

NO. A10-1558

State of Minnesota
In Court of Appeals

KIM HANSEN,

Appellant,

v.

ROBERT HALF INTERNATIONAL, INC.,

Respondent.

APPELLANT'S REPLY BRIEF AND APPENDIX

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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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INTRODUCTION

Appellant Kim Hansen pursues three distinct claims: that i) her termination was due to her gender (pregnancy); ii) she had an absolute statutory prescriptive right to reinstatement in her prior or similar position upon return from leave, and Respondent failed to reinstate her; and iii) her termination was in retaliation for her leave request.

Respondent's defense in part is to allege she was terminated due to a Reduction in Force (RIF), bypassing the fact that other employees were hired into Appellant's position, or similar positions, before, during and after Appellant's leave.¹ It also contends, among other things, that Appellant had no reinstatement rights under MPLA because Appellant never requested such leave, and relies primarily upon its alleged RIF in defense of Appellant's retaliation claim.

The District Court ignored that the facts in this case were highly contested and inappropriately granted summary judgment. Accordingly, we ask this Court to reverse the District Court and remand with instructions to enter summary judgment in favor of Appellant as to her MPLA reinstatement claim.

¹Respondent offers the startling "defense" that Respondent, on a single occasion, actually hired a woman with children. (Respondent's brief ("RB"), p. 19.) In notable contrast to Respondent's self-congratulation, the U.S. Department of Labor and U.S. Bureau of Labor Statistics find that, in 2008, the civilian labor force participation rate of mothers with children under 18 was 71.2% (and that such participation rate of mothers with older children (6-17 years of age) was 77.5%). *See Women in the Labor Force: A Databook*, <http://www.bls.gov/cps/wlf-databook-2009.pdf>.

RESPONDENT'S STATEMENT OF "FACTS."

As with the District Court, Respondent burnishes its facts and, where Appellant controverts same, Respondent simply ignores them or, worse, doubles-down and, more insistently, declares them "undisputed."

For example, Respondent was obliged under MPLA to place Appellant in a comparable position if it had been unable to return her to her previous one. Respondent could have transferred Appellant into the temporary-placement ("temp") position that Respondent transferred Jennifer Hedin into the very day Appellant returned to work. Respondent now argues that "the only thing" that temp and permanent-placement ("perm") positions have in common is that they "both place candidates in legal positions." (RB, p. 3.) For that "fact," it relies upon *three sentences* from Jackie Moes' deposition and *one paragraph* from Marilyn Bird's Affidavit. Respondent contends that temp hours are "less flexible" and that the sales such employees make are "different," presumably meaning that perm "recruiters" sell "permanent" employees, while temp "account executives" sell "temporary" employees. (*Id.*, pp. 3-4.)

However, flexibility is not a criterion. Under MPLA, the question is whether the other position was one of "comparable duties, number of hours, and pay." Minn. Stat. § 181.942, subd. 1(a). Respondent concedes what matters: "recruiters" and "account executives" *both* find individuals looking for work, locate law firms seeking employees, and bring them together. Put in terms of the FMLA, they perform jobs involving "the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility and authority." 28 C.F.R. § 825.215(a).

Respondent's former regional vice president Moes was "absolutely" clear that both positions "engaged in identifying and interviewing candidates to be placed" and that the "job skills that serve one well also serve that employee well in the other." (Moes dep. 56:3-11.) This assessment is also shared by Bird, whose affidavit testimony states that "[w]ithin the temporary and permanent placement teams, employees are responsible either attorney placements or support staff placements." (Bird Aff., ¶¶ 12-13.) Respondent's contention that there are no similarities between the jobs is a self-serving distortion.

The District Court unfortunately adopted this erroneous position. At a minimum, the court should have found a genuine issue of material fact. Moreover, the court should have concluded, as a matter of law, that a temp position is indeed comparable and Respondent's failure to place Appellant in such a position constitutes an MPLA reinstatement violation.

Respondent also transparently "re-brands" its leave policy for purposes of this appeal, identifying its "Short Term Medical and Pregnancy Disability Leave" policy (RB, p. 6) and subsequently defining it as simply "short-term disability leave." Respondent in fact offers one of *three* types of leave: FMLA, "short-term medical, pregnancy, workers' compensation leave," or personal leave. Without exception, Appellant's leave request form and Respondent's related internal documents identify Appellant's leave not as FMLA but as short-term medical and pregnancy leave, specifically noting that it is referred to as "pregnancy disability leave in some states." (See Ex. V to Appellant's

memorandum opposing summary judgment.) Appellant will therefore refer to such leave as “pregnancy leave.”

