NO. A15-0396

State of Minnesota

In Supreme Court

Nicole LaPoint,

Respondent,

v.

Family Orthodontics, P.A.,

Appellant.

BRIEF OF *AMICUS CURIAE* MINNESOTA DEFENSE LAWYERS ASSOCIATION

Marshall H. Tanick (#108303)
Teresa J. Ayling (#157478)
HELLMUTH & JOHNSON, PLLC
8050 West 78th Street
Edina, MN 55439
(952) 941-4005

Attorneys for Appellant
Family Orthodontics, P.A.

Steven Andrew Smith (#260836)
Bonnie M. Smith (#391915)
NICHOLS KASTER, PLLP
4600 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 256-3200

Attorneys for Respondent
Nicole LaPoint

Margaret R. Ryan (#331181)
Jacalyn N. Chinander (#388266)
MEAGHER & GEER, PLLP
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Tel: (612) 228-0661

and

William J. Davidson (#201777)
LIND, JENSEN, SULLIVAN
& PETERSON, PA
1300 AT&T Tower
901 Marquette Avenue South
Minneapolis, MN 55402
(612) 333-3637

Attorneys for Amicus Curiae
Minnesota Defense Lawyers Association

(Additional counsel listed on following page)

2016 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Frances E. Baillon (#28435X)
BAILLON THOME JOZWIAK
& WANTA, LLP
100 South Fifth Street, Suite 1200
Minneapolis, MN 55402
(612) 252-3570

Attorneys for Amicus Curiae
National Employment Lawyers Association-
Minnesota Chapter

Brian Rochel (#391497)
Douglas A. Micko (#299364)
TESKE MICKO KATZ KITZER
& ROCHEL, PLLP
222 South Ninth Street, Suite 4050
Minneapolis, MN 55402
(612) 746-1558

Attorneys for Amicus Curiae
National Employment Lawyers Association-
Minnesota Chapter

Leslie L. Lienemann (#230194)
CULBERTH & LIENEMANN, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300

Attorneys for Amicus Curiae Employee
Lawyers Association of the Upper Midwest

Justin D. Cummins (#276248)
CUMMINS & CUMMINS, LLP
1245 International Centre
920 Second Avenue South
Minneapolis, MN 55402
(612) 465-0108

Attorneys for Amicus Curiae Employee
Lawyers Association of the Upper Midwest

Margaret Jacot (#346755)
Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL STATE OF MINNESOTA
445 Minnesota Street, Suite 900
St. Paul, MN 55101
(651) 757-1467

Attorneys for Amicus Curiae
The Commissioner of the Minnesota
Department of Human Rights (Pending)

Jill R. Gaulding (#388751)
Lisa C. Stratton (#236858)
Christy L. Hall (#392627)
GENDER JUSTICE
550 Rice Street
St. Paul, MN 55103
(651) 789-2090

Attorneys for Amicus Curiae
Gender Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF LEGAL ISSUE[1]

1. Viewing the record in the light most favorable to the judgment and giving due regard to the opportunity of the fact-finder to judge the credibility of the witnesses at trial, as required by Minnesota Rule of Civil Procedure 52.01, did the district court clearly err when it made the factual determination that the appellant's challenged employment decision was not motivated by unlawful discriminatory animus as defined by the Minnesota Human Rights Act?

Apposite authority:

Rasmussen v. Two Harbors Fish Co., 832 N.W.2d 790, 797 (Minn. 2013).
Hasnudeen v. Onan Corp., 552 N.W.2d 555 (Minn. 1996).
Minn. R. Civ. P. 52.01.
Minn. Stat. § 363A.08, subd. 2 and § 363A.03, subd. 42.

INTRODUCTION OF AMICUS PARTY

The Minnesota Defense Lawyers Association (MDLA), founded in 1963, is a non-profit Minnesota corporation whose members are, in large part, trial lawyers in private practice. MDLA members devote a substantial portion of their practice to the defense of clients in civil litigation. Over the past 53 years, the MDLA has grown to include over 650 attorney-members from law firms across Minnesota.

Among the MDLA's goals is the protection of the rights of litigants in civil actions, the promotion of high standards of professional ethics and competence, and the improvement of the many areas of law in which its members regularly practice. The

[1] Pursuant to Minn. R. Civ. App. P. 129.03, the undersigned certify that they authored this brief in its entirety. No person or entity, other than the Minnesota Defense Lawyers Association and the undersigned counsel, made any monetary contribution to the preparation or submission of this brief.

