

NO. A11-1339

State of Minnesota  
 In Court of Appeals

Kathryn Brenny,

*Plaintiff-Respondent,*

vs.

The Board of Regents of the University of Minnesota,

*Defendant,*

and

John Harris, individually and in his capacity as Director of Golf,

*Defendant-Appellant.*

**DEFENDANT-APPELLANT'S BRIEF AND ADDENDUM**

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

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## STATEMENT OF THE ISSUE

Did the trial court err in denying Appellant-Defendant John Harris' motion to dismiss Respondent-Plaintiff Kathryn Brenny's tortious interference with contract claim for lack of subject matter jurisdiction?

In her Amended Complaint, Plaintiff Kathryn Brenny ("Plaintiff") asserted a claim of tortious interference with contract against Defendant John Harris ("Harris"), who was Plaintiff's supervisor when she was employed by the University of Minnesota. (AA. 14-15¶¶ 81-88.)<sup>1</sup> Harris filed a motion to dismiss that claim under Minn. R. Civ. P. 12.02(a) for lack of subject matter jurisdiction, arguing that employment decisions by the University and University employees like Harris are subject to the Court of Appeals' exclusive jurisdiction on a writ of certiorari. (AA.132-133; AA.23-28.) In an Order dated July 13, 2011, the District Court denied Harris' motion to dismiss Plaintiff's tortious interference claim. (ADD.5.)<sup>2</sup> Harris preserved the issue by appealing the Order as a matter of right via a notice of appeal dated July 27, 2011. (AA.1.) *See, Willis v. County of Sherburne*, 555 N.W.2d 277, 279 n.1 (Minn. 1996) ("an order denying a motion to dismiss for lack of jurisdiction is immediately appealable of right").

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<sup>1</sup> Citations to "AA. \_\_\_\_" refer to Appellant John Harris' Appendix, filed with this Brief.

<sup>2</sup> Citations to "ADD. \_\_\_\_" refer to the attached Addendum.

Most Apposite Cases:

1. *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323 (Minn. App. 2007)
2. *Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187 (Minn. App. 1999)
3. *Kobluk v. Regents of Univ. of Minn.*, No. C8-97-2264, 1998 WL 297525 (Minn. App. June 9, 1998)
4. *Hansen v. Indep. Sch. Dist. 820*, No. C4-96-2476, 1997 WL 423567 (Minn. App. July 29, 1997)

**STATEMENT OF THE CASE**

This is an employment dispute between Plaintiff and her former employer, the University of Minnesota. However, Plaintiff seeks to make this dispute more personal and press-worthy by making meritless and unnecessary claims against her former supervisor, John Harris, a well-known United States Amateur Golf Champion and PGA Tour Professional. The District Court already dismissed one of Plaintiff's two claims against Harris (statutory fraud). Harris appeals the District Court decision denying dismissal of the only remaining claim against him (tortious interference with contract).

On or about August 30, 2010, the University hired Plaintiff as the Associate Head Coach – Women's Golf. Plaintiff reported to Harris, the Director of Golf for the University. Almost immediately after she began working for the University, Plaintiff became unhappy with her role on the coaching staff. Plaintiff alleged that she was not allowed to immediately carry out the duties she expected to perform, that the University changed her job duties and description, and that the University intended to give her a notice of non-renewal of her employment agreement and reassign her to another position

within the University. Plaintiff resigned, claiming she was constructively discharged, and signed a severance agreement on October 27, 2010. She later rescinded that agreement.

In her Amended Complaint, Plaintiff asserted claims against the University under the Minnesota Human Rights Act for sex and/or sexual orientation discrimination (Count I), sexual harassment (Count II), and reprisal/retaliation (Count III). She also asserted a claim against the University for statutory fraud under Minn. Stat. § 181.64 (Count V). Plaintiff asserted two claims against Harris: tortious interference with contract (Count IV); and statutory fraud under Minn. Stat. § 181.64 (Count V).

In response to the Amended Complaint, Harris moved, pursuant to Minn. R. Civ. P. 12.02(a), to dismiss Plaintiff's tortious interference claim for lack of subject matter jurisdiction. The Minnesota Supreme Court and Court of Appeals have consistently held that employment decisions by the University and University employees, like Harris, are subject to the exclusive jurisdiction of the Court of Appeals on a writ of certiorari. Plaintiff's tortious interference claim arises out of employment decisions that Harris allegedly made in his capacity as a University employee and Plaintiff's supervisor. Accordingly, the District Court lacks jurisdiction over that claim. Harris also moved, pursuant to Minn. R. Civ. P. 12.02(e), to dismiss Plaintiff's tortious interference and Minn. Stat. § 181.64 claims for failure to state a claim.

