Plenary Tuesday

The 2018 Minnesota Update

Shalanda D. Ballard
3M Company
Saint Paul

2017-2018 Minnesota Employment Law Update

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I. 2017-18 MINNESOTA EMPLOYMENT LEGISLATION UPDATE

A. PAID SICK AND SAFE LEAVE LAWS

1. Minneapolis Paid Sick and Safe Leave Ordinance

The Minneapolis Paid Sick and Safe Leave Ordinance went into effect on July 1, 2017 and applies to every employer with six or more employees, provided the employer has at least one employee within the geographic boundaries of the city of Minneapolis. The ordinance requires Minneapolis employers to provide paid sick time to full-time and part-time employees who work at least 80 hours in a calendar year. Eligible employees earn one hour of sick and safe leave for every 30 hours worked, up to 48 hours per year. The ordinance caps paid sick and safe leave at 80 hours. The leave can be used for the following purposes:

- For an employee's, or an employee's family member's, mental or physical illness, injury, or health condition, or when an employee or his or her family member needs to obtain diagnosis, care, treatment, or preventive care;

- For an absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member, provided the absence is to seek medical attention, obtain services from a victim services organization, obtain psychological or other counseling, seek relocation, or take legal action;

- When an employee's place of business is closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency;

- To care for a family member whose school or place of care has been closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency; or

- To care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure.

Minneapolis Paid Sick and Safe Leave need not be paid out to employees upon termination of employment. The City of Minneapolis has provided detailed guidance and tools to help employers comply with the new law.

a. Minneapolis Clarifies its Paid Sick and Safe Leave Ordinance.

On September 28, 2016, the Minneapolis City Council enacted changes to clarify the Minneapolis Paid Sick and Safe Leave Ordinance. The key changes were as follows:

- Tips, commissions, bonuses, premium overtime pay, expense reimbursements and certain other payments are not included in the regular rate of pay calculation that is used for paid sick and safe leave.

- The accrual rate must be in one-hour increments.

- Employers can "front load" sick and safe leave by giving employees 48 hours of sick leave after the employee's first 90 days of employment or by providing at least 80 hours of paid sick and safe time at the beginning of the calendar year.

- Employers need not track hours worked in Minneapolis for employees who only perform work in the city occasionally.

The above went into effect on July 1, 2017 at the same time the Minneapolis Paid Sick and Safe Leave Ordinance became effective.

b. Minneapolis Paid Sick and Safe Leave is Challenged in Court.

In October 2016, the Minnesota Chamber of Commerce filed a lawsuit in Hennepin County district court to stop the enforcement of the Minneapolis Paid Sick and Safe Leave Ordinance. The Chamber made two arguments: (1) the ordinance is preempted by state law and (2) the ordinance was an overreach by the City. At the preliminary injunction stage, the court determined that the Chamber was not likely to prevail on the "preemption" argument, but was likely to prevail on the "overreach" argument. As a result, the Court granted the Chamber's request to stop enforcement of the ordinance against non-Minneapolis employers during the pendency of the lawsuit, but the court denied the remainder of the Chamber's arguments. As a result of that ruling, non-Minneapolis employers can proceed as if the Minneapolis Paid Sick and Safe Leave Ordinance will not be enforced against them, but Minneapolis employers should comply with the terms of the Ordinance.

The Chamber appealed the decision of the Hennepin County district court to the Minnesota Court of Appeals. On September 18, 2017, the Court of Appeals upheld the decision of the lower court. *Minnesota Chamber of Commerce v. City of Minneapolis,* 2017 WL 4105201 (Minn. Ct. App. 9/18/17). The Minnesota Supreme Court denied review on November 28, 2017.

2. St. Paul Paid Sick and Safe Time Ordinance

On September 7, 2016, St. Paul passed an ordinance mandating employers to provide paid sick and safe time for their workers. The Ordinance applies to private employers of all sizes, provided the employer has at least one employee working within the St. Paul city limits. And, the St. Paul Ordinance applies to employees who work in St. Paul for at least 80 hours in a year. Covered employees can accrue one hour of sick and safe time for every 30 hours worked, up to 48 hours in a year. Employees can use their paid sick and safe time for the following reasons:

- For an employee's, or an employee's family member's, mental or physical illness, injury, or health condition, or when an employee or his or her family member needs to obtain medical diagnosis, care, treatment, or preventive care;

- For an absence due to domestic abuse, sexual assault, or stalking of the employee or the employee's family member, provided the absence is to seek medical attention, obtain services from a victim services organization, obtain psychological or other counseling, seek relocation, or seek legal advice or take legal action;

- When an employee's place of business is closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency;

- To care for a family member whose school or place of care has been closed by order of a public official to limit exposure to an infectious agent, biological toxin or hazardous material or other public emergency; or

- To care for a family member whose school or place of care has been closed due to inclement weather, loss of power, loss of heating, loss of water, or other unexpected closure.

The St. Paul Ordinance tracks many of the requirements in the Minneapolis Paid Sick and Safe Time Ordinance. St. Paul's Ordinance became effective on July 1, 2017 for employers with 24 or more employees and will be effective on July 1, 2018 for employees with fewer than 24 employees.

3. Duluth Paid Sick and Safe Time Ordinance

The City of Duluth is considering mandating paid sick and safe time for employees who work in the city. In late 2016, a city task force began a year-long study looking at the impact of mandating paid sick and safe time. Duluth plans to hold eight public input sessions – the first of which was held on February 17, 2017. On March 26, 2018 the council voted to move forward with the Paid Sick Leave ordinance, however with several amendments.

