

NO. A04-2493

State of Minnesota
In Court of Appeals

Gregory A. Kvidera,

Respondent,

vs.

Rotation Engineering and Manufacturing Co.,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Rotation and Kvidera agreed to specific dates, but they did not agree to modify the employment relationship from at will termination to termination only for cause. The two contracts signed by the parties only discuss Kvidera's title, compensation, and bonus; the contracts are silent as to termination. The district court erred in determining that the parties had agreed to terminate only for cause and in requiring that Rotation defend its decision to terminate Kvidera after it had lost confidence in his performance. Rotation was entitled to terminate Kvidera for any reason or no reason at all.

Further, the jury's decision to award Kvidera a bonus for the end of 2002 was not an award of wages or commissions under Minn. Stat. § 181.13 and did not entitle Kvidera to receive a penalty. The district court's analysis on this point is in error because it broadly construes a penal statute, which must be strictly construed. The district court's award of penalties under this statute must be reversed. In addition, the district court erroneously awarded Kvidera attorney's fees for Kvidera's prosecution of a common law breach of contract claim, yet there is no provision in either a statute or the parties' agreement to support such an award. The award of attorney's fees must be reversed and remanded, with instructions to segregate the fees for the statutory claim.

I. KVIDERA'S EMPLOYMENT WITH ROTATION WAS TERMINABLE AT WILL

A. The Dates In The Parties' Contracts Refer Only To How Kvidera's Bonus Would Be Calculated

The parties agree that Kvidera began as an at will employee at Rotation and that the two contracts signed by both parties do not contain a clause stating that Kvidera was

terminable only for cause. (See Respondent's Br. at 8; T. 289 – Kvidera testified that neither contract says anything about termination.) Kvidera argues that the original agreement for at will termination was modified by the dates found in the two contracts. (A. 44-45.) The main premise of Kvidera's argument is flawed, however. The dates in the two contracts refer only to how his compensation was to be calculated; the dates do not guarantee employment for two one-year periods.

The date provisions included in these contracts can only be read to relate to Kvidera's salary and bonus, particularly, how the bonus would be calculated. Because the bonus plans established several different criteria on which Kvidera's bonus would be measured and rated, the parties provided dates to define measurements and ratings. A company's fiscal year is a prudent measure for calculating an employee's compensation. Kvidera admitted at trial that his bonus was determined by the company's fiscal year. (T. 260, 269.)

In arguing that these dates imply the duration of Kvidera's employment, Kvidera discusses only part of the language in the 2002 contract, the contract in place at the time of Kvidera's termination. The contract states

Dates: **Salary starts first pay check in June, 2002**
 Bonus below is for fiscal year 2003 (Bonus per 2002
 contract to be paid as per 2002 contract)
 Agreement runs through June 30, 2003

(A. 45, emphasis original.) The "Dates" section makes clear that the dates state when Kvidera's increased salary begins and that the bonus is to be calculated pursuant to the fiscal year. The provision does not include anything about Kvidera's termination or a

one-year duration to his employment and does not state that Kvidera's employment ends on a particular date.

Kvidera's argument relies on pulling the contract language out of context. Kvidera exclusively discusses the language stating, "Agreement runs through June 30, 2003." (Respondent's Br. at 9-10.) Plainly read, the "agreement" is for salary and bonus. Nothing within the contract indicates that the parties intended this language to apply to the duration or termination of the employment relationship instead of the payment of salary and bonus.

Rotation's reading of the contract is not only consistent with the rest of the "Dates" clause, but it is also consistent with other provisions in the contract. The 2002 contract includes other dates that occur after June 30, 2003, the date on which Kvidera argues his guaranteed employment would automatically end. If Kvidera's employment was to end on June 30, 2003, as Kvidera argues, the inclusion of the provision "Annuity/life insurance begin discussions September 1, 2002 and reach agreement by *July 1, 2003*" would not make sense. (A. 45, emphasis added).

Further, the context in which the second contract was signed supports the conclusion that the dates relate only to Kvidera's bonus and salary, rather than the duration of his employment. The parties' first contract states merely "Dates: 7-1-01 thru 6-30-02," yet the agreement is signed on August 3, 2001. (A. 44.) The contract was signed after the alleged duration of Kvidera's employment began because the dates "7-1-01 thru 6-30-02" did not actually reference the duration of the employment relationship

but rather established how the bonus was to be calculated, in other words, pursuant to the fiscal year.