In an Order filed July 13, 2011, Hennepin County District Court Judge William R. Howard granted Harris' motion to dismiss Plaintiff's Minn. Stat. § 181.64 claim, but denied Harris' motion to dismiss Plaintiff's tortious interference with contract claim. Harris appeals the District Court's denial of his motion to dismiss Plaintiff's tortious

interference claim for lack of subject matter jurisdiction.<sup>3</sup> This Court should reverse the District Court's decision on that issue. Plaintiff's tortious interference claim should be dismissed so that this litigation proceeds between the only proper parties to this dispute – Plaintiff and the University.

### **STATEMENT OF THE FACTS**<sup>4</sup>

In July 2010, Harris became the Director of Golf for the University of Minnesota. (AA.3¶ 2.) After he was hired, Harris began looking for a new associate head coach for the University's women's golf team. (AA.4¶ 8.) Harris contacted Plaintiff, who was then living in North Carolina, about the position. (AA.4-5¶¶ 10, 12.) Plaintiff called Harris back and stated that she was inclined to accept the position. Harris told her to submit a resume, which Plaintiff did. (AA.5¶ 13.) The University posted the job of Associate Head Coach – Women's Golf on the University's website. Plaintiff accessed the website and read the job description. (Id. ¶ 14.)

On or about August 2, 2010, Plaintiff met with Harris to discuss the position. According to Plaintiff, Harris informed her that he could not hire his son-in-law, Ernie

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<sup>3</sup> This Court declined to review any other aspects of the District Court's Order on a discretionary basis.

<sup>4</sup> The factual background set forth in this section is based upon the allegations of the Amended Complaint which, for the purpose of Harris' motion to dismiss and this appeal, will be assumed to be true. In fact, the Amended Complaint contains numerous allegations that are false.

Rose, as the associate head coach, so he instead hired him as Director of Instruction for the golf program. (AA.5-6¶¶ 15-16.)<sup>5</sup>

On or about August 4, 2010, Plaintiff posted her resume and cover letter to the University's job application website. (AA.6¶ 17.) On August 21, 2010, Plaintiff interviewed for the Associate Head Coach position. The same day, Harris allegedly offered the job to Plaintiff, and Plaintiff accepted the job (Id. ¶ 1.), although a written employment contract was not signed until the end of August. (AA.43-44.)

On or about August 30, 2010, Plaintiff signed a written employment agreement – a “Memorandum of Agreement” – with the University Athletics Department. (AA.6 ¶¶ 19-23.) In her Amended Complaint, Plaintiff alleges that the very next day, Harris began to refuse to allow her to fulfill her role as the Associate Head Coach of the women's golf team, instead assigning her administrative tasks while limiting her interaction with the team and prospective student-athletes. (AA.7-8¶ 28.)

On or about September 17, 2010, Plaintiff met with two Athletics Department officials and Harris, and complained about Harris' treatment of her. (AA.8¶¶ 30-33.) At the meeting, Plaintiff was told that she would be provided with a revised job description, which she was provided the same day. (AA.9¶¶ 35-36.) Plaintiff “interpreted” the job description and an alleged statement by Harris that she take a few days to decide whether

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<sup>5</sup> This is one of many false statements in the Amended Complaint. In fact, Harris did not hire Ernie Rose. Brad James, the prior Director of Golf for the University, had hired Rose as the Director of Instruction for the golf program over a year before Harris ever worked for the University.

she was “on board” as an ultimatum that she either accept the new job description or quit. (AA.9¶¶ 37, 35.)

Under Plaintiff’s written employment agreement – the Memorandum of Agreement – her position was to last less than one year, ending on June 19, 2011. (AA.43-44.) Her base salary was set at \$44,000 per year. (*Id.*) The Agreement provided specifically that during the term of the contract, the University had the right to “non-renew” Plaintiff’s appointment and reassign Plaintiff “to other or no duties without just cause.” (AA. 44.)

