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WHEN AN EMPLOYMENT NEGOTIATION BREAKS DOWN OVER A MATERNITY LEAVE REQUEST, THE SEARCH FOR WHAT ACTUALLY MOTIVATED THE EMPLOYER GETS COMPLICATED

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MDLA 2017 LEGISLATIVE REPORT

WHEN AN EMPLOYMENT NEGOTIATION BREAKS DOWN OVER A MATERNITY LEAVE REQUEST, THE SEARCH FOR WHAT ACTUALLY MOTIVATED THE EMPLOYER GETS COMPLICATED

By Jacalyn Chinander, Meagher & Geer PLLP

In *LaPoint v. Family Orthodontics, P.A.*,892 N.W.2d 506 (Minn. 2017) the Minnesota Supreme Court considered the legal standard for proving pregnancy discrimination under the Minnesota Human Rights Act (MHRA). Family Orthodontics rescinded a job offer to LaPoint shortly after she disclosed that she was pregnant. *Id.* at 508. The facts are rather remarkable for an employment discrimination case because the reasoning behind the employer's decision-making was transparent and well-documented: on three occasions—in a voicemail message and an e-mail message to LaPoint and in her own handwritten notes scribbled across LaPoint's résumé—Family Orthodontics's owner repeated the two concerns that prompted the reversal: (1) she questioned why LaPoint had not disclosed her pregnancy during their job interview; and (2) she was concerned that the length of the maternity leave LaPoint expected would be too disruptive to her small practice. *Id.* at 509.

After a bench trial, the district court entered judgment for the employer. *Id.* at 510. The court found that the job offer was not rescinded because of LaPoint's pregnancy, but instead, because of the length of the maternity leave she had requested, which, by the way, the clinic was not legally required to provide. *Id.* at 511. Accordingly, the district court concluded that LaPoint did not prove her claim of pregnancy discrimination under the MHRA. *Id.*

The Minnesota Court of Appeals—moved to find a remedy for the pregnant job-seeker—overturned this judgment, finding that LaPoint had proven a claim of pregnancy discrimination, as a matter of law, through direct evidence. *Id.* In doing so, the appellate court failed to give the required deference to the district court's fact finding and articulated an unprecedented "specific link" standard. *Id.* The Minnesota Supreme Court corrected these legal errors with a reversal, but also remanded the case to have the district court take a second look at its factual determinations. Here, the supreme court wanted to be sure that the district court had not believed that a finding of animus was required to find that discrimination had occurred. *Id.* at 517.

The take-away from the decision is this: unlawful discrimination can occur in the absence of evidence of animus or hostility based on the protected trait, but it is the fact-finder's role to determine whether the protected trait actually motivated the challenged employment decision, and this factual finding should not be easily overturned.

THE FACTS

Two days after LaPoint interviewed for an orthodontic assistant position, Family Orthodontics's owner, Dr. Angela Ross, left her a voicemail message offering her the position with a start date just over two weeks away. *Id.* at 508. LaPoint called back and accepted. *Id.* During this conversation, she also disclosed that she was pregnant and would be due in about seven months. *Id.* Dr. Ross congratulated LaPoint and expressed happiness. *Id.* She also wrote "Pregnant?!" and "Due 10/13!" on LaPoint's resume. *Id.* at 509.

Then, Dr. Ross asked LaPoint if she anticipated returning to work after the birth, and how much maternity leave she had taken after the birth of her first child. *Id.* at 508. When LaPoint answered that she had taken a 12-week maternity leave, Dr. Ross told her that she did not think her practice could handle a 12-week leave because it would be too disruptive. *Id.* at 508-09. Dr. Ross explained that the clinic's policy provides for just six weeks of maternity leave. LaPoint responded that she was open to a shorter leave, but only indicated that she would consider taking ten weeks, instead. *Id.* at 510.

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The next morning, Dr. Ross left a voicemail message for LaPoint informing her that she was "not going to offer [her] the job just yet" because of concerns she had about why LaPoint had not disclose her pregnancy during the job interview, and about the length of the maternity leave that LaPoint wanted. *Id.* at 509. She asked for a few days to make a decision and invited LaPoint to give her a call if she had answers to her concerns. *Id.* Dr. Ross then jotted down additional notes on LaPoint's résumé: "I L/M rescinding (rescinding) offer & told her needed a few more days. 2 concerns: (1) why didn't she tell me in the interview? (2) will 3 mos maternity be too disruptive? Most took 6 wks." *Id.* Later that morning, Dr. Ross reposted an advertisement for the position. *Id.*

LaPoint then sent an e-mail to Dr. Ross explaining that she had not even told her family about her pregnancy, and that her decision to tell Dr. Ross now was as a "loyal employee who has the office's best interests at heart." *Id.* LaPoint reiterated her plans to return to work after the birth, but she did not indicate that she would accept a shorter maternity leave. In a response e-mail, Dr. Ross reiterated her concerns, writing:

> (1) I'm confused as to why you told me of your pregnancy after the job offer was made on the phone Sunday evening, but did not say anything during our face to face interview in my office on Friday, and
>
> (2) We've had lots of staff members get pregnant, have children, and continue at the practice (including me!), but they typically take off 6 weeks. You have requested 12 weeks off, and frankly, I'm not sure that a small practice like mine can handle that request.