Respondent contends this policy provides leave eligibility only for employees who are “medically disabled and unable to work for more than five business days due to an illness, injury or disability.” (RB, p. 6.) Respondent again outright misstates the facts: the policy reads that pregnancy leave is available to an employee who is unable to work “due to illness, injury or disability or disability related to pregnancy/childbirth.” (AA-169.) In similar fashion, Respondent declares, without citation, that Appellant is “incorrect” in her contention that such leave constitutes leave under the MPLA. (RB, p. 6, n. 10.) Respondent feigns ignorance that its pregnancy leave policy provision expressly provides:

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

(AA-169.) Under MPLA, leave is six weeks unless extended by the employer. Here, Respondent agreed to extend leave to December 1. Its allegation that no connection exists between its pregnancy leave policy and MPLA pregnancy leave is further disproven by part III of its own policy, which specifically describes the interrelation of FMLA and other leaves. That provision states that “a leave from work for your . . . disability related to pregnancy or childbirth may be covered by the RHI short-term medical leave and the FMLA as described below.” (AA-179.) The policy further

provides that the duration of the short-term medical and pregnancy leave is “12 weeks in a rolling 12 month calendar year.” (AA-180.)

Continuing its “re-branding” scheme, Respondent falsely asserts that Appellant “blindly” purports she was “ranked either first, [*sic*] or second in the entire office every month.” (RB, p. 29.) Appellant in fact provided *evidence* of Appellant’s strong performance – ranking first or second – from April through July 2008 (the time period that year in which her duties were focused on personal production and prior to her working reduced hours due to her pregnancy). (AA-88-89.)

While acknowledging that employees other than Appellant were retained, and allowed to transfer into temp, Respondent would ignore them because they had not worked as long as Appellant and Respondent’s expectations of them were correspondingly lower. One such employee, Melissa Zollman, had been with Respondent for a full year, had a PDA of slightly over \$11,000 (less than half of Appellant’s), and yet was allowed to transfer from temp to perm. (Bird Aff., ¶ 27.)

Respondent also glosses over, but cannot rebut, the fact that Katie Miller, an employee transferred from perm to temp (after having been first transferred from temp to perm) while Appellant was on leave, also failed to meet her performance requirements. Respondent’s “minimum productivity standards” show that employees are expected to reach \$30,000 in total billings over their first three months. (RA-26.) However, Miller achieved below that threshold. She was nonetheless transferred into temp, ostensibly

because she had worked temp before (as had Appellant)² (Wyman Aff., ¶ 8; Harder Aff., Ex. M; AA-113.)

In addition, Appellant contends other employees averaging below \$16,000 were not terminated. Respondent dismisses the relevance of this by suggesting that in previous years it was not suffering financially. (RB, p. 12.) The point, however, is that *at the time of Appellant's termination*, Respondent allegedly was suffering financially and terminated Appellant because of her alleged low performance. The fact that others were performing lower creates at least a *genuine issue of material fact* regarding the actual reason for her termination.

Similarly, Respondent whitewashes the fact that, while (allegedly) in “RIF mode,” it hired Hedin into the same job Appellant was on leave from, and later transferred her into a position the temp group. Respondent simply declares itself innocent: “hiring Jennifer Hedin had nothing to do with Kim Hansen’s position.” (RB, p. 14.) Other than this self-serving declaration, the “proof” of this is the claim that the initial requisition form was filled out on May 21, 2008, before Appellant was on leave. (Id.) Respondent then proclaims Hedin in fact had been hired to replace *other* people – without the support of any evidence or credible basis. (Id., n.18). This theory is pure nonsense: Respondent contends Hedin instead was hired to replace Zollman . . . or Hoffman . . . or Nilson (but

²Appellant worked the temp side as a staffing manager for Respondent’s “Office Team.” The fact that i) Miller was able to easily transfer from temporary to permanent and back to temporary and ii) Hedin and Zollman transferred from permanent to temporary is further confirmation that these positions are essentially interchangeable – and thus *comparable* under MPLA.

somehow *not* Appellant). (Id.) Respondent is unclear if Hedin was hired to fill all three chairs. Zollman quit in July 2008, Hoffman in August 2008, and Nilson was terminated from perm in October 2008, all long after the Hedin “requisition” in May 2008. This flimsy “fact” proves nothing.

I. THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S SEX (PREGNANCY) DISCRIMINATION CLAIM.

A. Appellant Makes a *Prima Facie* Case.

Respondent’s assertion that Appellant cannot make a *prima facie* case because she cannot make an additional showing is simply untrue and hinges on Respondent’s assertion of a RIF. (RB, pp. 22-23). Respondent argues that some decisions in Minnesota have found a RIF to be genuine in a particular case. But that is precisely the point: the determination is case-specific and fact-intensive. As to the circumstances in this case, Respondent falsely alleges that it is “undisputed” that there had been a legitimate RIF. (Id. at 23.)