MDLA's interest in this case is primarily a public one: to promote clarity of the law and uniform application of important legal principles at issue in civil litigation in Minnesota. In this case, the MDLA generally supports the appellant's request for reversal of the Court of Appeals' decision and affirmance of the district court's order for judgment.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The MDLA adopts the Statement of the Case and Statement of the Facts submitted in the Appellant Family Orthodontics, P.A.'s Brief and Addendum to the Minnesota Supreme Court.

ANALYSIS

I. Introduction

Appellant Family Orthodontics, P.A. is a small medical practice with nine employees owned by Dr. Angela Ross, D.M.D. (Add. 021 at ¶¶ 3, 4). In 2013, Dr. Ross offered Respondent Nicole LaPoint an orthodontic assistant position. (Add. 023 at ¶ 21). After she accepted the job offer, LaPoint disclosed that she was pregnant, and that she planned to request 12 weeks of maternity leave. (*Id.* ¶¶ at 23, 24, 28-31). Dr. Ross informed LaPoint that the practice offered only six weeks of maternity leave, and explained her concern that a twelve-week leave would be too disruptive to the small practice's operations. (*Id.* at ¶ 30). LaPoint responded that she would consider a shorter leave of ten weeks. (*Id.* at ¶ 31). After this conversation, Dr. Ross rescinded the job offer. She explained that this decision was based on two concerns: (1) LaPoint's failure to disclose her pregnancy during the job interview; and (2) that the length of LaPoint's

maternity leave would be too disruptive to the practice. (*See* Add. 023-24 at ¶¶ 33-34, 37). After discovery, the parties' cross motions for summary judgment were denied.

Following a bench trial, the district court concluded that LaPoint did not satisfy her burden of proving that her pregnancy motivated Family Orthodontics's decision to rescind her job offer under the Minnesota Human Rights Act (MHRA), Minnesota Statute section 363A.08, subdivision 2. (Add. 028-029 at ¶¶ 7, 8). Instead, after weighing all the evidence, the district court found that Family Orthodontics rescinded the job offer because of its legitimate concern that the length of the maternity leave LaPoint sought would be too disruptive to the practice. (Add. 025-26 at ¶¶ 38-39, 45).

The Minnesota Court of Appeals disagreed with the district court's factual determinations, finding that the evidence showed a "specific link" between LaPoint's pregnancy and the rescission of the job offer, which required judgment for LaPoint. (Add. 010); *LaPoint v. Family Orthodontics, P.A.*, 872 N.W.2d 889 894 (Minn. Ct. App. 2015). The court of appeals held, as a matter of law, that LaPoint had "directly proved her claim by a preponderance of the evidence." (Add. 002); *LaPoint*, 872 N.W.2d at 889.

In reviewing the district court's factual findings, however, the court of appeals did not apply the clearly erroneous standard and did not give deference to the district court's credibility determinations as required by Minnesota Rule of Civil Procedure 52.01. Instead, it substituted its own view of the evidence in determining there was "robust affirmative evidence [of discrimination]." (Add. 011); *LaPoint*, 872 N.W.2d 889.

The court of appeals also created a "specific link" causation standard that has never been applied to the MHRA. Here, the court of appeals held that mere evidence of a

link between a protected trait and a challenged employment decision proved—as a matter of law—intentional, unlawful discrimination. It did so without regard to Family Orthodontics's rebuttal evidence and the fact finder's credibility determinations, and without evaluating whether evidence existed that supported the fact-finder's determination. (*See id.*)

Under the MHRA, however, liability "'depends on whether the protected trait [. . .] actually motivated the employer's decision.'" *Goins v. West Group*, 635 N.W.2d 717, 722 (Minn. 2001) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (further citations omitted)). Evidence of a mere "specific link" does not satisfy this legal standard. Under the direct-evidence method of proving discrimination, evidence of a "specific link" is relevant to determining whether the plaintiff satisfied the *prima facie* burden of establishing a genuine issue of fact for trial. However, evidence of a "specific link" does not displace the requirement that to prevail at trial, the plaintiff must meet her ultimate burden of proving that the protected trait actually motivated the decision.

