

NO. A06-1318

State of Minnesota
In Court of Appeals

Lisa Gagliardi,

Plaintiff-Appellant,

vs.

Ortho-Midwest, Inc.,

Defendant-Respondent.

APPELLANT'S REPLY BRIEF

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INTRODUCTION

Blatantly ignoring the standard of review and attempting to bamboozle the Court into applying an incorrect standard, Respondent invites the Court to view Ms. Gagliardi's employment as a series of isolated incidents. However, a hostile work environment is determined by examining the totality of the circumstances of an employee's work environment. Continental Can Co. v. State, 297 N.W.2d 241, 249 (Minn. 1980). Respondent's strategy deftly avoids the central question in this case: Are there issues of material fact regarding whether Appellant experienced unwelcome sexual harassment and retaliation while employed by Respondent? There are.

Appellant's contention that she experienced unwelcome sexual harassment while employed by Respondent is supported by sufficient evidence to make this issue one for the finder of fact. The district court erred in holding otherwise, and Appellant respectfully requests that this matter be reversed and remanded for trial.

STANDARD OF REVIEW

Respondent's proposed standard of review frames the Court's review as being deferential to the district court. Resp. Br. at 13. Indeed, Respondent claims that this Court must "afford great deference to the district court's findings of fact." Id. citing Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999)¹. Respondent also claims that the Court must review the trial court's "ultimate conclusions under the abuse of discretion standard." Resp. Br. at 13 citing Rehn v. Fischley, 557 N.W.2d 328, 333

¹ Fletcher, of course, is not a case involving summary judgment. Instead, Fletcher is an appeal from a *bench trial*. 589 N.W.2d at 98.

(Minn. 1997). Rehn is not a summary judgment case but one involving the grant of a directed verdict. Rehn, 557 N.W.2d at 330. The Minnesota Supreme Court has rejected the argument that a motion for summary judgment mirrors a motion for a directed verdict. See DLH, Inc. v. Russ, 566 N.W.2d 60, 69 (specifically declining to hold that the standard for granting summary judgment in Minnesota mirrors the standard for directing a verdict). Instead, the DLH court noted that a motion for a directed verdict and a motion for summary judgment occur in drastically different contexts:

We recognize the differences between a summary judgment and a directed verdict. A summary judgment motion is usually made before trial and decided on the pleadings, depositions, answers to interrogatories, admissions, affidavits, and documentary evidence, if any, while directed verdict motions are made at trial and decided on all of the evidence that has been admitted in the course of trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251, 106 S.Ct. 2505, 2511 91 L.Ed.2d 202 (1986) (quoting Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n. 11, 103 S.Ct. 2161, 2171 n. 11, 76 L.Ed.2d 277 (1983)). At trial, cross-examination is available, the judge has the opportunity to observe witnesses, and documents can be explained. Accordingly, the district court should only grant a directed verdict when the court would be obligated to set aside a contrary verdict by the jury as being manifestly against the entire evidence because reasonable persons could draw only one conclusion from the evidence presented. Coleman v. Huebener, 269 Minn. 198, 203, 130 N.W.2d 322, 325 (Minn. 1964) (citations omitted).

The district court's function on a motion for summary judgment is not to decide issues of fact, but solely to determine whether genuine factual issues exist. See Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981) (citing Anderson v. Twin City Rapid Transit Co., 250 Minn. 167, 186, 84 N.W.2d 593, 605 (1957)). We reiterate that the court must not weigh the evidence on a motion for summary judgment. See Murphy v. Country House, Inc., 307 Minn. 344, 351, 240 N.W.2d 507, 512 (1976); Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co., 535 N.W.2d 337, 341 (Minn. 1995).

Id. at 70. Indeed, *no deference* is paid to the district court's decision. Hubred v. Control Data Corp., 442 N.W.2d 308, 310 (1989). Furthermore, on appeal from an award of summary judgment, all evidence must be viewed in the light most favorable to Appellant as the non-moving party, and Appellant is entitled to the benefit of any doubt as to whether an issue of material fact exists. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 112 (Minn. 1992). Appellant is also entitled to the benefit of all reasonable inferences that can be drawn from the facts; any evidence or inferences to the contrary should be ignored. See Burns v. State, 570 N.W.2d. 17, 21 (Minn. Ct. App. 1997).