Id.

LaPoint responded that she looked forward to discussing the concerns further when Dr. Ross returned from vacation, but the parties never spoke again about the rescinded job offer. *Id.* Instead, Family Orthodontics hired a non-pregnant former intern to fill the position, and LaPoint challenged the rescission of her job offer as pregnancy discrimination in violation of the MHRA. *Id.*

THE LEGAL STANDARD

The MHRA prohibits discrimination because of sex. "Sex" is specifically defined to include "pregnancy, childbirth, and disabilities related to pregnancy or childbirth." Minn. Stat. § 363A.08, subd.2 and 363A.03, subd. 42. The MHRA also prohibits employers from requiring or requesting that job applicants provide information that pertains to sex and other protected statuses. Minn. Stat. § 363A.08, subd. 4(a)(1).

To prevail on her MHRA pregnancy discrimination claim, at trial, LaPoint was required to prove that her pregnancy "actually motivated" Family Orthodontics's decision to rescind her job offer, or that it was a "substantial causative factor" in the challenged decision. *LaPoint,* 892 N.W.2d at 514 (citing *Goins v. West Group,* 635 N.W.2d 717, 722 (Minn. 2001); and *Anderson v. Hunter, Keith, Marshall & Co.,* 417 N.W.2d 619, 624 (Minn. 1988)).

Also relevant to this case are the statutory maternity leave requirements, or lack thereof, in the case of job applicants and employees of small employers. Job applicants and newly-hired employees are not eligible for protected maternity leave under the Family and Medical Leave Act (FMLA) or the Minnesota Parental Leave Act (MPLA). *See* 29 U.S.C. § 2611(2)(A) and (B); and 29 C.F.R. § 825.110 (coverage limited to employees who have been employed 12 months and worked 1,250 hours in the previous 12 months); and Minn. Stat. 181.940, subd. 2 (coverage limited to employees who have been employed 12 months and worked an average number of hours per week equal to one-half the full-time equivalent position in the employee's job classification during the previous 12-month period). In addition, not all employers are subject to the maternity leave requirements. *See* 29 U.S.C. § 2611(4)(A) (FMLA generally only covers employers that employ 50 or more employees) and Minn. Stat. § 181.940, subd. 3 (MPLA generally only covers employers with 21 or more employees). As a result, LaPoint would not have had any legally-protected right to maternity leave if she had been hired by Family Orthodontics, and with just nine employees, Family Orthodontics was not legally obligated to offer employees maternity leave beyond what its own leave policies provided.

THE DISTRICT COURT'S FACT-FINDING

After a bench trial, the district court found that Dr. Ross had testified credibly that she was not upset about the pregnancy and merely questioned the reason LaPoint did not bring it up initially so they could discuss leave of absence issues during the interview. *LaPoint*, 892 N.W.2d at 510. Likewise, the district court noted that in her interactions with LaPoint, Dr. Ross did not demonstrate any animus toward LaPoint because of her pregnancy. *Id.* Moreover, the court's factual determinations noted that on two previous occasions, Dr. Ross had hired employees while they were pregnant and, in accordance with the clinic's policy, the clinic had uniformly given employees who requested maternity leave up to six weeks of leave. *Id.* at 511. Finally, the district court also found credible the testimony of several employees about the impact a longer maternity leave would have had on the clinic. *Id.* at 510.

Based on these findings, the district court concluded that the evidence demonstrated that the length of the leave requested, and not the pregnancy, was the "overriding concern," or the "only one reason [that] truly factored into [Dr. Ross's] decision," and was the "sole reason Dr. Ross declined to hire Plaintiff." *Id.* at 511. According to the district court, this conclusion was based on Dr. Ross's contemporaneous notes, her voicemail messages, her discussions with her husband, and the testimony of the clinic employees regarding the effect a longer leave of absence would have had on the clinic's workload. *Id.*

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Although the district court acknowledged that Dr. Ross had cited LaPoint's failure to disclose her pregnancy during the job interview as a reason for withdrawing the job offer, the district court found that the "totality of the evidence establishes that Dr. Ross was not upset about the pregnancy" and did not demonstrate any animus or hostility because of the pregnancy. *Id.* at 510. Therefore, the district court concluded that LaPoint failed to prove a claim of pregnancy discrimination under the MHRA.