On or about September 21, 2010, Plaintiff met again with the same University representatives, complained about her job, and requested that the University reconsider its position on her job description. (AA.10 ¶ 39.) Plaintiff claims that Harris’ alleged “mistreatment” of her – *e.g.*, excluding Plaintiff from various tasks and delegating administrative tasks to her when she wanted to be on the course instructing players – continued. (*Id.* ¶ 40.)

On or about October 12, 2010, Plaintiff met with the University’s Athletic Director, Joel Maturi (“Maturi”), whom she alleges gave her a choice to resign or comply with her supervisor’s requirements. (AA.10¶ 42, 44.) On or about October 20, 2010, Plaintiff met again with Maturi, at which time Maturi told Plaintiff the University would offer her a severance package. (AA.11¶¶ 47-48.) A few days later, the University even offered to transfer Plaintiff to a position at TCF Bank Stadium at her existing compensation. (*Id.* ¶ 49.) In response, Plaintiff decided to resign her employment at the University. On October 27, 2010, Plaintiff executed a separation agreement (under

which she would receive \$11,000 in severance). However, Plaintiff subsequently rescinded that agreement. (Id. ¶¶ 51-53.) The University informed Plaintiff that it intended to provide her with a notice of non-renewal of her Memorandum of Agreement and to reassign her to the sales position at TCF Stadium (as allowed by her written employment agreement). (Id. ¶¶ 54-55.) Plaintiff contends that this alleged “demotion” amounted to a “constructive discharge” of her employment. (Id. ¶ 56.)

Plaintiff alleges that the University’s actions (all consistent with its rights under her employment contract)<sup>6</sup> constituted discrimination, harassment, and/or retaliation based upon the fact that she is a woman and a homosexual. In her Amended Complaint, Plaintiff asserted the following claims against the University:

- Count I: Sex and/or Sexual Orientation Discrimination  
(Minnesota Human Rights Act)
- Count II: Sexual Harassment (Minnesota Human Rights Act)
- Count III: Reprisal/Retaliation (Minnesota Human Rights Act)
- Count V: Violation of Minn. Stat. § 181.64

(AA.12-16 ¶¶ 57-96.)

Rather than simply suing her employer (the University), Plaintiff strained to assert claims against her supervisor, Harris. Plaintiff included in her Amended Complaint the following claims against Harris:

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<sup>6</sup> Notably, Plaintiff did not even assert a breach of contract claim against the University. In other words, Plaintiff claims that Harris is liable for tortiously interfering with a contract that Plaintiff does not claim was breached.

Count IV: Tortious Interference with Contract

Count V: Violation of Minn. Stat. § 181.64.

(AA.14-16¶¶ 81-96.)

Harris brought a motion to dismiss Plaintiff's tortious interference claim under Minn. R. Civ. P. 12.02(a) (lack of subject matter jurisdiction) and Minn. R. Civ. P. 12.02(e) (failure to state a claim). Harris also moved to dismiss Plaintiff's Minn. Stat. § 181.64 claim under Minn. R. Civ. P. 9.02 and 12.02(e). (AA.132-133.) The University brought a separate motion to dismiss Plaintiff's Minn. Stat. § 181.64 claim.

In an Order filed July 13, 2011, Hennepin County District Court Judge William R. Howard granted Harris' and the University's motions to dismiss Plaintiff's Minn. Stat. § 181.64 claim. (ADD.5-ADD.6.) However, the District Court denied Harris' motion to dismiss Plaintiff's tortious interference with contract claim against him. (ADD.5.)

Harris appeals the District Court's denial of his motion to dismiss the tortious interference claim for lack of subject matter jurisdiction. The District Court's decision on that issue is immediately appealable as a matter of right. *Willis v. County of Sherburne*, 555 N.W.2d 277, 279 n.1 (Minn. 1996). The other decisions in the District Court's Order are not appealable as a matter of right – they are subject to discretionary review only. Harris brought a petition for discretionary review of the District Court's denial of Harris' motion to dismiss Plaintiff's tortious interference claim for failure to state a claim, and Plaintiff brought a petition for discretionary review of the District Court's dismissal of Plaintiff's Minn. Stat. § 181.64 claim. This Court denied both petitions. Thus, the only

issue to be decided in this appeal is whether the District Court lacked subject matter jurisdiction over Plaintiff's tortious interference claim.