To oppose summary judgment, Appellant need only show evidence of material factual disputes and need not prove the issue. Johnson v. Group Health Plan, Inc., 994 F.2d 543, 545 (8th Cir. 1993). The burden is on Respondent to show that there are no issues of material fact. W.J.L. v. Bugge, 573 N.W.2d 677, 680 (Minn. 1998). Given this standard, the decision below must be reversed.

ARGUMENT

I. Respondent's Arguments Concerning Appellant's Credibility Should Be Ignored.

In its brief, Respondent continues the approach it chose with the district court – attempting to demonstrate that Appellant is unworthy of belief. Indeed, Respondent specifically states that Ms. Gagliardi's veracity deserves "special scrutiny." Resp. Br. at 21 n. 4. For example, Respondent asks the Court to disbelieve that Ms. Gagliardi did not want to see a sexually suggestive calendar consisting of photographs of the wife of her boss. Resp. Br. at 18 n. 3. Respondent suggests the Court should disbelieve Ms. Gagliardi and instead believe two witnesses who claim Ms. Gagliardi wanted to see the

calendar. Id. Respondent also attempts to attack Ms. Gagliardi's credibility by suggesting that Ms. Gagliardi's "contemporaneous words contradict her alleged objection" to Mr. Carlander's conduct. Resp. Br. at 19-21. Even if Ms. Gagliardi had lied, a court at the summary judgment stage cannot make credibility determinations regarding her testimony. Powell v. Anderson, 660 N.W.2d 107 (Minn. 2003). Instead, opposing counsel can use the testimony of other witnesses or use Ms. Gagliardi's "own contemporaneous words" to impeach Ms. Gagliardi at trial. Respondent's contention that Ms. Gagliardi, at the summary judgment stage, is unworthy of belief based on the testimony of other witnesses should be ignored.²

II. The Totality Of The Circumstances Determines A Hostile Work Environment.

In arguing that Ms. Gagliardi was not subjected to sexual harassment, Respondent focuses solely on the behavior of Mr. Carlander and ignores the conduct of others. Resp. Br. at 17-19. While perhaps a convenient argument for Respondent to make, under the MHRA a court does not view a hostile work environment claim from the perspective of the harasser or the employer alone.

The MHRA makes it an unfair discriminatory practice to discriminate against someone on the basis of sex. Minn. Stat. § 363A.12. The MHRA requires that a court must consider only whether the alleged conduct falls within a list of specific behaviors included under the MHRA's broad definition of sexual harassment. Cummings v.

² The Court should also ignore Respondent's speculation and conjecture as to why Ms. Gagliardi dropped her federal lawsuit. Resp. Br. at 12, 21 n. 4. Respondent's theory,

Koehnen, 568 N.W.2d 418, 423 (Minn. 1997). The Minnesota Supreme Court has held the perspective of the victim *must be considered* when judging the hostility of the environment. See In re Peters, 428 N.W.2d 375, 378 (Minn. 1988) (citing Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981)). Indeed, while incidents examined individually might seem inconsequential, it will often be true that the same incidents in the aggregate illustrate a course of conduct creating a hostile environment. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-05, 91 L. Ed. 2d 49 (1986) (sexual harassment includes such conduct having the effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment); Harris v. Forklift Sys., 510 U.S. 17, 126 L. Ed. 2d 295, 114 S.Ct. 367, 371 (1993) (all circumstances must be examined in hostile work environment cases); Johnson v. Ramsey County, 424 N.W.2d 800, 808-809 (Minn. Ct. App. 1988) (district court must look at the incidents collectively to see if discrimination has occurred). Thus, although Respondent fervently wishes it were not so, *all* the conduct Ms. Gagliardi experienced while employed by Respondent must be considered by the Court.