First, Appellant meets the four factors set forth in Hubbard v. United Press Int’l, Inc., 330 N.W.2d 428, 442 (Minn. 1983). (See RB, pp. 21-22.) Appellant was indeed replaced by non-members of her protected class (e.g., Hedin and Breiland) and other similarly situated non-protected employees were not discharged for the same behavior (e.g., Miller and her underperforming numbers). Under MPLA, Appellant had a right to be reinstated into a “comparable” position. Minn. Stat. § 181.942, subd. 1(a). As already demonstrated, and shown in the record, the positions of “recruiting manager” and “account executive” are indeed comparable. (See e.g., AA-78-79.)

FMLA employs the phrase “equivalent position” with respect to reinstatement. “Upon return from FMLA leave, employees are entitled to reinstatement to the same or an equivalent position without the loss of benefits . . . ” Darby v. Bratch, 287 F.3d 673, 679 (8th Cir. 2002) (citation omitted). With respect to FMLA, an equivalent position “*must involve the same or substantially similar duties and responsibilities, which must entail substantially equivalent skill, effort, responsibility, and authority.*” 29 C.F.R. § 825.215(a) (emphasis added).

Respondent’s insistence to the contrary is certainly not dispositive of the issue and, without conceding Appellant’s position, simply demonstrates – at most – that a genuine issue of material fact may exist. Nevertheless, Respondent’s position on the comparable nature of a position in temp as compared to perm is ultimately belied by the fact that it so easily transferred employees like Miller and Hedin back and forth between the two groups.³

B. Respondent was not Engaged in a Genuine RIF.

Next, the Minnesota Supreme Court’s analysis concerning the *prima facie* employment discrimination case in the RIF context in fact supports Appellant, especially in light of the comparable nature of perm and temp positions. Both parties have cited to Dietrich v. Canadian Pacific Ltd., 536 N.W.2d 319 (Minn. 1995), which found:

³Respondent again misstates the record when its refers to the hiring of Minick, Breiland and Hedin as all occurring “on the temporary placement team.” Respondent itself contradicts this when its states elsewhere (RB, p. 14) that Hedin was hired into the permanent placement team and later transferred into the temporary team.

the first question . . . is whether a reduction-in-force in fact occurred.

While it is not always a simple task to determine whether a genuine reduction-in-force has occurred, the Sixth Circuit Court of Appeals has articulated a standard that we find helpful:

[a] work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company. *An employee is not eliminated as part of a work force reduction when he or she is replaced after his or her discharge.* However, a person is not replaced when another employee is assigned to perform the plaintiff's duties in addition to other duties, or when the work is redistributed among other existing employees already performing related work. *A person is replaced only when another person is hired or reassigned to perform the plaintiff's duties.*

536 N.W.2d at 324 (citations omitted) (emphasis added).⁴ It is important to note at this point the findings in Pinson v. Grazzini Brothers & Co. with respect to the four *prima facie* factors:

the supreme court recognized that the requirements for a *prima facie* case needed to be modified and that *the fourth requirement could be met by showing that "opportunities remained available or were given to other persons with plaintiff's qualifications."* In a reduction-in-force situation, the fact that opportunities remained available could indicate discrimination because if there are opportunities available for work, *there is not a reason for a reduction in force, which makes the abolition of a job position suspect.*

⁴Respondent chafes at Appellant's citation to cases outside Minnesota standing for the express, though obvious, principle that whether a defendant engaged in a RIF is a question of fact. Dietrich, without such an explicit statement, makes clear that this is the case.

2004 WL 1254117 *5 (Minn. Ct. App. 2004) (citing Dietrich, 536 N.W.2d at 323-24) (emphasis added).

As the record shows, perm and temp positions are comparable under MPLA; at the absolute minimum a fact issue exists, given that a reasonable jury could arrive at such a conclusion (referring to a U.S. Supreme Court standard that *Respondent itself* cites in its brief) (RB, p. 20 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986))). It is, of course, true that an employee on leave has no greater right or benefit than any right she may have had had she not been on leave. See U.S.C. § 2614(a)(3)(b). Nevertheless, Breiland's hiring into temp within mere days of Appellant's dismissal and Miller and Hedin reassignments (both during Appellant's leave, the latter occurring one day before Appellant was terminated) into temp to perform duties to which Appellant was entitled to be reinstated under the MPLA demonstrate that, according to the Dietrich analysis, Appellant was *not eliminated pursuant to a legitimate RIF*. No "additional showing" is therefore necessary.

