

NO. A10-1558

State of Minnesota
In Supreme Court

KIM HANSEN,

Appellant,

ROBERT HALF INTERNATIONAL, INC.,

Respondent.

RESPONDENT'S BRIEF AND 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 Ave. 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).

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
STATEMENT OF LEGAL ISSUES	vi
I. MUST AN EMPLOYEE SEEKING LEAVE UNDER THE MINNESOTA PARENTING LEAVE ACT SPECIFICALLY REQUEST LEAVE UNDER THAT ACT?	vi
II. DID THE COURT OF APPEALS DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUSTICE IN DETERMINING RESPONDENT UNDERTOOK A BONA FIDE REDUCTION IN FORCE AS A MATTER OF LAW?	vi
STATEMENT OF THE CASE	vi
STATEMENT OF FACTS	1
I. <u>RESPONDENT’S BUSINESS.</u>	1
A. Division of Permanent Placement and Temporary Placement Teams.	2
B. Performance of Permanent Placement Team Members.	3
II. <u>APPELLANT’S EMPLOYMENT WITH RESPONDENT.</u>	5
A. Appellant’s Hiring and Move to RHL.	5
B. Appellant’s Performance Issues.	5
III. <u>APPELLANT’S PREGNANCY AND REQUEST FOR LEAVE UNDER THE FMLA.</u>	8
A. Respondent’s Leave of Absence Policies.	9
IV. <u>RESPONDENT IMPLEMENTS A RIF AND OTHER COST-SAVING MEASURES.</u>	11
V. <u>APPELLANT’S “EVIDENCE” OF DISCRIMINATION.</u>	15
ARGUMENT	17

I.	<u>AN EMPLOYEE SEEKING LEAVE UNDER THE MINNESOTA PARENTING LEAVE ACT MUST SPECIFICALLY REQUEST LEAVE UNDER THAT ACT.</u>	17
A.	<u>Standard of Review</u>	18
B.	<u>Appellant did not take Leave under the MPLA.</u>	18
1.	<i>The Undisputed Facts Support the Lower Court’s Determination that Appellant did not Invoke the Protections of the MPLA.</i>	21
C.	<u>Appellant’s Alleged “MPLA” Leave was not Extended.</u>	24
D.	<u>Appellant has No Right to Reinstatement or to a Comparable Position Under the MPLA.</u>	27
1.	<i>Appellant’s Extension of Leave Defeats a Claim to Reinstatement.</i>	28
a.	<u>Appellant’s Claims of Estoppel Fail as a Matter of Law.</u>	31
E.	<u>Appellant’s Argument that Respondent was not Operating Under a Bona Fide Layoff and Recall System is Inappropriate and without Merit.</u>	33
II.	<u>THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUSTICE IN DETERMINING RESPONDENT UNDERTOOK A BONA FIDE REDUCTION IN FORCE AS A MATTER OF LAW.</u>	35
A.	<u>Standard of Review</u>	35
B.	<u>The Lower Courts did not Err in Determining Appellant failed to Establish a Prima Facie Case as a Matter of Law.</u>	36
C.	<u>Respondent Proffered a Legitimate Business Reason for Appellant’s Termination and there is no Pretext for Discrimination.</u>	39
	CONCLUSION	43
	CERTIFICATION OF BRIEF LENGTH	1

TABLE OF AUTHORITIES

Cases

<i>Am. Family Ins. Grp. v. Schroedl</i> , 616 N.W.2d 273 (Minn. 2000).....	18
<i>Bd. Of Trustees of Keene State College v. Sweeney</i> , 439 U.S. 24 (1978).....	36
<i>Brua v. Minn. Joint Underwriting Ass’n</i> , 778 N.W.2d 294 (Minn. 2010).....	19
<i>Chambers v. Metro. Prop. & Cas. Ins. Co.</i> , 351 F.3d 848 (8th Cir. 2003).....	37
<i>Cummings v. Koehnen</i> , 568 N.W.2d 418 n.5 (Minn. 1997)	20
<i>Daley v. Wellpoint Health Networks, Inc.</i> , 146 F.Supp.2d 92 (D. Mass. 2001)	29
<i>Dietrich v. Canadian Pacific Ltd.</i> , 536 N.W.2d 319 (Minn. 1995).....	37
<i>Duty v. Norton-Alcoa Proppants</i> , 293, F.3d 481 (8th Cir. 2002)	31
<i>Eischen Cabinet Co. v. Hildebrandt</i> , 683 N.W.2d 813 (Minn. 2004)	18
<i>Gangnon v. Park Nicollet Methodist Hosp.</i> , 771 F. Supp. 2d 1049 (D. Minn. 2011).....	22, 37
<i>Goins v. West Grp.</i> , 635 N.W.2d 717 (Minn. 2001).....	36, 39
<i>Groves v. Cost Planning & Mgmt. Int’l, Inc.</i> , 372 F.3d 1008 (8th Cir. 2004).....	40
<i>Hamann v. Park Nicollet Clinic</i> , 792 N.W.2d 468 (Minn. Ct. App. 2010).....	33
<i>Hayes v. U.S. Bancorp Piper Jaffray, Inc.</i> , 2004 WL 2075560, *6 (D. Minn. 2004).....	37, 40, 41
<i>Hearst v. Prog. Foam Technologies, Inc.</i> , 647 F. Supp. 2d 1071 (E.D. Ark 2009).....	32, 33
<i>Highlands Hosp. Corp. v. Preece</i> , 323 S.W.3d 357 (Ky. Ct. App. 2010).....	29
<i>Holley v. Sanyo Mfg.</i> , 771 F.2d 1161 (8th Cir. 1985).....	37
<i>Hoover v. Norwest Private Mortgage Banking</i> , 632 N.W.2d 534 (Minn. 2001)	36
<i>Hubbard v. United Press Int’l, Inc.</i> , 330 N.W.2d 428 (Minn. 1983).....	36, 42
<i>Hunt v. Rapides Healthcare System, LLC</i> , 277 F.3d 757 (5th Cir. 2001).....	29

<i>Jordan v. Jostens, Inc.</i> , 1998 WL 901769 (Minn. Ct. App. 1998)	37
<i>Kobus v. College of St. Scholastica</i> , 608 F.3d 1034 (8th Cir. 2010)	20, 34
<i>Krueger v. Speedway Superamerica, LLC</i> , 2005 WL 1475368, *3 (D. Minn. 2005)	41
<i>LaBonte v. TEAM Industries, Inc.</i> , 2007 WL 2106787 (Minn. Ct. App. 2007)	37
<i>Lapidoth v. Telcordia Tech., Inc.</i> , 22 A.3d 11 (N.J.Super.A.D. 2011).....	30
<i>Manns v. ArvinMeritor, Inc.</i> , 291 F. Supp. 2d 655 (N.D. Ohio 2003).....	29, 30
<i>McGregor v. Autozone, Inc.</i> , 180 F.3d 1305 (11th Cir. 1999).....	29
<i>Mentch v. Eastern Sav. Bank, FSB</i> , 949 F.Supp. 1236 (D. Md. 1997).....	29
<i>Mondaine v. American Drug Stores, Inc.</i> , 408 F.Supp.2d 1169 (D. Kan. 2006).....	29
<i>Munshi v. Alliant Techsystems, Inc.</i> , 2001 WL 1636494 (D. Minn. 2001)	37
<i>Podkovich v. Glazer’s Distributors of Iowa, Inc.</i> , 446 F. Supp. 2d 982 (N.D. Iowa 2006)	41
<i>Rask v. Fresenius Med. Care N. Am.</i> , 509 F.3d 466 (8th Cir. 2007)	20, 34
<i>Rosenberg v. Heritage Renovations, LLC</i> , 685 N.W.2d 320 (Minn. 2004).....	18
<i>Santosuosso v. NovaCare Rehab.</i> , 462 F. Supp. 2d 590 (D. N.J. 2006).....	30
<i>Standifer v. Sonic-Williams Motors, LLC</i> , 401 F.Supp.2d 1205 (N.D. Ala. 2005).....	29
<i>State by Cooper v. French</i> , 460 N.W.2d 2 (Minn. 1990)	18, 35
<i>Swanigan v. W. Airlines, Inc.</i> , 396 N.W.2d 607 (Minn. Ct. App. 1986)	36
<i>Thiele v. Stich</i> , 425 N.W.2d 580 (Minn. 1988).....	33
 <u>Statutes</u>	
29 C.F.R. § 825.104	27
29 C.F.R. § 825.301(b)(2010).....	19
Minn. Stat. § 181.940, subd. 2 (2010).....	vi, 18, 23

Minn. Stat. § 181.941, subd. 1 19, 24, 25, 28
Minn. Stat. § 181.942 27, 33
Wis. Stat. § 103.001(5) 20
Wis. Stat. § 103.10(1)(b)(2010) 20, 21

Rules

Minn. R. Civ. P. 56.03 (2011)..... 18

STATEMENT OF LEGAL ISSUES

- I. MUST AN EMPLOYEE SEEKING LEAVE UNDER THE MINNESOTA PARENTING LEAVE ACT SPECIFICALLY REQUEST LEAVE UNDER THAT ACT?

The Minnesota Court of Appeals held the plain language of the Minnesota Parenting Leave Act requires an employee to expressly request leave under the Minnesota Parenting Leave Act.

Apposite Authority:

Minn. Stat. § 181.940, subd. 2 (2010)

- II. DID THE COURT OF APPEALS DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUSTICE IN DETERMINING RESPONDENT UNDERTOOK A BONA FIDE REDUCTION IN FORCE AS A MATTER OF LAW?

The district court held, and the Court of Appeals affirmed, that an employee loses the right to reinstatement as a part of a bona fide reduction in force.

