycare hours on December 1 (Id., p. 34), and fired the next, is just bad timing. The court accepted Respondent's assumption and concluded that due to daycare issues, Appellant "cannot meet" the job's requirements. (A-ADD-0019, n. 12).

The pool of potential terminations, however, was every employee in every position in the central zone, Respondent, however, has failed to provide any proof as to the performance figures as to anyone other than two or three employees in the Minneapolis office. Respondent has made certain conclusory legal arguments, but offer no evidence.¹⁰ Even in the Minneapolis office, a great number of employees' numbers were worse. Respondent dismisses those as irrelevant because they had not worked there as long as Appellant. Respondent has not established Appellant was the "worst performer" as alleged. As to all of the employees in all of the other offices in the central zone, Respondent contends only that Appellant was worse than some, which necessarily means she was better than some. Respondent has not bothered to provide any performance numbers for those other non-terminated employees (or even their identity), or why

¹⁰Incredibly, Respondent has never offered evidence as to Appellant's performance. Instead, Respondent refers repeatedly to the Wyman affidavit, which in fact is a numerical chart created by a paralegal in Appellant's law firm created through many hours of sifting through complex computer printouts produced by Respondent (attached at A-SUPP-ADD-005-009). One would think that if PDA was "everything" Respondent would produce a simple chart showing the respective PDA numbers. They have not.

it made the decision to terminate Appellant, whose performance was admittedly superior to a number of non-terminated perm employees.

Appellant presented additional facts showing discriminatory animus that Respondent has chosen to ignore. (Appellant was terminated directly after returning from leave, she had more experience working temp than those who were transferred, and was told there were no open positions in the temp department when she was terminated). The district court found there were in fact open positions at the time she inquired. Lastly, Appellant's own manager, who admittedly consulted with Bird regularly regarding her perceptive perception of Appellant's performance, made comments showing an animus against pregnant women. Incredibly, Respondent now defends itself by claiming it once hired a woman with kids! (Respondent's brief, p. 16). Instead of addressing these additional facts in its brief to this court, Respondent chooses to recite only three facts in support of a showing of discriminatory animus, and then decides those three, hand-picked facts are insufficient to make the requisite showing.

Appellant presented a genuine issue of material fact that Respondent acted with discriminatory animus when determining Appellant would be terminated and not transferred.

B. Respondent's Proffered Business Reasons – MPLA And MHRA

Under both her retaliation claim and her discrimination claim, Appellant provided evidence that Respondent offered many business reasons, and the reasons changed over time. (Appellant's Brief, pp. 33-39). Respondent gave at least three "legitimate" business reasons. As established by the Eighth Circuit, a changing reason for termination may show pretext. 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 does not respond to Appellant's argument that numerous reasons were offered, and they changed over time. Instead, Respondent acknowledges only the assertion of a RIF, stating "the need for and genuineness of the RIF on the permanent placement side of Respondent has been indisputably established and the lower courts did not err." (Respondent's Brief, p. 39). It was disputed. The court should be reversed.

C. Respondent's Proffered Reasons Are Pretext

Appellant puts forth six arguments showing Respondent's proffered business reasons were pretext. (Appellant's Brief, pp. 34 – 42). Respondent responds to only three of them.

Respondent does not respond to Appellant's arguments in support of pretext that 1) Respondent intentionally and unilaterally misconceived and misjudged Appellant's qualifications and availability to work in legal temp; 2) Appellant's supervisor intentionally misrepresented to Appellant that no temp positions were available and directed her not to contact Jim Kwapick to inquire about open positions; and 3) Appellant's supervisor made discriminatory remarks evidencing pregnancy animus. (Appellant's Brief, pp. 37-40; 42).

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

Respondent argues Appellant has put forth "efforts to confuse the Court" regarding the adequacy of her performance. Appellant in no way has attempted to confuse the court. At all times, Appellant has presented to this Court and the courts below with the performance numbers provided by Respondent. Those numbers show Appellant was consistently among the better performers in the Minneapolis office. During the months of May, June, and July of 2008 (directly before Appellant went on leave in August), Appellant ranked either first or second out of all Minneapolis perm employees. (A-APP 0075).