In holding that LaPoint directly proved her case, as a matter of law, the court of appeals misapplied the direct-evidence method of proving discrimination. First, the evidence of discriminatory motive offered by LaPoint is not "direct evidence" because it requires an inferential leap to prove a discriminatory motive existed. But even if it is "direct evidence," LaPoint is not excused from the ultimate burden to persuade the factfinder that she was the victim of unlawful, intentional discrimination. Therefore, the court of appeals erred in holding that LaPoint had proved her claim as a matter of law.

If the court of appeals's published decision in this case is sustained, and applied to future cases, the role of the fact finder in weighing evidence and determining what truly motivated an employment decision will be diminished and defendants will be deprived of their right to offer a defense through rebuttal evidence to dispute and disprove the plaintiff's *prima facie* evidence of discrimination.

The court of appeal's decision in this case is also troubling to employers because it impedes the employer's ability to make legitimate and lawful business decisions about requests for accommodations when the purpose of the request is linked to a protected status. The "specific link" standard articulated by the court of appeals imposes liability without any finding that the decision was actually motivated by an unlawful discriminatory motive. Under this "specific link" standard, all failure-to-accommodate cases would require liability because there will always be a specific link between the employer's inability to accommodate an unreasonable request, and the employee's protected status that is the predicate for the request, whether pregnancy, familial status, disability, or religion.

II. The district court's fact finding must be upheld unless it is clearly erroneous.

For actions tried upon the facts without a jury, "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. To apply this clearly erroneous standard of review, the reviewing court must view the evidence in the light most favorable to the verdict, and examine the record to see "[i]f there is reasonable evidence" in the record to support the

[district] court's findings." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). "If there is reasonable evidence to support the district court's findings, [the reviewing court] will not disturb them." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999)

To conclude that the "[f]indings of fact [. . .] are clearly erroneous" the court must be "'left with the definite and firm conviction that a mistake has been made.'" *Rasmussen*, 832 N.W.2d at 797. However, "[t]he standard of review that controls [the court's] examination of the district court's decision does not permit [the reviewing court] to engage in fact-finding anew." *Id.* (quoting *Johnson v. Johnson*, 84 N.W.2d 249, 254 (Minn. 1957) ("It is not within the province of this court to determine issues of fact [. . .]. This is true even though this court might find the facts to be different if it had the fact finding function."); *further citing, Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) ("[A]ppellate courts may not 'sit as factfinders,' and are 'not empowered to make or modify findings of fact.'" (citations omitted)).

In this case, rather than examine the record to determine whether reasonable evidence existed to affirm the verdict, the court of appeals' analysis focused on evidence it deemed would support the opposite result—a verdict for LaPoint. This, however, is the standard of review applied at summary judgment. *See e.g.*, Minn. R. Civ. P. 56.03 (judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law); *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993)

("[o]n appeal [of summary judgment], the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.").

In fact, the court of appeal's conclusion that—"[t]aken as a whole, the evidence and the district court's findings show a specific link between LaPoint's pregnancy and the rescission of the job offer"—cites two cases that analyze summary judgment decisions. *See LaPoint,* 872 N.W.2d at 894 (citing *Diez v. Minnesota Mining & Manufacturing*, 564 N.W.2d 575, 579 (Minn. Ct. App. 1997) (affirming summary judgment), and *Ramlet v. E.F. Johnson Co.*, 507 F.3d 1149 (8th Cir. 2007) (affirming summary judgment)). If LaPoint was appealing summary judgment, viewing the evidence in the light most favorable to her would be appropriate to determine whether she presented genuine issues of material fact for trial. But it is error to conduct such a review after a trial. Minn. R. Civ. P. 52.01; *Rogers,* 603 N.W.2d at 656 ("In conducting this review, we must look to what evidence was presented in the record to support the [verdict]").

The court of appeals also departed from the standard of review by disregarding the district court's fact-finding. Instead, it made its own findings of fact. Specifically, contradicting the district court's finding that Dr. Ross credibly testified that she was not upset about LaPoint's pregnancy (Add. 025 at ¶ 38), had no animus toward her because of her pregnancy, and that her "overriding concern" was the disruption the leave sought by LaPoint would cause to her practice (Add. 026 at ¶ 45), the court of appeals determined, instead, that there was "robust affirmative evidence" of pregnancy

discrimination. 872 N.W.2d at 894. Thus, the court of appeals inappropriately replaced the district court's credibility determinations and fact-finding with its own.