B. MUNICIPAL MINIMUM WAGE ORDINANCE

On June 30, 2017, the Minneapolis City Council approved an ordinance providing for a $15 minimum wage to be phased in over the next 5 years. The minimum wage will be available to employees "for all time worked within the geographic boundaries of" the city of Minneapolis. Employees whose primary employment is not in Minneapolis may still be entitled to the $15 minimum wage if, in any given week, they perform a minimum of two hours of work for their employer within the city's "geographic boundaries." The increases began on January 1, 2018, requiring businesses with over 100 employees ("Large Businesses") to provide a minimum wage of $10.00, with an increase to $11.25 set for July 1, 2018. Businesses with less than 100 workers ("Small Businesses") saw no increase on January 1, 2018, but will be subject to a minimum wage of $10.25 beginning July 1, 2018.

Earlier this year, the ordinance survived its first legal challenge in *Graco Inc. v. City of Minneapolis,* 27-CV-17-17198 (2/27/18). In its opinion, the Court noted that the "Minnesota Legislature has specifically provided for local minimum wage ordinances in its prior legislation. It has incorporated language providing for a local minimum wage ordinance from federal law, . . . [and] a recent bill in the Minnesota Legislature specifically designed to preempt local minimum wage ordinances failed." The Court then upheld Minneapolis' $15 minimum wage ordinance. The case was appealed to the Minnesota Court of Appeals. The Ordinance will remain effective while pending review.

C. ADA ACCESSIBILITY LAWSUITS

On May 23, 2017, Governor Mark Dayton signed into law amendments to the Minnesota Human Rights Act (MHRA) intended to reduce the growing number of "drive-by" disability accessibility lawsuits in the state. The amended law requires plaintiffs to provide written notice to the place of public accommodation which they believe is not in compliance with state accessibility requirements and allow the business 60 days to cure before bringing a civil action. If weather conditions prevent a business from removing an architectural barrier during the 60-day window, the business may obtain a 30-day extension by responding in writing affirming its plans to remove the barrier. Also, a business may cite remediation within the cure period as an affirmative defense.

This legislation does not affect plaintiffs filing claims *pro se*, or lawsuits which began before its effective date of May 24, 2017. Also, since the American with Disabilities Act (ADA) is federal law, the legislation will not impact plaintiffs' ability to submit claims under the ADA which does not require notice.

D. PENDING MINNESOTA EMPLOYMENT LEGISLATION

1. Uniformity of State Labor Standards for Private Employers *(HF 600, SF 580)*.

On March 2, 2017, the Minnesota House of Representatives passed a bill that would preempt cities from enacting labor laws, such as: (1) minimum wages higher than the state minimum wage, (2) a requirement for paid or unpaid leave, (3) a work hours or scheduling requirement, and (4) mandates on benefits, working conditions, or other terms and conditions of employment. The Minnesota Senate passed the bill on April 20, 2017. Just over a month later, on May 30, 2017, Governor Mark Dayton vetoed the bill because he felt it would, "preempt local governments' ability to set wage and benefit levels higher than state law."

2. Wage Theft Protection Bill *(HF 1391, SF 1329)*.

The wage theft protection bill contains 12 changes to the Wage Theft Prevention Act. The following are three key changes in the bill. One, the bill creates a criminal penalty of a gross misdemeanor for an employer that fails to pay any wage due to an employee(s), if the total wages withheld in relation to all affected employees is $10,000 or more. Two, the bill requires employers to pay employees on a regularly scheduled payday that occurs at least every 16 days; rather than the 31 days provided under current law. Three, the bill requires employers to give employees written notice of certain employment related information at the start of employment, including:

- The employee's rate of pay
- Information about paid time off accruals and terms of use
- Scheduled paydays
- Whether the employee is exempt from minimum wage or overtime
- The legal name of the employer, and
- The employer's address and phone number

The bill requires an employer to provide employees with any changes to the information contained in the notice at least seven calendar days prior to the effective date of the changes. The Wage Theft Protection Bill is still in committee in the Minnesota Senate.

3. Sexual Harassment Definition Amendment *(HF 4459, SF 4031)*.

On April 23, 2018, Joyce Peppin (Minnesota House Majority Leader) introduced HF 4459, which would change the legal standard for sexual harassment claims brought under the Minnesota Human Rights Act. The bill has 34 co-sponsors and wide bipartisan support. It proposes to remove the "severe and pervasive" standard for sexual harassment claims. If passed, Minnesota would be the only state in the nation that does not use the "severe and pervasive"

standard. And, the bill does not propose a replacement standard. Rather, Peppin explained that the bill allows the court to use its judgment to decide if a situation constitutes sexual harassment.

The House Civil Law and Data Practices Committee held a hearing on the proposed amendment on April 26, 2018. During the hearing, Representative Peppin indicated that her amendment was designed to return the definition of sexual harassment back to the plain language of the statute, *i.e.*, that there is harassment if conduct or comments "substantially interfere" with the work environment. Some witnesses and representatives were concerned that the bill contained no definition or guidance on the meaning of the term "substantially interfere," especially given the centrality of the term "substantially interfere" to the amendment. Still, the amendment passed Committee and will move to the House floor for debate and a full vote.

There is a companion bill in the Senate which was sponsored by Senator Karen Housley. The Senate bill was referred to the Senate Judiciary Committee which has not taken any action on the bill as of yet.

II. 2017-18 MINNESOTA EMPLOYMENT CASE LAW UPDATE

A. AGE DISCRIMINATION

1. ***Peterson v. City of Minneapolis,*** 892 N.W.2d 824 (Minn. 2017) The City of Minneapolis' internal complaint process was "dispute resolution process" sufficient to toll the MHRA's one-year statute of limitations.

In *Peterson v. City of Minneapolis*, 892 N.W.2d 824 (Minn. 2017), the Minnesota Supreme Court affirmed the Court of Appeals' decision that an internal complaint can qualify as a "dispute resolution process" which tolls the running of the MHRA's one–year statute of limitations. In *Peterson*, the Minneapolis Police Department transferred Scott Peterson (54) from the violent offender task force to the less prestigious licensing unit. Peterson filed an age discrimination complaint with the Minneapolis Department of Human Resources which took more than a year to make a determination. Peterson then filed an age discrimination lawsuit which the district court dismissed, holding that it was time-barred under the MHRA's one-year statute of limitations.