In contrast to a situation in which an employer terminates workers and then spreads the increased workload among the remaining, fewer employees, Respondent was *hiring* employees. Notwithstanding the fact that Respondent claims to have suffered as a result of shocks to the U.S. economy beginning (at an unspecified time) in 2008, Respondent in fact hired employees like Hedin into Robert Half Legal *perm*, only to conveniently transfer her into temp on the day Appellant returned to work. This alone falls precisely under Dietrich's articulation of a non-RIF termination. Furthermore,

Respondent hired others into positions that were “comparable” under the MPLA (i.e., temp) and thus positions to which Appellant had a prescriptive right.⁵

1. The District Court Erred when it Determined that Respondent Presented a Legitimate Business Reason for its “RIF.”

Belying the shifting foundation upon which its RIF claims lie, Respondent now – for the first time ever, in its opposition brief – engages in impermissible hair-splitting by positing that merely one “team” within Respondent’s organization was engaged in a RIF. (RB, p. 24.) That “team,” Respondent purports, is of course Robert Half Legal *perm*. According to Respondent (now), there was *no* RIF in Robert Half Legal temp, and *no* RIF in Robert Half Legal as a division; nor does Respondent claim that Respondent itself, as an organization, was engaged in a RIF. This was, apparently, a purely localized phenomenon within Respondent, one that, conveniently, occurred among one “team” of employees (perm) that was overseen by the very same management personnel (supervisor (Hennen), regional vice president (Moes), senior regional vice president (Bird) and corporate president (Clark)) overseeing another, comparable, group of employees (temp) that was hiring and promoting *actively* throughout 2008 and 2009, and which readily sent employees to perm (that is to say, quite literally, to a different room and to different chairs), and similarly took them back from perm with open arms.

⁵Respondent brazenly trumpets that “[i]n this case, [Appellant’s] contentions notwithstanding, it is undisputed that the RIF . . . was necessary and genuine.” (RB, p. 23.) By definition, the fact that Appellant maintains *opposing* “contentions” means that the question of the RIF’s necessity and genuineness is very much *disputed*.

The District Court, adopting Respondent's inaccurate characterization of the facts, clearly erred with respect to whether or not Respondent dismissed Appellant pursuant to a genuine RIF. It withheld from Appellant the opportunity to have a jury weigh the hotly disputed facts, make its own determination as to credibility and render a verdict based on that reasonable determination.

C. Respondent's Asserted Non-Discriminatory "Reason" for the Existence of a RIF is Mere Pretext.

As the District Court of Minnesota noted in Brenden v. Westonka Public Schools, Independent School Dist. 277:

[t]he United States Supreme Court recently declared that "[p]roof that the defendant's explanation is unworthy of credence . . . may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is . . . cover[ing] up a discriminatory purpose." In finding pretext, the factfinder must decide "whether the employer gave an honest explanation of its behavior." Further, if the employer's stated reason(s), assuming they are true, do not adequately explain the employer's actions, *the inference can be drawn that the reason is pretextual.*

2005 WL 1936195 *11 (D.Minn.) (citing Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 (2000)) (additional citations omitted) (emphasis added).

This observation is apt with respect to i) Respondent's contention that it pursued a RIF at the time it terminated Appellant and, ii) its novel line of argument that only the perm "team" experienced a RIF. However, the Brenden Court's analysis – based in part on that of the U.S. Supreme Court – cries out at the District Court's errors, as depicted below.

1. The District Court Misapplied an Essential Tenet of the Summary Judgment Standard, Overlooked Unrebutted Inconsistencies in Respondent's Alleged RIF Criteria and Ignored Evidence that Respondent had Falsified its Evaluation.

It is irrefutable, based on the record, that employees were transferred to temp who did not meet Respondent's now-professed performance criteria. Courts may, in determining whether the RIF is pretextual, consider evidence that i) the termination of the employee is inconsistent with the employer's RIF criteria; ii) the employer's evaluation of the employee was falsified to cause termination; or iii) the RIF is more generally pretextual." Rowland v. Franklin Career Services, LLC, 272 F.Supp.2d 1188, 1205-06 (D. Kan. 2003). The Eighth Circuit has also examined the issue of inconsistencies in the application of RIF policy. See, e.g., Spencer v. Stuart Hall Co., Inc., 173 F.3d 1124, 1128 (8th Cir. 1999) (based on RIF inconsistencies, the jury could have discredited defendant's managers' testimony and the basis they gave for laying off plaintiff; where conflicting evidence is presented at trial, the jury, rather than the court, assesses witness credibility and decides whose version to believe).

Respondent's inconsistent policy is evidence of (or a least creates a genuine issue of material fact concerning) pretext and is *proof* – unrebutted – that Respondent did not comply with its own RIF criteria.

In addition, the District Court took one comment of one employee, who "thought" Appellant's numbers had been inflated due to inheriting a book of business and concluded that Appellant's performance numbers had been "dramatically increased,"

thereby finding facts in the light most favorable to the *moving* party. Respondent ignores this violation of the summary judgment standard— entirely.