STATEMENT OF THE CASE

This case arises from Appellant's unfounded and unsupported belief that Respondent discriminated against her based on her gender (pregnancy) under the Minnesota Human Rights Act, and that she was entitled to reinstatement upon her return from a leave allegedly taken pursuant to the Minnesota Parenting Leave Act, Minn. Stat. § 181.940, et seq. ("MPLA") Appellant did not request or receive leave under the MPLA – rather she took leave under the Family Medical Leave Act ("FMLA"), the more generous federal statute. As such, Appellant was not entitled to reinstatement under the MPLA nor did she present a dispute of fact, and her claims under that statute should be

dismissed.¹ Even if this Court were to find that Appellant took leave under the MPLA, she had no right to reinstatement because she took 13 weeks of leave, far more than the six weeks of leave allowed under the statute. Finally, even if Appellant were entitled to reinstatement, that right to reinstatement is not absolute, and Respondent was entitled to eliminate Appellant's position and terminate her due to the bona fide reduction-in-force ("RIF") it implemented during and after Appellant's leave.

Appellant also claims that Respondent discriminated against her because of her gender (pregnancy) under the Minnesota Human Rights Act ("MHRA") by terminating her employment in December 2008. Appellant makes this claim though she presented no admissible evidence to support her beliefs. Appellant was terminated from her position as part of the RIF that led to Respondent eliminating all but one Recruiting Manager position in Appellant's department.

Finally, Appellant asserts a claim for retaliation under the MPLA, though she never pled such a claim in her Complaint. Appellant should be barred from arguing a retaliation claim because she failed to put Respondent on notice that she intended to pursue such a claim. Additionally, even if Appellant had properly pled a retaliation claim, Respondent had a legitimate, non-retaliatory reason for terminating Appellant's employment, and any claim for retaliation by Appellant must be dismissed. The Court of Appeals ruled that since Appellant did not request leave under the MPLA, she cannot

¹ Appellant failed to assert any claims under the FMLA, so all of her arguments for failure to reinstate and retaliation rely on her unsupported claim that she took leave under the MPLA.

prove retaliation. The District Court correctly reached all of the above conclusions in considering Respondent's Motion for Summary Judgment, and the Court of Appeals correctly affirmed that decision. Respondent respectfully requests that this Court affirm the lower courts' judgments in all respects.

Appellant petitioned this Court for review and Respondent opposed the petition. On June 28, 2011 this Court granted review on the two issues presented by Appellant in her petition.

STATEMENT OF FACTS

I. RESPONDENT'S BUSINESS.²

Respondent is an international staffing service that conducts its business through a number of distinct divisions, including OfficeTeam and Robert Half Legal (“RHL”).³ R-ADD-004, ¶ 4; 3/17/10 Nolan Aff., Ex. A, (“Hennen Depo.”) 8:14-18. [Hereafter, the document to which the deposition pages are attached will only be referenced the first time the deposition is cited or if the pages cited are attached to a different document.] RHL places lawyers, paralegals, law clerks and legal support professionals on a temporary, project, or permanent basis in law firms and other organizations throughout the United States. R-ADD-004, ¶ 5.

RHL's U.S. operations are divided into three zones: the Eastern Zone, the Central Zone, and the Western Zone. Hennen Depo. 9:3-9. During the relevant time frame, the Minneapolis, Minnesota office of RHL is in the Central Zone, headed by president Bob Clark. R-ADD-004, ¶ 6. The other offices in the Central Zone are in Chicago, Illinois; Dallas, Texas; Houston, Texas; and Denver, Colorado. 4/5/10 Harder Aff., Ex. C, (“Bird Depo.”) 12:12-15. Prior to a reduction in force (“RIF”), beginning in fall 2008, there were also offices in Columbus, Ohio and St. Louis, Missouri. R-ADD-011, ¶ 46.

Marilyn Bird, the District Director for RHL – Central Zone, reported to Mr. Clark. R-ADD-004, ¶ 7. The Regional Manager, Jackie Moes, reported to Ms. Bird. Hennen

² This is an accurate description of Respondent's business during Appellant's employment. The internal corporate structure of Respondent has subsequently changed.

³ At all relevant times, Appellant worked as a Recruiting Manager for the RHL division. R-ADD-004, ¶ 10.

Depo. 18:6-10; 4/5/10 Harder Aff., Ex. B, (“Moes Depo.”) 40. Ms. Moes’ position was eliminated in June 2008, and Amber Hennen, the Branch Manager at RHL Minneapolis since approximately September 2007 reported directly to Ms. Bird. Hennen Depo. 14:15-18. Finally, the Division Directors, who supervise teams of Recruiting Managers or Account Executives within the Minneapolis office, report to Ms. Hennen. R-ADD-004, ¶ 7.

The Branch Manager and Division Directors serve in both supervisory and production roles. *Id.*, ¶ 8. They are responsible for marketing to clients and placing candidates, as well as supervising the employees who report to them. *Id.* A Division Director’s primary duty is generally her own personal production. *Id.*, ¶ 10.

A. Division of Permanent Placement and Temporary Placement Teams.

The permanent and temporary placement teams operate separately, and employees are assigned to either the permanent placement or temporary placement team.⁴ R-ADD-005, ¶ 11. There are significant differences between the permanent placement and temporary placement teams. 4/5/10 Harder Aff., Ex. B, (“Moes Depo.”) 55:18-24. About the only thing the two teams have in common is that they both place candidates in legal positions. *Id.* The temporary placement team moves much more quickly than the permanent placement team, due to the urgency of clients’ needs. R-ADD-005, ¶ 14. The work hours on the temporary placement team are less flexible than on the permanent

⁴ Recruiting Managers are responsible for placement of permanent attorney or support staff candidates, while Account Executives place temporary employees into law firms and other organizations. R-ADD-004, ¶ 10.

placement team, as employees need to be available to receive orders from clients at any time and identify candidates on an expedited basis. *Id.* RHL requires temporary placement team members to be present during normal office hours (from 7:30 a.m. until 5:30 p.m.) and to stay after 5:30 p.m. if client needs necessitate it. *Id.*, ¶ 15. The “sales” that the team members must make to clients are also different on the permanent and temporary placement teams. Moes Depo. 56:1-2. Success is measured quite differently between the two teams, and the salary structures are significantly different between the teams. *Id.*, 56:17-57:1.

B. Performance of Permanent Placement Team Members.

RHL evaluates its team members based almost entirely on their production and the revenue they bring to the business. Moes Depo. 16:19-20. Each month, permanent placement team members set and attempt to achieve their “target goals.” The “target” or “target goal” is a number that is established each month by Recruiting Managers in conjunction with their managers, and fluctuates based on the production each Recruiting Manager thinks they can achieve in a given month. R-ADD-015, ¶ 6; Moes Depo. 19:12-20:4.

Recruiting Managers set their target goals each month in an attempt to achieve a per desk average (“PDA”), of \$25,000.00.⁵ R-ADD-004, ¶ 18; Hennen Depo. 59:23-60:1; 3/17/10 Nolan Aff., Ex. B, (“Hansen Depo.”) 21:19-25; Moes Depo. 67:24-68:5. The PDA is the most significant basis on which permanent placement team members’

⁵ PDA represents the total monthly production of each team member, averaged over two or more months. R-ADD-006, ¶ 18.

performance is evaluated. R-ADD-006, ¶ 18. While an employee's monthly target and total monthly production could and does vary from month to month, all Recruiting Managers at RHL are expected to have average production (i.e., have a PDA) of \$25,000 a month. R-ADD-016, ¶ 8; Moes Depo. 21:3-14. RHL evaluates employees based on their PDA, rather than their actual monthly production, because it recognizes that the nature of its business means that employees may have a "good month," followed by a "bad month." R-ADD-016, ¶ 9; 4/15/10 Harder Aff., Ex. C, ("Bird Depo.") 20:1-5. Accordingly, while an employee's monthly target goal may change as the month progresses, the overall PDA expectation rarely fluctuates from \$25,000. R-ADD-016, ¶ 10; Moes Depo. 16:19-23, 21:7-14.

Permanent placement team members are not expected to achieve a monthly PDA of \$25,000 starting with their first day of work. RA-026; Bird Depo. 88:14-18. Rather, RHL provides a "ramping up" period for new members of the team. New permanent placement recruiters are expected to make only \$30,000 in total billings during their first three months on the team (\$10,000 a month), then \$20,000 per month for the next 4-8 months of their employment. R-ADD-016, ¶ 11; RA-026; 4/12/10 Halbach Aff. Ex. C, ("Bird Depo.") 103:13-20. Recruiting Managers are only expected to reach the \$25,000 monthly PDA goal after they have been on the permanent placement team for nine months. R-ADD-016, ¶¶ 8, 11. An employee's tenure on the permanent placement team is therefore a key factor in evaluating that employee's performance. R-ADD-006, ¶ 21.

II. APPELLANT'S EMPLOYMENT WITH RESPONDENT.

A. **Appellant's Hiring and Move to RHL.**

Appellant was hired into the OfficeTeam division on April 6, 2004. 3/7/10 Nolan Aff., Ex. B., ("Hansen Depo.") 11:4-7. Appellant held that position until approximately March 2006, after her first FMLA leave when she requested a transfer to RHL, where she was assigned to the permanent placement team. *Id.* 11:15-19; Hennen Depo. 22:7-10.

Upon her transfer, Appellant was granted, at her request, a reduced schedule. Affidavit of Amber Hennen ("Hennen Aff."), R-ADD-012, ¶ 5. Appellant worked from approximately 8:00 a.m. until 3:00 or 3:30 p.m., but was still expected to meet the same production levels as other Recruiting Managers. Hennen Depo. 40:13-15, 40:20-23; R-ADD-012, ¶ 5.