The Minnesota Court of Appeals disagreed that Peterson's MHRA claims were time-barred. The Court began by clarifying several issues: (1) a "dispute resolution process" is not limited to arbitrations, conciliations, mediations or grievance procedures, (2) the process can be voluntary even though it is initiated unilaterally by one party, and (3) the process need not be presided over by a third-party neutral. The Court then stated that the intent of the law was to encourage claimants to vet their discrimination claims in nonjudicial forums without forfeiting their option to file an MHRA lawsuit. The *Peterson* case was appealed to the Minnesota Supreme Court which affirmed the Court of Appeals decision. The Minnesota Supreme Court held that because the parties were "voluntarily engaged in a dispute resolution process involving a claim of unlawful

discrimination under the MHRA, the statute of limitations was suspended for the duration of th[e] process," and the claim could therefore proceed.

B. DISABILITY DISCRIMINATION

1. *LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506 (Minn. 2017) Animus is not necessary to establish that unlawful pregnancy discrimination occurred.

In *LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506 (Minn. 2017), Nicole LaPoint applied to and was offered an orthodontic assistant position with Family Orthodontics. Her job offer was rescinded after she informed Family Orthodontics that she was pregnant. LaPoint filed suit alleging pregnancy discrimination in violation of the Minnesota Human Rights Act (MHRA). After a bench trial, the District Court concluded that Family Orthodontics' decision to rescind LaPoint's job offer was not discriminatory. The Minnesota Court of Appeals reversed, concluding that "the evidence and the district court's findings show a "specific link" between LaPoint's pregnancy and the rescission of the job offer." The Court of Appeals held that "the district court erred in concluding that LaPoint failed to prove that her pregnancy was a substantial causative factor in Family Orthodontics's decision."

The Minnesota Supreme Court took the matter and considered whether the Court of Appeals applied an incorrect legal standard when it allowed LaPoint to show only a 'specific link' between the employer's conduct and the protected characteristic. The Minnesota Supreme Court held that LaPoint must establish that "the protected characteristic 'actually motivated' the employer's conduct," not just that there was a specific link between LaPoint's pregnancy and the rescission of her job offer. The Supreme Court also stated that a finding of animus was not necessary to determine that unlawful pregnancy discrimination occurred. Since the Court of Appeal's reasoning suggested that animus was required, the Supreme Court remanded the case for further proceedings consistent with its decision that animus was not necessary.

2. *McBee v. Team Indus., Inc.*, 906 N.W.2d 880 (Minn. Ct. App. 2018) The MHRA does not require an employer to engage in an interactive process to determine an appropriate reasonable accommodation.

In *McBee v. Team Industries, Inc.*, 906 N.W.2d 880 (Minn. Ct. App. 2018), Thaleaha McBee was a machine operator who was required to lift objects in excess of thirty pounds as part of her job. McBee was given a ten-pound lifting restriction because of her bulged disc, bone spurs, and other ailments. She informed HR of the restriction, and was terminated "due to concerns relating to her medical restriction." McBee filed suit alleging that Team Industries violated the MHRA when it terminated her employment rather than explore possible reasonable accommodations with her. The Court disagreed, noting that the MHRA does not have language requiring an interactive process. The Court noted that "the ADA predates the MHRA." So, the Minnesota legislature could

have included language in the MHRA that required an interactive process, but it "consciously refrained" from doing so. That conscious decision not to include interactive process language means that the MHRA "does not require an employer to engage in an interactive process to determine an appropriate reasonable accommodation."

C. EMPLOYMENT/ SETTLEMENT AGREEMENTS

1. ***Mid-America Business Systems v. Sanderson et al.*, 2017 WL 4480107 (D. Minn. 10/6/17) Non-compete agreements entered into after the start of employment require independent consideration beyond just continued employment.**

In *Mid-America Business Systems v. Sanderson*, 2017 WL 4480107 (D. Minn. 2017), Mid-America Business Systems employed Kevin Sanderson as a temporary service technician. He was later converted to a permanent position, at which time he was required to sign a non-compete agreement. Sanderson resigned from Mid-America in November 2016 and began working as a service technician for a competitor. Mid-America sought a temporary restraining order to enforce its non-compete agreement with Sanderson and argued that being hired as a permanent employee was the independent consideration for the non-compete agreement. The Court was not convinced, noting that permanent employment is often sufficient consideration, but not when Mid-America allowed Sanderson to work as a temporary employee without a non-compete. The Minnesota District Court held that there was no independent consideration for the parties' non-compete agreement, and therefore, the non-compete agreement was likely invalid. The Court then rejected Mid-America's TRO request on the grounds that, without independent consideration for the non-compete agreement, Mid-America had not "demonstrated sufficient likelihood of success" on the merits of its claim.

2. ***Safety Center, Inc. v. Stier*, 903 N.W.2d 896 (Minn. Ct. App. 2017) Independent consideration is required if a non-competition agreement is not entered into at the beginning of or ancillary to the employment relationship.**

In *Safety Center, Inc. v. Stier,* 903 N.W.2d 896 (Minn. Ct. App. 2017), Joan Marie Steir applied for a position as a part-time therapist with the Safety Center, a treatment center for special-needs sex offenders. Steir was offered and accepted the therapist job. Safety Center sent a letter confirming Steir's acceptance of the position which did not mention that Steir needed to sign a non-compete agreement. In fact, she was not given a non-compete agreement until her first day of employment. Steir left the Safety Center several years later to start a competing business. The Safety Center sued Steir alleging that she was violating her non-compete. The district court found that the noncompete agreement was not ancillary to the employment relationship because Steir entered into the employment relationship before Safety Center gave her the noncompete agreement. The district court also found that "no independent consideration support[ed] Steir's

execution of the noncompete agreement, and concluded that the agreement [was] not enforceable." The Safety Center appealed those adverse decisions.