Appellant has also shown that her performance numbers were subject to manipulation by management. (AA-77.) Respondent has never addressed the reason for Appellant’s differing performance numbers and thus never rebutted the allegation that Respondent manipulated those numbers. If the court in fact considered the facts in the light most favorable to the (non-moving) Appellant, as the District Court claimed, it should have determined Appellant’s PDA to be nearly \$35,000, as opposed to hovering above \$18,000.

Most telling is the fact that when Appellant was terminated on December 2, she expressly asked Hennen if there were any “other positions in Robert Half Legal at the time.” She pointed out that she had worked “temp” for Robert Half before, asked if there was any other position available and was told expressly that “there was no other position.” (Hansen dep. 77:14-18.) Hennen can deny her remarks, but that simply creates a *genuine issue of material fact*. The allegation that there was no job for Appellant to transfer into is belied by the fact that Hedin had just transferred into an *open* position.

Accordingly, Appellant both presents unrebutted evidence and creates, at the very minimum, genuine issues of material fact. The District Court has erred and its judgment should be reversed and remanded.

II. NOTWITHSTANDING RESPONDENT’S ARGUMENTS, THE DISTRICT COURT ERRED WHEN IT DETERMINED APPELLANT HAD NO RIGHT TO RETURN UNDER MPLA.

Respondent argues that Appellant had no right of reinstatement, arguing: (1) she never asked for a leave under MPLA; (2) she overextended her leave; and (3) her job was eliminated through a legitimate RIF.

A. The District Court Erred When it Found that Appellant Sought Leave Under FMLA and not Under MPLA.

Respondent’s contention that Appellant did not request – and take – leave under MPLA is propped up by the same misleading spin presented (successfully) to the District Court.

On each of the forms concerning Appellant’s leave, either *Appellant herself* or *Respondent* checked or filled out the box relating to pregnancy leave, not FMLA. Respondent does not rebut this fact, leaving its prior mischaracterizations disproven and abandoned. Respondent suggests to this Court that Appellant testified she had requested leave under short-term disability and FMLA. (RB, p. 31 (citing Hansen dep. p. 60:5-6, which is not part of the record on this appeal).) However, the phrase “FMLA” does not appear at any time in Appellant’s deposition. Respondent ignores its forms and relies exclusively on a letter from the benefits coordinator, which states that Appellant’s “short term disability/FMLA leave” has been processed.⁶

⁶That letter notes that, if necessary, Appellant could request a separate and distinct *personal leave*, which does not carry a guarantee of job reinstatement. (RA-25.) The logical inference is that approved leave indeed carries both the contractual and statutory guarantee of reinstatement. (AA-169, 177.)

In an attempt to distract from the undisputed fact that all of Respondent's personal action forms here reference *pregnancy* and not FMLA leave, Respondent suggests they are meaningless because Appellant never "saw them before this litigation commenced." (RB, p. 33.) It cites Appellant's testimony on p. 64:7-21 (*id.*, p. 33, n. 30), which hardly supports Respondent's cause: at that point in the deposition, Appellant confirmed *her signature was on the leave of absence request form.* (Hansen dep. 64:1-6; Ex. V to Appellant's memorandum opposing summary judgment.)

That document, consistent with Respondent's other leave forms, again has Sections A, B and C, expressly referring to pregnancy leave, FMLA leave and personal or military leave, respectively. The document instructs the applicant to "only select one type of leave per form – Section A, B or C." As the Court will note, Section A (pregnancy leave) – is filled out, referencing that Appellant "had a baby 8/29/08." Section B (FMLA) is entirely blank.

Given that Section B is blank *in each and every* leave document, Respondent's stupefying assertion to this Court that the record is clear and unequivocal that Appellant requested only FMLA leave and never MPLA leave is hogwash.

This is consistent with the underlying principles of both FMLA and MPLA. It is not an employee's burden to determine precisely what type of leave(s) might apply to her situation. The MPLA and FMLA simply do not work that way. "In requesting the leave, an employee need not invoke the specific language of the statute, but must apprise the employer of the request for time off for a serious health condition." Seaman v. CSPH, Inc., 179 F.3d 297, 302 (5th Cir. 1999). Indeed, "an employee need not expressly assert

rights under the FMLA or even mention the FMLA”; she must simply mention a request for leave to the employer; and at that point “the *employer should inquire further . . .*” 29 C.F.R. § 825.302(c) (emphasis added).

Respondent perverts this. Appellant was pregnant. She told Respondent’s benefits personnel that she needed to go on leave and, ultimately, that the leave needed to occur sooner due to pregnancy-related medical complications. She and her employer discussed this and she simply did what her employer told her to do.⁷

However, seeking to escape from a lawsuit, Respondent now clamors that none of Appellant’s leave was under MPLA because Appellant did not expressly ask for it. This argument fails: Appellant, like any employee in the State of Minnesota, must simply identify that she requires leave; the employer must determine the particular type.