B. **Appellant's Performance Issues.**

After her transfer to RHL, Appellant was initially a good performer and maintained good production throughout much of 2006 and 2007. As such, Appellant was promoted from her Recruiting Manager position to the Division Director position effective January 1, 2008. Hennen Depo. 24:2-9. Appellant's performance began to suffer soon after this promotion, however. R-ADD-007, ¶ 25;.

Throughout the first quarter of 2008, Ms. Bird had frequent discussions about Appellant's underperformance with Bob Clark and with Appellant's managers. Hennen Depo. 41:15-42:2, 93:17-22, 94:13-18; Moes Depo. 37:10-17; R-ADD-007, ¶ 26. Appellant's managers were concerned that Appellant did not have enough time, due her reduced work schedule and the additional administrative duties associated with her new

position, to reach her minimum personal production goals. Hennen Depo. 42:5-15.

During the first quarter of 2008, Appellant's PDA (\$17,133.12) was the lowest on the permanent placement team in the Minneapolis office for her tenure. R-ADD-007, ¶ 27.

Appellant's managers believed that Appellant would be able to increase her personal production if her administrative duties were reduced. Hennen Depo. 107:24-108:7; Hansen Depo. 33:24-34:5. In March 2008, RHL reduced the number of employees supervised by Appellant. R-ADD-007, ¶ 28. Appellant remained the Division Director, but rather than supervising both attorney and support staff teams, she was only responsible for supervising the support staff Recruiting Managers. Hennen Depo. 107:12-23.

Appellant's production numbers continued to be unacceptable even after the reduction in her responsibilities as Division Director. Appellant's production for the months of March and April was \$19,900 and \$18,087, respectively, below the expected \$25,000 PDA. R-ADD-008, ¶ 29; Hansen Depo. 26:22-27:7, 27:18-25. Based on Appellant's failure to increase her personal production numbers, Jackie Moes decided to remove Appellant as Division Director and return her to her previous position as a Recruiting Manager. Moes Depo. 66:5-24; Hennen Depo. 48:8-13, 59:14-17. Ms. Moes and Ms. Hennen met with Appellant on April 30, 2008 to relay this decision to Appellant. Hennen Depo. 48:8-13; Hansen Depo. 37:18-24. In June 2008, Jessica Kuhl became the Division Director. Hennen Depo. 49:4-8.

While Appellant's personal production improved somewhat in May 2008 after her transfer back to the Recruiting Manager position, her PDA continued to be below what

was expected of a Recruiting Manager at her level of experience. R-ADD-008, ¶ 30. Ms. Hennen and Ms. Kuhl held a Personal Activity Review (“PAR”) meeting with Appellant in mid-July 2008 to address these performance deficiencies. Hansen Depo. 23:1-5. Appellant was told that she needed to continuously increase her activity numbers on a weekly basis and achieve a minimum production of at least \$27,000 for the month of August 2008. *Id.* 23:1-9, 24:1-7, 24:25-25:18; 3/17/10 Nolan Aff., Exs. E – F. Despite the clear expectations set during that meeting, Appellant’s production was approximately \$18,007.50 in July, and \$8,050.00 in August. 3/17/10 Nolan Aff., Ex. R.

Appellant refuses to acknowledge what the undisputed production numbers clearly establish (that her performance was lacking), instead arguing that Jackie Moes’ mixed testimony can somehow overcome what the production figures clearly establish. Appellant makes this argument even though Ms. Moes was not even employed by RHL during the last half of 2008. Moes Depo. 9:1-3. Additionally, the testimony that Appellant relies on (a statement by Ms. Moes that Appellant’s performance was “stellar”) was later retracted by Ms. Moes in her deposition.⁶ The testimony of Jackie Moes does not create a fact issue as to Appellant’s performance during 2008.

Appellant also inexplicably claims that the rolling reports indicate that her PDA was not the lowest in the Minneapolis office. First, Appellant’s assertion ignores a key factor (as stated above) – PDAs are evaluated based on an employee’s tenure in their

⁶ When Ms. Moes was presented with Appellant’s actual 2008 performance numbers, she stated that “those wouldn’t be stellar numbers.” Moes Depo. 72:4-10. Ms. Moes also clarified that she was talking about Appellant’s 2007 performance when she had previously referred to Appellant’s “stellar” production. *Id.* 72:4-5.

position, and new employees have lower production expectations than existing employees. R-ADD-007, 9, ¶¶ 27, 38; RA-026. Appellant's comparisons to employees with lower PDAs, including Melissa Zollman and Katie Miller, are therefore inappropriate and irrelevant since these two employees are not similarly situated to Appellant because they did not begin working on the permanent placement team of RHL until January 2008 and June 2008. R-ADD- 017, ¶ 12; RA-026. Indeed, a review of the spreadsheet (prepared by Appellant) demonstrates that the monthly production for the similarly situated employees (those of similar tenure to Appellant) of the Minneapolis office of RHL were: (1) Appellant, \$18,128.14; (2) Sarah Dunn, \$23,658.66; (3) Jessica Kuhl, \$34,777.33. Wyman Aff., Ex. A.

Appellant confuses the record in several aspects about her performance in 2008, but one fact remains true throughout – the numbers do not lie.

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

Appellant told Ms. Hennen and others at RHL about her pregnancy sometime in January or February 2008. Hennen Depo. 64:12-15.

During her third trimester, Appellant began to experience health issues as a result of her pregnancy. Hansen Depo. 91:18-92:2. Appellant shared these issues with Ms. Hennen and other RHL employees in June, July, and August 2008. Hennen Depo. 64:21-24; R-ADD-013, ¶ 10. Appellant raised the issue of her health during the July 16, 2008 PAR meeting with Ms. Hennen and Ms. Kuhl. Hennen Depo. 125:14-21; 123:25-124:12; Hansen Depo. 23:1-3, 23:18-21. Ms. Hennen told Appellant during that meeting

that she was concerned about Appellant's health, as well as the health of Appellant's baby, and that Appellant had the option of taking an early maternity leave to address her health issues. Hennen Depo. 125:14-21; Hansen Depo. 25:19-26:2.

Appellant delivered her second child on August 29, 2008. A-ADD-0036. Her leave under Respondent's Short Term Disability Leave policy and FMLA began that same day. *Id.* Appellant was granted 12 weeks of leave. *Id.* Respondent sent Appellant a letter dated September 11, 2008 confirming her Short Term Disability/FMLA leave, enclosing a copy of the Leave of Absence manual ("LOA Manual") and expressly stating that Appellant had "no guarantee of reinstatement" if she took more than 12 weeks of leave.⁷ RA-025; Hansen Depo. 67:11-22.

A. Respondent's Leave of Absence Policies.

Respondent has established policies regarding leaves of absence set out in its LOA Manual. Bird Aff., Ex. A; *see also* A-ADD-40-48.⁸ The LOA Manual is available upon request, and is provided to all employees who take a leave of absence.⁹ There are several types of leave discussed in the LOA Manual, though the only ones applicable in this case are Respondent's Short Term Medical and Pregnancy Disability Leave and FMLA Leave. Bird Aff., Ex. A.

⁷ Respondent enclosed a copy of the LOA Manual with this letter. 4/12/10 Halbach Aff., Ex. A., ("Hansen Depo.") 148:1-11.

⁸ Appellant's Addendum attaches most relevant portions of the LOA Manual. A-ADD-0040-48. The entire LOA Manual is in the record attached as Exhibit A to Marilyn Bird's Affidavit.

⁹ The LOA Manual is also available via Respondent's intranet. Hansen Depo. 148:8-11.

Respondent voluntarily provides a paid Short Term Medical and Pregnancy Disability Leave (“Short Term Disability Leave”), described in Part II, Section 1 of the LOA Manual.¹⁰ A-ADD-0047. This leave is available to all full-time Respondent employees starting on their first day of work at Respondent. *Id.* Employees are eligible for leave if they are medically disabled and unable to work for more than five business days due to an illness, injury, or disability. *Id.* The maximum amount of leave available under this policy is 12 weeks or the length of the employee’s disability, whichever is less. *Id.*

Respondent also provides leave under the FMLA, described in Part II, Section 2 of the LOA Manual. *Id.* In order to qualify for FMLA leave, employees must meet the requirements established by federal law and regulations.

Part III of the LOA Manual, which addresses the inter-relation of the various types of leave, states that if an employee is eligible for leave under the Short Term Disability Leave and FMLA, the employee’s leave will be charged under both policies. A-ADD-0042-48. This section of the LOA Manual makes clear that Short Term Disability Leave and FMLA leave run concurrently, and that an employee is not entitled to more than 12 weeks of leave total under these policies in any given 12 month period. *Id.*

Part I, Section 9 of the LOA Manual clearly advises employees about their right to reinstatement. A-ADD-0045. Reinstatement is not available if “the position or a

¹⁰ While Appellant claims that this leave is the same as leave under the MPLA, she is incorrect. This is a leave Respondent voluntarily provides to its employees that exceeds any obligations it has under state or federal law.

substantially similar position ceases to exist because of legitimate business reasons unrelated to the employee's leave." *Id.*

IV. RESPONDENT IMPLEMENTS A RIF AND OTHER COST-SAVING MEASURES.

Like many companies throughout the United States, RHL was severely and negatively affected by the economic downturn in 2008 and 2009. Hennen Depo. 51:7-10; R-ADD-008, ¶ 33; Hansen Depo. 28:15-19. Law firms and other organizations (RHL's clients) were significantly affected by the economic downturn. R-ADD-008, ¶ 33; Hennen Depo. 86:14-87:4. The needs of those companies for RHL's staffing services, and its permanent placement services in particular, decreased dramatically beginning in the 4th quarter of 2008.¹¹ Hennen Depo. 85:2-8. Monthly production from permanent placements in the Central Zone of RHL decreased more than 90 percent between August 2008 and December 2008. R-ADD-009, ¶ 35. Both the Minneapolis office and the Central Zone as a whole experienced more than a 50 percent decrease in production between the 3rd and 4th Quarters of 2008. *Id.*

Due to this downturn, and recognizing that a recovery was not likely until sometime in 2009 at the earliest, Respondent instituted several cost-reduction measures throughout its offices starting in November 2008. Hennen Depo. 84:22-85:1; 3/17/10 Nolan Aff., Ex. D, ("Kwapick Depo.") 32:8-13. Throughout the 4th Quarter of 2008 and 1st Quarter of 2009, Bob Clark, the Central Zone President, directed Ms. Bird to reduce

¹¹ While the temporary placement area also saw a decrease in production, it was not as dramatic as the downturn in permanent placements because many law firms and organizations hired temporary employees to save costs. R-ADD-009, ¶ 34.

the number of permanent placement employees at RHL ultimately down from approximately 20 to a total of 8 throughout the Central Zone. R-ADD-009, ¶ 36; Hennen Depo. 85:9-17, 89:10-17. Mr. Clark issued directives on several occasions between approximately October 2008 and March 2009, and Ms. Bird was usually required to accomplish the headcount reduction within, at most, 2 days of each of Mr. Clark's directives. R-ADD-009, ¶ 37.