In this case, the appellate court must view the record in the light most favorable to the district court's findings, affording the appropriate deference to the district court's credibility determinations, to determine whether reasonable evidence exists to support the verdict. *See Rasmussen,* 832 N.W.2d at 799 n.5 (remanding case to district court to reevaluate the evidence applying the legal standard articulated by the court, and refusing, specifically, to replace the district court's fact finding, recognizing that where there are questions of fact reviewed under the clearly erroneous standard, the court must construe the evidence in the light most favorable to the district court's verdict). Where, as in this case, the fact finder is required to judge the credibility of witnesses and determine the weight, if any, to be given their testimony to determine what truly motivated an employment decision, the court cannot conclude that the district court's findings are clearly erroneous. *See Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 557 (Minn. 1996) (reversing court of appeals and reinstating the district court's finding that the plaintiff had not proven discrimination). In this case, the court of appeals engaged in the same improper fact-finding as it did twenty years ago in *Hasnudeen.* The same result, reversal and reinstatement of the district court's findings, should occur here.

III. To impose liability under the MHRA, the plaintiff must prove that a protected trait actually motivated the challenged employment decision—a mere "specific link" is not enough.

Under the MHRA, it is unlawful for an employer to discriminate "because of [. . .] sex," which includes pregnancy. Minn. Stat. § 363A.08, subd. 2; Minn. Stat § 363A.03,

subd. 42 (defining "sex" to include "pregnancy, childbirth, and disabilities related to pregnancy or child birth"). To prove unlawful discrimination under the MHRA, a plaintiff must prove that her protected status "actually motivated" the challenged employment decision. *Goins,* 636 N.W.2d at 722; *see also Anderson v. Hunter, Keith, Marshall & Co., Inc.,* 417 N.W.2d 619, 626-27 (Minn. 1998) (holding that a protected trait must be "a substantial causative factor").

In this case, the court appeals concluded that, "[t]aken as a whole, the evidence and the district court's findings show a specific link between LaPoint's pregnancy and the rescission of the job offer." *LaPoint,* 872 N.W.2d at 894. A mere "specific link," however, is inconsistent with the recognized legal standard of causation under the MHRA, which requires proof that the protected status "actually motivated" the challenged decision. *Goins* 636 N.W.2d at 722; *Anderson,* 417 N.W.2d at 626-27. The MDLA is concerned that the unprecedented "specific link" standard articulated in the court of appeals's published decision unintentionally abrogates the firmly-established "actually motivated" causation standard under the MHRA.

At summary judgment, when advancing a claim under the direct-evidence method of proof, courts have analyzed whether there is *prima facie* evidence of a "specific link" between an alleged discriminatory animus and the challenged decision that would support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action. *See e.g., LaPoint,* 872 N.W.2d at 893 (citing *Ramlet,* 507 F.3d at 1152 (affirming summary judgment)). While evidence of a "specific link" to a protected trait may be evidence that is sufficient to raise a reasonable inference of

discrimination, the law is firmly settled that liability is not imposed under the MHRA unless the plaintiff proves that the protected trait actually motivated the decision maker. *See Hasnudeen,* 552 N.W.2d at 557 (noting that, in both single and mixed-motive cases, the plaintiff's ultimate burden is to persuade the factfinder that the plaintiff was the victim of intentional discrimination) (*citing Anderson,* 417 N.W.2d at 626); *see also, St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 514 (1993) (stating that under Title VII, a court has no "authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate factfinder determines, according to proper procedures, *that the employer has unlawfully discriminated*"); *see also Venturelli v. ARC Cmt. Servs.,* 350 F.3d 592, 601 (7th Cir. 2003) (stating "[c]ircumstantial evidence under the direct method [. . .] must allow a jury to infer more than pretext; it must itself show that the decision maker acted because of the prohibited animus").