The second contract states that Kvidera's title is President/CEO as of June 1, 2002, and according to Kvidera's assertion, terminates on June 30, 2003. The parties signed the second contract on May 31, 2002. If the dates included in these contracts refer to the duration of Kvidera's employment, then the early new contract makes no sense. If the parties' first contract guaranteed employment through June 30, 2002, there would have been no need for the parties to sign a second employment contract that started on June 1, 2002. On the other hand, if the first contract referenced compensation only and Rotation was seeking to entice Kvidera to stay by increasing his compensation, the early new contract makes sense. In fact, the second contract significantly increased Kvidera's compensation. (T. 141-42.)

Moreover, Kvidera's position relies on an inaccurate understanding of the record evidence. Kvidera's brief argues, "Lorence hurried to sign Kvidera to the second contract before the first term expired," implying that this was because Lorence was worried about Kvidera's term expiring. (Respondent's Br. at 9.) No record evidence is cited to support this assertion, and, in fact, Kvidera and Lorence both testified that Kvidera began preparation for the new "compensation proposal" in 2002. (T. 136; T. 590.) Later, Lorence suggested changes. (T. 136; T. 620-21.) In light of Kvidera's efforts to demand increased compensation, a more plausible construction of why the parties entered into an early agreement for 2002-03 was to make sure the at will relationship continued.

B. Kvidera's Arguments Impose Higher Standards On Rotation Than The Law Requires

Kvidera argues that Rotation could have written the contract differently if Lorence intended the contract to remain at will, but the argument imposes higher standards on Rotation than the law requires. First, there is no reason to add a provision, as Kvidera suggests (Respondent's Br. at 11), that the contract does "not constitute an offer of an employment contract." In this case, the two contracts described the parties' efforts to agree on compensation and were intended as such. Indeed, Kvidera testified that, when he started as Rotation's general manager, they agreed on a salary of \$75,000 and "then we would – we are going to develop a bonus plan on performance of the company and different – some subjective things, some objective things." (T. 74.)

Furthermore, there is no case law supporting Kvidera's suggestion that Rotation should have included a statement in the contract that the contract did not alter the at will relationship. Initially, Kvidera had already signed a written acknowledgement¹ that the relationship was at will and would be changed only by formal agreement. (A. 62.) In

¹ Kvidera signed this written acknowledgement upon receipt of Rotation's employee handbook. Kvidera's brief misstates Rotation's position when it asserts that the handbook was not a binding contract. (See Respondent's Br. at 13-14.) First, Rotation has always maintained that the handbook reflected the parties' at will employment. (RA 40-41.) Second, the handbook states, "this employee handbook is not a contract, either express or implied. The company adheres to the policy of employment-at-will, which means that either you or the company may terminate your employment at any time, for any reason, with or without cause and with or without notice." (A. 85.) Kvidera, however, testified at trial that the handbook "generally speaking" applied to him, except for the "at will part." (T. 288-89.) The legal significance of the handbook should not be overstated; Kvidera admits he began his employment at will. (Respondent's Br. at 8.) The relevant issue is whether the parties changed that relationship, not in the handbook, but in the 2001 and 2002 contracts.

addition, while such a provision certainly makes sense with the benefit of hindsight and this litigation, Rotation is aware of no case, and Kvidera has failed to cite one, suggesting that the law requires an employer to re-assert that an agreement for compensation does not alter an existing at will relationship. To the contrary, the law presumes an at will relationship unless the parties specifically agree otherwise. *Harris v. Mardan Bus. Sys. Inc.*, 421 N.W.2d 350, 354 (Minn. Ct. App. 1988).