In addition, leave is not granted in an employer’s discretion. MPLA leave, like that of the FMLA, is *mandatory*. Assuming qualifying conditions are met, the employer must grant it. Presumably, Respondent’s position is that MPLA leave was never granted because (it pretends) the documents somehow do not identify MPLA leave. If that is so, Respondent did not grant Appellant MPLA leave – in direct contravention of the non-discretionary mandate of the statute.

In fact, Respondent, in a rare moment of candor, acknowledges it has “no choice” but to grant Appellant’s leave request. It simply, and erroneously, postulates it granted twelve weeks of FMLA leave because that is what “Plaintiff requested.” (RB, p. 36.)

⁷At no time did Appellant testify she had requested a particular type of leave; she “just went with what they told [her]” to do. (Hansen dep. 29:23-25.)

While it is true that Respondent had “no choice,” it is – based on the record – demonstrably *false* that Appellant requested leave under the FMLA.

B. Respondent’s Refusal to Reinstate Appellant Constitutes Clear Interference with her Rights Under MPLA and the District Court Erred When it Found Appellant Lost her Reinstatement Rights Because her Leave Exceeded Six Weeks.

First, Respondent declares it “well established” that no reinstatement obligation exists if an employee has taken more leave than allowed under the statute. However, Respondent makes no distinction between an employee who is unable to return to work upon conclusion of approved leave, and an employee who has her leave extended and is able to return at the end of that extended leave.

Again, Respondent’s position (and the effect of the District Court’s order) is that an employer may extend MPLA leave (consistent with the statute) but the agreement to do so does not carry an obligation to return the employee to work at the end of leave. The essence of “leave” is the right to be away from work temporarily with the concomitant obligation (and right) to return to work at the end of the approved period. Indeed, a return to work is *implicit* in the definition of a “leave of absence.”⁸ Expressly granting someone the right to leave, and then firing them upon their return, is not a leave—it is a *delayed termination*.

⁸Black’s Law Dictionary defines “leave of absence” as “[a] worker’s temporary absence from employment or duty with the intention to return.” *Black’s Law Dictionary* 901 (7th ed. 1999).

That said, Respondent's cases do not support its position. It relies on Mondaine v. American Drugstores, Inc., 408 F. Supp. 2d 1169, 1206 (D. Ks. 2006), in which the employee's "FMLA leave expired on February 26, 2004, some three weeks before she returned to work on March 17, 2004." Unlike the instant case, plaintiff was unable to return on the agreed-upon leave expiration date.

Similarly, in Standifer v. Sonic-Williams Motors, LLC, 401 F. Supp. 2d 1205, 1221-22 (N.D.Ala. 2005), the employee's approved leave expired March 12, 2003, but the employee did not attempt to return until nearly three months later. Likewise, in Hunt v. Rapides Healthcare System, LLC, 277 F.3d 757, 764 (5th Cir. 2001), the employee made no attempt to return to work until after the leave had already expired; and in Daley v. Wellpoint Health Networks, Inc., 146 F. Supp. 2d 92, 99-100 (D.Mass. 2001), the employee attempted to return to work "three weeks after her leave expired . . ."

In Mentch v. Eastern Sav. Bank, FSB, 949 F.Supp. 1236 (D.Md. 1997), the trial court found – under the FMLA – that once plaintiff requested an extended maternity leave, the employer was relieved of its obligation under *federal* law to return her to her pre-maternity leave position. And in McGregor v. Autozone, Inc., 180 F.3d 1305, 1308 (11th Cir. 1999), the court noted that the employee "was absent for more than the protected period of time." The court also noted that (unlike MPLA and its explicit extension provision) the FMLA "does not suggest that the 12 week entitlement may be extended." (Id.)

Respondent, and the District Court, brush past the fact that MPLA unambiguously provides that an employer may extend leave. Here, leave was extended, in writing, by

Bird. The notion that Respondent somehow can advise an employee that her leave is extended and that she may return to work, but later insist that she has no right to actually return to her job on the agreed-upon date, is simply repugnant to the essence of the MPLA. Indeed, the right of reinstatement is “all-important.” Throneberry v. McGehee Desha County Hosp., 403 F.3d 972, 977 (8th Cir. 2005). “[T]he FMLA does not provide leave for leave’s sake, but instead provides leave with the expectation an employee will return to work after the leave ends.” Id. at 978.

Finally, Respondent contends there would be a “chilling effect” if an employer’s extension of leave carries with it the obligation to restore that employee upon the expiration of her leave, citing Eklind v. Cargill, Inc., 2009 WL 2516168 (D.N.D. 2009); Slentz v. City of Republic, Mo., 448 F.3d 1008, 1010 (8th Cir. 2006); and Grosenick v. Smithkline Beecham Corp., 454 F.3d 832, 836 (8th Cir. 2006).