Thus, evidence of a "specific link" to a protected status relates to a quantum of evidence used to establish the employer's motivation, but does not mandate a conclusion that discrimination actually motivated the decision as a matter of law. For example, in cases where the court is reviewing a verdict for the plaintiff, the evidence of a "specific link" might be enough to support the fact finder's determination that the protected trait actually motivated the challenged decision. However, in this case, by imposing liability for discrimination—as a matter of law—based on evidence that the court of appeals determined established a "specific link," without any factual determination that LaPoint's pregnancy actually motivated the challenged decision, the court of appeals has adopted an unprecedented legal standard for proving discriminatory intent under the MHRA.

If the court affirms the court of appeals' new "specific link" causation standard, it will not only abrogate well-established Minnesota precedent, but it will also make Minnesota an outlier with respect to the evidence required to impose liability for discrimination. It would be a departure from the legal standard applied under federal discrimination cases, as well as a departure from the legal standards applied in state anti-discrimination statutes—at least within the Eighth Circuit and this region. *See e.g., Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1345 (2015) (stating, in a pregnancy discrimination claim under Title VII and Pregnancy Discrimination Act, "we have said that '[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision'") (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003) (claim under Americans with Disabilities Act); *Davis v. Wharf Resources (USA), Inc.*, 867 N.W.2d 706, 712 (S.D. 2015) (plaintiff's burden under the South Dakota Human Relations Act is consistent with the standard applied under federal law, in that evidence of discrimination must be sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment act); *Cox v. Kansas City Chiefs Football Club, Inc.*, 473 W.W.3d 107 (Mo. 2015) (Missouri Human Rights Act requires plaintiff to prove that the protected trait was a "contributing factor" in the challenged decision); *Deboom v. Raining Rose, Inc.*, 722 N.W.2d 1, 11-14 (Iowa 2009) (in action brought pursuant to the Iowa Civil Rights Act, plaintiff must prove the protected trait is "a motivating factor" in the challenged decision); *Crockett v. Counseling Services of Eastern Arkansas, Inc.*, 154 S.W.3d 278, 284 (Ark. Ct. App. 2004) (analyzing whether plaintiff offered evidence of a

discriminatory motive under the Arkansas Civil Rights Act); *Allen v. AT&T Technologies, Inc.*, 423 N.W.2d 424, 512 (Neb. 1988) (noting that evidence of a discriminatory motive is essential in a disparate treatment claim of discrimination under the Nebraska Act Prohibiting Unjust Discrimination in Employment Because of Act); *Schuhmacher v. North Dakota Hosp. Ass'n,* 528 N.W.2d 374, 377-78 (N. D. 1995) ("[d]efendants in cases involving the North Dakota Human Rights Act must be allowed the opportunity to prove that their actions were based on nondiscriminatory motives") *citing Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1434 (10th Cir. 1993) ("going so far as to allow hearsay evidence offered to establish the defendant's state of mind in making its employment decisions)); and *Currie v. State of Wisconsin Dept. of Industry, Labor and Human Relations, Equal Rights Div.*, 565 N.W.2d 253, 260 (Wis. Ct. App. 1997) (applying motivating factor standard in upholding determination by Wisconsin's Labor and Industry Review Commission that plaintiff had not proven her claim of discrimination).

IV. In holding that LaPoint directly proved her case, as a matter of law, the court of appeals misapplied the direct-evidence method of proving discrimination.

A. Under the MRHA, discrimination claims can be proven directly or indirectly.

There are two evidentiary frameworks used to prove a disparate treatment claim under the MHRA: the direct-evidence method, and the *McDonnell Douglas*, burden-shifting method. *See Friend v. Gopher Co. Inc.*, 771 N.W.2d 33, 37 (Minn. Ct. App. 2009). Under the *McDonnell Douglas* framework, the discrimination claim is proved indirectly by relying on circumstantial evidence that attempts to disprove legitimate

reasons for the challenged employment decision, "thereby allowing the inference that the decision was motivated by discrimination." *Id.* Under the direct-evidence method, the plaintiff proves the discriminatory motive directly, rather than relying on evidence to establish it by inference. *Goins*, 635 N.W.2d at 722. With this method, the plaintiff offers evidence that—if true—points directly to a purposeful, intentional, or overtly discriminatory motive. *See id.*

Minnesota courts have recognized that the "direct-evidence method" is a misnomer that has caused confusion. *See Friend*, 771 N.W.2d at 39 (citing *Rogers v. City of Chicago*, 320 F.3d 748, 754 (7th Cir. 2003) (changing the terminology to "direct method")). This evidentiary framework is more appropriately termed the "direct method" because the evidence used in such cases is not restricted to evidence that would be considered "direct evidence" in the strict legal sense of the word. *See id.* at 38. Rather, the evidence offered to prove discrimination through the direct method can be either direct evidence, circumstantial evidence, or a combination of both. *Id.* at 40. In either case, the evidence must still be proven at trial. *See id.* (remanding case with instructions that the district court must identify the evidentiary framework under which it is evaluating the claim, and make all findings requisite to the identified framework).