III. Appellant Has Satisfied The Elements Of A Sexual Harassment Claim.

To establish a *prima facie* case of sexual harassment based on a hostile work environment, a plaintiff must show that (1) the conduct is unwelcome; (2) the conduct consists of "sexual advances, requests for sexual favors, sexually motivated physical

while imaginative, is not supported by the record before the Court and is simply another attempt to besmirch Ms. Gagliardi's credibility.

contact or other verbal or physical conduct or communication of a sexual nature”; (3) the conduct is sufficiently pervasive so as to substantially interfere with the plaintiff’s employment or to create a hostile, intimidating, or offensive work environment; and (4) “the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.” Cummings, 568 N.W.2d 418, 424 (Minn. 1997) (quotation omitted); see also Minn. Stat. § 363A.03, subd. 43. Respondent is deemed to have knowledge of the actions of Mr. Carlander. See Tretter v. Liquipak Int’l, Inc., 356 N.W.2d 713, 715 (Minn. Ct. App. 1984); see also McNabb v. Cub Foods, 352 N.W.2d 378, 383 (Minn. 1984). Additionally, liability for sexual harassment exists for employers even when the sexual harassment is perpetrated by third parties when the employer knows or should have known about the harassment. Costilla v. State, 571 N.W.2d 587 (Minn. Ct. App. 1998).

In its brief Respondent argues that Ms. Gagliardi’s claim fails because the conduct was not pervasive or severe. Resp. Br. at 17-18.³ This argument is utterly without merit.

In the six weeks of her employment, Ms. Gagliardi experienced a sexual assault; the comment that “women with thin lips give the best blow jobs”; being told she looked “delicious”; emails suggesting that she have a personal relationship with one of Respondent’s clients; Mr. Carlander pointing out that her e-mail address was “too hot”; Mr. Carlander’s expressing his desire to have an agreement with his female employees

³ It is worth noting that that Respondent’s argument is mostly based on cases from outside this state that are not binding precedent for this Court and do not actually interpret the MHRA. Resp. Br. at 17-18.

that they not sue each other for sexual talk; Mr. Carlander giving Ms. Gagliardi a calendar of nude and sexually suggestive pictures of his wife; Mr. Carlander placing his head in her lap during a nighttime car ride; Mr. Carlander informing Ms. Gagliardi that he liked to eat dinner in his bathrobe and that there was an extra bathrobe for her; Mr. Carlander insisting on spending time in her hotel room and questioning her when she did not want to stay in the room with him; and Mr. Carlander being offended that Ms. Gagliardi did not want to stay in his room, and terminating her shortly thereafter. Courts have found much less egregious conduct to be sexual harassment. See e.g. Tretter, 356 N.W.2d at 715 (“offensive comments, leering and touching” constitutes sexual harassment under the MHRA); see also Rorie v. United Parcel Service, Inc., 151 F.3d 757 (8th Cir. 1998) (holding summary judgment inappropriate where supervisor pats female employee on the back, brushes up against her, and tells her she smells good); Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1997) (reversing a judgment for defendant where supervisor engaged in touching of plaintiff two times – pinching plaintiff and hitting her buttocks with a clipboard); Kopp v. Samaritan Health Systems, Inc., 13 F.3d 264 (8th Cir. 1993) (holding conduct including swearing at female employees and using vulgar language could create hostile working environment); see also Beach v. Yellow Freight System, 312 F.3d 391 (8th Cir. 2002) (holding that the presence of only sexual graffiti in 70% of defendant’s trailers was pervasive to establish liability under the MHRA). Indeed, a single incident of harassment may be actionable under the MHRA. Johns v. Harborage I, Ltd., 585 N.W.2d 853, 861 (Minn. Ct. App. 1998). In this case, the

evidence of record, viewed in a light most favorable to Ms. Gagliardi, shows that Ms. Gagliardi was subjected conduct that was both severe and pervasive sexual harassment.

IV. Respondent Should Have Known Ms. Gagliardi Was Being Harassed.

Misstating the applicable law, Respondent argues it is not responsible for the harassment of Ms. Gagliardi by Aircast employees. Resp. Br. at 28-29. However, the question is not, as Respondent argues, whether Respondent was actually aware of the harassment. Instead the question before the Court is whether Respondent knew or *should have known* of the existence of the harassment and failed to take timely and appropriate action. Cummings, 568 N.W.2d 418, 424 (Minn. 1997). Under this standard summary judgment was inappropriate.

Ms. Gagliardi presented evidence that Mr. Carlander should have known that sexual conduct occurred at the Aircast National Sales meeting for several reasons. Mr. Carlander was told such conduct occurred. (A. 95.) Moreover, Ms. Gagliardi reported the “blow job” comment directly to Mr. Carlander, yet he did nothing to protect Ms. Gagliardi from coming into contact with the harasser after the comment was made. (A. 61-62.) Additionally, Mr. Carlander himself observed the “lost puppy” conduct and commented about it to Ms. Gagliardi. (A. 11, 63.) At a minimum, this evidence creates a fact question as to whether Respondent should have known of the harassment. As such, the decision of the district court must be reversed.