Eklind does not support the proposition because the plaintiff there sought to return to work almost one full year after the commencement date of her 12-week FMLA leave and she was “clearly unable to perform” her job at the expiration of twelve weeks. 2009 WL 2516168 *6. There was no evidence that the leave period had been extended.

In Slentz, the employee sued simply because the employer refused to extend his leave beyond 12 weeks. The court noted the employer had no obligation to do so, and dismissed. Finally, in Grosenick, the employee similarly asserted not that her leave had in fact been extended or her reinstatement refused, but instead complained that “her protected period *should have been* extended.” 454 F.3d at 835 (emphasis added). These cases do not apply to the instant matter.

Respondent appears gobsmacked that Appellant does not simply roll over and acknowledge the “overwhelming majority” of cases that Respondent has (mis)cited. (RB, p. 35.) Capping it off, Respondent announces that its cited cases “have held that the right to *reinstatement expires* at the end of the 12 weeks required by federal law – *even if the employer has voluntarily given more than 12 weeks of leave (i.e., “agreed to” extend the leave).*” (RB, p. 37 (emphasis added).) This is true in only one very limited sense: in some of Respondent’s cases the employer agreed to extend leave beyond the 12-week mandate of the federal FMLA. However, *in each and every* such case, the employee was unable to return to work at the end of that extended period. If Respondent’s statement means to suggest that any of its cases support the notion that an employer can get away with extending leave but not extending the right of reinstatement, such statement is patently false.⁹ Indeed, Respondent has unveiled no case from any jurisdiction holding that an employer has the right to extend leave but has no obligation to reinstate at the end of that leave (assuming the employee is willing and able to return at that time).

1. The District Court Erred when it Denied Appellant’s Motion for Summary Judgment.

Appellant moved the District Court for summary judgment under Rule 56.03 (AA 109) because there is no genuine issue of material fact i) that Appellant was entitled to a comparable position with Respondent under MPLA; and ii) that RHI did not provide

⁹Respondent’s statement that “there is nothing in the MPLA to suggest that an agreement to extend the length of leave also extends the right of reinstatement.” RB, p. 37 (emphasis in the original), is ridiculous. The statute’s language is plain and unambiguous. To argue otherwise is to disregard the canons of statutory construction.

Hansen such a position. Respondent failed to comply with the prescriptive reinstatement rights of MPLA.

Not only was summary judgment inappropriate for Respondent, but it should have been granted for the Appellant under Rule 56.03.

C. Respondent is Estopped from Arguing that Appellant was not Entitled to Reinstatement Because Appellant Reasonably Relied Upon Respondent's Agreement that her MPLA Leave was Extended.

Appellant has cited several cases applying estoppel principles to prevent an employer from doing precisely what Respondent attempts here; i.e., agreeing to extend leave and then denying the reinstatement right. Respondent's only counterargument is to claim that Appellant has not demonstrated she actually and reasonably relied on the extension of her leave.

That argument is nonsensical, as the record demonstrates. Respondent acknowledges Appellant's leave was extended and admits that it never advised her that her right of reinstatement had expired or did not carry along with the extension. It claims, however, that Appellant has failed to prove she stayed away until December 1 because her employer expressly told her she could. The absurdity of this suggests, at a minimum, a fact question as to whether a reasonable jury could conclude that an employee reasonably relied upon an employer's promise that she had an approved leave until December 1 in order to make the decision to stay away from work until that date.

Further, Appellant has testified she simply printed the leave form off Respondent's website and her supervisor filled out the document. (Hansen dep. 65:7-19.) To her detriment, she relied upon her employer. As to the nuances of Respondent's leave policy

Appellant was clear: “I’ve never been clear on this and, honestly, I trusted our admin with everything and he just told me what to fill out and I didn’t read all the fine print.” (Id., p. 66:21-25.) When asked if she had specifically filled out an MPLA leave request, she responded that she simply “just filled out the paperwork for Robert Half.” (Id., p. 63:13-25.)

One may reasonably assume Appellant relied on Respondent’s promise because she in fact returned on December 1. Nobody suggested she was going to be terminated on December 1. (Bird dep. 125:10 – 126:21.) Instead, Appellant was told on that date that they “were going to be fine and run a lean team.” (Hansen dep. 63:9.) She tried – for a few hours. Then she got fired.

Respondent concludes with the odd statement that the “two” cases cited by Appellant are distinguishable.¹⁰ It pretends to distinguish Fry v. First Fidelity Bank Corp., 1996 WL 36910 (E.D.Pa. 1996), by suggesting that it is somehow distinguishable because plaintiff there was not told her “reinstatement was limited.” (RB, p. 39.) To suggest that Fry is distinguishable implies that Respondent at some point advised Appellant that, while her leave was *extended*, her right of reinstatement was *limited*. Respondent has conceded it gave Appellant no such notice. This is hardly a distinction.