B. Respondent and the court of appeals misconstrued the role of "direct evidence."

In deciding this case, it is important to remember that a fact can be proven either by direct or circumstantial evidence or both. 4 Minn. Prac., Jury Inst. Guides—Civil CIVJIG 12.10 (6th ed.). The law does not prefer one form of evidence over the other. *Id.* Both types of evidence are considered at trial, and the law makes no distinction between

the weight given to direct and circumstantial evidence. *Id; see also Friend*, 771 N.W.2d at 40. Rather, it is the fact finder's role to decide how much weight to give either kind of evidence. Minn. CIVJIG 12.10.

This Court has adopted the definitions of direct and circumstantial evidence found in Black's Law Dictionary. *Bernhardt v. State,* 684 N.W.2d 465, 477 (Minn. 2004) (citing *Black's Law Dictionary* 565 (8th ed. 2004)). "Direct evidence" is "evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption." *Id.* By contrast, "circumstantial evidence" is defined as "[e]vidence based on inference and not on personal knowledge or observation" and "[a]ll evidence that is not given by eyewitness testimony." *Id.*

Even direct evidence, however, must be proven at trial and is subject to being weighed against rebuttal evidence offered at trial and the fact finder's credibility determinations. Minn. CIVJIG 12.10. (Instructing that it is up to the jury to decide how much weight to give direct and circumstantial evidence, instructing the jury to consider both types, and noting the law makes no distinction between the weight to be given either kind of evidence).

LaPoint misunderstands the nature of "direct evidence." In her Response to the Petition for Review of the Decision of the Court of Appeals, LaPoint argued that the evidence she offered to directly prove discrimination was not subject to a fact finder's credibility determination and weighing: "While it is true that the district court found Dr. Ross to be a credible witness, this case was unlike most employment discrimination cases in that it did not hinge on credibility. The material facts were undisputed." (Response to

the Pet. for Rev. at 5). At trial, though, there was a material dispute of fact. Dr. Ross did not admit that her decision-making was motivated by LaPoint's pregnancy, and that is why LaPoint had to prove her case at trial. Moreover, even assuming evidence offered at trial was "direct evidence," which it was not, the evidence was still subject to the fact finder's weighing and credibility determinations to make the ultimate determination of whether LaPoint's pregnancy actually motivated Dr. Ross's decision. *See* Minn. CIVJIG 12.10.

LaPoint also argued, without further explanation, that the district court "failed to give proper evidentiary weight to *Dr. Ross's own statements* at the time of her decision." (LaPoint's Reply Brief to the Court of Appeals at 10 (emphasis in original)). However, again, the fact finder decides how much weight to give the evidence. Minn. CIVJIG 12.10.

C. The court of appeals erred in determining that LaPoint had directly proved her claim as a matter of law.

The court of appeals erred in holding that LaPoint directly proved her claim as a matter of law because there is no factual determination that her pregnancy actually motivated the challenged decision. Here, LaPoint argues that she proved her discrimination claim by offering "direct evidence" of discrimination, including Dr. Ross's statements that she had rescinded the job offer because of two concerns: (1) because LaPoint did not disclose her pregnancy at the interview; and (2) because she was concerned that a three-month maternity leave would be too disruptive to the practice. However, the district court determined that this evidence fell short of "direct evidence" of discrimination. (Add. 028 ¶ 7).