V. Summary Judgment Is Inappropriate On Ms. Gagliardi’s Reprisal Claim.

Respondent essentially advances two arguments as to why summary judgment was appropriate on Ms. Gagliardi’s retaliation claim. First, Respondent argues that Mr.

Vegdahl's complaint of sexual harassment offers no protection to Ms. Gagliardi. Resp. Br. at 31. As discussed extensively in Ms. Gagliardi's initial brief, this argument is contrary to Minnesota public policy.

Minnesota Statute section 363A.15 prohibits employers from engaging in retaliatory conduct because an "individual" opposed discrimination or reported it. "Reprisal" is defined as "any form of intimidation, retaliation or harassment." *Id.* The Minnesota Legislature has expressly stated the MHRA is to be construed liberally to accomplish the purposes thereof. Minn. Stat. § 363A.04. The fundamental purposes of the MHRA include "placing individuals who have suffered discrimination in the same position they would have been in had no discrimination occurred" and "encouraging victims of discrimination to pursue their claims." Correll v. Distinctive Dental Services, P.A., 636 N.W.2d 578, 584 (Minn. Ct. App. 2001) (citation omitted).

Federal courts addressing this issue have concluded that an employer violates Title VII's anti-retaliation provision by taking adverse employment action against an employee because of the protected activity of a family member or friend. McKenzie v. Atlantic Richfield Co., 906 F. Supp. 572, 575 (D. Colo. 1995) (citing Wu v. Thomas, 863 F.2d 1543 (11th Cir. 1989); De Medina v. Reinhardt, 444 F. Supp. 573 (D.D.C. 1978).) See also Thurman v. Robertshaw Control Co., 869 F. Supp. 934, 941 (N.D. Ga. 1994); Clark v. R.J. Reynolds Tobacco Co., Civ. No. 79-7, 27 Fair Empl. Prac. Cas. (BNA) 1628, 1982 U.S. Dist. LEXIS 11679, 1982 WL 2277, at * 7 (E.D. La. Feb. 2, 1982); De Medina v. Reinhardt, 444 F. Supp. 573, 580 (D.D.C. 1978); Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 312 (N.D. Ohio 1976); McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir.

1996); EEOC v. Ohio Edison Co., 7 F.3d 541, 545-46 (6th Cir. 1993); Wu v. Thomas, 863 F.2d 1543, 1547 (11th Cir. 1989); Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108, 1117-18 (W.D.N.Y. 1996); EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1210-11 (E.D. Cal. 1998); Kennard v. Louis Zimmer Comm., Inc., 632 F. Supp. 635, 638-39 (E.D. Penn. 1986).

To construe the MHRA to say that only where the employee herself has participated in activity giving rise to unlawful retaliation leaves employees who have third parties complain on their behalf without a remedy. The employer would be free to engage in indirect retaliatory conduct, accomplishing indirectly what it is prohibited from doing directly. Such an interpretation would chill employees from exercising their MHRA rights against unlawful employment practices out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative. This would in turn frustrate the state's efforts to ferret out and prevent impermissible employment practices.

Finding Ms. Gagliardi's reprisal claims actionable under MHRA, is a proper exercise of this Court's duty to broadly interpret the MHRA to effectuate the statute's overarching purposes. Summary judgment should be reversed.⁴

⁴ Respondent's argument in support of the district court's decision to grant summary judgment on Ms. Gagliardi's reprisal claim is that there is no evidence that Mr. Carlander knew Mr. Vegdahl had complained. Resp. Br. at 32. In fact, Mr. Carlander was aware that "human resource" issues regarding Ms. Gagliardi had been raised to Ortho-Midwest clients. (A. 79.)

Respondent also argues that Ms. Gagliardi's claims fail because they have articulated a legitimate reason for her termination. Resp. Br. at 32. This argument is also without merit. It is well established that an employer does not escape liability merely because it offers a legitimate reason for the discharge, if an illegitimate reason also played a role in the discharge. See McGrath v. TCF Bank Savings, fsb, 509 N.W.2d 365, 366 (Minn. 1993). Even if the employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason more likely than not motivated the discharge decision. Id. (citing Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 627 (Minn. 1988)).⁵

For purposes of summary judgment, a plaintiff need not convince the court that she established a *prima facie* case or that the adverse employment action was precipitated by unlawful conduct; rather, a plaintiff need only show that a genuine issue of material fact exists sufficient to prevent judgment on those issues. Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995).

