

No. A08-1203
STATE OF MINNESOTA
IN COURT OF APPEALS

Lawrence Baer,

Appellant,

vs.

J.D. Donovan, Inc.,

Respondent.

RESPONDENT'S BRIEF AND ADDENDUM

Leslie L. Lienemann (#230194)
Celeste E. Culberth (#0228187)
CULBERTH & LIENEMANN, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
Telephone (651) 290-9300

Attorneys for Appellant

Joni M. Thome (#232087)
HALUNEN & ASSOCIATES
220 South Sixth Street
Suite 2000
Minneapolis, MN 55402
Telephone (612) 605-4098

Steven J. Weintraut (#251975)
Mark Thieroff (#322404)
**SIEGEL, BRILL, GREUPNER
DUFFY & FOSTER, P.A.**
1300 Washington Square
100 Washington Avenue South
Minneapolis, MN 55401
Telephone (612) 337-6100

Attorneys for Respondent

Stephen L. Smith (#190445)
**LAW OFFICE OF
STEPHEN L. SMITH**
700 Lumber Exchange Building
Ten South Fifth Street
Minneapolis, MN 55401
Telephone (612) 305-4355

Attorneys for *Amicus Curiae*
National Employment Lawyers Association, Minnesota Chapter

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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STATEMENT OF THE ISSUES

I. In order for Appellant Baer to recover damages or other relief from Respondent Donovan under the MHRA, he had the burden of proving at trial that he sought and was qualified for employment at Donovan, that Donovan utilized Baer's responses to the impermissible application questions in deciding not to offer Baer a job, and that Baer suffered a cognizable injury as a result. After a two-day court trial, the district court found that Baer had not sought and was not qualified for a position with Donovan, that Donovan had not utilized Baer's responses to the challenged decisions in making its hiring decisions, that Donovan had not engaged in discrimination, that Baer had made more income from other jobs he held during the two years after he was not offered a position by Donovan, and that Baer had not suffered any other injury from any alleged discrimination by Donovan. The Court found that Baer was therefore not entitled to recover any damages from Donovan. Baer contends on appeal that the district court erred by not awarding Baer at least nominal damages in the amount of \$1.

Did the district court abuse its discretion when it denied Baer an award of damages at trial?

Most apposite authority:

Minn. Stat. § 363A.08, subd. 4(b).

Minn. Stat. § 363A.29, subd. 4.

Butler v. Leadens Investigations, 503 N.W.2d 805, 808 (Minn. Ct. App 1993).

Meads v. Best Oil Co., 725 N.W.2d 538, 542 (Minn. 2003).

Cossette v. Minn. Power & Light, 188 F.3d 964, 970 (8th Cir. 1999)

II. Under the MHRA and applicable case law, the district court may, in its discretion, award attorney's fees to a "prevailing party" plaintiff. In order for Baer to be considered a "prevailing party," he must have obtained a judgment for money damages that directly benefited him; declaratory relief is not enough. The district court denied all of Baer's requests for damages and other relief at trial, but made two rulings that were arguably adverse to Donovan: 1) the district court declared that certain questions on the outdated application form that Donovan mistakenly provided to Baer in 2002 violated the MHRA (a finding that Donovan never contested during the litigation or at trial); and 2) the district court ordered Donovan to pay a \$500 civil penalty to the State of Minnesota (not Baer) based on Donovan's utilization of the application form with the impermissible questions. The district court determined that Baer was not a "prevailing party" under the MHRA's attorney's fees provision and denied Baer's request for attorney's fees.

Did the district court err in determining that Baer was not a “prevailing party” under the MHRA’s attorney’s fees provision?

Most apposite authority:

Minn. Stat. § 363A.33, subd. 7.

Farrar v. Hobby, 506 U.S. 103, 111 (1992).

Pedigo v. P.A.M. Transport, Inc , 98 F.3d 396, 398 (8th Cir. 1996).

III. Even if the district court erred on the “prevailing party” issue, this Court can still affirm the denial of attorney’s fees to Baer if there are “special circumstances” that would make an award of attorney’s fees to Baer unjust. Whether there are special circumstances depends on whether an award of attorney’s fees to Baer would promote the purposes of the MHRA, and whether the balance of equities supports an award or denial of attorney’s fees. The purpose of the MHRA is to put individuals that have been discriminated against in the same position they would have been in had the discrimination not taken place. Baer was not discriminated against by Donovan, and the purpose of his claim has been to generate and recover attorney’s fees, not to seek relief that he had a legitimate chance of achieving. This appeal is in fact another attempt by Baer to achieve only the recovery of attorney’s fees.

If the district court is found to have erred on the “prevailing party” issue, should its denial of attorney’s fees to Baer still be affirmed based on the special circumstances of this case?

Most apposite authority:

Tyler v. Corner Construction Corp., 167 F.3d 1202, 1206 (8th Cir. 1999).

Thomas v. City of Tacoma, 410 F.3d 644, 648 (9th Cir. 2005).

State v. Grunig, 660 N.W.2d 134, 137 (Minn. 2003).

STATEMENT OF THE CASE AND FACTS

I. Appellant Lawrence Baer's History Of Claims Of Discrimination Based On Application Forms.

Appellant Lawrence Baer is a career litigant. Baer has sued former employers for wrongful termination,¹ asserted seven worker's compensation claims,² and has even filed an administrative charge of gender discrimination against a technical college. In 2001, after quitting an 18-wheel tractor-trailer driving course at Dakota County Technical College, Baer filed an administrative charge with the Minnesota Department of Human Rights ("MDHR") and claimed that the school engaged in gender discrimination by giving female students preferential treatment compared to male students. (That administrative charge was later dismissed.)³

By 1996, Baer had a working knowledge of what questions on an application form were or were not in violation of the MHRA,⁴ and has asserted no less than five claims based on application forms that he has obtained from companies. In 1996, he brought an administrative charge of discrimination with the MDHR against Award Temporary Services, based on questions on an application form that asked what type of work the applicant could perform and whether he had been injured or had filed a claim for work

¹ Trial Ex. 56, pp. 2-3; *see also* May 30, 2007, Affidavit of Mark Thieroff, Ex. A, p. 36.

² *See* the May 30, 2007, Affidavit of Mark Thieroff, Ex. E at pp. 228-29; Ex. A at pp. 67-68.

³ Trial Ex. 60; T.154-156.