THE MINNESOTA COURT OF APPEALS' REVERSAL

The Minnesota Court of Appeals disagreed with the district court, finding there was "extensive evidence in the record that Family Orthodontics discriminated against LaPoint on the basis of her pregnancy in a purposeful, intentional, and overt manner." 872 N.W.2d 889, 893 (Minn. Ct. App. 2015).

The appellate court found that Dr. Ross's two reasons for rescinding the job offer constituted direct evidence that pregnancy motivated the decision. Specifically, it found the first reason—the failure to disclose the pregnancy at the interview—was based substantially on her pregnancy, and was illegitimate because it punished LaPoint for failing to disclose a fact about which the employer could not lawfully inquire under the MHRA. *Id.* The second reason—the concern over the length of the maternity leave—according to the court of appeals, was "very closely related to LaPoint's pregnancy" because the "anticipated maternity leave was due to the pregnancy." Therefore, "taken as a whole," the appellate court concluded that, "the evidence and the district court's findings show a specific link between LaPoint's pregnancy and the rescission of the job offer." *Id.* at 894. It held that "in the face of the robust affirmative evidence, the district court erred in concluding that LaPoint had failed to prove that her pregnancy was a substantial causative factor in Family Orthodontics's decision." *Id.*

THE MINNESOTA SUPREME COURT'S REVERSAL AND REMAND

On appeal to the Minnesota Supreme Court, a number of amicus parties joined the case. The Commissioner of the Minnesota Department of Human Rights, the National Employment Lawyers Association-Minnesota Chapter, the Employee Lawyers Association of the Upper Midwest, and Gender Justice lined up in support of LaPoint. The Minnesota Defense Lawyers Association filed the lone brief in support of the defense, urging the court to reverse the court of appeals and to reinstate the district court's judgment because its factual determinations were not clearly erroneous.

In its decision, the Minnesota Supreme Court rejected the appellate court's "specific link" standard and reaffirmed that the correct legal standard under the MHRA required LaPoint to prove that her pregnancy "actually motivated" Family Orthodontics' decision not to hire her by producing evidence demonstrating that her pregnancy was "a substantial causative factor" in the decision. 892 N.W.2d at 514.

Next, the court reviewed whether the court of appeals had utilized the correct standard of review. Relying on both the United States Supreme Court and its own precedent, the court first affirmed that the ultimate question of whether the employer discriminated is a question of fact. *Id.* at 514-15 (citing *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000) (identifying the issue of discrimination as an ultimate question of fact) (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 524 (1993)); *U.S. Postal Serv. Bd. Of Governors v. Aikens,* 460 U.S. 711, 715 (1983) (The 'factual inquiry' in a Title VII case is '[whether] the defendant intentionally discriminated against the plaintiff.'" (alteration in original) (*quoting Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248 (1981)); *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 557 (Minn. 1996) ("The *Hicks* court merely emphasized that the plaintiff still bore the 'ultimate burden' of persuading the factfinder by a preponderance of the evidence that the defendant discriminated against him because of his race."); *Bilal v. Nw. Airlines, Inc.*, 537 N.W.2d 614, 618 (Minn. 1995) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains with the plaintiff.").

Next, the court applied Minnesota Rule of Civil Procedure 52.01, instructing that, in an action tried to a court without a jury, the district court's findings of fact "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." *LaPoint,* 892 N.W.2d at 514 (citing Minn. R. Civ. P. 52.01). The court also noted that the reviewing court is expected to "examine the record to see '[i]f there is reasonable evidence' in the record to support the court's findings." *Id.* (citing *Rasmussen v. Two Harbors Fish Co.,* 832 N.W.2d 790, 797 (Minn. 2013) (further citation omitted)). The reviewing court is also expected to "view the evidence in the light most favorable to the verdict," and only overturn the district court's findings if it is "left with the definite and firm conviction that a mistake has been made." *LaPoint,* 892 N.W.2d at 514. In other words, when the district court's findings of fact are granted the proper level of deference, the reviewing court should be looking for a way to affirm the decision, not to reverse it.

The defense argued that the court of appeals did not apply the correct scope of review, and instead, engaged in its own fact-finding. The Minnesota Supreme Court agreed, holding that the court of appeals failed to find that any of the district court's findings of fact were clearly erroneous. *Id.* at 516.

THE NON-DISCLOSURE REASON DID NOT DIRECTLY PROVE PREGNANCY DISCRIMINATION

On appeal, LaPoint focused on the first reason Dr. Ross gave for rescinding the job offer—the fact that she had not disclosed her pregnancy during the job interview. She argued that because the MHRA prohibits employers from inquiring about pregnancy during a job interview, the failure to hire her because of the

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non-disclosure of such information is evidence that LaPoint's pregnancy actually motivated Family Orthodontics's decision. *Id.* at 516.