In determining which positions would be eliminated, Ms. Bird reviewed total production from individual offices within the Central Zone, as well as the lowest performing employees within each of the offices.¹² *Id.*, ¶ 38. In comparing the performances of the relevant employees, Ms. Bird considered their production numbers for 2008, given their relative tenure with RHL. *Id.* While Ms. Bird kept Ms. Hennen updated throughout this time period on RHL's general plans to reduce headcount in the Minneapolis office, Ms. Hennen was not involved in the decisions to reduce headcount or eliminate particular positions. *Id.*, ¶40; Hennen Depo. 91:3-15, 92:2-7, 98:4-21.

When Mr. Clark issued another directive to eliminate another permanent placement position in December 2008, Ms. Bird chose Appellant's position for elimination. R-ADD-010, ¶ 41; 4/5/10 Harder Aff., Ex. F ("Kuhl Depo.") 54:25-55:1; 4/12/10 Halbach Aff., Ex. C, Bird Depo. 64:6-8. Appellant's position was chosen for elimination because her PDA was consistently the lowest of all employees on the permanent placement team in the Minneapolis office during 2008, based on her tenure.

¹² Employee production figures are the primary criteria RHL management evaluates when deciding whether to terminate an employee. Hennen Depo. 112:2-7.

R-ADD-010, ¶ 41. Appellant's leave was not included in the calculation. *Id.* ¶ 42.

Appellant's PDA was also among the lowest in the Central Zone as a whole. *Id.*

Appellant returned to work on December 1, 2008, after 13 weeks leave. R-ADD-013, ¶ 12. She met with Amber Hennen that day to discuss what had happened at work while she was gone, and to create a plan to achieve her production numbers in December. Hennen Depo. 101:19-21, 102:1-3, 9-11. Ms. Hennen asked Appellant what hours she expected to work going forward. *Id.* 102:12-15. Ms. Hennen did not know during that meeting that Appellant's position would be eliminated the next day. *Id.*, 130:3-14; Bird Depo. 126:6-21.

Ms. Bird informed Ms. Hennen of her decision to eliminate Appellant's position during a telephone conference on December 2, 2008. R-ADD-010, ¶ 43; Hennen Depo. 100:12-21. Ms. Hennen held a meeting with Appellant shortly after her telephone conference with Ms. Bird, during which she informed Appellant of RHL's decision to eliminate her position. Hennen Depo. 134:19-21; Hansen Depo. 75:20-24.

RHL eliminated a total of 12 permanent placement positions in the Central Zone as part of the RIF. R-ADD-010, ¶ 44. Minneapolis' permanent placement team was reduced from a total of four employees in August 2008 to one, Jessica Kuhl, between December 2008 and February 2009.¹³ *Id.* Ms. Kuhl was retained on the permanent placement team because she had the highest PDA for 2008. *Id.*, ¶ 45. The Minneapolis

¹³ Another permanent placement employee, Sarah Dunn, began maternity leave on approximately December 1, 2008. She was reinstated to her previous position when she returned from leave in early March 2009 but left RHL the same month. Hennen Depo. 46:3-12.

office of RHL operated with only one permanent placement Recruiting Manager until October 2009, when two permanent placement employees were hired.¹⁴ Hennen Depo. 79:19-80:6; 80:21-81:10. One of these employees was hired to replace Ms. Kuhl, the only remaining Recruiting Manager, who voluntarily left RHL in October 2009. *Id.*

Respondent implemented several other cost-saving measures starting in November 2008. The permanent placement teams in the Columbus, Ohio and St. Louis, Missouri RHL offices were eliminated entirely in January 2009. R-ADD-011, ¶ 46. The company reduced the salaries of almost all employees. *Id.*, ¶ 47. Finally, Respondent eliminated several administrative positions and significantly decreased all discretionary spending. *Id.*, ¶ 48.

Appellant claims that while she was out on leave, Respondent hired an employee (Jennifer Hedin) to “replace” Appellant. Appellant’s Br. at 8. This claim is false and is contradicted by the undisputed evidence on this issue. Marilyn Bird, the individual responsible for making hiring decisions, testified unequivocally that “[h]iring Jennifer Hedin had nothing to do with Kim Hansen's position.” *See* Bird Depo. 32:19-33:7. The personnel requisition form for the position that was eventually filled by Jennifer Hedin was dated May 21, 2008, long before Appellant even went on leave. Supp. Hennen Aff., Ex. 4. Finally, Ms. Hedin was hired at a time when multiple other employees had

¹⁴ Appellant makes the unsupported statement in her brief that RHL hired other permanent placement employees after her discharge. Appellant’s S. Ct. Brief, p. 8. This claim is false.

recently left the permanent placement team, and she was in fact hired to replace them (not Appellant).¹⁵

Appellant attempts to argue that the RIF on the permanent placement team was not genuine because temporary positions of Account Executives were being filled during the same time period. As set forth above, the permanent placement team (of which Appellant was a member) and the temporary placement team (of which Appellant was never a member), have always operated as two different units. *Supra* p. 2-3. The temporary placement team did not lay off employees in late 2008 because that team was not as severely affected by the economic downturn as the permanent placement team. R-ADD-009, ¶ 34. Respondent has never suggested that there was a freeze in hiring or a RIF on the temporary placement team, and such hiring on a completely separate team does not mean that the RIF on the permanent placement team was not genuine.

V. APPELLANT'S "EVIDENCE" OF DISCRIMINATION.¹⁶

Appellant's "evidence" of discrimination is based almost exclusively on the timing of her discharge and allegedly discriminatory comments made by Amber Hennen, a non-decisionmaker. Appellant's Br. at 42. The primary basis of Appellant's discrimination and retaliation claims is that she was terminated on her second day back from leave.

Hansen Depo. 152:20-153:5.

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

Appellant also bases her claims on allegedly discriminatory statements made by Ms. Hennen regarding pregnancy. Appellant's Brief at 42. Hansen Depo. 40:8-17, 41:6-17;¹⁷ Hansen Depo. 44:14-20.¹⁸ Appellant acknowledges that Ms. Hennen hired several women, including one with children, while Appellant was employed by RHL. *Id.* 96:15-16, 97:18-98:6, 98:20-23. Notably, Appellant cannot provide any detail regarding when these allegedly discriminatory statements were made, and cannot identify any potential witnesses to the alleged comments. *Id.* 95:17-96:1.

There is no dispute that any alleged comments made by Ms. Hennen were made more than a full year before Appellant's termination. Amber Hennen testified that the comment she made about the pregnant candidate (for which Respondent has provided a non-discriminatory explanation that Appellant did not dispute) was made in September 2007. R-ADD-013, ¶ 14. Any comment made by Ms. Hennen regarding Molly Adrian (which Respondent disputes) must have been made before Ms. Adrian was terminated by

¹⁶ Appellant does not set forth this evidence in her Statement of Facts. *See* Appellant's Br. at 4-10. Rather it is presented within her legal argument at page 42. *Id.* at 42.

¹⁷ Appellant acknowledges that she does not know the circumstances under which the employee left RHL. Hansen Depo. 43:3-9. That employee's PDA was below expectations for a significant period of time before her termination, and Jackie Moes made the decision to terminate her employment. R-ADD-013, ¶ 13. Furthermore, Ms. Adrian was terminated on November 2, 2007, more than a full year before Appellant's termination. *Id.*

¹⁸ Ms. Hennen made this statement because the candidate volunteered that she was pregnant and did not want to begin working until after she had her child. R-ADD-013, ¶ 14. Ms. Hennen was disappointed that the candidate could not begin work immediately, because RHL had an immediate need to fill the position. *Id.* In any case, Ms. Hennen made this comment in October 2007, long before Appellant's termination. *Id.*

Jackie Moes on November 2, 2007. *Id.*, ¶ 13. Appellant was not terminated until December 2, 2008, long after these alleged comments were made, and in direct contradiction of her assertions.

ARGUMENT

I. AN EMPLOYEE SEEKING LEAVE UNDER THE MINNESOTA PARENTING LEAVE ACT MUST SPECIFICALLY REQUEST LEAVE UNDER THAT ACT.

Appellant cannot assert a claim of violation of the Minnesota Parenting Leave Act (“MPLA” or “Act”) because she did not ever request leave under the Act and was never granted a leave under the Act. The lower courts correctly determined that the plain language of the MPLA requires a person to expressly request leave under that Act.