The Minnesota Court of Appeals explained that independent consideration is not required if the employer and employee enter into a non-compete agreement "at the inception of the employment relationship." However, if the non-compete agreement is not entered into at the inception of the employment relationship (i.e., is not ancillary to the employment relationship), independent consideration must be given to the employee to make the agreement valid and enforceable. In *Safety Center,* the Court of Appeals found that the non-compete agreement was not ancillary to the employment relationship, because it was not signed at the inception of the employment relationship, which occurred days earlier. Therefore, there needed to independent consideration for the non-compete agreement to be valid. Since there was no independent consideration, the parties' non-compete agreement was neither valid nor enforceable.

3. *St. Jude Medical, Inc. v. Carter*, 899 N.W.2d 869 (Minn. 2017) Contracts must be interpreted to give all provisions meaning which includes, but is not limited to, a remedies provision in a non-competition agreement.

In *St. Jude Medical Center, Inc. v. Carter*, 899 N.W.2d 869 (Minn. 2017), Heath Carter entered into a non-compete agreement with St. Jude which limited his ability to work for any of St. Jude's competitors for one year after his employment ended. The agreement also contained a remedies provision which stated, "in the event Employee breaches the covenants contained in this Agreement, Employee recognizes that irreparable injury will result to [St. Jude] . . . and that [St. Jude] shall be entitled to an injunction." In August 2015, Carter voluntarily resigned from St. Jude to take a position at Boston Scientific, which was a direct competitor. St. Jude filed suit against Carter alleging that he breached the noncompete provision of his employment contract. The jury concluded, after a four-day trial, that Carter breached his non-compete agreement with St. Jude. Still, the district court determined that St. Jude was not entitled to injunctive relief because it was not irreparably harmed. St. Jude appealed, arguing that it was error for the district court to ignore the remedies provision in the parties' agreement which provided for an injunction if the non-compete provision was breached.

The Minnesota Court of Appeals agreed with St. Jude. The Court explained that case law states "that the court must enforce contractual provisions to prevent the provisions from becoming meaningless and to ensure that the non-breaching party does not lose the benefit of its bargain." The Court further stated that the "district court's failure to recognize the enforceability of the remedies provision in Carter's employment contract rendered that provision meaningless and constituted reversible error." So, the Minnesota Court of Appeals held that St. Jude was entitled to injunctive relief.

4. ***Capistrant v. Lifetouch National School Studios, Inc.*, 899 N.W.2d 844 (Minn. 2017). Disproportionate forfeiture clauses are disfavored in law and in equity.**

In *Capistrant v. Lifetouch National School Studios, Inc.*, 899 N.W.2d 844 (Minn. 2017), John Capistrant worked as a territory manager for Lifetouch. He executed an employment contract that contained a non-compete provision, a non-disclosure provision, and a return of property provision, among other provisions. Capistrant's employment contract stated that Lifetouch did not have to pay Capistrant a residual commission, if he violated any terms of the parties' contract. Capistrant filed a declaratory-judgment action against Lifetouch in September of 2014 for approximately $2.6M in residual commissions. Six months later, he retired and took approximately 19,000 pages of confidential Lifetouch information with him. Lifetouch argued that Capistrant's failure to return its property (*i.e.,* the confidential information he took and still had in his possession) was a condition precedent to their duty to pay Capistrant's residual commissions and, since the condition precedent did not occur, Lifetouch was excused from paying Capistrant's residual commissions. The district court agreed and granted summary judgment in favor of Lifetouch.

The Minnesota Court of Appeals reversed. The Court found that the return of property clause was not a condition precedent to Lifetouch's payment of residual commissions; rather, it was a forfeiture clause. As such, the well-settled precedent on the unenforceability of disproportionate forfeiture clauses was applicable. The Court felt that it was disproportionate for Capistrant to forfeit $2.6M because he did not immediately return 19,000 pages to Lifetouch, especially since Lifetouch was not harmed in any way. The *Capistrant* case is now on appeal to the Minnesota Supreme Court. The Supreme Court will decide (1) whether the return-of-property provision is a non-compete clause; and (2) whether the provision that allowed Lifetouch to discontinue post-employment payments operates as a disproportionate forfeiture clause.

D. JUDICIAL ESTOPPEL

1. ***Grosch v. Soo Line Railroad Company,* 2017 WL 4104759 (Minn. Ct. App. 12/18/2017). Judicial estoppel prevents an employee from claiming that they are totally disabled in one proceeding and then claim that they are able to work in another proceeding.**

In *Grosch v. Soo Line Railroad Company,* 2017 WL 4104759 (Minn. Ct. App. 2017), Crystal Grosch worked for Soo Line Railroad Company as an audit clerk in the pay services department. Grosch was involved in a car accident which affected her ability to complete daily work tasks. After the accident, Grosch was asked to file between 500 and 600 documents which caused her injuries to flare-up. She went to her doctor and got a work restriction that prohibited her from doing "any filing." Soo Line Railroad told Grosch that it could not accommodate her work restriction because filing was an essential function of her job. One month later, Grosch applied for disability benefits from the United States Railroad Retirement Board (RRB), alleging that her work restriction

rendered her unable to work. Based on Grosch's assertions, the RRB concluded that she was totally and permanently disabled and that Grosch qualified for a disability annuity as of November 20, 2012, *i.e.,* the date she first submitted work restrictions to Soo Line Railroad. Grosch filed suit against Soo Line Railroad for disability discrimination, failure to accommodate, and reprisal under the Minnesota Human Rights Act.

The district court granted summary judgment on Grosch's disability discrimination and failure to accommodate claims for two separate and independent reasons: (1) Grosch failed to present evidence that she was "qualified" given her work restriction prohibiting her from doing "any filing," and (2) Grosch's contrary representations to the RRB judicially estopped her from claiming that she was physically or mentally qualified for the position. The Court of Appeals affirmed. Judicial estoppel is an equitable doctrine that is generally intended to "prevent a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding." In this case, Grosch's assertion to the RRB that "she could no longer work because of her work restrictions" was inconsistent with her assertions in her MRHA claim that there was a reasonable accommodation that would allow her to work. Therefore, the Court held the district court "did not err by determining that [Grosch was] judicially estopped from asserting that she was a qualified disabled person after November 20, 2012 – the date she began receiving disability benefits for being totally disabled and completely unable to work.