⁴ T. 77.

injury.⁵ (In 2001, he brought an administrative charge of discrimination with the MDHR against Metro Home Waterproofing, contending that an application form he had obtained from Metro violated the MHRA by asking for the applicant's age. That charge was later dismissed.⁶ On June 28, 2002, Baer filed two more administrative charges of discrimination based on an application form. Baer filed the charges against two small, family-owned trucking companies, G & T Trucking⁷ and Respondent Donovan. In both charges, Baer claimed that the application form those companies used, which were essentially the same outdated form, violated the MHRA by asking for disability-related information. And in 2003, Baer filed a claim with the MDHR against Pro Drivers based on an application form that he contended had questions that violated the MHRA.⁸

II. J.D. Donovan, Its Hiring Practices And Ads.

Donovan is a small, family-owned trucking company in Rockville, Minnesota. Donovan's business consists of hauling fuel oil and construction materials to construction sites in Minnesota, Iowa, the Dakotas, and Wisconsin. Donovan hires employees to drive 18-wheel tanker trucks, 18-wheel side-dump trucks, and 18-wheel belly-dump trucks. Donovan also hires "owner-operators" to drive these types of trucks to pull these types of trailers.⁹ Donovan was founded in 1989 by Joan Donovan, and she is currently the

⁵ See p. 5, ¶ 20 of the June 5, 2008, Findings of Fact, Conclusions of Law, Order for Judgment and Judgment (hereinafter "Trial Order"), at Appellant's Appendix (hereinafter "AA. ___"), AA. 1-31, AA. 6, ¶ 20; T. 76-77; Trial Exhibit 57.

⁶ AA. 6, ¶ 20; T.78-79; Trial Ex. 61.

⁷ See AA. 72-75 (Baer's application that he requested from G & T Trucking).

⁸ AA. 6, ¶ 20; T. 81; Trial Ex. 59.

⁹ AA. 2.

President and owner of Donovan.¹⁰ Colleen Donovan, Joan Donovan's sister, has been the Vice-President of Donovan since approximately 2000 or 2001, and has been in charge of hiring for Donovan since that time.¹¹

Donovan typically ran "help wanted" ads every spring for drivers, even when it was not then hiring.¹² Consistent with this policy, on March 8, 2002, Donovan ran two driver ads in the Star Tribune. The two driver ads were as follows:

Driver
Owner Operators
Truck tractor trailer owner operators to pull belly dumps. Call J.D.
Donovan Inc., M-F 8-4:30. 320-251-1213

Drivers Wanted
For belly dump. CDL required. Or hot oil tanker. CDL required along
with hazmat & tanker endorsement. Call J.D. Donovan, M-F 8-4:30. 320-
251-1213.¹³

Baer saw Donovan's ad and called Donovan on March 11, 2002. In 2001, Donovan was using an application form that it purchased from a forms publisher called JJ Keller.¹⁴ Page 1 of the form¹⁵ included a series of questions, under the heading PHYSICAL HISTORY, that sought disability-related information. Colleen Donovan was aware that the MHRA prohibited employees from asking pre-employment questions

¹⁰ AA. 3, ¶ 2.

¹¹ AA. 3, ¶ 3.

¹² AA. 3, ¶ 7; Trial Exs. 25-32.

¹³ Trial Ex. 63.

¹⁴ AA. 3, ¶ 4.

¹⁵ Trial Ex. 1.

concerning disabilities,¹⁶ and in early 2002, had obtained a new application form that did not include the improper, disability-related questions.¹⁷

But while Colleen Donovan was on vacation in February and March 2002, a former Donovan employee, Peggy Vanderbilt, took calls from potential employees and sent out applications. At the time Vanderbilt fielded calls from potential applicants, both the old and new application forms were still on Colleen Donovan's desk.¹⁸ In February and March 2002, Vanderbilt sent the old form out to 11 potential applicants, including Baer.¹⁹ When Colleen Donovan returned from vacation in April 2002, she started using the new application form, without the impermissible questions.²⁰ Donovan never provided another application form with the impermissible questions to another person after Baer received the outdated application in March 2002.

III. Baer's Incomplete Application To Donovan.

When Baer partially filled out the old application form he received from Donovan, he did not respond to several legitimate employment-related questions. He did not indicate the "position(s) applied for." He did not indicate whether he was currently employed, explaining during his deposition that it was "none of their business" and, later at trial, testifying that he figured he could address the issue during an interview.²¹ Baer did not provide a date on which he would be "available for work" and did not respond to

¹⁶ AA. 3, ¶ 5.

¹⁷ AA. 3, ¶ 4.

¹⁸ AA. 3, ¶ 4.

¹⁹ AA. 3, ¶ 4; Trial Ex. 10.

²⁰ AA. 8, ¶ 28; Trial Ex. 92.

²¹ AA. 5, ¶ 13; Trial Ex. 1.

questions regarding traffic accidents or moving violations. Nor did he respond to a question regarding his willingness to travel, and wrote, in response to an inquiry regarding transportation to out-of-town work, “we can talk.”²²

Baer answered 4 of the 7 questions listed under the PHYSICAL HISTORY section on page 1 of the application, denying any disability and expressing a willingness to submit to a physical examination and drug testing.²³ Donovan received Baer’s application on March 27, 2002.²⁴ Baer’s application does not indicate that he has a disability (he has none), Donovan was not otherwise made aware of any disability that Baer might have, and there is no evidence that Donovan ever concluded or assumed that to be the case.²⁵ Even had Donovan been aware of any potential disability issue with Baer, Donovan has previously hired individuals with disabilities (diabetes) and has also hired women and minorities in the past.²⁶ The only formal or informal claim against Donovan based on an alleged discrimination or wrongful employment practice is Appellant’s.

IV. Baer’s Lack Of Qualifications For The Type Of Positions Donovan Filled.

Donovan’s job description for its truck drivers requires that belly/side dump drivers “must have experience in driving/operating tractor/trailer combination units.” For tanker drivers, Donovan requires that applicants have “tanker and hazmat endorsements”

²² Paragraphs 14-15; Trial Ex. 1.

²³ AA. 4, ¶ 10; Trial Ex. 1.

²⁴ AA. 4, ¶ 9; Trial Ex. 11.

²⁵ AA. 13, ¶ 63; Trial Ex. 1.

²⁶ AA. 1. ¶ 6; T.365-366, 401.

and “experience in driving/operating a tractor/trailer combination unit.”²⁷ Donovan has not operated any other types of trucks from 1992 to the present.

Baer’s application to Donovan showed that he had no experience driving an 18-wheel tractor-trailer truck for the 17 years preceding his application. (Baer’s appreciation of his own lack of experience is indicated by his decision to take an 18-wheel tractor-trailer course at Dakota County Technical College in 2001, which he did not complete before quitting the course and bringing an administrative charge against the school).²⁸

Baer drove a dump truck or ready-mix truck for the four previous employers that he listed on his application to Donovan, from March 1996 through September 2001. But Donovan does not use dump trucks or ready-mix cement trucks in its operations.²⁹ There are significant differences between driving an 18-wheel tractor trailer “belly dump” or “hot oil tanker” and driving dump trucks and ready-mix trucks. The 18-wheel trucks are heavier, longer, have more wheels and axles, and require more skill in maneuvering for backing up, turning corners, and stopping. The positioning of belly and side dump trucks for dumping is more difficult and involves different skills than those required of end dump truck or ready-mix truck operators.³⁰

Baer simply wasn’t qualified to drive the only types of trucks that Donovan operates.³¹

²⁷ AA. 8, ¶ 29; Trial Ex. 5.

²⁸ AA. 8, ¶¶ 34-35.