C. Kvidera's Case Law Does Not Stand For The Propositions Presented

Kvidera argues that it is misleading to state that employment contracts silent as to termination are at will. (Respondent's Br. at 12.) The cases cited by Kvidera, however, do not contradict this basic principle of employment law enumerated in *Harris*. In fact, *Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc.*, 372 N.W.2d 412, 415 (Minn. Ct. App. 1985), specifically states the very same principle: "Where an employment or dealership agreement is silent as to whether it is terminable at-will or for-cause, Minnesota law construes it to be terminable at-will." In *Dorso*, this Court held that the contract was terminable at-will. *Id.*

Kvidera also relies on *Audette v. Northeast State Bank of Minneapolis*, 436 N.W.2d 125, 126 (Minn. Ct. App. 1989) (Respondent's Br. at 12), for the proposition that an employee's at will status can be modified if the parties agreed to a specific duration or conditions of termination, but the decision neither states nor implies such a proposition. Rather, *Audette* stands only for the principle that a company's policy manual or handbook can modify an at will employment relationship. *Id.* at 126. It does not signal what

language – duration or termination – the handbook must contain in order to modify an employment relationship to one terminable only for cause.

Finally, Kvidera cites *Olmstead v. Volkmuth*, No. CX-89-468, 1990 WL 52, *1 (Minn. Ct. App. Jan. 2, 1990) (unpublished) (RA 43-44), as noting “that an employment contract for a term of five years, and silent regarding termination, was terminable only for cause.” (See Respondent’s Br. at 13.) The decision says nothing of the kind. The contract involved was not silent as to termination but provided for termination of employment upon sale of the business. *Id.* The issue decided and appealed was whether the employer had good cause to terminate the employee. *Id.*

Contrary to Kvidera’s assertions, the law in Minnesota is that, without an express agreement regarding termination for cause, an employee must provide “clear and unequivocal language by the employer evidencing an intent to provide job security.” *Gunderson v. Alliance of Computer Prof’ls, Inc.*, 628 N.W.2d 173, 182 (Minn. Ct. App. 2001). In this case, the contracts do not demonstrate that the parties expressly agreed to termination for cause only and there is no clear and unequivocal language by Rotation that guarantees employment to Kvidera either in 2001 or 2002. As such, the relationship was terminable whenever Lorence, as owner, made “his call” and the district court erred in submitting the breach of contract claim to the jury.

II. KVIDERA’S BONUS IS NOT A WAGE UNDER MINN. STAT. § 181.13

A. Bonuses Are More Like Severance Pay Than Vacation Pay

Minn. Stat. § 181.13 is a penal statute and must be strictly construed. *Chatfield v. Henderson*, 252 Minn. 414, 410, 90 N.W.2d 227, 232 (1958). Disregarding this principle

of statutory construction, Kvidera argues that a bonus is similar to vacation pay, which this Court included as a wage under Minn. Stat. § 181.13 in *Brown v. Tonka Corp.*, 519 N.W.2d 474 (Minn. Ct. App. 1994). Kvidera's bonus, however, is more similar to severance pay, which is not a wage under Minn. Stat. § 181.13, than it is to vacation pay.

A careful review of case law makes clear that vacation pay has been compared to wages where it is based upon the length of service and time worked, in other words, where it is compensation directly for the employee's services. On the other hand, severance pay and bonuses (like the bonus in Kvidera's 2001 contract) are not compensation for an employee's services and are not based upon the length of service and time worked. Severance pay and bonuses are paid on the happening of certain events or meeting of conditions, for example, voluntary or involuntary termination, and company profitability. Minn. Stat. § 181.13 indicates that penalties are available only for unpaid compensation for services (earned wages and commissions), not unpaid severance pay or bonuses.

In *Brown*, 519 N.W.2d at 475, the employer agreed to pay its employees' vacation pay for their earned and unused vacation time. In determining that such pay was a wage, this Court stated "It is beyond dispute that an agreement to pay vacation pay to employees made to them before they performed their services, *and based upon length of service and time worked*, is not a gratuity but is a form of compensation for services." *Id.* at 477 (emphasis added). As the *Brown* decision recognized, vacation time is usually based on time worked. In most employment situations an employee earns a certain amount of vacation time for each day, week, or month worked. Accordingly, when the

employee receives vacation pay for earned and unused vacation time, the money he or she receives was "by the day, hour, week, month, or piece or by commissions" as required by the language of Minn. Stat. § 181.13. Hence, vacation pay is encompassed by the requirements of Minn. Stat. § 181.13.