E. MINNESOTA FAIR LABOR STANDARDS ACT

1. ***Burt v. Rackner Inc.*, 902 N.W.2d 448 (Minn. 2017). The Minnesota Fair Labor Standards Act contains a cause of action for wrongful discharge for which the employee can be awarded wrongful discharge damages.**

In *Burt v. Rackner*, 902 N.W.2d 448 (Minn. 2017), Rackner Inc. d/b/a Bunny's Bar & Grill ("Bunny's Bar") told its employee, Todd Burt, that he needed to share his tips. When Burt refused to share his tips, Bunny's Bar terminated his employment. Burt sued, claiming that his employment was wrongfully terminated in violation of the Minnesota Fair Labor Standards Act (MFLSA). Bunny's Bar moved for judgment on the pleadings which the district court granted. The District Court stated that the MFLSA "does not contemplate an action for wrongful discharge" and "if the Legislature had intended for employees [to] be able to sue for wrongful discharge, it would have included that language explicitly in the MFLSA, as it has done in numerous other statutes." The Minnesota Court of Appeals disagreed, holding that Burt's wrongful discharge claim is a cause of action that is recognized by the MFLSA and that Burt can seek wrongful discharge damages.

The Minnesota Supreme Court affirmed the Minnesota Court of Appeals. The Court relied heavily on Section 177.24 which states that "[n]o employer may require an employee to contribute or share a gratuity" and although an employee may voluntarily agree to share tips, he must do so "without employer coercion or participation." The Court stated that threatening to discharge (or actually discharging) an employee for failing to share tips constitutes coercion. The Supreme Court explained that, given the MFLSA's "broad, private cause of action for any violation," it was

unreasonable to interpret the statute in such a way that prohibits mandatory tip-sharing yet would allow the discharge of an employee who refused to engage in the prohibited conduct. So, the Minnesota Supreme Court held that the MFLSA contains a wrongful discharge cause of action which allows for an award of wrongful discharge damages.

F. RACE DISCRIMINATION

1. ***Abou v. University of Minnesota,* 2017 WL 2836175 (Minn. Ct. App. 7/3/17). The causation element (and its supporting proof) is irrelevant and will not be considered by the court, if there was no adverse employment action.**

In *Abou v. University of Minnesota,* 2017 WL 2836175 (Minn. Ct. App. 2017), Dr. Seraphin Abou taught in the Department of Mechanical and Industrial Engineering at the University of Minnesota, Duluth (UMD). In September 2012, Abou applied for a promotion to associate professor and for tenure. His application was denied due to "serious concerns with the quality and content of his published works." Abou then filed an internal complaint with the University's Office of Equal Opportunity and Affirmative Action, alleging that his denial of tenure was because of race and national origin discrimination. The office did not find Abou's promotion and tenure decision to be discriminatory. In the fall of 2013 (as his teaching assignment was ending), Abou asked his department head, Dr. Ryan Rosandich, if he could stay on as an adjunct professor. Rosandich said "he thought that Abou's 'chances were pretty slim because he brought legal action against the University.'" UMD's Dean checked to see if Abou could remain, but the University had already hired someone to teach Abou's courses. So, Abou was not hired as an adjunct professor, and his employment ended in May 2014.

Abou filed suit against the University in September 2015 alleging, among other things, retaliation. The district court granted summary judgment on Abou's retaliation claim on the grounds that there was no adverse employment action when the university declined to rehire Abou because there was no position available. The Court of Appeals agreed with that decision. The Court, then, considered Rosandich's comments that he did not think Abou would be rehired because he brought a legal action against the University. The Court acknowledged the comment was "troubling" but concluded it was irrelevant. Rosandich's comment was relevant to the issue of whether there was a causal connection between the protected activity and the adverse employment action. However, if there was no adverse employment action (such as in the *Abou* case), the Court does not get to the issue of causation where that comment would have relevance. So, while troubling, Rosandich's comment established nothing with respect to Abou's retaliation claim. The Court of Appeals affirmed summary judgment for the University because Abou could not point to an open position for which he was qualified and therefore could not prove that he experienced an adverse employment action.

2. *Temple v. Metropolitan Council,* 2017 WL 6272716 (Minn. Ct. App. 12/11/17). To prevail on a race discrimination claim, the employee must prove that he was treated less favorably because of race and that the decisionmaker was motivated by racial animus.

In *Temple v. Metropolitan Council,* 2017 WL 62727716 (Minn. Ct. App. 2017), Lafayette Temple is an African-American man who worked as a police officer for the Metro Transit Police Department (MTPD). The MTPD assigned Temple to work the light rail train (LRT) line which he did not want to work. Temple told his managers that he would not work the LRT line and began responding to patrol calls instead of working the LRT line. Chief John Harrington ordered an Internal Affairs (IA) investigation which concluded that Temple's conduct violated policy. Chief Harrington then made the decision to terminate Temple's employment. In May 2016, Temple sued the Metropolitan Council, alleging race discrimination and reprisal in violation of the Minnesota Human Rights Act. The Metropolitan Council moved for summary judgment which was granted by the district court. Temple appealed and argued that he was treated differently than his fellow officers. The Minnesota Court of Appeals was not persuaded, because "treating an employee differently is not the threshold question;" rather the question is whether "an employee is treated less favorably than others *on the basis of race*." The Court found that Temple did not "show that MTPD's actions regarding discipline and termination were grounded in racial discrimination."