²⁹ AA. 9, ¶¶ 37-38.

³⁰ AA. 8, ¶ 39.

³¹ Baer obtained another job with River City Asphalt by June 2002, approximately three months after his application to Donovan. Baer claimed that he drove an 18-wheel belly

V. Donovan Offered Positions To Other Drivers Rather Than Baer Based On Legitimate, Nondiscriminatory Reasons.

Donovan's record retention policy was to retain applications for one year. Since it received Baer's application on March 27, 2002, the relevant time period for Donovan's decision on whether to hire Baer was from March 27, 2002, to March 27, 2003. Between March 27, 2002 and June 2003, Donovan offered truck driving positions to 10 applicants other than Baer.³² The district court found that each of the other 10 applicants were offered positions by Donovan:

Based upon the qualifications disclosed in the job application and subsequent interviews. Plaintiff's qualifications, as disclosed in his application, were so lacking as to not warrant an interview.³³

Donovan did not take into account the answers, or lack thereof, to any of the challenged questions on the old applications with respect to Baer or any other applicant.

The district court found that this was:

corroborated by [Donovan's] offers of employment to at least two drivers whose responses to the challenged questions were virtually identical to [Baer's]. There is no credible evidence that the illegal questions were considered by [Donovan] or were factors in [Donovan's] hiring decisions.³⁴

dump tractor trailer for River City Asphalt, and that he suffered a work-related injury in September or November 2002. Baer claimed that in his next job, in 2003, he drove an 18-wheel end dump for Pearson Brothers and was injured on the job. Baer claimed that in 2006 he drove an 18-wheel side dump for S.M. Hentges and was injured on the job. So Baer claimed he was injured on the job for three of the four jobs that he held after his application to Donovan in which Baer drove an 18-wheel belly dump or side dump, the type of trucks Donovan operated and which Baer had not driven for the 17 years preceding his application to Donovan. (T.414-416; Trial Ex. 84, Answer to Interrogatory No. 23).

³² AA. 10, ¶¶ 42-43.

³³ AA. 13, ¶ 12.

³⁴ AA. 13, ¶ 54.

As the district court found:

Plaintiff's failure to respond to other, legitimate application questions, coupled with his lack of recent, relevant driving experience establish that [Donovan] was justified in not offering an interview and in concluding that Baer was not qualified for the positions available with [Donovan].³⁵

VI. Baer Made More Income With His Other Jobs And Activities Than He Would Have At Donovan.

Of the 10 applicants who were offered positions by Donovan after Donovan's receipt of Baer's application on March 27, 2002, only 5 of the drivers actually worked at Donovan.³⁶ Three of those 5 workers were tanker drivers, and district court found that the wages for those employees were "irrelevant"³⁷ because Baer did not have the requisite hazmat endorsement to be a tanker driver,³⁸ and Baer's application did not even indicate that he had that required endorsement.³⁹

The 2 other drivers, Chad Stahovich and John Schafer, worked for Donovan as side-dump drivers in 2002 and 2003. During those two years, Baer worked for three different employers. *His wages for those three jobs that he worked in 2002 and 2003 exceeded what Stahovich and Schafer made at Donovan.*⁴⁰ And the district court held that any attempt by [Baer]:

³⁵ AA. 7, par. 22.

³⁶ AA. 18, ¶ 64(q).

³⁷ AA. 18, ¶ 64(q).

³⁸ AA. 9, ¶ 36.

³⁹ AA. 13, ¶ 52; Trial Ex. 1.

⁴⁰ AA. 19, ¶ 64(u).

to project wage loss into 2004 would be unduly speculative. Plaintiff held three jobs in 2002 and 2003 and five different jobs between March 2002, and March 2006. His employment history establishes a pattern of relatively short term employment.⁴¹

So Baer made more income as a result of not receiving or accepting an offer from Donovan than what he would have made working for Donovan. And this was proven based only on the wages that Baer actually admitted that he earned during those two years. As the district court noted:

Plaintiff failed to produce other documents to show whether he was including all of his income for any of the five years that he includes in his wage loss damage calculation. Plaintiff did not produce tax returns during discovery or at trial to substantiate his actual income from the time period of 2002 to the present, despite the fact that he filed tax returns during that time. Although Plaintiff received worker's compensation wage loss benefits from March 2002 to the date of trial, Plaintiff did not produce any information indicating the amount of his wage loss benefits. Nor did Plaintiff disclose the wage loss amount received from G&T Trucking in settlement of his lawsuit.⁴² (Plaintiff stated at trial that part of the confidential settlement with G&T Trucking included a "clause in there for damages" for the same time period that he sought lost wages damages from Donovan).⁴³

Baer's failure to receive a job offer from Donovan therefore resulted in a financial *benefit*, not detriment, to Baer.

VII. Baer's Administrative Charges And Lawsuits Against Donovan And G & T Trucking.

Baer filed administrative charge of discrimination against G & T Trucking and Donovan on June 28, 2002, and made the same allegations based on nearly identical

⁴¹ AA. 19, ¶ 64(v); Trial Ex. 84, Answer to Interrogatory No. 23.

⁴² AA. 19, ¶ 64(w).

⁴³ AA. 14, ¶ 62.

application forms that he had received from both companies.⁴⁴ Before receiving determinations from either the MDHR or the EEOC on either of his charges of discrimination against G&T Trucking or Donovan, Baer's attorney requested and received Notices of Right to Sue letters from the EEOC.⁴⁵ Baer then brought a federal court action against Donovan, and alleged a class action under the Americans with Disabilities Act even though Donovan did not have the requisite number of employees to sustain an ADA claim. Baer later dismissed the federal court action, and brought an action against Donovan in state district court, alleging violation of the Minnesota Human Rights Act and seeking wage loss damages, treble damages, a civil penalty, declaratory relief, injunctive relief, punitive damages, and attorney's fees and costs.⁴⁶

On May 25, 2007, Donovan extended a Rule 68 offer to Baer in the amount of \$2,500, which included attorney's fees, the grant of declaratory relief that the challenged questions violated the MHRA, and an injunction prohibiting Donovan from utilizing an application form that asked those questions.⁴⁷ Baer never responded to that offer.

VIII. The District Court's Summary Judgment Order.

On May 27, 2007, the parties brought cross-motions for summary judgment. Plaintiff brought his motion to have the court determine that the questions on Donovan's

⁴⁴ AA. 13, par. 58; Trial Exs. 33, 58.

⁴⁵ AA. 14, ¶ 60; Trial Exs. 89, 90.

⁴⁶ AA. 62-63.

⁴⁷ See Defendant's Rule 68 Offer of Judgment dated May 25, 2007, attached as Exhibit 1 to the August 8, 2008, Affidavit of Mark Thieroff. Donovan filed the Rule 68 Offer in support of its motion to tax costs and disbursements after the district court's June 5, 2008 Trial Order. The Rule 68 Offer was therefore not part of the record in front of the district court at trial or before the June 5, 2008 Trial Order was issued.

old application form violated Minn. Stat. 363A.08, Subd. 4(a)(1) by requesting information pertaining to disability. Donovan did not contend otherwise, and conceded at summary judgment that some of the questions on the outdated form that it purchased and mistakenly provided to Baer ran afoul of the MHRA.