On the other hand, as Rotation argued in its opening brief, a bonus is not calculated by the day, hour, week, or month. Rather, a bonus is more similar to severance pay, which this Court has held falls outside wages pursuant to Minn. Stat. § 181.13. In finding that severance pay is different from vacation pay in *Cole v. Holland Neway Int'l, Inc.*, No. A03-609, 2004 WL 503751 (Minn. Ct. App. Mar. 16, 2004) (unpublished) (A. 150-52), this Court found important the fact that "an employee is not entitled to use his severance benefit at any time." *Id.* at *3. The Court recognized that severance benefits are not "owing" simply upon the employee meeting certain conditions. *Id.* An event, such as voluntary termination or retirement, has to occur in order for the severance benefits to be owed to the employee.

Kvidera erroneously attempts to distinguish *Cole* by arguing that, unlike severance pay, bonuses are earned prior to termination, but the distinction is immaterial. The Court's analysis in *Cole* did not depend on severance pay being paid after termination. The Court instead explained that because an employee is not entitled to severance pay at any time, it is not earned and owing and the statutory penalties under Minn. Stat. § 181.13 do not apply. *Id.* Similar to severance pay, a bonus is not "owing" until specific conditions have been met.

Further, unlike vacation pay, Kvidera's bonus was discretionary, despite Kvidera's arguments to the contrary. The factors used to determine Kvidera's bonuses were discretionary and dependent on certain requirements being met, some of which were entirely subjective. For example, in the parties' 2001 contract, Kvidera's bonus was calculated on the company's profits, on-time delivery and a quality rating, some of which are outside of Kvidera's control. (A. 44.) Furthermore, one of the criterion on which Kvidera's bonus was calculated was "CSR group," meaning, customer service response. (*Id.*) The bonus plan specifically stated that this criterion was subjective. (*Id.*) In the parties' 2002 contract, Kvidera's bonus was calculated on factors such as "Cleanliness" and "Acquisition or 2 new proprietary products," both of which the contract states are subjective factors. (A. 45.)

Finally, like the employer in *Cole*, 2004 WL 503751, at *3, Rotation did not fail to pay base salary, but legitimately disagreed with its employee that a bonus had been earned. Indeed, after hearing the parties' arguments on summary judgment, the district court held that the whether the bonus was owed presented a question of fact for the jury.

Each side has asserted through their memoranda and affidavits that their own respective method for calculating the bonus criteria is the appropriate method. The Court find that the evaluative methods agreed upon by the parties is not clearly detailed under the contract (e.g. how to measure on-time delivery, how to measure the quality rating and so forth) and will appropriately go before a trier of fact at trial. There are, then, disputed material facts as to whether or not Rotation altered the method used to calculate its performance to deny Kvidera his bonus, what the intended evaluative method was, and, ultimately, if Kvidera earned his 2002 bonus.

(A. 94.)

Rotation's Deb Cooper testified that Lorence "okayed" bonus figures presented by Kvidera in July 2002. (T. 453-55; RA 38.) However, Kvidera testified that he did not tell Lorence he had final numbers when he requested his 2002 bonus and he knew adjustments would be made to year-end figures in computing his final bonus. (T. 272-74.)² Rotation's accountant testified that, when Kvidera presented his request for \$17,000 to Rotation, year-end figures were not available. (T. Ex. 6; T. 781.) After Rotation's accountant finalized year-end figures, Rotation contended Kvidera's bonus was substantially less. (T. 781-85; T. 519-23.) While the jury agreed with Kvidera's computation and not Rotation's, there is no basis to conclude that Kvidera's bonus was a "non-discretionary" and "wholly contractual" bonus, as Respondent's Brief asserts.

B. The Cases On Which Kvidera Relies Are Distinguishable

Kvidera mistakenly relies on several cases from foreign jurisdictions for the proposition that bonuses are wages. First, *Knutson v. Snyder Indus., Inc.*, 436 N.W.2d 496 (Neb. 1989), and *Rohr v. Ted Neiters Motor Co.*, 758 P.2d 186 (Colo. Ct. App. 1988) (*see* Respondent's Br. at 18-19), both involve employees who resigned from employment and were not involuntarily discharged. Minnesota distinguishes between the two situations in two separate statutes for unpaid wages. *See* Minn. Stat. § 181.13 (unpaid wages upon involuntary discharge); Minn. Stat. § 181.14 (unpaid wages upon voluntary discharge). Minn. Stat. 181.14, which covers employees who resign, is different from

² Although Kvidera asserted that Rotation "cooked the books" (T. 228), he also acknowledged that the final profit and loss statements prepared by Rotation's accountants after he was terminated reflect a decrease in the amount of his bonus. (T. 226-33.)