The Court of Appeals, then, turned its attention to Temple's cat's paw argument. Temple alleged that, during his field training, Sergeant Peter Peterson made several racially hostile comments including telling Temple to "kill yourself . . . we don't want you here; I don't like your kind, black people.". He also stated that his training officers encouraged him to be aggressive toward minorities and that he frequently overheard fellow officers boasting about using excessive force against black men. Temple argued that those officers directly influenced the IA investigations on which Chief Harrington relied in terminating Temple's employment. The Court rejected Temple's "cat's paw" argument, finding that Chief Harrington conducted his own *Loudermill* hearings prior to imposing any discipline. So, while "Sergeant Peterson may have acted with racial animus toward Temple during his field training, Sergeant Peterson had little influence or involvement in Temple's discipline or termination." The Court found that Temple did not produce any evidence that the decisionmaker, Chief Harrington, was motivated by racial animus. The Court of Appeals affirmed summary judgment against Temple on his race discrimination claim.

G. RES JUDICATA

1. ***Breaker v. Bemidji State University*, 899 N.W.2d 515 (Minn. Ct. App. 6/12/17). Res judicata does not bar an employee's claim when the employee did not have a full and fair opportunity to litigate the claim in their previous lawsuit.**

In *Breaker v. Bemidji State University,* 899 N.W.2d 515 (Minn. Ct. App. 2017), Martin Breaker was a faculty member at Bemidji State University (BSU), working as an assistant professor and program coordinator in the business department. In 2005, the U.S. Army Reserve called Breaker into active military duty. Three years later, Breaker notified BSU that he would be returning to work. But, BSU had eliminated Breaker's prior position so it offered him a temporary fixed-term teaching position. Breaker declined that position because it was not comparable in pay, status, seniority, opportunity, or location. In 2011, Breaker sued BSU claiming intentional infliction of emotional distress and, although he alleged USERRA violations, Breaker did not seek relief under USERRA. Breaker's case was dismissed in 2011 because it did not sufficiently allege extreme and outrageous conduct by BSU. In April 2012, the Minnesota Legislature passed a law waiving state sovereign immunity from USERRA claims. Breaker filed suit against BSU again, asserting two USERRA claims. The district court concluded that res judicata barred Breaker's claims and dismissed his complaint.

Breaker appealed to the Minnesota Court of Appeals. The issue on appeal was whether res judicata barred Breaker's USERRA claims because he had a full and fair opportunity to litigate those claims in *Breaker I*. It was undisputed that BSU is an arm of the State of Minnesota and therefore was entitled to sovereign immunity. The Court of Appeals found that since "the state did not waive its sovereign immunity from USERRA claims until after *Breaker I* was dismissed, and Congress did not validly abrogate sovereign immunity from USERRA claims, sovereign immunity would have barred Breaker's private damages action against his state employer for USERRA violations in *Breaker I*. For those reasons, the Minnesota Court of Appeals held that "Breaker lacked a full and fair opportunity to litigate his USERRA claims in *Breaker I* and the district court erred in dismissing Breaker's USERRA claims on the basis of res judicata."

H. SEX DISCRIMINATION/HARASSMENT

1. ***Bliss v. Central States Insulation Wholesale, Inc.,* 2017 WL 2332726 (Minn. Ct. App. 2017). The Court of Appeals will not overturn a district court's rulings during trial unless there was some error by the district court.**

In *Bliss v. Central States Insulation Wholesale, Inc.,* 2017 WL 2332726 (Minn. Ct. App. 2017), Jacquelyn Bliss claimed that she was sexually harassed and subjected to a hostile work environment while she worked in Central States Insulation's (CSI) Blaine office from September 2010 through August 2011. There was a four-day trial on Bliss's allegations. The jury returned a

verdict in favor of CSI, finding that there was no hostile work environment and that Bliss was not constructively discharged or sexually harassed. Bliss appealed the adverse verdict to the Minnesota Court of Appeals where she challenged several of the trial court's decisions. One, Bliss argued that the district court erred by excluding evidence of pornographic images recovered from her supervisor's computer. The Minnesota Court of Appeals held that there was no error, because the district court did not exclude the pornographic images rather Bliss simply did not offer that proof believing that it would be excluded. Two, Bliss argued that evidence about her previous lawsuit was improperly used as character evidence during cross-examination and closing argument. The Court of Appeals noted that Bliss never objected to the use of her previous lawsuit before or during trial, and therefore, waived those objections. And three, Bliss argued that she should not have been cross-examined about her romantic relationship with a coworker, despite the fact that she mentioned the relationship during her testimony. The Court of Appeals stated that, if Bliss did not want to be cross-examined about her romantic relationship with a coworker, she should not have talked about it in her testimony and opened the door. The Minnesota Court of Appeals ended its opinion by saying that it was not going to overturn the result of a close trial when "the district court did not err in any of its rulings."

I. UNEMPLOYMENT COMPENSATION BENEFITS

1. ***Superior Glass, Inc. v. Johnson*, 896 N.W.2d 137 (Minn. Ct. App. 2017) An employee is covered by Minnesota's unemployment statute when the employee performs 50% or more of their work in Minnesota during the benefits quarter.**

Superior Glass, Inc. v. Johnson, 896 N.W.2d 137 (Minn. Ct. App. 2017) involved two Superior Glass employees who performed work for the company in both Wisconsin and Minnesota. The employees were laid off, and both applied for unemployment-insurance benefits in Minnesota, where they resided. The employees provided the Minnesota Department of Employment and Economic Development (DEED) with detailed logs of their hours worked, from which DEED determined that the employees were eligible for unemployment benefits for the quarters during which they "performed their employment primarily in Minnesota." Those decisions were affirmed by unemployment law judges (ULJ).

Superior Glass appealed, arguing, among other things, that the ULJs "misinterpreted 'covered employment' as defined in Minn. Stat. § 268.035, subd. 12(a)," which states that an employee's entire employment during a calendar quarter is covered provided the employment during the quarter was "performed primarily in Minnesota." Examining the statute, the Court concluded that "the only reasonable interpretation of 'primarily' is '[c]hiefly; mainly' because the context… suggests a quantitative, not sequential, meaning." As such, the Court held that when an employee performs more than 50% of his or her hours during a quarter in Minnesota, the employment was "performed primarily in Minnesota," and therefore covered under the statute.