### STANDARD OF REVIEW

"The existence of subject matter jurisdiction is a question of law, which [the Court of Appeals] reviews de novo." *Shaw v. Bd. of Regents of Univ. of Minn.*, 594 N.W.2d 187, 190 (Minn. App. 1999); *see also Tischer v. Housing Redev. Auth. of Cambridge*, 693 N.W.2d 426, 428 (Minn. 2005) (de novo review of denial of motion to dismiss for lack of subject matter jurisdiction).

### ARGUMENT

In Count IV of the Amended Complaint, Plaintiff alleges that Harris tortiously interfered with her employment contract with the University. Black letter Minnesota law clearly provides that this claim is subject to the exclusive subject matter jurisdiction of the Minnesota Court of Appeals on a writ of certiorari. The District Court erred when it denied Harris' motion to dismiss Count IV under Minn. Rule. Civ. P. 12.02(a) for lack of subject matter jurisdiction. This Court should reverse. *See Tischer*, 693 N.W.2d at 431 (denial of motion to dismiss reversed); *Dietz v. Dodge County*, 487 N.W.2d 237, 240-41 (Minn. 1992) (grant of motion to dismiss affirmed); *Hansen v. Indep. Sch. Dist. No. 820*, No. C4-96-2476, 1997 WL 423567, \*1 (Minn. App. July 29, 1997) (AA.55-56 (denial of motion to dismiss reversed); *Narum v. Burrs*, C8-97-563, 1997 WL 526304, \*1 (Minn. App. Aug. 26, 1997) (AA.45-46) (denial of motion to dismiss reversed); *Springer v. City of Marshall*, No. CX-94-81, 1994 WL 396324, \*1 (Minn. App. Aug. 2, 1994) (AA.53-54) (grant of motion to dismiss affirmed).

**I. THE EXCLUSIVE METHOD FOR CHALLENGING UNIVERSITY EMPLOYMENT DECISIONS IS A WRIT OF CERTIORARI TO THE COURT OF APPEALS .**

Minnesota appellate courts have appropriately granted deference to the co-equal executive branch of the State of Minnesota. “The University is part of the executive branch of state government, and as such, its decisions are given deference by this court under the principle of separation of powers.” *Williams v. Bd. of Regents of the Univ. of Minn.*, 763 N.W.2d 646, 651 (Minn. App. 2009) (quoting *Maye v. Univ. of Minn.*, 615 N.W.2d 383, 385 (Minn. App. 2000)). This deference is reflected in the “certiorari rule,” which requires that “discretionary decisions be granted deference by the judiciary to avoid usurpation of the executive body’s administrative prerogatives.” *Tischer*, 693 N.W.2d at 429 (citing *Dietz*, 487 N.W.2d at 239).

Minn. Stat. § 606.01 authorizes writs of certiorari to “correct any proceeding” and requires any party seeking a writ of certiorari to apply to the Minnesota Court of Appeals. Certiorari review by the Minnesota Court of Appeals pursuant to Minn. Stat. § 606.01 is the exclusive vehicle for reviewing executive branch (specifically including the University) employment decisions. *Shaw*, 594 N.W.2d at 191. According to the Minnesota Supreme Court, “[b]ecause a direct action in the district court would contemplate de novo review, we have concluded that review by certiorari is required to provide appropriate deference and to minimize the judicial intrusion into administrative decision-making.” *Tischer*, 693 N.W.2d at 429.

The certiorari rule applies to claims filed against the University as well as claims filed against University personnel, like Harris, acting in their official capacities. *See*

*Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 333 (Minn. App. 2007); *Kobluk v. Regents of the University of Minnesota*, C8-97-2264, 1998 WL 297525, \*4 (Minn. App. June 9, 1998) (AA.61-64). Minnesota courts have specifically held that a University employee's claim filed in district court against her supervisor for tortious interference with contract should be dismissed for lack of subject matter jurisdiction pursuant to the certiorari rule. *See Grundtner*, 730 N.W.2d at 333 (district court properly declined to exercise jurisdiction over tortious interference with prospective economic advantage claim against individual University employee); *Kobluk*, 1998 WL 297525 at \*4 (district court erred in exercising jurisdiction over tortious interference with contract claim against individual University employee); *see also Narum*, 1997 WL 526304 at \*2 (district court erred in exercising jurisdiction over intentional interference with contractual rights claim against individual Fillmore County employee).