Minn. Stat. § 181.13 and does not include the provision "whether the employment was by the day, hour, week, month, or piece or by commissions." It is that language, in part, that suggests that bonuses are not included in Minn. Stat. § 181.13. (See discussion, Appellant's Opening Br. at 21-22.)

Furthermore, Colorado's definition of wage is much broader than the language adopted by the Minnesota legislature in Minn. Stat. § 181.13.³ In *Rohr*, the Colorado appellate court applied a definition of wages included in Colorado's wage penalty statute and stressed that wage includes "all amounts . . . whether the amount is . . . ascertained by the standard of time, task, piece, commission basis, or other method of calculating. . . ." 758 P.2d at 187 (emphasis original).

If this Court turns to the analysis in *Rohr*, setting aside the differences in statutory language, the Colorado appellate court's analysis actually supports Rotation's position. The *Rohr* decision looked at additional considerations in making its determination, such as the proportion of the employee's compensation that was derived from bonus and from base salary. *Id.* at 188. Because the employee in *Rohr* earned a \$24,000 salary and a \$61,408 bonus, the court concluded the bonus was intended to be a wage. *Id.* Here, the amount of Kvidera's bonus was small in proportion to his significant salary. Kvidera had

³ Minn. Stat. § 181.13(a) states

When any employer employing labor within this state discharges an employee, the wages or commissions actually earned and unpaid at the time of the discharge are immediately due and payable upon demand of the employee. If the employee's earned wages and commissions are not paid within 24 hours after demand, whether the employment was by the day, hour, week, month, or piece or by commissions, the employer is in default.

a \$77,100 salary in 2001 compared with a claimed \$25,000 bonus. (A. 44.) Similarly, under the 2002 contract, Kvidera's salary was \$95,000, with a possible bonus of \$33,000. (A. 45.) Applying the analysis in *Rohr*, Kvidera's bonus was not intended to be a wage.

Additionally, Kvidera's discussion of Louisiana case law in general and specifically *Pearce v. Austin*, 465 So. 2d 868 (La. Ct. App. 1985) is not entirely accurate. *Pearce* should be distinguished from the other Louisiana case law discussed in Appellant's Opening Brief because it involved commissions, rather than bonuses, a significant difference because of the way the two amounts are computed. Commissions are computed from an employee's actual sales and therefore are directly earned by an employee. (In Minnesota, the penalty statute specifically includes wages and commissions.) Bonuses, on the other hand, are paid when other conditions are met, e.g., in Kvidera's case, when pretax profits of the company exceed \$300,000. (A. 45.) Further, the decision in *Pearce* resolved the penalty issue by recognizing that, pursuant to existing Louisiana case law, "wages" include commissions. *Id.* at 873.

On the other hand, Rotation relies on more recent Louisiana case law that clearly decides bonuses are not wages under the Louisiana statute. For example, *Ward v. Tenneco Oil Co.*, 564 So. 2d 814 (La. Ct. App. 1990) (Appellant's Opening Br. at 22), was decided after *Pearce* and has not been overruled or even distinguished. Furthermore, *Cochran v. Am. Advantage Mortgage Co.*, 638 So. 2d 1235, 1239 (La. Ct. App. 1994),

clearly holds that, for penalties to apply, the amount sought by the employee must be payable by the hour, day, week, or month.⁴

Finally, Kvidera places too much emphasis on *Anderson v. Medtronic, Inc.*, 382 N.W.2d 512 (Minn. 1986). (Respondent's Br. at 1, 15.) As Kvidera argued in its Opening Brief, *Anderson* does not definitively resolve the issue of whether Minn. Stat. § 181.13 applies to unpaid bonuses. (See discussion, Appellant's Opening Br. at 20.) The issue on appeal in *Anderson* was whether the district court erred in submitting to the jury the issue of the employer's bad faith in failing to pay the discharged employee's wages, not whether Minn. Stat. § 181.13 was the proper vehicle to seek penalties for an unpaid bonus.