In light of the lower courts’ correct interpretation of the plain language of the MPLA, all of Appellant’s arguments and efforts to claim that she requested leave under the Act or to create a material fact as to whether she did so, as well as her arguments about Respondent granting an extension of the six-week “MPLA” leave, thereby agreeing to an extension of reinstatement rights under the MPLA, are unavailing. Similarly the Court need not and should not reach or consider Appellant’s issues of whether or not there was a “bona fide layoff and recall”, whether a comparable position should have been offered to her, whether the Recruiting Manager and Account Executive positions are comparable, whether Respondent retaliated against her for requesting MPLA leave, or whether Respondent is estopped from claiming that she did not request a leave.

A. Standard of Review.

The construction of a statute is a question of law. *Rosenberg v. Heritage Renovations, LLC*, 685 N.W.2d 320, 324 (Minn. 2004). A lower court’s construction of a statute is reviewed *de novo*. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000); *Eischen Cabinet Co. v. Hildebrandt*, 683 N.W.2d 813, 815 (Minn. 2004).

Summary judgment shall be rendered “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” Minn. R. Civ. P. 56.03 (2011). On appeal from summary judgment, the Court considers whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

B. Appellant did not take Leave under the MPLA.

Appellant first argues the lower courts erred in concluding Appellant had not requested leave under the MPLA and that the MPLA requires an employee to make a clear and specific request to invoke the protections of the Act. Appellant’s argument is without merit. A *de novo* review of the plain language of the MPLA shows a person must expressly invoke leave under the MPLA to be afforded its protections.

The Act defines protected employees as those individuals “who perform[] services for hire for an employer from whom leave is requested under section 181.941 [or, the Act].” Minn. Stat. § 181.940, subd. 2 (2010); *see also* R-ADD -001. Under the terms of the Act, “[a]n employer must grant an unpaid leave of absence to an employee who is a

natural . . . parent in conjunction with the birth . . . of a child. The length of the leave shall be determined by the employee, but may not exceed six weeks, unless agreed to by the employer.” Minn. Stat. § 181.941, subd. 1; R-ADD-002. The MPLA is to be applied in accordance with its plain and unambiguous language. *Brua v. Minn. Joint Underwriting Ass’n*, 778 N.W.2d 294, 300 (Minn. 2010).

Appellant asserts that since the definitional section of the Act contains the language requiring a person to affirmatively invoke the act (defining “employee” as one “from whom a leave is requested under [the Act]”) as opposed to the “substantive” provisions of the Act, then the Act must be “silent” as to how such leave should be requested under the MPLA. Appellant further suggests that since the Family Medical Leave Act (“FMLA”) and a few states’ acts have been determined not to require an express request for leave under those acts, Minnesota should similarly not require any express request under the MPLA. This analysis is flawed, and the lower courts properly interpreted the plain language under the MPLA.

In stark contrast to the MPLA, the FMLA does not contain any provision requiring, or even suggesting, that an employee must specifically request leave under the FMLA. To the contrary, the Department of Labor has expressly promulgated rules providing that no express request is necessary to invoke the obligation of the employer to determine whether an employee is in fact eligible for FMLA leave. 29 C.F.R. § 825.301(b)(2010) (“An employee giving notice of the need for FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying

reason for the needed leave . . .”) (emphasis added). Case law consistent with this regulation has subsequently correctly interpreted the regulation.¹⁹ *See, e.g., Kobus v. College of St. Scholastica*, 608 F.3d 1034, 1036-37 (8th Cir. 2010); *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 474 (8th Cir. 2007).

As for Appellant’s argument that other states have similarly held under their state laws that no “magic words” are necessary to invoke the protections of their family leave acts, Appellant has not chosen, for a reason, to provide the court with the language of other states’ acts to allow the court to compare differences or similarities between the states’ acts in those cases compared to the MPLA. In contrast to the language of the MPLA, defining an employee as one who requests leave under the Act, the language of the Wisconsin and New Jersey laws relied upon by Appellant contain no such language either in their definitions or throughout the statutes. *See* Wis. Stat. § 103.10(1)(b)(2010)(under Wisconsin’s Family Medical Leave Act, an employee is defined as “an individual employed in this state by an employer, except the employer’s parent, spouse, domestic partner, or child.”); Wis. Stat. § 103.001(5)(Wisconsin general employment regulations defining an employee as “any person who may be required or directed by any employer . . . to engage in any employment, or go to work or be at any time in any place of employment.”); N.J.A.C. 13:14-1.2 (2010)(an “eligible employee” under the New Jersey Family Leave Act is defined as “any individual employed by the

¹⁹ It is of note that Minnesota courts have chosen not to follow federal cases where the statutory language is different, as is the case here. *See, e.g., Cummings v. Koehnen*, 568 N.W.2d 418, 422 n.5 (Minn. 1997).

same employer in the state of New Jersey for 12 months or more and has worked 1000 or more base hours during the preceding 12 month period.”). In addition, nowhere within the “substantive” provisions of these laws is there any requirement for an employee to expressly request leave under those acts. *See* N.J.A.C. 13:14-1.1 *et seq.*; Wis. Stat. § 103.10 *et seq.* These states, as well as other states’, interpretations of their own unique statutes, are not dispositive or precedential in regard to Minnesota’s interpretation of the MPLA.

1. *The Undisputed Facts Support the Lower Court’s Determination that Appellant did not Invoke the Protections of the MPLA.*

The undisputed facts in this case show that the lower courts did not err in their application of law. The undisputed facts in this case, related to Appellant’s request for leave, are:

1. Appellant never requested a six-week MPLA leave, she asked for twelve weeks. 4/15/10 Harder Aff., Ex. A, Hansen’s Depo. 66:2-6 (“I told them I was taking 12 weeks”).

2. Appellant had previously taken an FMLA leave of twelve weeks with her first pregnancy, showing that she understood Respondent’s leave policies, having utilized them already. *Id.* at 67:11-18 (speaking about the letter confirming her leave and her prior leave of absence, stating that she assumed the leave was the “same” this time.)

3. Prior to this litigation, Appellant viewed only three of the documents among those she presented to the trial court in support of her assertion that either she requested MPLA leave or that, at a minimum, a dispute of fact exists to what leave she

requested. The three documents she reviewed are (a) Respondent's Leave of Absence Manual; (b) her Leave of Absence Request, which she filled out and signed (except for the date of the leave commencement); and (c) the September 11, 2008 letter granting her leave under the FMLA. Bird Aff., Ex. A; A-ADD-0036, 39.

4. Appellant refers also to a Leave of Absence Personnel Action Form ("PAF"), completed on October 29, 2008, to extend Appellant's leave to December 1, 2008. Appellant's Br. at 7; A-ADD-0038. This an internal accounting and processing form utilized by Respondent, which was never seen by the Appellant until provided to her in discovery. This is also the case for other internal documents relied upon by Appellant. See A-ADD-033, 35. As such, none of its contents could be construed as a request by Appellant to invoke the MPLA or extend leave under that Act.

5. The Leave of Absence Request Form actually completed and signed by Appellant selects "section A" as the type of leave that she was requesting. A-ADD-0036. Section A is a request for "Short-term Medical Disability," "Pregnancy-related disability," or "Workers' Compensation Disability" leave and states in pertinent part immediately under that section: "Note: Leave under FMLA runs concurrently with Short-Term Medical Leave." *Id.* Appellant admits this form was her only request for leave. Hansen Depo. 63:13-22.

Appellant's reliance on *Gangnon v. Park Nicollet Methodist Hosp.*, 771 F. Supp. 2d 1049 (D. Minn. 2011) for the proposition that a request for non-FMLA medical leave can be interpreted as an express request for MPLA leave is without merit. Appellant's Br. at 15. In *Gangnon*, the invocation of the MPLA was not at issue, rather, the Court

looked at whether the employer violated the MPLA for refusing reinstatement after MPLA leave. *Gangnon*, 771 F. Supp. 2d at 1053. In spite of Appellant's attempts to compare her leave request to the request in *Gangnon*, *Gangnon* is easily distinguishable in that the plaintiff there did not qualify for FMLA leave and requested only six weeks of leave. *Id.*

6. Appellant requested short-term medical disability pay during her leave. *Id.* Short-term disability leave is a leave policy voluntarily provided by Respondent to its employees that is distinct from the federal or state mandated leaves. A-ADD-0047. Appellant claims that the short-term disability leave is the "same" as the MPLA leave and that she therefore requested and was granted leave under the MPLA. Appellant's Br. at 15. She is incorrect.

A comparison of these two types of leaves demonstrates they are clearly different.²⁰ Short-term disability leave is available to employees from their first day of employment, while the MPLA is only available to employees who have worked for their employer for at least 12 months and at least for an average number of hours equal to half the full time equivalent position. A-ADD-0047; Minn. Stat. § 181.940, subd. 2 (2). Short-term disability leave is only allowed to employees who are medically disabled and unable to work for at least five business days, while the MPLA is available to all eligible employees in conjunction with the birth or adoption of a child (it is a parenting leave and

²⁰ A detailed description of short-term disability policy is set out on page 8 of the Leave of Absence Manual. A-ADD-0047. The requirements for leave under the MPLA are set forth in Minn. Stat. § 181.940, subd. 2. R-ADD-001.

there is no requirement that the employee be disabled). A-ADD-0047; Minn. Stat. § 181.941, subd. 1. Finally, the maximum time available under Respondent’s short-term disability leave policy is the shorter of either 12 weeks or the period of disability, as established by a doctor’s note. A-ADD-0047. The MPLA only allows up to six weeks’ total leave, and is not connected with or limited by the period of disability of the employee. Minn. Stat. § 181.941, subd. 1. Clearly, there are significant differences between the Respondent’s short-term pregnancy disability leave and the MPLA, and Appellant’s claim she requested and was granted leave under the MPLA based on Respondent voluntarily granting her leave under the more generous company-provided short-term disability leave policy (and the mandatory 12 weeks under the FMLA) is unpersuasive.²¹

C. Appellant’s Alleged “MPLA” Leave was not Extended.

The lower courts did not err when they determined, after assuming for argument’s sake that Appellant may have requested leave under the MPLA, that Appellant did not extend her MPLA leave pursuant to Minnesota law. Minn. Stat. § 181.941, subd. 1, R-ADD-002; *Hansen*, 796 N.W.2d at 369. The lower courts correctly held there was no material question of fact that Appellant did not extend a six-week MPLA leave to a

²¹ Notably, the Leave of Absence Request Form filled out and signed by Appellant does not mention MPLA leave anywhere or indicate that Appellant sought leave under the MPLA. A-ADD-0036. It only refers to FMLA leave and the short-term disability leave. *Id.* Appellant herself acknowledges in her deposition that the Leave of Absence Request Form does not contain any reference to the MPLA. Hansen Depo. 64:7-21.

thirteen week leave because such an extension was not “agreed to by the employer.”
Minn. Stat. § 181.941, subd. 1, R-ADD-002.