2. ***Winter v. Manpower,* 2017 WL 3013273 (Minn. Ct. App. 7/17/17). A single incident of discriminatory conduct can be serious enough to constitute employment misconduct and make an employee ineligible for unemployment benefits.**

Winter v. Manpower, 2017 WL 3013273 (Minn. Ct. App. 2017) considered the issue of whether a single-incident of discriminatory conduct could constitute employment misconduct, making an individual ineligible for unemployment benefits. Barton Winter began working for Manpower, Inc. (a staffing company) in May 2016. Manpower assigned Winter to work on a project for 3M performing light assembly work. Winter's team leader on the 3M project was Amos Wilson, a 3M employee. On June 14, 2016, Wilson asked Winter to count out and bring 40 boxes to the assembly area. But, Winter did not follow that instruction. When Wilson asked why Winter did not do as he was asked, Winter said "This is 3M, not Africa." He later explained that he made the comment because "he worked with Liberians in the past and in his mind 'Africa would be plagued by corruption, plagued by people who act in a pompous authoritarian manner who actually don't get things done well." The next day, Manpower terminated Winter's employment and told him that his "comment about Africa . . . [was] not tolerable."

Winter applied for unemployment benefits. Minnesota Department of Employment and Economic Development (DEED) denied Winter's application because his termination was for employment misconduct. Winter appealed the ineligibility determination. The ULJ also concluded that Winter's termination was for employment misconduct. Winter then appealed to the Minnesota Court of Appeals. The Court concluded that "the evidence amply supports the ULJ's determination that Winter violated Manpower's reasonable anti-discrimination policy and was discharged for doing so." The Court then turned its attention to Winter's "single incident" argument. The Court explained that "there is no single-incident exception to the statutory definition of employment misconduct;" therefore, a single incident can be serious enough to be considered misconduct. Here, Winter's discriminatory comment (which he knew violated both Manpower's and 3M's policies) was serious enough to constitute employment misconduct. The Minnesota Court of Appeals affirmed the ULJ's decision that Winter was ineligible for unemployment benefits.

J. MINNESOTA WHISTLEBLOWER ACT

1. ***Friedlander v. Edwards Lifesciences LLC*, 900 N.W.2d 162 (Minn. 2017). The "good faith" requirement in the Minnesota Whistleblower Act no longer requires that the employee prove that they were "exposing an illegality."**

Friedlander v. Edwards Lifesciences LLC, 900 N.W.2d 162 (Minn. 2017) answered the question of what the term "good faith" means in the Minnesota Whistleblower Act. James Friedlander alleged that while employed at Edwards Lifesciences his supervisors engaged in illegal activities—such as breach of contract and breach of fiduciary duty. Friedlander claimed he reported concerns about his supervisor's behavior, and was told that they "already knew about

the conduct in question." After reporting his concerns, Friedlander's employment with Edwards Lifesciences was terminated.

Friedlander filed suit alleging wrongful termination in violation of the Minnesota Whistleblower Act (MWA). Edwards Lifesciences moved for summary judgment, arguing that because Friedlander made his report to individuals who already knew of his supervisor's allegedly unlawful conduct, Friedlander did not in fact "expose an illegality." That meant Friedlander did not make a report in "good faith," and therefore, was not protected by the MWA. To support this argument, Edwards Lifesciences relied on the common law definition of "good faith" in *Obst v. Microtron, Inc.*, which required a potential whistleblower to have acted "with the purpose of exposing an illegality." Conversely, Friedlander argued that the common law definition of "good faith" was abrogated by the MWA's 2013 amendment, which provided a definition for "good faith" that did not include exposing an illegality.

The Minnesota District Court stated it "was not aware of any controlling precedent that decides the question of whether the 2013 amendments to the [MWA] eliminated the expose-an-illegality requirement," and certified the question to the Minnesota Supreme Court for resolution. The Minnesota Supreme Court held that the common law definition of "good faith" under the Minnesota Whistleblower Act (MWA)—which requires that a potential whistleblower "act with the purpose of exposing an illegality"—was abrogated by the definition of "good faith" provided in the MWA's 2013 amendment. Bottom line, employees no longer have to prove that they were acting with the purpose of exposing an illegality to prevail on a Minnesota Whistleblower Act claim.

K. WORKERS COMPENSATION

1. ***Sanchez v. Dahlke Trailer Sales, Inc.*, 897 N.W.2d 267 (Minn. 6/28/17) An undocumented worker can maintain a retaliatory discharge action under the Minnesota Workers Compensation Act.**

In *Sanchez v. Dahlke Trailer Sales, Inc.,* 897 N.W.2d 267 (Minn. 2017), Anibal Sanchez immigrated to the United States, but he was not authorized to work in the United States. He obtained employment with Dahlke Trailer Sales and, in September 2013, injured his leg, neck and back while using a sandblaster. He filed for workers compensation benefits. During his deposition in that case, Sanchez disclosed that he was not eligible to work in the United States. The next day, Dahlke placed Sanchez on an indefinite, unpaid leave of absence. Sanchez filed suit, claiming workers compensation retaliation. The Minnesota Court of Appeals had to determine, as a preliminary matter, if an undocumented worker could maintain a workers compensation retaliation cause of action. The Court concluded that the Immigration Reform Control Act does not preclude an undocumented worker from maintaining a retaliatory discharge cause of action under the Minnesota Workers' Compensation Act.