III. KVIDERA'S ARGUMENT REGARDING ATTORNEY'S FEES IGNORES THE REAL ISSUE

Preliminarily, Kvidera presents the wrong standard of review on appeal for this issue. (See Respondent's Br. at 8.) Kvidera cites *Amerman v. Lakeland Dev. Corp.*, 295 Minn. 536, 203 N.W.2d 400 (1973), to argue that in this case, the district court's determination of attorney's fees is a question of fact and should not be reversed unless clearly erroneous. The clearly erroneous standard, however, relates to this Court's review of the district court's determination of the reasonable value of attorney's fees. That is not the issue here. The issue in this case is whether the district court erred in awarding

⁴ In *Cochran*, 638 So. 2d at 1239, the court concluded that the employee's bonus was a wage under the Louisiana wage statute because it was payable monthly. Here, however, Kvidera's bonus was not payable or calculated monthly; instead, it was payable based on company performance twice a year in the 2001 contract and quarterly in the 2002 contract. (A. 44-45.)

attorney's fees without allocating between Kvidera's statutory and common law claims. The standard in reviewing a district court's determination of whether a party is entitled to attorney's fees is abuse of discretion. *See Minn. Council of Dog Clubs v. City of Minneapolis*, 540 N.W.2d 903, 904 (Minn. Ct. App. 1995).

The district court and Kvidera both err in their analysis regarding attorney's fees under Minn. Stat. § 181.171. Minn. Stat. § 181.171 does not allow for the receipt of attorney's fees for all claims brought in addition to a claim under Minn. Stat. § 181.13. Furthermore, Kvidera's common law claims were separate and distinct from his Minn. Stat. § 181.13 claim. As a practical matter, the trial of this case involved both issues and witnesses separately discussed whether good cause existed for Kvidera's termination and what the amount of the bonus was under the terms of the 2001 contract in light of the company's performance. Under Minn. Stat. § 181.171, the district court has authority to award attorney's fees only for the bonus claim under Minn. Stat. § 181.13.

A. Minn. Stat. § 181.17 Authorizes Recovery Of Attorney's Fees Only For The Statutory Claim

The district court and Kvidera misinterpret Minn. Stat. § 181.171 when they conclude that because Kvidera brought his claims under Minn. Stat. § 181.13, Kvidera is entitled to the full amount of his requested attorney's fees. Subdivision three of Minn. Stat. § 181.171 states that "[i]n an action brought under subdivision 1, the court shall order an employer who is found to have committed a violation [of Minn. Stat. § 181.13] to pay . . . attorney fees." Subdivision 1 of Minn. Stat. § 181.171 states that "[a] person may bring a civil action seeking redress for violations of

section . . . 181.13." Neither subdivision makes reference to *other* claims included in an employee's civil action under Minn. Stat. § 181.13.

In arguing that the statute does not state that the attorney's fees must be allocated to the portions of recovery, Kvidera ignores the plain language of the statute, which makes clear that a court may award attorney's fees related to a violation of Minn. Stat. § 181.13. Because established case law clearly provides that attorney's fees may be awarded only if allowed under statute or contract, *Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 87 (Minn. 2004), the district court erred in failing to allocate the attorney's fees between Kvidera's different claims.

B. Kvidera's Common Law Claims Are Separate And Distinct From His Minn. Stat. § 181.13 Claim

In his brief, Kvidera states, "the district court determined that the full amount of work expended in the case was necessary regardless of whether the damages included the bonus or breach of contract." (Respondent's Br. at 20.) The district court, however, never made any such determination nor did it state that Kvidera had to prove its common law claim in order to prevail on its statutory claim. Rather, Kvidera's statutory claim and common law claims were completely separate and distinct from one another. Kvidera's claim that "all amounts were reasonable and necessary for any recovery, bonus and/or contract, pursuant to the statute," (Respondent's Br. at 20 emphasis original), is simply wrong.