The first concern, over LaPoint's failure to disclose her pregnancy at the job interview, is not direct evidence because it does not prove a discriminatory motive without inference or presumption. *See Friend*, 771 N.W.2d at 38. It might be reasonable for a fact finder to infer that Dr. Ross was concerned by the failure to disclose the pregnancy because of a discriminatory animus, but the statement of concern over the failure to disclose does not operate as a purposeful, intentional, or overt admission of discriminatory intent. *See Goins*, 635 N.W.2d at 722. Rather, it requires an inferential leap to connect the statement about the concern over the failure to disclose and a discriminatory motive. Accordingly, the failure-to-disclose concern is not "direct evidence" of discrimination. *See e.g., Friend* 771 N.W.2d at 38 (citing *Black's Law Dictionary* 636 (9th ed. 2009) (defining direct evidence as that which "proves a fact without inference or presumption")). Similarly, the second concern, which on its face refers to the employer's legitimate concern about the length of the leave sought, likewise does not directly prove the existence of a discriminatory motive.

For example, in *Friend*, where the employer appealed a judgment for the plaintiff following a court trial, despite the absence of express findings required under the *McDonnell-Douglas* test, which the court of appeals acknowledged would require remand, the plaintiff urged the court of appeals to affirm the judgment under the direct-evidence method. 771 N.W.2d at 35. The plaintiff argued that the verdict could be upheld because the decision-maker's testimony that he was concerned about her pregnancy and had considered changing her employment status based on that concern was direct evidence of pregnancy discrimination. *Id.* at 38. The court of appeals

disagreed that this testimony was "direct evidence" in the strict legal sense, but went on to hold that a claim could be proved directly with either direct or circumstantial evidence. *Id.* at 38-40. However, importantly, in *Friend*, the court of appeals declined to make factual findings with regard to whether the evidence directly proved discrimination. *Id.* at 40. Instead, it remanded the case to the district court instructing the trial court to make factual findings related to credibility, or findings that resolved or weighed the conflicting testimony at trial. *Id.*

Like the employer's testimonial evidence the plaintiff relied on to try to prove a discriminatory motive in *Friend*, the evidence proffered by LaPoint in this case is also not "direct evidence" of discrimination in the strict legal sense because it requires an inferential leap to prove a discriminatory motive. *Compare, id.* at 38. Even so, the district court properly analyzed the totality of the evidence and made the requisite factual findings relating to credibility, and based on those findings, determined that LaPoint failed to establish her MHRA claim. (*See* Add. 028-029 at ¶ 7); *see also, Friend*, 771 N.W.2d at 40 (holding that a discrimination claim can be proved under the direct-evidence evidentiary method with direct evidence, circumstantial evidence, or a combination of both).

Specifically, the district court found that Dr. Ross's legitimate concern over the length of leave is what actually drove both of the concerns she had articulated. (*See* Add. 025 at ¶ 38, 45). The district court credited Dr. Ross's testimony with regard to her concerns over LaPoint's failure to disclose her pregnancy at the job interview, finding that Dr. Ross testified (credibly) that she "questioned why Plaintiff did not bring it up

initially so they could discuss leave of absence issues at that time." (*See* Add. 025, ¶ 38). Thus, the district court found that the concern related to LaPoint's failure to disclose the pregnancy was linked to the legitimate concern over the length of leave LaPoint sought. (*See id*). As a result, the district court rejected the conclusion, from the evidence it weighed, that Dr. Ross's concern over LaPoint's failure to disclose her pregnancy at the job interview proved (directly or indirectly) that Dr. Ross intended to discriminate against LaPoint because of her pregnancy. (*See* Add. 028-029 at ¶¶ 7, 8).

Importantly, in *Friend*, the court of appeals recognized that it could not engage in fact-finding. *See* 771 N.W.2d at 40. Rather, the court of appeals remanded the case to the district court with instructions to expressly identify the evidentiary framework under which it evaluated the claims, and to make specific factual findings regarding its credibility determinations and resolution of conflicting testimony heard at trial. *Id.* The same deference to the role of the fact finder is required in this case, but remand is unnecessary because the district court already made the requisite factual findings.

Here, although the two concerns articulated by Dr. Ross are closely related to LaPoint's pregnancy status, the district court found that the evidence did not prove that LaPoint's pregnancy actually motivated the decision to rescind the job offer. Rather, after weighing the evidence and making credibility determinations, the district court concluded that these two concerns were motivated by Dr. Ross's concern with the length of the maternity leave sought, which exceeded the clinic's allowed, lawful, time for leave. In other words, the district court found that Family Orthodontics was not motivated by the presence of a protected trait, but rather, by the legitimate and lawful

business decision that it could not reasonably accommodate the leave that LaPoint sought. Indeed, pregnancy and a request for maternity leave are analytically distinct—an employer can consider the request for leave while ignoring the pregnancy. Thus, it is incorrect to say that a decision based on the length of the maternity leave sought is necessarily made because of the pregnancy. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993) (distinguishing a decision based on years of service from one that is based on age because they are analytically distinct).