Looking at the evidence in a light most favorable to Ms. Gagliardi, a reasonable fact finder could conclude that her termination was precipitated by unlawful conduct. As an initial matter, Ms. Gagliardi disputes that she had no contact with Mr. Carlander. (A. 31.) Thus a fact question exists as to whether Ms. Gagliardi was in contact with Mr. Carlander. Even if no fact question exists as to whether Ortho-Midwest has proffered a

⁵ Respondent's argument that by articulating a reason, or in this case several, for Ms. Gagliardi's termination overlooks that even uncontroverted testimony need not be believed. Were it otherwise, all criminal cases without an eyewitness would end in a finding for the accused because of their testimony that they did not commit the crime.

legitimate non-discriminatory reason, summary judgment is still inappropriate because Ms. Gagliardi can demonstrate pretext. If the defendant produces evidence of such a legitimate purpose, the presumption of unlawful discrimination disappears, the inquiry shifts to the third step of the McDonnell Douglas analysis, and the plaintiff must persuade the court, by a preponderance of the evidence, that the defendant intentionally retaliated against him. Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 711 (Minn.1992); Sigurdson v. Isanti County, 386 N.W.2d 718, 720 (Minn. 1986). The plaintiff sustains this burden “either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer’s proffered explanation is unworthy of credence.” Sigurdson, 386 N.W.2d at 720 (quotation omitted); see also, McGrath, 509 N.W.2d at 366.

Ortho-Midwest has offered multiple reasons for terminating Ms. Gagliardi. These reasons include the failure to keep in touch with Mr. Carlander, as well as a purported failure to make sales calls, or work sufficient hours.⁶ The company’s multiple and shifting explanations, standing alone, are sufficient to support an inference of discrimination. See Young v. Warner-Jenkinson Co., Inc., 152 F.3d 1018, 1022 (8th Cir. 1998); Randle v. City of Aurora, 69 F.3d 441, 455 (10th Cir. 1995) (holding a defendant’s shifting explanations regarding the reason for discharge strengthens a plaintiff’s pretext argument); Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1993)

⁶ Ms. Gagliardi called several of her contacts in attempts to make sales calls. (A. 6.) Moreover, Mr. Carlander never spoke negatively about her performance at any time during her employment. (A. 18.)

(same); Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1380-81 (10th Cir. 1994); Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994); National Labor Relations Board v. Henry Colder Co., Inc., 907 F.2d 765, 769 (7th Cir. 1990) (“shifting explanations for discharge may, in and of themselves, provide evidence of unlawful motivation”).

The timing of Ms. Gagliardi’s termination, both with respect to her reports and those of Mr. Vegdahl; Mr. Carlander’s knowledge of his own conduct and the fact that “human resource” issues regarding Ms. Gagliardi had been raised to Ortho-Midwest clients; and Ortho-Midwest’s multiple explanations for Ms. Gagliardi’s termination create, at a minimum, a fact question as to Ms. Gagliardi’s reprisal claims. Summary judgment was not appropriate. The district court’s order granting summary judgment should be reversed.

CONCLUSION

The arguments advanced by Respondent for supporting the decision below rest mainly on attacking Ms. Gagliardi’s credibility. Without this, all of Respondent’s arguments fail. Ms. Gagliardi has presented evidence upon which a fact finder could find in her favor on the issue of whether Ms. Gagliardi experienced sexual harassment and retaliation while employed by Respondent. Ms. Gagliardi respectfully asks this Court to reverse the district court’s order granting summary judgment to Respondent.

DATED: September 25, 2006

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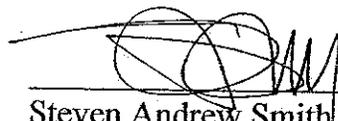
CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellant Lisa Gagliardi certifies that this brief complies with the following requirements:

1. This brief was drafted using Microsoft Word 2000 word processing software;
2. The brief was drafted using Times New Roman, 13-point font, compliant with the typeface requirements; and
3. There are 3,631 words in this brief.

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