The undisputed facts showing Appellant took twelve weeks of FMLA leave, followed by an additional unprotected leave, and not leave under the MPLA, are as follows:

1. The internal payroll form (“PAF”) extending Appellant’s “maternity” leave relied upon by Appellant was never reviewed by Appellant prior to this litigation and certainly could therefore not be construed as any “request” by Appellant to extend leave under the MPLA. *See* A-ADD-0038; Appellant’s Br. at 15. Moreover, the date of this internal form is dated October 29, 2008, eight weeks after Appellant’s original request for leave and therefore long after the expiration of the six-week maximum leave that Appellant would have been allowed to take under the MPLA, had she actually requested it. *Compare* A-ADD-0038 with Minn. Stat. § 181.941, subd. 1, R-ADD-002. As the District Court correctly stated:

Even assuming for the sake of argument that Plaintiff did not need to specifically request leave under the [M]PLA, the record before the Court conclusively establishes that Plaintiff’s 13-week maternity leave far exceeded the leave protected by the Act. The [M]PLA provides that

[a]n employer must grant an unpaid leave to an employee who is a natural or adoptive parent in conjunction with the birth or adoption of a child. The length of leave shall be determined by the employee, but may not exceed six weeks, unless agreed to by the employer.

A-ADD-0015(emphasis in original)(citation omitted).

Appellant argues that because Respondent allowed her thirteen weeks for maternity leave, it necessarily “agreed” to extend her parental leave under the Act. As the record shows, however, Respondent never agreed to any leave under the Act, let alone a thirteen week leave under the Act. Indeed, in Respondent’s letter confirming Appellant’s FMLA leave, Respondent acknowledged 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.” A-ADD-0039 (emphasis added).

2. Moreover, the PAF relied upon by Appellant is nothing more than an internal personnel document executed and filed by Respondent for accounting purposes to terminate Appellant’s short-term disability leave voluntarily offered by Respondent. A-ADD-0038. It further confirms that, as requested and as was granted to her, Appellant received a 12-week FMLA leave. However, since her doctor certified Appellant as eligible to return to work and no longer disabled, the short-term disability pay offered by Respondent expired and the 12-week concurrent FMLA leave continued to run. The PAF serves to document Appellant’s physician’s certification that she was medically able to return to work at that time, but remained eligible for additional FMLA leave since twelve weeks had not expired.

3. Appellant confirms she received the letter dated September 11, 2008, clearly stating that her “Short Term Disability/FMLA Leave of absence has been processed” and approved. A-ADD 0039. Appellant concedes she received this letter and

assumed it was the “same” as her previous FMLA leave. Hansen Depo. 67:15-19. She never disputed or questioned the contents or conclusions in that letter. *Id.* at 67:7-18.

4. Respondent is considered an “employer” under the federal law and is required to grant leaves up to 12 weeks under the FMLA. 29 C.F.R. § 825.104. If an employee actually seeks MPLA leave when he or she would be eligible under the FMLA law, query could an employer limit the leave to six weeks even if federal law required it to grant up to 12 weeks, and then refuse to “agree” to extend the six-week leave? If the employer did agree to extend the six-week leave, could the employer then legally decide not to agree to extend any right to guaranteed reinstatement and not violate the FMLA?

The District Court did not err in addressing these inquiries:

Indeed, Plaintiff lost the right to reinstatement under the [M]PLA once her leave extended beyond the six weeks protected by the Act. The Court refuses to read the act as broadly as the Plaintiff, who conflates rights under the FMLA with those under the [M]PLA. An employer who provides the federally required twelve-week leave period under the FMLA does not thereby agree to an extended maternity leave protected by the [M]PLA.

A-ADD-0016 at n. 8.

D. Appellant has No Right to Reinstatement or to a Comparable Position Under the MPLA.

Appellant did not seek leave under the MPLA and, even if she did, her leave of absence far exceeded the six-week leave protected by the Act. As a result, Appellant has no protections under the Act, including the right to reinstatement. *See* Minn. Stat. § 181.942.

The MPLA entitles an employee to “return to employment in the employee’s former position or in a position of comparable duties, number of hours and pay.” *Id.*, subd. 1(a). However, as the Act is correctly interpreted by the lower courts, since Appellant is not an “employee” under the Act because she did not request leave under the Act, she is therefore not entitled to return to her former position or a comparable position. A *de novo* review of the plain language of the Act confirms this result. This should be the end of the analysis, as the Court of Appeals determined, in spite of Appellant’s argument that both courts somehow erred in their interpretation.

1. *Appellant’s Extension of Leave Defeats a Claim to Reinstatement.*

Assuming, *arguendo*, that Appellant may be considered an “employee” under the Act and therefore expressly invoked its protection, Appellant’s extension of leave to thirteen weeks defeats any right to reinstatement to the same or comparable position.

There is no language in the MPLA to suggest that an agreement to extend the length of leave also extends the right of reinstatement. *See generally* Minn. Stat. § 181.941 *et seq.* The resulting absence of law on the matter, and the District Court’s decision to therefore turn to case law analyzing the right to reinstatement after extension of 12-week FMLA leave was not in error.²²

²² Appellant looks to the FMLA in support of her argument that she should not have to expressly invoke the MPLA to qualify under the Act. When the District Court looked to the FMLA with respect to Appellant’s claim that she is entitled to reinstatement after extending her leave, she now claims reliance on the FMLA was in error.

Federal courts interpreting the FMLA have held an extension of leave terminates the right to reinstatement to an equal or comparable position.²³ *Mondaine v. Am. Drug Stores, Inc.*, 408 F. Supp. 2d 1169, 1206 (D. Kan. 2006); *Standifer v. Sonic-Williams Motors, LLC*, 401 F. Supp. 2d 1205, 1221-22 (N.D. Ala. 2005); *Hunt v. Rapides Healthcare Sys., LLC*, 277 F.3d 757, 763-64 (5th Cir. 2001); *Daley v. Wellpoint Health Networks, Inc.*, 146 F. Supp. 2d 92, 99-100 (D. Mass. 2001); *McGregor v. Autozone, Inc.*, 180 F.3d 1305, 1308 (11th Cir. 1999); *Mentch v. Eastern Sav. Bank, FSB*, 949 F. Supp. 1236, 1247 (D. Md. 1997); *see also* ADD-0016 (District Court Order citing *Highlands Hosp. Corp. v. Preece*, 323 S.W.3d 357 (Ky. Ct. App. 2010); *Manns v. ArvinMeritor, Inc.*, 291 F. Supp. 2d 655, 660 (N.D. Ohio 2003)). Appellant's attempts to distinguish these cases are unavailing.

For example, Appellant claims the District Court's reliance upon *Highlands Hosp. Corp.* is inapposite of the District Court's determination because in that case, the employer did not inform the plaintiff that the leave was designated as FMLA, therefore the employee had no way of knowing that an extension of that leave would waive the

²³ It is of note that even if Appellant was entitled to restoration to a comparable position, she failed to identify an open comparable position to which she could have been returned. An employee does not have a right to "bump" an existing employee from a position in which she is working (or a position for which she has already been hired) upon her return from leave. 29 C.F.R. § 825.216. Appellant has not established that there was an open position to which she could have been transferred when she was terminated on December 2, 2008. The temporary placement positions to which she points (Lisa Breiland and Jennifer Hedin) had been filled before December 2, 2008, when Appellant was terminated. Marilyn Bird did not decide until the morning of December 2, 2008 that Appellant's position would be eliminated, and there were not any positions open as of that date. Bird Depo. 126:6-21. There is no evidence that there was a comparable position to which Appellant could have been transferred when she was terminated.

right to reinstatement. 323 S.W.3d at 362. In stark contrast, Respondent clearly articulated Appellant's leave was designated as FMLA leave. A-ADD-0039. The Kentucky court's statement that an extension beyond the twelve week FMLA leave results in a loss of FMLA protections remains accurate, it was simply not applicable in the case before the Court. *Highlands Hosp. Corp.*, 323 S.W.3d at 362.

Similarly, the Court's conclusion in *Manns*, that one loses a right to reinstatement upon extension of leave past the twelve weeks afforded by the FMLA, remains true. Again, simply because the facts to the cited case vary from the present matter as most case law typically does, it does not render the remaining law inapplicable to the present matter.

The one case that Appellant relied upon in support of her contention that an extension of leaves carries with it a right to reinstatement has been overruled. See Appellant's Br. at 21 (citing *Santosuosso v. NovaCare Rehab.*, 462 F. Supp. 2d 590 (D. N.J. 2006)(overruled by *Lapidoth v. Telcordia Tech., Inc.*, 22 A..3d 11, 16 (N.J.Super.A.D. 2011)). Appellant's most recent attempts to then distinguish the basis of the grounds for overrule are disingenuous, particularly Appellant's statement that "Respondent at no time advised Appellant of any condition, other than that she return to work on December 1 – which she did." Appellant's Br. at 21. This is simply untrue, and Respondent respectfully points this Court to the September 11, 2008 letter stating "[a]t the conclusion of Short Term Disability/FMLA Leave, a Personal Leave may be granted . . . An employee on personal leave has no guarantee of job reinstatement" A-ADD-0039.