Instead, Donovan brought its own motion for partial summary judgment, and argued that while Baer could file an administrative charge of discrimination to be addressed and possibly pursued by the Minnesota Department of Human Rights, he could not pursue a district court claim against Donovan seeking to recover damages or other relief because under the MHRA, only a party “who is *required* to provide information that is prohibited” by the Act has standing to bring a district court action. Minn. Stat. § 363A.08, subd. 4(b)(emphasis added). Donovan argued that since Baer never actually provided any information pertaining to disability and suffered no adverse employment action as a result, that he was only requested, not “required,” to provide information relating to disability. Baer, Donovan contended, therefore had no standing to pursue his claims in district court.

In its September 18, 2007, order, the court granted Baer’s motion for partial summary judgment and ruled that Donovan had violated Minn. Stat. § 363A.08, subd. 4(a)(1) when it utilized the old application form that included some questions that were impermissible under the MHRA.⁴⁸ The district court therefore granted that portion of Baer’s summary judgment motion that Donovan conceded. The district court denied Donovan’s motion for summary judgment, finding that there was a “genuine issue of

material fact regarding whether there is a tangible injury” and whether the “application questions were a factor in Donovan’s decision not to hire Baer....”⁴⁹ The district court allowed Baer to proceed to trial to attempt to show that there was a causal connection between the impermissible questions and a “tangible injury” to him.

IX. The District Court’s Findings Of Fact, Conclusions Of Law, Order For Judgment And Judgment.

The case proceeded to a 2-day court trial on September 28 and October 31, 2007. At trial, Baer sought to recover \$80,015.52 in wage loss for the time period of 2002 – 2006. Baer also sought treble damages, damages for emotional anguish, punitive damages in the amount of \$8,500.00, a civil penalty in the amount of \$10,000, attorney’s fees, and injunctive relief.⁵⁰

On June 5, 2008, the district court issued its order, confirming what Donovan had maintained for the nearly 6 years since the administrative charge of discrimination was filed by Baer -- that Donovan mistakenly handed out an outdated application form with impermissible questions on it but never engaged in discrimination or any adverse employment action against Baer or any other applicant based on the prohibited questions in the application. The district court ordered Donovan only to pay a \$500 civil penalty to the State based on Donovan’s utilization of the outdated form with the impermissible question on it in 2002, and denied all of Baer’s other requests for relief.⁵¹ The district

⁴⁸ AA. 47.

⁴⁹ AA. 46.

⁵⁰ See Plaintiff’s Closing Argument and Memorandum supporting proposed Findings of Fact and Conclusions of Law dated February 14, 2008, pp. 10-15.

⁵¹ AA. 31.

court specifically denied Plaintiff's request for recovery of attorney's fees.⁵² This appeal followed.

ARGUMENT

I. THE DISTRICT COURT'S DETERMINATION THAT BAER WAS NOT ENTITLED TO RECOVER ANY DAMAGES FROM DONOVAN SHOULD BE AFFIRMED.

A. Standard Of Review.

Baer contends on appeal that the district court should be reversed because he is "entitled to an award of damages."⁵³ Baer contends that this aspect of his appeal presents an issue of law, with *de novo* review.⁵⁴ But the entire argument raised by Baer is premised on his claim that he proved that Donovan engaged in discrimination. *See* Appellant's Brief, pp. 6-10 (arguing that proof of "discrimination" by Donovan mandates award of nominal damages to Baer even where no actual damages are sustained). As set forth in more detail below, however, a finding of discrimination requires factual findings contrary to the court's Trial Order. And Baer alleges on appeal that the district court made incorrect findings of fact that "were wholly unsupported by the evidence."⁵⁵

Where, as here, the Appellant requests that the district court's findings of fact be reversed, the scope of review is limited to determining whether the district court's findings are clearly erroneous. *See Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 729 (Minn. 1990). The district court's factual findings must be "manifestly contrary to the

⁵² *Id.*

⁵³ Appellant's Brief, p. 6.

⁵⁴ Appellant's Brief, p. 9.

⁵⁵ Appellant's Brief, pp. 10-13.

weight of the evidence or not reasonably supported by the evidence as a whole” to warrant reversal. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999) (quotation omitted). “Findings of fact are clearly erroneous only if the reviewing court is left with the definite and firm conviction that a mistake has been made.” *Matter of Welfare of M.J.L.*, 582 N.W.2d 585, 588 (Minn. App. 1988).

Baer can not meet his burden to establish that the district court clearly erred when it determined that Donovan did not engage in discrimination and that Baer was not entitled to recover any damages from Donovan. Baer’s appeal should therefore be denied and the district court affirmed on the issue of damages.

B. Donovan Did Not Engage in Discrimination.

Baer brought his claim based on Minn. Stat. § 363A.08, subd. 4(a)(1), which provides that it is impermissible for a potential employer to “require or request” a job applicant to “furnish information that pertains to... disability.”⁵⁶ Minn. Stat. § 363A.08, subd. 4(b) provides that if Baer was *required* to provide the information relating to disability, that he is an “aggrieved party” pursuant to a § 363A.28, subdivisions 1 to 9.⁵⁷ Minn. Stat. § 363A.28, subd. 1, allows an aggrieved party to bring a civil action for an alleged violation pursuant to Minn. Stat. § 363A.33.⁵⁸ Minn. Stat. § 363A.33, subd. 6 provides that if the respondent has engaged in an unfair discriminatory practice, that the court shall issue an order for relief provided in § 363A.29, subs. 3 to 6.⁵⁹ Minn. Stat. §

⁵⁶ See p. 1 of the Addendum to Respondent’s Brief (hereinafter “Add. _____”).

⁵⁷ Add. 2.

⁵⁸ Add. 4.

⁵⁹ Add. 10.

363A.29, subd. 4 provides for payment to an “aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained.”⁶⁰ So the statutory framework, upon which Baer based his claim for damages and other relief, requires proof of both discrimination by Donovan and damages to Baer caused by that discrimination.

Accordingly, as the district court correctly noted, damages are only recoverable under the MHRA if and when the plaintiff has “suffered discrimination,” which requires that Baer prove four elements:

1. that he is a member of a protected group;
2. that he sought and was qualified for an employment opportunity made available to others;
3. that he was not hired despite being qualified; and
4. that the opportunity remained available or was given to another person with his qualifications.

See Butler v. Leadens Investigations, 503 N.W.2d 805, 808 (Minn. App 1993). An employer can prevail on a claim of discrimination by demonstrating that it did not hire the applicant based on legitimate, nondiscriminatory reasons. *See Meads v. Best Oil Co.*, 725 N.W.2d 538, 542 (Minn. 2003).