The certiorari rule applies to all University employment decisions, not just decisions to terminate an employee. *See Shaw*, 594 N.W.2d at 191; *Kobluk*, 1998 WL 297525 at \* 3. Minnesota courts have recognized that a district court lacks jurisdiction based on the certiorari rule over University decisions involving:

- Hiring: *see Michurski v. City of Minneapolis*, No. C8-02-238, 2002 WL 1791983, at \*3-4 (Minn. App. Aug. 6, 2002) (AA.47-50) (City of Minneapolis's decision not to hire plaintiff for new position was reviewable on writ of certiorari only); *Hartzberg v. Rosemount-Apple Valley-Eagan Indep. Sch. Dist. No. 196*, No. C8-96-1878, 1997 WL 292175, \*1 (Minn. App. June 3, 1997) (AA.51-52) (reviewing, on writ of certiorari, county decision not to hire coach who had previously resigned);
- Firing: *Tischer*, 693 N.W.2d at 429;

- Reinstatement: *see Dokmo v. Indep. Sch. Dist. No. 11*, 459 N.W.2d 671, 673 (Minn. 1990) (writ of certiorari is the “only method of appealing school board decisions on teacher related matters,” including decision not to reinstate teacher);
- Tenure: *Kobluk*, 1998 WL 297525 at \* 3;
- Promotions: *see Bahr v. City of Litchfield*, 420 N.W.2d 604, 606 (Minn. 1988) (“It is therefore well established that the proper vehicle for obtaining judicial review of the [police commission’s decision to promote two officers other than the plaintiffs] is a writ of certiorari issued pursuant to Minn. Stat. § 606.01 (1986).”); and
- Changes in responsibilities: *see Hansen*, 1997 WL 423567 at \*1 (school district’s decision not to allow plaintiff to perform contractual duties was reviewable on writ of certiorari only).

The Minnesota Supreme Court has declared it irrelevant how a plaintiff attempts to characterize a challenge to a public employment decision. *Willis*, 555 N.W.2d at 282. “Regardless [of how] the claim is cloaked,” courts are limited to certiorari review when the claim involves an inquiry into employment-related decisions. *Id.*

Plaintiff’s tortious interference with contract claim against Harris (a University employee and Plaintiff’s supervisor) arises directly from and necessarily requires review of the University’s employment decisions related to Plaintiff and is, therefore, subject to the certiorari rule. Plaintiff challenges Harris’ alleged decision not to allow her to perform her duties as Associate Head Coach – Women’s Golf, the alleged decision to change her job duties, her alleged “demotion” to a new position in the University, and her “constructive discharge.” All of these alleged decisions are discretionary employment-related decisions. All are subject to the exclusive jurisdiction of the Court of Appeals on a writ of certiorari. *See, e.g., Tischer*, 693 N.W.2d at 429 (termination of

employment); *Bahr*, 420 N.W.2d at 606 (failure to promote); *Hansen*, 1997 WL 423567 at \*1 (refusal to allow employee to perform duties).

Because the District Court clearly lacked subject matter jurisdiction over Plaintiff's tortious interference claim, it was reversible error to deny Harris' motion to dismiss that claim under Rule 12.02(a). See *Tischer*, 693 N.W.2d at 431 (denial of motion to dismiss reversed); *Hansen*, 1997 WL 423567 at \*1 (denial of motion to dismiss reversed); *Narum*, 1997 WL 526304 at \*1 (denial of motion to dismiss reversed).

**II. THE DISTRICT COURT'S DENIAL OF HARRIS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION IS CONTRARY TO MINNESOTA LAW.**

In denying Harris' motion to dismiss Plaintiff's tortious interference with contract claim, the District Court created exceptions to the certiorari rule that are unsupported by Minnesota law. The District Court gave two reasons for denying Harris' motion to dismiss on jurisdictional grounds: (1) Plaintiff alleged that Harris acted with malice and bad faith and, therefore, outside the scope of his employment with the University; and (2) Plaintiff's claim did not involve any decision to terminate her employment. (ADD.11.) Minnesota appellate courts have never adopted such exceptions. Indeed, no matter how Plaintiff's claim is "cloaked," it implicates University employment decisions that can be reviewed by the Court of Appeals on a writ of certiorari only. See *Willis*, 555 N.W.2d at 282.