In sum, while the Court of Appeals saw no reason to reach this level of analysis in light of the plain language of the MPLA disqualifying Appellant from its protections, the District Court did not err when it determined as a matter of law:

[Respondent] did not agree to a 13-week maternity leave with a continued right to reinstatement under the [M]PLA. Plaintiff was on notice that if she took more than 12 weeks, she did not have a right to reinstatement in her former position under the FMLA. She chose to extend her leave, and thereby lost any statutory right to reinstatement in her former position under either the FMLA or [M]PLA.

* * *

Indeed, Plaintiff lost the right to reinstatement under the [M]PLA once her leave extended beyond the six weeks protected by the Act. The Court refuses to read the act as broadly as Plaintiff, who conflates rights under the FMLA with those under the [M]PLA. An employer who provides the federally required 12-week leave period under the FMLA, does not thereby agree to an extended maternity leave protected by the PLA.

(A-ADD-0016; *id.* at n. 8). The lower courts did not err. The opinion of the Court of Appeals should be affirmed.

a. Appellant's Claims of Estoppel Fail as a Matter of Law.

Appellant next argues that Respondent should be estopped from refusing to reinstate Appellant because it never advised Appellant she would lose her right to reinstatement if her FMLA leave was extended by a week. Appellant's Br. at 22-23. Appellant relies significantly on *Duty v. Norton-Alcoa Proppants*, 293, F.3d 481, 494 (8th Cir. 2002) for this proposition. Respondent does not challenge Appellant's citation to *Duty* or the statement that *Duty* articulates that an employer may be estopped from terminating an employee under circumstances where the employer makes a representation

upon which an employee reasonably relies as an assurance of a return to employment. Appellants Br. at 22 (citing *Duty*, 293 F.3d at 493-94). There is one key difference Appellant neglects however: there are no facts in the record to suggest Respondent informed Appellant she could extend her leave without a loss in FMLA protection. Quite to the contrary, Respondent clearly and unequivocally advised Appellant that an extension of leave would lose those protections. A-ADD-0039. Similarly, Respondent's LOA Manual states that the right to reinstatement expires at the "maximum time allowed for the applicable leave of absence." A-ADD-0045.

Last, Appellant's illustration of *Hearst v. Prog. Foam Technologies, Inc.*, 647 F. Supp. 2d 1071 (E.D. Ark 2009) is misstated and inaccurate with respect to the principle of estoppel.²⁴ Appellant's Br. at 23. Her attempts to make the District Court's reliance on this case seem in error are misleading. *Id.*; A-ADD-0017. The District Court was correct when citing to *Hearst* stating that "[p]unishing employers . . . for adopting a more generous leave policy than the law requires is contrary to the purpose of the FMLA" A-ADD-0017 (citation omitted). In *Hearst*, equity dictated that the employer should not be punished for granting leave under the FMLA where the employee was not an eligible employee under the FMLA but received the leave anyway. 647 F. Supp. 2d at 1074. Similarly, equity dictates that an employer's willingness to extend leave from

²⁴ Perhaps most important is Appellant's suggestion that this case suggests Respondent can't "recant its position" to contend that leave was only extended for twelve weeks. Appellant's Br. at 24. Appellant does not dispute that it permitted thirteen weeks of leave and does not seek to "recant" this. Rather, of those thirteen weeks, twelve were FMLA leave and the last was personal leave, to which Appellant was clearly informed afforded no right to reinstatement. A-ADD-39, 45. Appellant's argument is nonsensical.

FMLA to personal leave should not require an employer to extend the right to reinstatement, as it would have “the perverse effect of chilling employers’ willingness to voluntarily extend additional leave.” A-ADD-0017. This is precisely the equitable outcome contemplated by *Hearst*.

There are no facts to support any claim that Appellant reasonably relied upon an assurance of reinstatement to the same or comparable position. The lower courts’ decision that there was no material fact with respect to this issue is supported by the record and not in error.

E. Appellant’s Argument that Respondent was not Operating Under a Bona Fide Layoff and Recall System is Inappropriate and without Merit.

As a final matter, Appellant now argues, for the first time in her Supreme Court Brief, that Respondent was not operating under a “bona fide layoff and recall system” as that language is used within the MPLA. Appellant’s Br. at 18 (citing Minn. Stat. § 181.942, subd. 1(b)). Appellate courts generally address only those questions presented to and considered by the district court, and a party may not obtain review by raising the same general issue on appeal that was raised in district court but on a new theory. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Hamann v. Park Nicollet Clinic*, 792 N.W.2d 468, 472 (Minn. Ct. App. 2010). This issue has never been raised until long after Appellant’s Petition for Review to this Court. It should not now be considered.

In sum, this is not an issue of “magic words,” and even if the Supreme Court decides that the Appellant does not have to “request” leave under the statutory language,

Respondent, by granting the 13-week leave request, does not “agree to extend” under the MPLA language and therefore does not extend reinstatement rights.

Furthermore, Respondent was required to give leave under the FMLA.

Respondent was also required under the FMLA to decide what Appellant was asking for in terms of leave. *See Kobus v. College of St. Scholastica*, 608 F.3d 1034, 1036-37 (8th Cir. 2010); *Rask v. Fresenius Med. Care N. Am.*, 509 F.3d 466, 474 (8th Cir. 2010).

There is no fact in the record that suggests that Respondent could or should interpret Appellant’s Leave of Absence Request Form, A-ADD-0036, as being a request for six-weeks leave under the MPLA, plus an agreement to extend the leave and extend reinstatement rights, all of which would be necessary and the only way the Court could even get to Appellant’s additional arguments about the requirement to reinstatement to a “similar position,” or decide whether there was a “bona fide leave layoff and recall” under Minnesota law, or whether Respondent retaliated against Appellant for taking leave. *infra*. The Court should interpret the statute as requiring an employee to actually make a “request,” at least for those employers who also are obligated to grant leaves under the FMLA, so that the employer can actually make a decision to whether to “agree” to extend. Since a large employer has to give up to 12 weeks, to do otherwise essentially re-writes the MPLA provision and implicitly decides that any fulfillment of an employer’s obligations under the federal law would also constitute “agreement” under the MPLA making the MPLA a 12-week leave law.

II. **THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUSTICE IN DETERMINING RESPONDENT UNDERTOOK A BONA FIDE REDUCTION IN FORCE AS A MATTER OF LAW.**

Appellant's Petition for Review suggests that this issue is before the Court on the basis, as Appellant contends, that the lower courts departed from the accepted and usual course of justice in determining Respondent undertook a bona fide reduction in force ("RIF") as a matter of law. Now, Appellant argues numerous other issues not presented for review. Respondent objects to the presentation of new issues not presented in the petition for review and therefore not accepted for review. Nonetheless, Respondent will attempt to address the matter selected for review, along with Appellant's numerous other "issues" it now improperly raises. Most importantly, the lower courts made no departure from the accepted and usual course of justice in determining Respondent undertook a bona fide reduction in force both with respect to Appellant's MHRA claim and MPLA claim. Appellant did not meet her burden of presenting any material facts to create a dispute of fact regarding the genuineness of the RIF. There is adequate support in the record to conclude there was a bona fide reduction in force and the lower court's determination of this issue in accordance with whether Appellant established a prima facie case is not improper.

A. Standard of Review.

On appeal from summary judgment, the appellate court considers whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). If an

employee fails to establish a prima facie case of employment discrimination, summary judgment in favor of the employer is appropriate. *Rademacher v. FMC Corp.*, 431 N.W.2d 879, 882 (Minn. Ct. App. 1988).

B. The Lower Courts did not Err in Determining Appellant failed to Establish a Prima Facie Case as a Matter of Law.

Under the *McDonnell Douglas* burden-shifting framework, a plaintiff must first make out a *prima facie* case of discrimination. *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 542 (Minn. 2001). Once established, the burden then shifts to the employer to articulate a legitimate and nondiscriminatory reason for the adverse employment action. *Goins v. West Grp.*, 635 N.W.2d 717, 724 (Minn. 2001). The burden then again shifts to the plaintiff to put forward sufficient evidence to demonstrate that the employer's proffered explanation was a pretext for discrimination. *Id.* It is never the employer's burden to prove the absence of a discriminatory motive. *Bd. Of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 24-25 (1978).

To establish a *prima facie* case of discriminatory discharge, an employee must demonstrate that she (1) is a member of a protected class; (2) was qualified for the job that she was performing; (3) was discharged; and (4) was replaced by a non-member of the protected class, or that other similarly-situated non-protected employees were not discharged for the same behavior. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 442 (Minn. 1983); *Swanigan v. W. Airlines, Inc.*, 396 N.W.2d 607, 612 (Minn. Ct. App. 1986). When an employee is discharged pursuant to a RIF, however, "some additional showing [is] necessary to make a *prima facie* case." *Dietrich v. Canadian Pacific Ltd.*,

536 N.W.2d 319, 324 (Minn. 1995); *Holley v. Sanyo Mfg.*, 771 F.2d 1161, 1165-66 (8th Cir. 1985); *LaBonte v. TEAM Industries, Inc.*, 2007 WL 2106787, *2 (Minn. Ct. App. 2007); *Jordan v. Jostens, Inc.*, 1998 WL 901769, *5 (Minn. Ct. App. 1998); *Chambers v. Metro. Prop. & Cas. Ins. Co.*, 351 F.3d 848, 855-56 (8th Cir. 2003).