The case then went to the Minnesota Supreme Court which affirmed the Court of Appeals opinion in a 4-3 decision. Dahlke argued that the federal IRCA preempted the Minnesota Workers Compensation Act's anti-retaliation provision under the Supremacy Clause of the United States Constitution. Dahlke believed that the two provisions were in conflict because the Minnesota Workers Compensation Act's anti-retaliation provision requires that Dahlke continue to employ Sanchez; whereas, the IRCA prohibits Dahlke from knowingly employing an undocumented worker. The Minnesota Supreme Court rejected Dahlke's preemption argument, stating that the anti-retaliation provision in Minnesota's Workers Compensation Act did not conflict with the IRCA. The Court explained that the anti-retaliation provision did not require Dahlke to continue employing Sanchez after it knew that he was undocumented; rather, the anti-retaliation provision prohibited Dahlke from discharging Sanchez because he sought worker's compensation benefits. The Supreme Court stated that "the IRCA's aim is to discourage employment of undocumented workers, removing labor protections would undermine that goal by making the employment of undocumented workers cost-effective." The Minnesota Supreme Court held that an undocumented worker can maintain a retaliatory discharge claim under the Minnesota Workers Compensation Act.

2. *Halvorson v. B&F Fastener Supply*, 901 N.W.2d 425 (Minn. 2017). Requests for termination of rehabilitation benefits requires a showing of "good cause" as defined by Minn. Stat. §176.102, subd. 8(a).

The issue in *Halvorson v. B&F Fastener Supply,* 901 N.W.2d 425 (Minn. 2017) was what legal standard governs a request to terminate rehabilitation benefits awarded to an employee as part of a compensable workers' compensation injury. Julie Halvorson had a work-related injury for which she was awarded workers' compensation benefits, including rehabilitation services covered by B&F Fastener's insurance policy. Halvorson was out of work over two-years, but eventually found part-time employment with another employer. B&F Fastener filed a request to end rehabilitation services, claiming Halvorson was no longer a "qualified employee" eligible for rehabilitation benefits because she had obtained "suitable gainful employment" per Minn. R. 5220.0100. The compensation judge agreed with B&F Fastener that Halvorson was no longer a "qualified employee" due to her part-time employment.

Halvorson appealed to the Workers' Compensation Court of Appeals (WCCA). The WCCA reversed, finding that "every request to terminate rehabilitation services is subject to the 'good cause' standard in Minn. Stat. 176.102 subd. 8(a)," and that the compensation judge relied on the definitions in Minn. R. 5220.0100 in error. The Minnesota Supreme Court affirmed, holding that in addition to filing a request to terminate rehabilitation benefits, the employer must also make "a showing of good cause," as enumerated in Minn. Stat. 176102 Subd. 8(a). The Court stated that there "is nothing absurd about creating a procedural framework for the modification of a rehabilitation plan, particularly one that allows the parties to litigate the question of termination and guards against the premature or erroneous termination of a recipient's rehabilitation benefits."

3. ***Hohlt v. University of Minnesota*, 897 N.W.2d 777 (Minn. 2017): An employee remains "in the course of employment" for a reasonable period beyond their actual working hours, provided the employee is engaging in activities that are "reasonably incidental to employment" such as walking to the employee's vehicle.**

In *Hohlt v. University of Minnesota,* 897 N.W.2d 777 (Minn. 2017), Josephine Hohlt slipped and fell on an icy sidewalk while walking from her office to her car which was parked in her employer's parking ramp. Hohlt filed a claim for workers' compensation benefits which was denied. The compensation judge found that Hohlt's injury "did not arise out of her employment," as the hazard (*i.e.,* the slippery sidewalk) was not unique to her employment. The Workers' Compensation Court of Appeals (WCCA) reversed, holding that Hohlt's injury occurred "in the course of employment."

The Minnesota Supreme Court affirmed, finding that the hazard originated during the course of Hohlt's employment because she "was moving from one part of her employer's premises to another," and she was not there "as a member of the general public, but because of her employment." So, there was a causal connection between her employment and her injury which satisfied the "arising out of" requirement. Then, the Court noted that an employee remains "in the course of employment" for "a reasonable period beyond actual working hours" if engaging in activities "reasonably incidental to employment." Under this standard, the Court found leaving work and walking on an employer-maintained sidewalk to an employer-owned parking ramp was "reasonably incidental" to employment. For those reasons, the Supreme Court held that "Holht's injury both arose out of, and was in the course of, her employment."

4. ***Daniel v. City of Minneapolis,* 2017 WL 6418220 (Minn. Ct. App. 12/18/17). The Supreme Court holding that Worker Compensation Act exclusivity prevails over MHRA exclusivity is still binding precedent.**

In *Daniel v. City of Minneapolis,* 2017 WL 6418220 (Minn. Ct. App. 2017), Keith Daniel worked as a firefighter with the Minneapolis Fire Department. Daniel experienced many work-related injuries for which he sought workers compensation benefits, including several ankle injuries. Daniel's doctor gave him work restrictions that required him to wear tennis shoes. The parties engaged in numerous accommodation discussions about Daniel's work restrictions, but were unable to agree on footwear for Daniel. In December 2015, Daniel filed suit against the City of Minneapolis claiming disability discrimination, failure to accommodate, retaliation and workers compensation retaliation. The city moved for summary judgment, claiming that the district court lacked subject matter jurisdiction over Daniel's MRHA claims due to the exclusivity provision in the Workers Compensation Act. The district court denied the city's motion, and the city appealed that denial.

The Minnesota Court of Appeals noted that Daniel's MHRA claims were based on a workplace injury that is compensable under the WCA. The Court explained that in *Karst v. F.C. Hayer Co*. the Minnesota Supreme Court held that the WCA's exclusivity provision bars an employee's MHRA claim for disability discrimination. In other words, the WCA's exclusivity provision prevails over the MHRA's exclusivity provision. The Court of Appeals stated that "*Karst* is still binding precedent, the supreme court has not overruled it, and this [appellate] court has no authority to challenge the rulings of the supreme court." On that basis, the Minnesota Court of Appeals held that the district court did not have subject matter jurisdiction over Daniel's claims under the MHRA, because those claims were barred by the WCA's exclusivity provision.