**A. Harris' Alleged Personal Motivations Are Irrelevant to the Jurisdictional Analysis.**

The first reason the District Court denied Harris' motion to dismiss Plaintiff's tortious interference claim was that, according to the District Court, Plaintiff sufficiently alleged that Harris acted with "malice" and "bad faith," which removed Plaintiff's claim against Harris from the certiorari rule:

Taking the facts alleged as true, which a Court must due [sic] upon a Motion to Dismiss pursuant to Rule 12(e) [sic], the Court must assume for purposes of this motion that Mr. Harris [sic] actions towards [Plaintiff] in allegedly not allowing her to perform the job duties laid out in her original memorandum of agreement fell outside the scope of his official responsibility as Director of Golf for the University Athletics Department because he acted with malice and bad faith. If Mr. Harris was acting outside his official scope of responsibility, his actions would not constitute a public employment decision pursuant to *Willis* or *Grundtner* and Plaintiff's claims are not subject to the rule regarding writ of certiorari for claims filed against public entities.

(ADD.10-11.) The District Court cited no case law to support this conclusion. There is none. To the contrary, in several analogous cases, courts have held that a public employee's tortious interference claim against a supervisor may only be reviewed by the Court of Appeals on a writ of certiorari. *See, e.g., Grundtner*, 730 N.W.2d at 333; *Kobluk*, 1998 WL 297525 at \*4; *Narum*, 1997 WL 526304 at \*2. The supervisor's alleged malice towards the employee is irrelevant to the jurisdictional analysis.

The case of *Grundtner v. University of Minnesota*, 730 N.W.2d 323 (Minn. App. 2007), makes clear that so long as the official is engaging in conduct within the scope of his employment responsibilities, motivation for the challenged action is irrelevant.

*Grundtner* involved disputes between a University architect, Grundtner, and the head of

his department, Perkins. Perkins informed Grundtner that his position was being eliminated, assigned Grundtner to a temporary position in which he would work from home, banned Grundtner from University offices (even though Grundtner was still teaching a class there), and terminated his email access. *Id.* at 326-27. After his temporary assignment concluded, Grundtner sued Perkins for intentional interference with a business advantage. *Id.* at 332. Grundtner argued that the district court had subject matter jurisdiction because his claims against Perkins were based on Perkins' individual actions, which were motivated by personal reasons in an effort to hide illegal conduct. *Id.*, at 333.

The Minnesota Court of Appeals flatly rejected that argument. Despite Grundtner's allegations about Perkins' personal motivations, this Court ruled that "Perkins acted within his authority and capacity as a university employee. [Grundtner's intentional interference] claim does not affect anything that Perkins did as a private individual or in a private capacity." *Id.* (emphasis added); *see also Narum*, 1997 WL 526304, \*2 (certiorari rule applied to claims about supervision and request for termination of an employee where the claims had "no relationship to anything appellant did while acting as a private individual or in a private capacity"). As the University's sole decision-maker with respect to Grundtner's employment, Perkins acted on behalf of the University, and his decisions could be reviewed only by writ of certiorari. *Grundtner*, 730 N.W.2d at 333.

This case law makes clear that it is not the motive of the supervisor, but rather whether the conduct involved the supervisor's activities as a University

employee/supervisor as opposed to actions as a private individual or in a private capacity, that determines whether the certiorari rule applies. If the rule were otherwise, the certiorari rule would be meaningless because any plaintiff could avoid the exclusive subject matter jurisdiction of the Minnesota Court of Appeals by merely alleging bad faith or bad motive by the supervisor whose decisions are being attacked. No Minnesota appellate court has ever adopted such an interpretation of the certiorari rule. This Court should not make new law by doing so now.

Plaintiff's allegations against Harris – such as the alleged refusal to allow Plaintiff to travel with the team, the delegation of administrative tasks, instructions regarding the contact she could have with team members or recruits – are all inherently part of Harris' supervisory responsibilities as the University's Director of Golf and Plaintiff's supervisor. Plaintiff does not make any allegations that relate to matters in Harris' private life or activities outside his employment with the University. Harris' alleged personal motivations do not change the fact that this is a work-related dispute arising out of alleged decisions affecting Plaintiff's employment at the University. Minnesota case law is clear that, in this context, Harris' actions are reviewable only by the Court of Appeals on a writ of certiorari.