The district court found that Donovan *did not engage in discrimination*. It specifically found that Baer failed to meet his burden of proof to establish any of the four *Butler* elements.⁶¹ It further found that Donovan had 3 legitimate, nondiscriminatory reasons for not extending a job offer to Baer that justified a finding of no discrimination: 1) Baer’s application was incomplete (*see Kenney v. Swift Transp., Inc.*, 347 F.3d 1041

⁶⁰ Add. 7.

(8th Cir. 2003)); 2) the other applicants to whom Donovan offered positions were more qualified; and 3) Donovan didn't use or rely upon the challenged application questions in making its employment decisions.⁶²

Since Donovan did not engage in discrimination,⁶³ Baer did not and could not establish that he suffered any injury. He therefore failed to prove his claim of discrimination against Donovan, and can not recover damages. *See* Minn. Stat. § 363A.29, subd. 4; *Cossette v. Minn Power & Light*, 188 F.3d 964, 970 (8th Cir. 1999) (holding that plaintiff “must... establish that [the] violation of the ADA caused some sort of tangible injury”); *Griff v. Steeltek, Inc.* 160 F.3d 591, 594-95 (10th Cir. 1998) (permitting suit by “all job applicants who are subject to illegal medical questioning and who are in fact injured thereby”); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998)(requiring plaintiff to show “some cognizable injury in fact” that is “something more than a mere violation” of the statute); *Johnson v. Moundsvista, Inc.* 2002 WL 2007833, at *5 (D. Minn. August 28, 2002) (requiring tangible injury in order to sustain a claim under the MHRA); *Nieszner v. Minnesota Dep't of Jobs & Training*, 1995 WL 389248, *4 (Minn. App. 1995) (explaining in case involving allegedly improper interview question that “[c]ases applying the Human Rights Act to alleged interview discrimination require intentional discrimination”).

⁶¹ AA. 21–24.

⁶² AA. 24-26.

⁶³ AA. 28.

Since the district court did not clearly err when it found that Donovan did not discriminate against Baer, the district court's Order, finding that Baer was not entitled to recover any damages, should be affirmed on this basis alone.

C. Baer Did Not Suffer Any Injury.

Even had Donovan engaged in discrimination, which it did not, to recover any damages in this case, Baer still had to prove at trial that he sustained damages as a result of Donovan's alleged discrimination. Minn. Stat. § 363A.29, subd. 4 provides:

In all cases where the [court] finds that the [defendant] has engaged in an unfair discriminatory practice, the [court] shall order the [defendant] to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained.

But Baer suffered no damages or other injury. The district court correctly found that Baer's "actual earnings for the years 2002 and 2003 exceeded the amount he may have earned at [Donovan.]"⁶⁴ He also experienced no emotional distress as a result of anything Donovan did or did not do.⁶⁵ The district court therefore correctly ruled that Baer was not entitled to compensatory damages, treble damages, or emotional distress damages.⁶⁶

The district court's findings that Baer suffered no injury were not clearly erroneous, and its order denying Baer damages should be affirmed on this independent basis as well.

⁶⁴ AA. 28.

⁶⁵ AA. 29, par. 4(B).

⁶⁶ AA. 28 – 30.

D. Baer Is Not Even an “Aggrieved Party” Under The MHRA.

The district court should also be affirmed because Baer did not even prove that he is an aggrieved party with standing to pursue a district court action against Donovan. In 1989, the Minnesota legislature added the standing provision of Minn. Stat. § 363A.08, subd. 4(b), which provides that if Baer was *required* to provide the information relating to disability, that he is an “aggrieved party” pursuant to a § 363A.28, subdivisions 1 to 9.⁶⁷ In 1990, the legislature amended subdivision 4(a)(1) to add that it is an unfair employment practice for an employer to “request” a person to provide disability-related information. The legislature did not add “request” to the standing provision of subdivision 4(b) in 1990 or since that amendment.

Donovan argued at the summary judgment stage that Baer was only requested, not required, to answer the challenged questions, and that Baer could not bring a district court action against Donovan. The district court denied Donovan’s summary judgment motion, finding that there was a genuine issue of material fact regarding whether the “application questions were a factor in Donovan’s decision not to hire Baer...”⁶⁸

The district court did not address in its Trial Order whether Baer proved at trial that he was required to provide information relating to disability, and therefore an “aggrieved party” under Minn. Stat. Sec. 363A.08, subd. 4(b). But this Court can still affirm the district court’s denial of damages to Baer based on his failure to prove that he

⁶⁷ Add. 2. See Minn. Laws 1990, c. 567, § 3.

⁶⁸ AA. 46.

is an “aggrieved party” entitled to seek relief from Donovan. As the Minnesota Supreme Court has stated:

A respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted.

State v. Grunig, 660 N.W.2d 134, 137 (Minn. 2003).⁶⁹

At trial, the district court effectively found that Baer wasn’t “required” to provide information relating to disability, as Donovan contended at the summary judgment stage. The district court found that Baer wasn’t disabled or perceived as disabled by Donovan, that he didn’t provide any disability-related information when he filled out the Donovan application,⁷⁰ and that Donovan’s “failure to interview and hire Plaintiff for the open truck driver positions was not based upon Plaintiff’s failure to respond to the offending questions.”⁷¹ The district court specifically found that there was “no credible evidence that the illegal questions were considered by [Donovan] or were factors in their hiring decisions” relating to Baer or the other individuals that Donovan extended offers to instead of Baer.⁷²

⁶⁹ This court can affirm the denial of attorney’s fees based on this alternative theory even though Donovan did not file a Notice of Review. *Villarreal v. Independent School Dist. No. 659, Northfield*, 505 N.W.2d 72, 77 n.1 (Minn. Ct. App. 1993), *rev’d on other grounds*, 520 N.W.2d 735 (Minn. 1994); *Hoyt Inv. v. Bloomington Commerce & Trade Ctr. Ass’n.*, 418 N.W.2d 173, 175 (Minn. 1988) (notice of review not required when the district court has not ruled on a litigated question).

⁷⁰ AA. 4, ¶ 9.

⁷¹ AA. 6-7, ¶ 21.

⁷² AA. 12, ¶ 54.

Since Baer did not provide any disability-related information and suffered no adverse employment action by Donovan as a result, he was only requested, not required, to provide disability-related information. He is therefore not an aggrieved party entitled to seek any relief from Donovan in a district court action.

The district court can be affirmed on this independent basis, irrespective of this Court's determination of whether the district court abused its discretion in finding that Donovan did not engage in discrimination and that Baer suffered no damages. *See Grunig, 660 N.W.2d at 137.*

E. Baer's Attempt To Turn The MHRA Into A Strict Liability Statute Should Be Rejected And The District Court Affirmed.

Even though Baer wasn't required to provide disability-related information to Donovan, Donovan did not engage in discrimination, and Baer suffered no cognizable injury, Baer still challenges the district court's denial of an award of damages, and attempts to turn the MRHA into a strict liability statute. Baer argues:

Even in cases in which the law has been violated, but an individual does not suffer actual damages, an individual is entitled to recover at least nominal damages.⁷³

Baer cites primarily the *Dean* and *Hicks* cases for his contention that he is entitled to nominal damages. But his argument ignores a crucial distinction between those cases and Baer's: the plaintiffs in the other cases proved that the *defendant engaged in discrimination against the plaintiff*. In *Dean*, the plaintiff prevailed on her claim that she was discriminated against based on her gender when the U.S. Marshal Service withdrew

⁷³ Appellant's Brief, pp. 6-7.

a vacancy for another position plaintiff sought. The district court found that the plaintiff was discriminated against but did not suffer lost wages or other damages as a result because she didn't lose her existing position. The 8th Circuit reversed, requiring an award of nominal damages of at least \$1 and reasonable attorney's fees based on the "finding that the Marshal Service discriminated against" plaintiff based on her gender. *Dean v. Civiletti*, 670 F.2d 99, 101 (8th Cir. 1982).