Specifically, the employee must make an additional showing as a part of her *prima facie* case that discriminatory animus was a factor. *Dietrich*, 536 N.W.2d at 324. The additional showing is required since the employer's reason for discharging the employee is not otherwise unexplained." *Id.* "[T]he mere termination of a competent employee" or the fact that an employee outside of the plaintiff's class is retained, are not sufficient to establish a *prima facie* case of discrimination. *Id.* at 324-25. A plaintiff also must do more than show that she was qualified for the position she held or had good performance reviews. *Munshi v. Alliant Techsystems, Inc.*, 2001 WL 1636494, *4 (D. Minn. 2001); *Hayes v. U.S. Bancorp Piper Jaffray, Inc.*, 2004 WL 2075560, *6 (D. Minn. 2004).

Last, a RIF occurs "when business considerations cause an employer to eliminate one or more positions within the company." *Dietrich*, 536 N.W.2d at 324. The lower courts did not err in making the preliminary determination that Respondent undertook a bona fide RIF in considering whether Appellant established a *prima facie* case of discrimination.²⁵

²⁵ The MPLA does not address discriminatory retaliation, but Minnesota courts have applied the standard set forth in the MHRA when analyzing discrimination under the MPLA. *Gangnon*, 771 F. Supp. 2d at 1054.

To survive summary judgment on her claims for discrimination under the MHRA or MPLA (which the lower courts correctly determined was not pleaded), 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.²⁶ Appellant has not shown that there was discriminatory animus along with the genuine reduction in force at the time of her termination. Therefore she cannot show that she met the additional requirement to establish a *prima facie* case, or, alternatively, that Respondent has not met its burden of proffering a legitimate nondiscriminatory reason for her termination or the failure to recall her, or that a material dispute of fact exists to the reduction in force and the failure to reinstate her under either of her claims.

The only so-called facts that Appellant refers to in her record are the (erroneous) fact that she was a good performer, that Respondent hired Jennifer Hedin to do permanent placement on the RHL team while Appellant was on leave, and that during the time that the reductions in force occurred on the permanent placement side of RHL in the fourth quarter of 2008 and the first quarter of 2009, no similar layoffs or reductions occurred on the temporary placement side of RHL. Appellant's Br. at 34-36. None of these "facts" meets her burden, as the lower courts correctly determined. There is no error or departure from the accepted and usual course of justice.

²⁶ Moreover, if the Court gets that far in its analysis in her MPLA claim, Appellant has to demonstrate there is a material dispute of fact as to why she was not recalled or why the MPLA right of reinstatement would apply.

C. Respondent Proffered a Legitimate Business Reason for Appellant's Termination and there is no Pretext for Discrimination.

In the event Appellant established a *prima facie* case, the burden shifts to Respondent to show the RIF is legitimate. The burden then shifts back to Appellant to show that the proffered RIF was a pretext for discrimination. *Goins*, 635 N.W.2d at 724. Appellant cannot meet this burden. In order to show pretext to reverse summary judgment, Appellant must at least submit some disputed fact that Respondent's reasons for terminating Appellant are false, and she has not done so. The lower courts correctly concluded that Appellant cannot maintain a claim for retaliation under the MPLA and the MHRA.

With respect to Respondent's legitimate business reason for Appellant's termination, the need for and genuineness of the reduction in force on the permanent placement side of Respondent has been indisputably established and the lower courts did not err. *See* A-ADD-0025.

Appellant's analysis with respect to whether the Account Executive and Recruiting Manager positions are comparable, which goes to the reinstatement rights with hiring or not reducing on the temporary side rather than to the reduction in force on the permanent side of Respondent, are misdirected. Appellant expends great effort in trying to establish that the Account Executive and Recruiting Manager positions are in fact comparable and that therefore Respondent should have found Appellant a position in the RHL temporary legal placement position. The Court does not have to and should not go there in its analysis in that Appellant has presented no facts to suggest or establish that

Respondent did not view them separately from each other, which is within its discretion to do.

As it relates to Respondent's proffered legitimate business reason, Appellant only argues that the business should not have viewed the two divisions separately, rather than producing any fact in the record that would suggest that Respondent did not view them separately. In fact, it is logical that Respondent would have viewed the two sides separately given how they are structured generally and how each division was performing during the recession. As the lower courts have established and many cases support, the Court cannot substitute its business judgment for that of Respondent and conclude that, somehow, Respondent should not have viewed and treated the temporary placement and permanent placement sides of RHL differently or that Respondent should have looked at the two sides together or could have looked at the two sides together. *See, e.g., Hayes*, 2004 WL 2075560 at * 7 (and cites therein regarding the business judgment rule); *Groves v. Cost Planning & Mgmt. Int'l, Inc.*, 372 F.3d 1008, 1010 (8th Cir. 2004).

The *Hayes* case remains illustrative of this point, as it contains facts that are nearly identical to the instant case, including an analysis under both the MHRA and MPLA. The employee in *Hayes* was terminated on the same day she returned from a twelve week maternity leave. *Id.* The court held that the employee was not entitled to reinstatement because the company eliminated her position during her leave pursuant to a bona fide RIF. *Id.* Appellant's position had been chosen for elimination because she was "among the least profitable" of the remaining employees. *Id.* at *12.

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

With respect to Appellant's claims that Respondent's RIF was nothing more than a pretext for discrimination, Appellant relies in part on *Podkovich v. Glazer's Distributors of Iowa, Inc.*, 446 F. Supp. 2d 982 (N.D. Iowa 2006) in support of her claim that the close proximity between her return from leave and her termination establishes pretext. That case does not establish pretext, and in fact notes that temporal proximity alone is not enough to show a causal connection between termination and a pretext for discrimination. *Id.* at 1008-09. Most importantly, Appellant ignores cases from within this jurisdiction that contradict her argument, including *Hayes*. The plaintiff in *Hayes* was terminated under similar circumstances to those set forth in the present matter (one day after returning from maternity leave, and discharged for poor performance), and the court found that the timing alone was not sufficient to show that the employer's reason for the plaintiff's termination was pretextual. *See, e.g., Hayes*, 2004 WL 2075560, *6. Similarly, the court in *Krueger v. Speedway Superamerica, LLC*, 2005 WL 1475368, *3 (D. Minn. 2005) held that the question of temporal proximity should be measured from the date of the protected activity, i.e., the day that the plaintiff requested leave under the FMLA. In the instant case, given that Appellant requested leave sometime during the

summer of 2008 (and in any case no later than August 29, 2008), and was not terminated until December 2, 2008, there is not sufficient temporal proximity to show by itself that Appellant was retaliated against. Finally, the Minnesota Supreme Court in considering this issue has held that temporal proximity cannot establish pretext, especially if the employer has provided a non-retaliatory explanation for the timing of its adverse action. *Hubbard*, 330 N.W.2d at 445-46.

There is also no dispute in the record as to what production Respondent requires from its Recruiting Managers and what numbers it looked at in determining adequacy of a Recruiting Manager's performance, Appellant's efforts to confuse the Court notwithstanding. Appellant tries to blur the distinction between new employee requirements and the requirements for Recruiting Managers who have been employed longer than a year. She makes inaccurate statements regarding the time periods and the minimum "PDA" requirements, and regarding her PDA versus the PDA of newer Recruiting Managers. There is no dispute, however, in the record as to Respondent's requirements, no dispute as to the differences of the requirements for newer versus seasoned Recruiting Managers, no dispute that Appellant knew what was required of her, that she was told of those expectations and that she was the lowest performer based on PDA in the Minneapolis office and throughout the central zone at the time decisions were made regarding reducing the workforce on the permanent placement side of RHL. Similarly, there is no dispute of fact in the record that RHL went down from 20 Recruiting Managers to eight in the Central Zone and from four Recruiting Managers to one in the Minnesota RHL offices and that the one person retained had substantially

better production numbers than Appellant. Similarly, there is no dispute about the 2008/2009 recession and its effect on the RHL permanent placement side. The Court should not and need not look at whether the Account Executive position was “similar” or “comparable” to the Recruiting Manager position. The analysis should stop far short of looking at whether the failure to reinstate her or offer her a position as an Account Executive, if there was one open, which there was not, was discriminatory or retaliatory.

CONCLUSION

The Court should decide that: 1) the Appellant has not established there is a material dispute of fact of whether she requested and was granted a leave, with corresponding rights of reinstatement, under the MPLA; 2) Appellant has not stated a claim in her Complaint that she was retaliated against under the MPLA; 3) Appellant has not established a *prima facie* case for sex discrimination under the MHRA; 4) that Respondent has met its burden of establishing a legitimate nondiscriminatory reason for its actions under the MHRA; or finally, 5) that Appellant has not established a material dispute of fact as to whether there was pre-text. Respondent has satisfied its burden of production in all respects with comparative numbers regarding PDA of similarly situated employees and excerpts from depositions and affidavit of Marilyn Bird showing how she selected employees whose positions would be eliminated as part of the reduction in force and the need for elimination of positions because of the decline of permanent placement business of RHL.

Dated: August 26, 2011

Dayle Nolan

Dayle Nolan (121290)

Susan E. Tegt (387976)

Larkin Hoffman Daly & Lindgren Ltd.

1500 Wells Fargo Plaza

7900 Xerxes Avenue South

Minneapolis, Minnesota 55431-1194

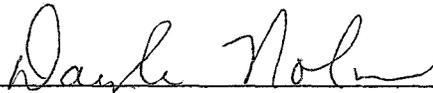
(952) 835-3800

Attorneys for Respondent

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a 13 point font. The length of this brief is 13,488 words. This brief was prepared using Microsoft Word 2007, version 12.0.

Dated: August 26, 2011



Dayle Nolan (121290)
Susan E. Tegt (387976)
Larkin Hoffman Daly & Lindgren Ltd.
1500 Wells Fargo Plaza
7900 Xerxes Avenue South
Minneapolis, Minnesota 55431-1194
(952) 835-3800

Attorneys for Respondent