**B. Even if Harris' Alleged Personal Motivations Were Relevant, Plaintiff Has Failed to Plead Malice or Bad Faith by Harris.**

Even if Harris' alleged personal motivations were relevant – which they are not – Plaintiff has failed to plead that Harris acted with malice and bad faith. The United States Supreme Court has held that a plaintiff's complaint must go beyond “labels and

conclusions” or the “speculative” presentation of a claim. *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 555-57 (2007). The Minnesota Supreme Court has adopted this “clarification” to the motion to dismiss standard. *See Barr v. Capella University*, 788 N.W.2d 76, 80 (Minn. 2010); *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008). The complaint must state “enough factual matter” or “factual enhancement” to suggest, short of “probability,” that there are “plausible grounds” for a claim – a pleading with “enough heft” to show entitlement to relief. *Barr v. Capella University*, 765 N.W.2d 428, 437 (Minn. App. 2009), *rev’d on other grounds*, 788 N.W.2d 76 (Minn. 2010) (citing *Twombly*, 550 U.S. at 556-67). To survive a motion to dismiss, a complaint must contain enough facts to state a claim to relief as plausible on its face, and “threadbare” recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Twombly*, 550 U.S. at 570. The mere claim that a defendant acted “willfully and maliciously” amounts to nothing more than a “formulaic recitation of the elements” of a claim. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949, 1954 (2009).

Plaintiff’s threadbare allegation that Harris acted with “malice” and “bad faith” is insufficient under Rule 12. Plaintiff must allege specific facts to support that allegation – which Plaintiff has failed to do.

Plaintiff argued in her briefing to the District Court that Harris acted maliciously because he intended to have Ernie Rose (Harris’ son-in-law), not Plaintiff, serve as the Associate Head Coach – Women’s Golf. AA.96 at 13.) Even if Plaintiff made that allegation in the Amended Complaint (which she did not), that allegation fails, as a matter of law, to support Plaintiff’s allegation that Harris acted with “malice.” The Minnesota

Supreme Court has defined “malice” as “personal ill-will, spite, hostility, or a deliberate intent to harm the plaintiff employee.” *Nordling v. N. States Power Co.*, 478 N.W.2d 498, 507 (Minn. 1991). The issue would thus be whether Harris allegedly felt “personal ill-will, spite, [or] hostility” towards Plaintiff or “deliberately inten[ded] to harm” Plaintiff. The issue is not Harris’ alleged intentions with respect to Rose. By alleging that Harris favored Rose, Plaintiff does not allege that Harris acted with “malice” towards Plaintiff.

At the hearing on Harris’ motion to dismiss, Plaintiff made the additional argument that Harris’ alleged “malice” was based on alleged gender and sexual preference discrimination. (4/27/11 Hearing Transcript at 16-17.) However, even if Harris discriminated against Plaintiff (and he did not), the legislature has determined that only the employer (here, the University) and not the individual supervisor may be sued for such discrimination. *See* Minn. Stat. §§ 363A.08, subd. 2 (discriminatory employment practices are practices by an “employer”); 363A.03, subd. 16 (defining employer as “a person who has one or more employees” and does not include other employees of the employer). The MHRA does not provide for an employment discrimination claim directly against Harris, and Plaintiff is therefore precluded from asserting one. Plaintiff should not be allowed to circumvent the MHRA’s liability limitations and sue Harris for conduct that otherwise would not subject him to individual liability by disguising an alleged discrimination cause of action as one for tortious interference with contract.

Plaintiff alleges no other facts to support her conclusory allegations that Harris acted with malice and bad faith when he allegedly limited Plaintiff's responsibilities. To the contrary, the only facts properly alleged in Plaintiff's Amended Complaint indicate that Harris was at all times acting within the course and scope of his employment with the University. Accordingly, his actions may only be reviewed on a writ of certiorari.

**C. The Certiorari Rule Applies to All University Employment Actions, Not Just The Termination of Employment.**

The second reason the District Court denied Harris' motion to dismiss under Rule 12.02(a) was that, according to the District Court, Harris' alleged actions did not relate to the termination of Plaintiff's employment. (ADD.11.) There are at least two significant deficiencies with this conclusion.

First, the District Court erroneously assumed that employment termination decisions are the only decisions subject to certiorari review. In fact, other employment actions – including the limitation or elimination of an employee's duties, promotion of one employee over another, or the decision not to grant an employee tenure – are also subject to the Court of Appeals' exclusive jurisdiction.