Similarly, in *Hicks*, the plaintiff proved that he had been discharged because of his race after working for the defendant for 34 years. The jury awarded the plaintiff punitive damages in the amount of \$10,000 based on the willful discrimination by the defendant, but no actual damages. The district court modified the jury's actual damages to \$1 and awarded Hicks attorney's fees and costs. The 8th Circuit affirmed that modification. *Hicks v. Brown Group, Inc.*, 902 F.2d 630, 652 – 53 (8th Cir. 1990), *rev'd on other grounds* 982 F.2d 295 (8th Cir. 1992).

In both *Dean* and *Hicks*, the plaintiffs proved what Baer woefully failed to prove here: that the defendant engaged in discrimination against the plaintiff.⁷⁴ The district court's findings and order are clear that Baer failed to prove that Donovan discriminated against Baer or anyone else. Since there has been no discrimination by Donovan, the district court was correct in not awarding damages to Baer under the MHRA, nominal or otherwise.

Baer also contends that the MHRA provision that the questions on the application violated *requires an award of damages to Baer without proof of discrimination or causation*.⁷⁵ But Baer's argument flies in the face of the clear text of the MHRA, and therefore amounts to an attempt to convince this court to add language to the MHRA and ignore applicable state and federal case law. Baer's motivation is to try to achieve the award of nominal damages, and thus prevailing party status so as to attempt to recover attorney's fees, premised solely on the court's finding that the questions on the outdated form violate the MHRA. But the MHRA claim Donovan brought does not provide for that relief. Rather, it allows recovery of "compensatory damages" for an "aggrieved party who has suffered discrimination." Minn. Stat. § 363A.29, subd. 4.

⁷⁴ The other cases cited by Baer to support his quest for nominal damages are irrelevant. In *Stepter v. Underhill*, 687 F.Supp. 1186, 1187 (S.D. Ohio), the court awarded nominal damages of \$1 after the jury found that the defendant engaged in race discrimination. Donovan didn't engage in discrimination. In *Wright v. Jasper's Italian Restaurant, Inc.*, 672 F. Supp. 424, 426 (W.D. Mo. 1987), the appellate court merely affirmed the district court's allowance of the jury's award of punitive damages to the successful plaintiffs based on claims of assault and false imprisonment even though the jury awarded plaintiffs no compensatory damages. Here, the district court denied Baer's request for punitive damages.

⁷⁵ Appellant's Brief, pp. 9-10.

Since Donovan didn't engage in discrimination and Baer didn't suffer from any, the district court properly denied Baer's request for damages. The district court's order denying Baer any damages should be affirmed.

II. THE DISTRICT COURT'S DETERMINATION THAT BAER IS NOT ENTITLED TO RECOVER ATTORNEY'S FEES SHOULD ALSO BE AFFIRMED.

A. The District Court Did Not Err When It Determined That Baer Was Not A "Prevailing Party" Under the MHRA's Attorney's Fees Provision.

Both Baer and Donovan asked the district court for an award of attorney's fees pursuant to Minn. Stat. Sec. 363A.33, subd. 7:

Subd. 7. **Attorney's fees and costs.** In any action or proceeding brought pursuant to this section the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

Pursuant to this provision, the court could have determined that Donovan was entitled to recover its attorney's fees and costs in defending against Baer's baseless claims that Baer suffered damages as a result of discrimination by Donovan. *See Bilal v. Northwest Airlines, Inc.*, 537 N.W.2d 614, 620 (Minn. 1995) (the court may award a prevailing defendant attorney's fees upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 722 (Minn. 1986).

The MHRA therefore provides the district court with 2 determinations to make: 1) whether either party is a "prevailing party" in the action; and 2) if so, whether that prevailing party should be awarded reasonable attorney's fees as a part of the costs. The district court found that neither Baer nor Donovan was a "prevailing party" under the

MRHA's fee provision and denied both parties' request for attorney's fees. The district court ruled:

Here, Plaintiff has prevailed on the question of [Donovan's] violation of the MHRA through use of an employment application containing prohibited questions; Defendant has prevailed on the claims relating to unfair discriminatory practice and Plaintiff's right to recover damages. Under the circumstances, *neither party qualifies as a prevailing party* and neither is entitled to recovery of costs or attorney's fees.⁷⁶

Baer simply ignores the fact that the district court determined that he was not a prevailing party under the MHRA, and bases his entire argument on the incorrect premise that he was declared a prevailing party at the district court level.⁷⁷ Baer contends that "the district court correctly determined that Plaintiff was a prevailing party under the MHRA. The court then, however, denied Plaintiff his attorney's fees and costs."⁷⁸

Amicus Curiae NELA does acknowledge the district court's determination that Baer was not a prevailing party under the MHRA, but contends that the district court "abused its discretion in failing to award Appellant prevailing party status along with reasonable attorney's fees."⁷⁹

Both Baer and the NELA are therefore urging this court to determine that the district court erred in determining that Baer was not a prevailing party under the MHRA. Baer and the NELA both incorrectly contend that the standard of review is abuse of discretion.⁸⁰ The review of a district court's determination of whether a litigant is a

⁷⁶ AA. 31(emphasis added).

⁷⁷ Appellant's Brief, p. 17.

⁷⁸ Appellant's Brief, p. 13.

⁷⁹ NELA Brief, p. 5.

⁸⁰ Appellant's Brief, p. 14; NELA Brief, p. 5.

prevailing party is *de novo*. See *St. Louis Fire Fighters Ass'n Int'l Ass'n of Fire Fighters Local 73 v. City of St. Louis, Missouri*, 96 F.3d 323, 330 (8th Cir. 1996).

The district court did not err when it determined that Baer was not a prevailing party. In construing the MHRA, Minnesota courts look to federal case law under Title VII. See, e.g., *Koop v. Ind. School Dist. No. 624*, 505 N.W.2d 93, 96 (Minn. App. 1993). In order to “prevail” for purposes of an award of attorneys’ fees, a discrimination plaintiff “must obtain relief on the merits that *directly benefits him or her* through an enforceable judgment[.]” *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (emphasis added). An “enforceable judgment” for these purposes is a money judgment for damages. See *id.*

Baer did not obtain a money judgment for damages or any other relief that directly benefited him. The only relief that the district court granted was 1) a determination that the application questions violated the MHRA, which Donovan did not challenge and resulted in no benefit to Baer⁸¹; and 2) a \$500 civil penalty that Donovan paid to the state, not Baer. The district court denied all of Baer’s requests for relief and found that: 1) Donovan had not engaged in discrimination or utilized the responses of Baer or any other applicant to the challenged questions in making any of its hiring decisions; 2) Baer had not suffered from discrimination; and 3) Baer was not damaged by anything that Donovan did or did not do.