¹⁰Appellant referenced numerous cases, all of which establish a position that an employer cannot grant leave and then refuse reinstatement. Respondent has made no attempt to distinguish, clarify or explain away any of them. See Appellant’s Brief, pp. 42-44.

D. Respondent was not Engaged in a Bona Fide RIF and Appellant was Entitled to Reinstatement Under MPLA.

As addressed above, Respondent finds support under neither the law (e.g., Dietrich) nor the facts concerning the purported legitimacy of its “RIF.”

To begin, although an employer is entitled to “interfere” with an employee’s leave rights, it is the employer’s burden to prove a non-retaliatory, non-violative “interference.” Although an employer has the right to lay off an employee on FMLA leave, it “would have the burden of proving that an employee would have been laid off during the FMLA leave period and therefore not entitled to restoration.” Id., citing 29 C.F.R. § 825.216(a)(1); see also, Smith v. Diffie Ford-Lincoln- Mercury, Inc., 298 F.3d 955, 963 (10th Cir. 2002). The employer has the burden of establishing it would have terminated the employee during her leave, for reasons unconnected to her leave request. O’Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349, 1354 (11th Cir. 2000).

Respondent misquotes the operative provisions of Minn. Stat. § 181.942, subd. 1(b), which states that “if, during a leave,” the employer experiences a layoff and the employee would have been terminated “had the employee not been on leave” then the employee is not entitled to reinstatement.¹¹ The MPLA’s layoff provisions apply only to employees that lose their position while on leave. Appellant did not lose her position while on leave. The statutory language of the MPLA, upon which Respondent relies, is expressly inapplicable.

¹¹Respondent contends that she is not entitled to be returned to her job if her position was eliminated “pursuant to a RIF.” (RB, p. 41).

Appellant had the prescriptive right to be restored to a comparable position. Respondent simply had no right to fill Appellant's position in perm while she was on leave and then transfer Hedin, and hire or transfer others, into temp. If Respondent wished to put Hedin in Appellant's position during her leave, it had the option to do so, on a *temporary* basis.

E. The District Court Errs in Finding that Appellant did not Claim Retaliatory Discharge in Violation of the MPLA.

Respondent's argument here is unpersuasive. Appellant clearly plead in her Amended Complaint that she brought claims for violations of the MPLA and did so in a manner meeting the standard that pleadings provide "information sufficient to fairly notify the opposing party of the claim against it." Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. & Cas. Ins. Co., 759 N.W.2d 651, 660 (Minn. Ct. App. 2009) (citing Minn. R. Civ. P. 8.01). In particular, the allegations in paragraph 36 are sufficient to notify Respondent it faces claims for failure to reinstate ("... Plaintiff was not returned to her former position or a comparable position.") *and* for retaliation ("... terminated the following day under the pretext that her position had been eliminated"). Respondent evidently seeks express terms ("retaliation" or "retribution"), which is irreconcilable with principles of notice pleading. Minnesota courts have also recognized that "employers may voluntarily approve additional parenting leave for employees" but are prohibited "from retaliating against employees who exercise that leave." Vosdingh v. Qwest Dex, Inc., 2005 WL 914732, *11 (D. Minn. 2005).

By Respondent's logic, i) Appellant's reinstatement claim would not be sufficiently plead because that same paragraph indicates that Appellant *returned* to work (for a day), and ii) a claim for retaliation more properly lies because she was terminated *after* her return.¹² Neither the District Court nor Respondent reached such an audacious conclusion.

In addition, when determining if a complaint sets forth a legally sufficient claim, Minnesota courts "consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." Hebert v. City of 50 Lakes, 744 N.W.2d 226, 229 (Minn. 2008) (citation omitted). Here, the facts alleged in the Amended Complaint, construed in Appellant's favor, sufficiently plead an MPLA retaliation claim.

The District Court plainly erred in determining that a retaliatory discharge claim was not before it. (AA-19, n.11.)

CONCLUSION

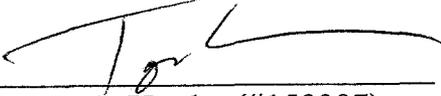
The District Court indeed erred in dismissing Appellant's claims, and in failing to grant Appellant summary judgment as to her reinstatement claim. Appellant respectfully reiterates her request that the Court of Appeals reverse and remand the judgment of the

¹²A jury could reasonably find that Respondent concluded it had an obligation to return Appellant to her position but that it could – misguidedly – “satisfy” its statutory obligation by bringing her back to work and then quickly firing her. Courts often look to temporal proximity in determining causal connection between an employee's activity and an employer's response. In this case, the causal connection is approximately 28 hours.

District Court, with direction to enter summary judgment in favor of Appellant as to her reinstatement claim.

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Dated: 11/5/10

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