In this case, however, the court of appeals disregarded these factual determinations, and instead, entered judgment as a matter of law based on its own determination that there was "robust affirmative evidence" that included a "specific link between LaPoint's pregnancy and the rescission of the job offer." (Add. 002, 009-011); *LaPoint*, 872 N.W.2d at 890, 893-94. By engaging in its own fact-finding and entering judgment as a matter of law, the court of appeals exceeded its role. *Compare, Friend*, 771 N.W.2d at 40 (remanding case to district court for further fact finding; *Rasmussen*, 832 N.W.2d at 799, n.5 (recognizing court's obligation to remand case for further fact-finding, rather than to enter judgment as a matter of law). In doing so, the court of appeals created an unprecedented liability standard, the "specific link" standard. This "specific link" standard abrogates the established "actually motivated" standard under the MHRA and is at odds with the statutory language of the reasonable accommodation provisions under the MHRA, which allow employers to lawfully refuse requests that are not reasonable, despite the existence of a link to a predicate protected status. Further, the court of appeals decision in this case misapplied the direct-evidence evidentiary method

of proving discrimination claims and misconstrued the role of "direct evidence" in proving a discrimination claim at trial.

The court of appeals erred in holding, as a matter of law, that LaPoint had directly proved her claim of discrimination. Further, because the district court's factual findings are not clearly erroneous, remand is unnecessary and the district court's judgment should be reinstated.

CONCLUSION

For the reasons set forth above, the MDLA respectfully supports the Appellant in seeking to uphold the district court's order and judgment.

Respectfully submitted,

Dated: 4/21/16

/s/ Margaret R. Ryan

Margaret R. Ryan (#331181)
Jacalyn N. Chinander (#388266)
MEAGHER & GEER, PLLP
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402
Telephone: (612) 338-0661

- and -

William L. Davidson (#201777)
LIND, JENSEN, SULLIVAN & PETERSON, PA
1300 AT&T Tower
901 Marquette Avenue South
Minneapolis, MN 55402
Telephone: (612) 333-3637
Attorneys for Amicus Curiae Minnesota Defense Lawyers Association

10908620.5

FORM AND LENGTH CERTIFICATION

This brief was drafted using Microsoft Word 2010 Standard. The font is Times New Roman, proportional 13-point font, which includes serifs. The word count of this brief is 5,425.

Dated: 04/21/16

/s/ Margaret R. Ryan
Margaret R. Ryan

State of Minnesota)
) SS.SS.
County of Hennepin)

Affidavit

Stephen M. West, being first duly sworn, states that he is an employee of Bachman Legal Printing, located at 733 Marquette Avenue, Suite 109, Minneapolis, MN 55402. That on **April 21, 2016**, he prepared the **Brief of Amicus Curiae Minnesota Defense Lawyers Association,** case number **A15-0396**, and served **2** copies of same upon the following attorney(s) or responsible person(s) by **First Class Mail postage prepaid.**

Frances E. Baillon
BAILLON THOME JOZWIAK
& WANTA, LLP
100 South Fifth Street, Suite 1200
Minneapolis, MN 55402

Leslie L. Lienemann
CULBERTH & LIENEMANN, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101

Margaret Jacot
Assistant Attorney General
OFFICE OF THE ATTORNEY
GENERAL STATE OF MINNESOTA
445 Minnesota Street, Suite 900
St. Paul, MN 55101

Subscribed and sworn to before me on
April 21, 2016

Signed _____

Notary Public _____

EDWIN R. MOTCH
NOTARY PUBLIC - MINNESOTA
My Commission Expires Jan. 31, 2020

BACHMAN
LEGAL PRINTING
Phone (612) 339-9518 ■ (800) 715-3582
Fax (612) 337-8053 ■ www.bachmanprint.com
733 Marquette Avenue
Suite 109
Minneapolis, MN 55402