Since Baer did not recover any damages in any amount or any other relief that benefited him at trial, the district court was correct when it determined that Baer was not

⁸¹ Donovan had ceased using the outdated form in April 2002, well before Baer had even asserted his charge of discrimination.

a “prevailing party.” See, e.g., *Pedigo v. P.A.M. Transport, Inc.*, 98 F.3d 396, 398 (8th Cir. 1996) (holding that plaintiff who established violation of Americans with Disabilities Act but who obtained only declaratory relief did not “prevail” for purposes of recovering attorney’s fees). The *Pedigo* court explained the analysis well:

The district court erred in finding that plaintiff was a prevailing party, because a judicial pronouncement that the defendant has violated the law, like the one that Mr. Pedigo received in this case, without an enforceable judgment on the merits, cannot render him a prevailing party. Plaintiff has no enforceable judgment, even of a nominal character, that affects the behavior of the defendant toward the plaintiff. The declaratory judgment, in this case, moreover, afforded plaintiff no relief because he had already left the defendant’s employ by the time that the district court declared that the defendant had discriminated against him. See *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) (per curiam).

Pedigo, 98 F.3d at 398.

Baer’s situation is substantially similar to the plaintiff in *Pedigo*. In both cases, the defendant was found to have violated a provision of an anti-discrimination statute, but the plaintiff had suffered no damages as a result. In both cases the outcome did not change the relationship between the plaintiff and defendant in a way that benefited the plaintiff.

Pedigo is therefore on point and establishes that the district court was correct when it determined that Baer was not a prevailing party for purposes of the MHRA fee provision. See also *Sierra Club v. City of Little Rock*, 351 F.3d 840 (8th Cir. 2003) (following *Pedigo* and finding that the Sierra Club was not a prevailing party under the Clean Water Act even though it was granted partial summary judgment on its claim that the City had violated its permit, because it could “point to no effect that the judicial declaration had on the City’s behavior toward Sierra Club”); *Peter v. Jax*, 187 F.3d 829

(8th Cir. 1999)(following *Pedigo* and finding that disabled student plaintiffs were not “prevailing parties” under 42 U.S.C. § 1988 when the defendant agreed to a consent injunction and stipulation); *Dehne v. Medicine Shoppe International, Inc.*, 261 F.Supp. 1142 (E.D. Missouri 2003)(following *Pedigo* and finding that plaintiff was not a prevailing party on his ADA claim when plaintiff obtained declaratory relief that defendant violated the ADA but recovered no damages). *See also Thomas v. J.C. Penney Co.*, 531 F.2d 270, (5th Cir. 1976)(reversing the district court’s award of attorney’s fees and costs under Title VII because plaintiff was not a “prevailing party” when he failed to prove discrimination at trial); *Adams v. Reed*, 567 F.2d 1283, 1287-88 (5th Cir. 1978)(affirming district court’s denial of award of attorney’s fees on plaintiff’s Title VII claim when “plaintiff prevailed on one issue, [and] the [defendant] Government prevailed on several [other issues] . . .”).

Farrar, Pedigo, and their progeny therefore establish that the district court did not err when it determined that Baer was not a prevailing party on his statutory claim. The only cases cited by Baer or NELA to support their argument that the district court should be reversed are inapposite. In *Peterson v. Ford Motor Co.*, 2006 WL 3030885 (D. Minn. 2006), the court found that the defendant had engaged in disability discrimination and that plaintiff had suffered damages as a direct result of that discrimination in the amount of \$1,282.40 in lost wages and \$27,000 for mental anguish and emotional distress. The district court made no such finding here.

In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the plaintiffs were involuntarily confined in the forensic unit of a Missouri state hospital and prevailed at trial when the

district court found constitutional violations in five of the six general areas of defendants' treatment of the plaintiffs, which justified an award of attorney's fees under 42 U.S.C. § 1988. The district court had determined that the plaintiffs were prevailing parties, and that determination was not even the subject of the defendants' appeal. The issue on appeal was the amount of the attorney's fee award in relation to the degree of success at trial, not whether the plaintiffs were "prevailing parties" under the attorney's fees provision. *Hensley* therefore does not even address or support Baer's and the NELA's contention that the district court abused its discretion when it determined that Baer was not a prevailing party under the MHRA.

In *Dean*, as already discussed, the district court found "that the Marshal Service discriminated against" plaintiff based on her gender. *Dean*, 670 F.2d at 101. Baer obtained no such finding here. The district court made it very clear that Donovan did not discriminate against Baer or anyone else, and that Baer did not suffer from discrimination.

Finally, in *Kunza v. St. Mary's Regional Health Center*, 747 N.W.2d 586 (Minn. Ct. App. 2008), the issue on appeal was whether the *prevailing party defendant* was entitled to recover attorney's fees under the MHRA, not whether a plaintiff was entitled to prevailing party status under the MHRA fee provision. *Kunza* would only be relevant had Donovan appealed the district court's denial of attorney's fees to Donovan. Although Donovan contended and still believes that it should have recovered its attorney's fees in this action, it understands and respects the district court's

determination, and has not appealed that issue. *Kunza* is therefore simply irrelevant to this appeal.

Since the district court did not err in denying Baer prevailing party status under the MHRA's fee provision, the district court should be affirmed and Baer's appeal denied.

B. Even if Baer Should Have Been Declared a Prevailing Party, the District Court's Denial of Attorney's Fees Should Still Be Affirmed.

Even if the district court erred and must award Baer prevailing party status, the district court should still be affirmed. The district court has the discretion to deny attorney's fees to a prevailing party plaintiff. *See* Minn. Stat. 363A.33, Subd. 7 ("the court, in its discretion, may allow the prevailing party a reasonable attorney's fee"). Denial of attorney's fees to a prevailing party plaintiff can be proper when there are "special circumstances" that "render such an award unjust." *Tyler v. Corner Construction Corp.*, 167 F.3d 1202, 1206 (8th Cir. 1999). Whether "special circumstances" exist depends on whether 1) allowing attorney's fees will further the purposes of the statute; and 2) whether the balance of equities favors or disfavors the denial of fees. *Thomas v. City of Tacoma*, 410 F.3d 644, 648 (9th Cir. 2005).

The purpose of the MHRA is to place individuals that have been discriminated against in the same position they would have been in had no discrimination occurred. *Brotherhood of Ry. And S.S. Clerks, Freight Handlers, Exp. And Station Empl, Lodge 364 v. State by Balfour*, 303 Minn. 178, 195, 229 NW.2d 3, 13 (Minn. 1975). Even if the district court erred when it denied Baer prevailing party status, this Court can still

independently affirm the district court based on special circumstances. *See Grunig*, 660 N.W.2d at 137.