Kvidera's common law and statutory claims involve distinctly different proof. Kvidera's common law claim against Rotation involved, first, the legal determination at

summary judgment whether Kvidera was an at will employee, and subsequently, the factual determination at trial whether Kvidera was terminated for cause. Numerous witnesses for both sides testified about the facts relating to cause for termination. On the other hand, Kvidera's Minn. Stat. § 181.13 claim dealt only with whether Rotation owed Kvidera the bonus that he requested and what was the amount of the bonus. The elements required and the evidence presented did not overlap.⁵ As a result, the Court should reject as untrue Kvidera's assertion that all attorney's fees were reasonable and necessary for any recovery.

The relief sought in this appeal illustrates the differences between the common law and statutory claims. Rotation seeks reversal of the district court's conclusion that the 2002 contract was terminable only for good cause. If this Court agrees that the 2002 contract was terminable at will, Rotation is entitled to judgment on the common law breach of contract claim. Separate from the contract issue, Rotation seeks reversal of the district court's award of penalties for nonpayment of wages under Minn. Stat. § 181.13. This Court should not broadly construe Minnesota's penalty statute to include Kvidera's bonus, which was neither a wage nor commission under the statutory language.⁶ Rotation hopes to prevail on both issues on appeal, but the legal issues are separate and distinct.

⁵ Kvidera's trial testimony is a good example of the two separate lines of proof. Kvidera testified about the amount of the 2002 bonus, *see* T. 68-152, T. 225-37, T. 241-53, T. 261-88, T. 291-93, and the reasons for his termination, *see* T. 152-225, T. 338-88, T. 405-14.

⁶ Finally and again separately, Rotation requests that this Court remand the issue of attorney's fees to the district court, instructing the district court to allocate the fees between Kvidera's statutory and common law claims.

IV. KVIDERA'S REQUEST FOR APPELLATE ATTORNEY'S FEES IS PREMATURE

Kvidera's request for attorney's fees at this time is premature for several reasons. First, *Bucko v. First Minn. Sav. Bank, F.B.S.*, 471 N.W.2d 95, 99 (Minn. 1991), the case Kvidera cites to support his argument, makes clear that to receive attorney's fees, one must be the prevailing party. Until this Court issues its decision on the merits, it cannot be said that Kvidera is the prevailing party on appeal. Second, Kvidera has not yet adhered to the required procedure for seeking attorney's fees on appeal. Minn. R. Civ. App. P. 139.06 states that a party seeking attorney's fees on appeal must submit such a request by motion under Rule 127. Pursuant to Rule 127, appellant would be allowed an opportunity to respond. Minn. R. Civ. App. P. 127.

If this Court in its discretion reaches the attorney's fee issue without further motion, it should remand to the district court for a determination of reasonable attorney's fees for the statutory claim only. Kvidera has not established the basis for an award of attorney's fees under Minn. R. Civ. App. P. 139.06, in which the Advisory Committee has stated that attorney's fees "may be allowed as a matter of substantive law or as a sanction." Advisory Committee Comment—1998 Amendments. No sanction is appropriate here. As a matter of substantive law, attorney's fees may be awarded only under Minn. Stat. § 181.171, subd. 3, when related to a violation of, for example, the penalty statute, Minn. Stat. § 181.13. Kvidera's submission to this Court does not distinguish between its fees based on the common law and statutory issues and should be

rejected on that basis. Further, a claim for over sixty hours of attorney time is excessive.

(RA 62.)

CONCLUSION

Kvidera began his employment with Rotation as an at will employee. Contrary to Kvidera's assertions, the dates included in the parties' contracts refer only to the calculation of Kvidera's bonus and do not modify the at will employment relationship. The district court erred in finding the dates sufficient to create a "for cause" relationship. The judgment favorable to Kvidera on his breach of contract claim should be reversed.

Additionally, the district court's awards for statutory penalties and attorney's fees must be reversed. Minn. Stat. § 181.13, as a penalty statute, must be strictly construed. The district court erred in broadly interpreting wages to include a bonus. Further, the district court abused its discretion in awarding attorney's fees to Kvidera without allocating attorney's fees to only his statutory claim. Because Minn. Stat. § 181.171 does not include attorney's fees for Kvidera's common law claims, the district court should have allocated the fees between Kvidera's claims. As a result, Rotation respectfully requests that this Court reverse the judgment for statutory penalties and attorney's fees and remand with instructions.

Respectfully submitted,

Dated: April 11, 2005

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