In *Hansen v. Indep. Sch. Dist. No. 820*, No. C4-96-2476, 1997 WL 423567 (Minn. App. July 29, 1997), an employee "sought to challenge the school district's decision to not request him to perform any services during the term of [his employment] agreement." *Id.* at \*1. The court determined that reviewing "the school district's decision in this case necessarily requires the court to scrutinize the manner in which the school district

discharged its administrative responsibilities,” and therefore concluded that a writ of certiorari was necessary. *Id.*

In *Bahr v. City of Litchfield*, 420 N.W.2d 604 (Minn. 1988), two police officers challenged the City of Litchfield’s decision to promote two other officers. The court decided it was “well established” that a writ of certiorari was the proper way to review the City’s decision. *Id.* at 606.

In *Kobluk*, a University professor’s (Kobluk) tortious interference claim against his department head (Dr. Fetrow) based on the failure to grant tenure to the professor was subject to review only by writ of certiorari. 1998 WL 297525 at \*3. This Court reasoned:

Fetrow’s actions were all connected to his teaching assignments or to Kobluk’s tenure review. The University’s Board of Regents, President, and department heads must be given latitude in making teaching assignments for those employed in various departments. A review of the University’s and Fetrow’s actions would require a district court to review the University’s academic decision-making and tenure review processes, something the University already did when its senate judicial committee held hearings on the matter. “[T]he internal management of the University has been constitutionally placed in the hands of the regents alone.” **Because these claims cannot be examined without examining the University’s internal management processes, the only manner of review is by writ of certiorari to this court.**

*Id.* at \*3 (citations omitted; emphasis added). The Court deferred to the University’s power to “control and manage the University’s affairs,” and held that the district court lacked jurisdiction over Kobluk’s claims. *Id.* at \*4.

None of these cases involved the termination of an employee. Yet the courts decided in each of these cases that the employment decision at issue was subject to

certiorari review. Moreover, the conduct challenged in *Hansen* and *Bahr* is practically identical to the conduct Plaintiff challenges here: limiting an employee's duties and favoring one staff member over another. This conduct can only be reviewed by writ of certiorari.

Second, even if the certiorari rule did apply only to employment termination decisions, Plaintiff's tortious interference claim against Harris is directly related to the termination of her employment. The gravamen of the claim against Harris is that he allegedly engaged in conduct as her supervisor that limited her duties as compared to what Plaintiff allegedly expected, and that other Athletics Department personnel took further actions regarding her employment that allegedly made her work environment "intolerable" and led to Plaintiff's "constructive discharge." (AA.11¶¶ 50, 56.)

Plaintiff's claim against Harris was not separate from the termination of her employment – according to Plaintiff's own Amended Complaint, Harris' alleged conduct as Plaintiff's supervisor allegedly forced her termination and was the very reason she left the University. The certiorari rule does not distinguish between claims against an employer for termination of employment and claims against a manager for conduct that led to termination. *See Grundtner*, 730 N.W.2d 323 (tortious interference claim against supervisor was inseparable from claim against University for termination of employment); *Narum*, 1997 WL 526304 (same).

No matter how Plaintiff characterizes the nature of her tortious interference claim, she cannot escape the certiorari rule. The rule applies to all discretionary employment-related decisions, so Plaintiff's claim certainly should be dismissed. Even if the rule is

limited to employment termination-related decisions, Plaintiff's claim still should be dismissed.

### CONCLUSION

This Court should honor the constitutional separation of powers between the judicial and executive branches, and grant the deference required by well-established case law to Harris, an official of the executive branch, on decisions involving the employment of one of his direct reports. This deference is embodied by the certiorari rule, under which executive branch employment decisions are subject to the exclusive jurisdiction of this Court on a writ of certiorari. This Court is bound to implement the certiorari rule in this case by reversing the District Court and requiring that a writ of certiorari is Plaintiff's sole method of challenging Harris' decisions with respect to her employment at the University.

At its heart, this is a dispute between Plaintiff and the University. Plaintiff has no valid claims against Harris and no basis to drag him into this litigation. The District Court correctly dismissed Plaintiff's Minn. Stat. § 181.64 claim against Harris. The District Court should have dismissed Plaintiff's remaining tortious interference claim against Harris as well. The District Court plainly lacks subject matter jurisdiction over that claim. This Court should therefore reverse the District Court's denial of Harris' motion to dismiss Plaintiff's tortious interference claim.

Dated: October 25, 2011

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App.

P. 132.01. The length of this brief is 5,682 words. This brief was prepared using  
Microsoft Word.

Dated: October 25, 2011

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