The district court had considered this non-disclosure reason. But it interpreted both of the stated reasons as "interrelated," and found that, although Dr. Ross would have preferred to discuss LaPoint's maternity needs at the initial interview, Dr. Ross's "overriding" or "sole" reason" in rescinding the job offer really was the length of the leave, and not the non-disclosure of the pregnancy. *Id.*at 511, 513. Accordingly, after weighing all the evidence, the district court concluded that the non-disclosure reason did not sufficiently demonstrate that LaPoint's pregnancy motivated the rescission.

The Minnesota Supreme Court also questioned the non-disclosure reason. It noted that Dr. Ross's remarks are evidence that such considerations might have played a part in the decision, which the fact finder should weigh, but when viewing the evidence in the light most favorable to the verdict, there was "reasonable evidence in the record to support the district court's decision" and it would not "lightly disturb" that finding. *Id.* at 516.

The dissent, however, found that the non-disclosure reason was dispositive. The dissent stated that it would affirm the court of appeals's decision that Family Orthodontics discriminated against LaPoint because she was pregnant, as a matter of law. *Id.* (Chutich, dissenting). To support this conclusion, the dissent stated that the ultimate question of whether discrimination occurred is a question of law, and therefore, the reviewing court did not have to find clear error to reverse the district court. *Id.* The dissent also concluded that the district court had misapplied the law. *Id.* The dissent, however, did not cite any legal authority for its position. Nor did it respond to the contrary legal authority, cited by the majority, which holds that the ultimate question of discrimination is a question of fact for the fact finder. *Id.*

The dissent further reasoned that "because the [MHRA] protects an applicant's right to withhold the need for maternity leave at the interview stage, it follows naturally that failure to disclose that information is an illegitimate reason for an employer to withdraw a job offer"—even for benign reasons, and even if the concern about the nondisclosure flowed from a concern over the length of the leave. *Id.* Rather, according to the dissent, all that mattered "is that the lack of disclosure "actually played a role" in Dr. Ross's decision to rescind the job offer." *Id.* at 520. In the end, the dissent advised the district court, on remand, to consider all the evidence together—direct and circumstantial—to determine "whether it is more likely than not that LaPoint's choice not to reveal her pregnancy before receiving a job offer actually played a role in Family Orthodontics' decision to rescind her offer." *Id.* This instruction, however, misstates LaPoint's burden of proof, which is, to prove that her *pregnancy*, not the *non-disclosure*, actually motivated Family Orthodontics's decision.

The weakness in the dissent's position and LaPoint's reasoning is that it conflates the discrimination claim with a claim alleging a technical violation of the MHRA's non-disclosure prohibition. In this case, LaPoint did not assert a claim under Minnesota Statute Section 363A.04 based on the non-disclosure reason. Therefore, whether the non-disclosure of the pregnancy during the job interview "actually motivated" the decision was not determinative of whether Family Orthodontics discriminated because of her pregnancy. The technical, non-disclosure violation certainly was relevant, circumstantial evidence, which the district court weighed, but the non-disclosure itself does not prove that the job offer was rescinded because of LaPoint's pregnancy. The district court and the Minnesota Supreme Court correctly made that distinction.

THE MINNESOTA SUPREME COURT'S DOUBTS ABOUT THE DISTRICT COURT'S APPLICATION OF THE LAW

Although the Minnesota Supreme Court reversed the court of appeals' decision, it did not affirm the district court's judgment. The district court's findings that Dr. Ross lacked anger or hostility about the pregnancy gave the court pause. Here, the court instructed that "a finding of animus, in the sense of dislike or hostility, is not necessary for a forbidden criterion to "actually motivate [ ]" an employer's decision." *LaPoint,* 892 N.W.2d at 517. In other words, an adverse employment decision could be based on pregnancy, or stereotypes associated with pregnancy, even though the decision-maker is sincerely happy for the mother-to-be. The court was, therefore, concerned that the district court had placed too much weight on Dr. Ross's congratulations to LaPoint. Although it noted that a lack of animus may still be relevant to the question of discriminatory motive, the court was unsure whether the district court incorrectly believed that evidence of animus was required for a finding of pregnancy discrimination under the MHRA. As a result, the case was remanded with instructions to the district court to clarify whether its findings are the same when the correct law regarding animus is applied.

CONCLUSION

LaPoint is a difficult case because it required the fact-finder to separate the pregnancy and the maternity leave request as distinct causative factors. Pregnancy and maternity leave will always be closely linked. But where employers are not required by law to provide maternity leave, an employment decision that is based on a request for maternity leave that the employer cannot provide due to legitimate business reasons is not necessarily causally-related to the pregnancy and is not direct evidence of pregnancy discrimination under the Minnesota Human Rights Act. Even so, this case also exposed the gap in legal protections that are afforded to pregnant employees, and any unease over the outcome may translate to calls for expanding the coverage of family leave laws in the future.