Respondent provides no performance figures for the rest of the Central Zone employees which, according to Respondent, is the proper pool of similarly situated co-comparators. They also ignore the evidence as to the employees that, unlike Appellant, were allowed to transfer. Zollman, who began in December, 2007, was allowed to transfer shortly before Appellant's leave, despite the fact her PDA in the first half of 2008 was approximately \$11,000.00 (A-SUPP-ADD-005-009), less than one-half what it should have been even during Respondents alleged "ramp up."¹¹ Katie Miller was allowed to transfer. Her average PDA for every month worked in 2008 is \$12,571.00. In the first half of 2008 Appellant's was approximately \$20,000.00. (*Id.*) Accordingly, Respondent transferred two individuals whose performance was approximately one-half of Appellant's, and had no experience in temp, and much less experience in the company. That is evidence of pretext.

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

In response to this argument, Respondent relies on Hayes and Podkovich for the proposition that "timing alone" is insufficient. See Hayes v. U.S. Bancorp Piper Jaffray Inc., No. Civ. 03-4208, 2004 WL 2075560, at *13 (D. Minn. Sept. 16, 2004); Podkovich v. Glazer's Distributors of Iowa, Inc., 446 F. Supp.2d 982 (N.D. Iowa 2006). However, the determination in Hayes and Podkovich that temporal proximity did not establish pretext was based on the fact temporal proximity was *the only* evidence offered in support of pretext. *Id.* Indeed, the Hayes court contrasted EEOC v. Kohler, 335 F.3d 766, 773-74 (8th Cir. 2003) with the plaintiff's situation in Hayes to illustrate when temporal proximity may be evidence of pretext. In Kohler,

¹¹According to Respondent during this purported "ramping up", employees employed for 4 to 8 months, such as Zollman, are expected to reach \$20,000.00 per month. (Respondent's Brief, p.4).

the EEOC presented evidence of temporal proximity *plus* evidence of inconsistent treatment of the defendant's employees.¹²

iii. Respondent's Distortions to Deny Appellant Her Right of Reinstatement is Evidence of Pretext

Finally, Respondent has gone to fantastic lengths urging this Court to ignore all documentary evidence, misconstrues its own policy and makes arguments flatly contradicted by all of its own testimony to suggest Appellant had no right to MPLA leave. What was contended to be FMLA leave (contrary to all evidence), became disability leave, and for the first time has now morphed into personal leave. This desperation to re-characterize Appellant's leave itself is evidence of Respondent's pretextual actions.

The District Court's finding Appellant had failed to present a genuine issue of material fact as to pretext is error and must be reversed.

CONCLUSION

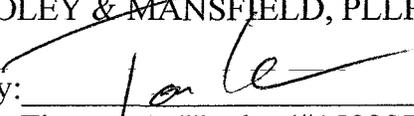
As to Appellant's prescriptive right of reinstatement, she was not restored to her position. Comparable positions were open, but denied her. This is not a question of intent, or discriminatory treatment. It is a violation of a statutory entitlement. The District Court should be reversed, with directions to enter summary judgment in favor of Appellant, with a trial on the issue of damages.

¹²In Brenlla, *supra*, the employee returned to work on a part-time basis for one week, then returned full-time, but was terminated the day of her return. The court concluded that "the temporal proximity between the plaintiff's request to be reinstated and the defendant's decision to terminate her employee clearly supports the conclusion that Ms. Brenlla was terminated because she took FMLA-covered leave." (Id. 2002 W.L. 1059117, *5).

As to the wrongful termination claims (i.e., the proscriptive rights), there were at a minimum many genuine issues of material fact. On those issues the District Court should be reversed, with directions to set the matter for trial.

Respectfully submitted,
FOLEY & MANSFIELD, PLLP

Dated: 9/6/14

By:  _____

Thomas A. Harder (#158987)
Greta Bauer Reyes (#039110)
250 Marquette Avenue, Suite 1200
Minneapolis, MN 55401
Telephone: (612) 338-8788
ATTORNEYS FOR APPELLANT