There are at least five facts established in the record that demonstrate that there are special circumstances here. These facts show that the purpose of the MHRA would not be furthered by an award of attorney's fees to Baer, and that the balance of equities favors a denial of Baer's fees in this case.

First, Baer's claim against Donovan (and against G&T Trucking) was orchestrated by Baer. Baer was not looking for a job with Donovan – he was looking for a lawsuit. Baer knew that the challenged questions on the application forms that he requested and received from Donovan and G & T in March 2002 violated the MHRA.⁸² He didn't answer any of those questions on his G & T application, and hedged his bets by answering 2 of the 5 challenged questions on the Donovan application.⁸³ He provided his partially-completed applications to both (small, family-owned) companies at the same time and then asserted virtually identical administrative charges of discrimination against both companies on the same date, followed by federal and state court actions against both companies. This shows that Baer was looking for a claim against Donovan, not a job with it. As the district court found:

A Plaintiff who has no genuine interest in employment with the defendant cannot make a case of employment discrimination. See Parr v. Woodmen of the World Like Ins., 657 F.Supp. 1022, 1032-33 (M.D. Ga. 1987); Allen v. Prince George's County, 538 F.Supp. 833, 841-43 (D. Md. 1982). Here, Plaintiff's application was incomplete in material respects unrelated to the challenged questions; JDDI offered less per hour in 2002 than Plaintiff

⁸² AA. 13, par. 56.

⁸³ AA. 14, par. 57.

made in his jobs both before and after he submitted his incomplete application to JDDI in March, 2002; JDDI often required out-of-state work, which Plaintiff was not interested in. Plaintiff does not meet his burden of proof as to this factor.⁸⁴

Awarding attorney's fees for an orchestrated claim where the plaintiff did not have a disability and was not discriminated against does not further the purposes of the MHRA, which is to place persons discriminated against in the position they would have been had the discrimination not occurred. The contrived nature of Baer's claim is a factor in favor of denying the fee request.

Second, on May 25, 2007, before Baer brought his motion for partial summary judgment, Donovan extended a Rule 68 offer to Baer in the amount of \$2,500, which included attorney's fees and the grant of the declaratory and injunctive relief that Baer sought.⁸⁵ If Baer had accepted the Rule 68 Offer, the litigation would have stopped prior to the district court's ruling on the cross-motions for summary judgment, and well before trial. The parties would have collectively saved tens of thousands of dollars in attorney's fees and costs. But Baer never even responded to that offer.

Instead, he proceeded through the summary judgment stage, a two-day court trial, and now this appeal with full knowledge that 1) he wasn't interested in or qualified for the positions Donovan had; 2) he wasn't disabled or perceived as disabled; 3) Donovan did not engage in discrimination; 4) he did not suffer any harm as a result of anything that

⁸⁴ AA. 23, ¶ 1(A)(a).

⁸⁵ See Defendant's Rule 68 Offer of Judgment dated May 25, 2007, attached as Exhibit 1 to the August 8, 2008, Affidavit of Mark Thieroff.

Donovan did or did not do; and 5) there was no financial detriment to him caused by his not receiving or accepting an offer of employment from Donovan.

Third, Baer's pursuit of this litigation through summary judgment and trial was done without any legitimate prospect of achieving anything other than what Donovan conceded – that there were questions on the outdated application form that Donovan handed out in 2002 (and never used again after April 2002) that were impermissible under the MHRA. Baer's pursuit of this action was therefore not motivated by a legitimate attempt to obtain relief for the plaintiff or to stop a discriminatory practice by the defendant.⁸⁶ It was motivated by the desire to generate and then attempt to recover attorney's fees.

Fourth, the district court found Baer's testimony in support of his claims to be less than credible in material respects. Without limitation, the district court found that Baer's testimony regarding an alleged conversation with a representative from Donovan that he contended showed that Donovan engaged in discrimination based on the challenged questions to not be credible⁸⁷ and that Baer's testimony that he had a requisite hazmat

⁸⁶ Baer contends that it was a common practice in the trucking industry to use outdated application forms with impermissible questions on them, and points to the application forms from Donovan, G & T, and Wiseway Motor Freight in Hudson, Wisconsin. (AA. 76-87). Baer contends that his motivation for this case and his other suit against G & T was to "bring these violations to light and stop this illegal practice." (Appellant's Brief, p. 15). But both Donovan and G & T stopped using the outdated application form before they even received notice of Baer's administrative charges, so they policed themselves. And Baer never even asserted a claim against Wiseway. So Baer never did affect the behavior of the three trucking companies that he provides as examples.

⁸⁷ AA. 5-6, pars. 16-18, 20.

endorsement for a tanker driving position to not be credible.⁸⁸ In other words, the district court found that Baer was lying – about material facts – under oath.

Fifth and finally, this appeal is being brought solely for the purposes of attempting to recover attorney’s fees that should have stopped accumulating prior to the parties’ cross-motions for summary judgment. Baer has appealed the district court’s determination that he is not entitled to damages and seeks an order that requires an award to him of only “nominal” damages of at least \$1. Baer no doubt recognizes what he doesn’t concede in his appellate argument – that pursuant to *Farrar* and *Pedigo*, he must obtain at least a nominal damages judgment against Donovan to attempt to achieve “prevailing party” status under the MHRA so as to even request an award of attorney’s fees. Baer’s entire appeal therefore seeks only one thing: recovery of attorney’s fees.

These five facts show that there are special circumstances here that provide an additional reason to affirm the district court’s denial of attorney’s fees to Baer. An award of attorney’s fees in this case would not further the purposes of the MHRA – there was no discrimination by the defendant, and there is no plaintiff who suffered from discrimination for the courts to attempt to place in the same position the plaintiff would have been had the discrimination not taken place. The balance of equities also favors not awarding attorney’s fees to Baer. So even if the district court abused its discretion on the “prevailing party” issue, it should still be affirmed on its denial of attorney’s fees to Baer on this independent basis.

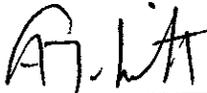
⁸⁸ AA. 9, par. 36.

CONCLUSION

The district court did not abuse its discretion in not awarding Appellant damages or attorney's fees, and its June 5, 2008, Order and Judgment should be affirmed in all respects.

Dated: September 16, 2008.

**SIEGEL, BRILL, GREUPNER,
DUFFY & FOSTER, P.A.**

By: 

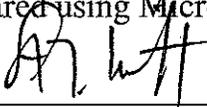
Steven J. Weintraut (#251975)
Mark Thieroff (#322404)

Suite 1300
100 Washington Avenue South
Minneapolis, MN 55401
(612) 337-6100
(612) 339-6591 - Facsimile

ATTORNEYS FOR RESPONDENT

CERTIFICATION

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,654 words. This brief was prepared using Microsoft Word, Version 2003.



Steven J. Weintraut