

NO. A08-1810

State of Minnesota
In Court of Appeals

Elizabeth Friend,

Respondent,

vs.

The Gopher Company, Inc. and
Jason Brouwer,

Appellants.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Respondent presents a distorted and myopic view of the record.

Understandably she fails to remotely even discuss her attendance issues while employed at Gopher. It was these attendance issues which led to her no longer being employed. A reason which must result in the district court being reversed.

STATEMENT OF FACT

Throughout respondent's brief are claimed facts which are not supported by the cited reference.¹ In other situations respondent takes testimony out of context. At other times respondent does not even provide a citation to the record.² Thus, it is necessary to detail the factual inaccuracies contained in respondent's brief as well as discuss those claimed facts which were not cited to the record and actually have no support whatsoever in the record.

Citing to page 236 of the transcript respondent claims Brouwer "had to make changes due to the Plaintiff's pregnancy." Resp. Br. at p. 3. However, Brouwer testified he had to do "what was good for her but also what was good for the company...." Tr. at p. 236, ll. 15-17. Furthermore, Brouwer testified he never had the opportunity to implement any of his ideas because Friend did not show for work. *Id.* at pp. 235-236.

¹ It is presumed the brief which was filed with the Court by respondent was executed by her counsel. Those served on appellants were not.

² Respondent had a duty to not only provide a reference to each claimed fact, but also had an obligation to state the facts with complete candor. Minn. R. Civ. App. P. 128.02, subd. 1, 2 and R. 128.03.

Respondent then claims there was no evidence that she could not perform her job at this time. Resp. Br. at pp. 3-4. What respondent fails to grasp is the fact she did not perform her job duties at any time. Pregnancy was not the issue; her inability to appear for work was the issue. A fact not squarely addressed in respondent's brief is for the ten months she was employed she missed over five weeks of work. Exs. 115, 108. She did not learn she was pregnant until the beginning of August 2005. Tr. at pp. 23-24. Her last day of work was August 16, 2005. *Id.* at p. 234; ex. 109 at p. 44. Her absenteeism and thus her inability to perform her job duties was not due to her pregnancy, but due to her inability to appear for work when scheduled.

As for the day Friend was no longer employed respondent again distorts the record. It is claimed Brouwer testified she was terminated because she went to her doctor rather than work. Resp. Br. at p. 4. However, the part of the transcript in which it is claimed contains this testimony is merely respondent's counsel restating Friend's testimony. Tr. at pp. 104-107. Likewise, the claim "[t]here was no other issue involved in the Plaintiff's termination" is a complete distortion of the record. Resp. Br. at p. 4. The actual testimony was there was nothing about that day that made it different than any other day. Tr. at p. 108.

There is no dispute the most important job of Gopher's receptionist was to answer the phone. In an attempt to diminish the impact of her excessive absenteeism respondent claims "Gopher had an answering service that answered phone calls when the receptionist was not on duty." Resp. Br. at p. 5. Yet, the answering service was utilized at night. Tr. at p. 206. In fact, the answering service was not utilized

until 8:30 or 9:00 p.m. Tr. at p. 237. The answering service would be switched off the following morning. *Id.* at pp. 237-238.

Respondent also misstates the record when she claims the sales marketing calls did not go through the main number. Resp. Br. at p. 5. The actual way the system worked was the telemarketer would give their direct number “if the customer was going to call back that night. If they were going to call the next morning, they were directed to call the main number.” Tr. at p. 240, ll. 19-22. It was the receptionist’s job to answer these calls. *Id.* at p. 202.³

No citation to the record was provided for the claim a female employee was fired for too many doctors’ excuses. Resp. Br. at 6. As for the male employee referenced by respondent the description as an extended leave is too kind. *Id.* Ian Goriesky was arrested and jailed for a DUI. Tr. at pp. 100-101. He was allowed to miss work because of this. *Id.* at p. 101. However, he was a salesman, not paid for his time off and his job did not include answering the phones. *Id.* at p. 123.

It is extremely disingenuous to claim there was little documentation of Friend’s attendance issues. Resp. Br. at p. 6. Exhibit 109 contained each and every time card for the respondent. Respondent did not claim there were days for which she was at work but failed to punch in. On the contrary Friend did not complain there was an error in her paycheck. Tr. at pp. 150-151.

³ Without citation to the record respondent claims Brouwer informed her she would receive a raise after a year. Resp. Br. at p. 5. Her actual testimony was not that she would receive a raise but that the issue would be discussed after a year. Tr. at p. 19.

Respondent glosses over her attendance issues. In fact, she makes two statements that not only strain logic, but for which the evidence is directly contrary to her assertion. First, she claims no one testified there was not a day in which she should have been at work she was not. Resp. Br. at p. 8. Second she claims on some of the days she missed work she was “otherwise indisposed.” *Id.*

As to the first, she was supposed to be at work every day. Every employer who hires an employee expects them to appear for work. To claim that appearing for work is somehow a voluntary choice of the employee is incredible. Even so, Friend informed another Gopher employee she sometimes missed work due to fights with her boyfriend. Tr. at p. 172.

As to the second, it is unclear what is meant by “otherwise indisposed.” What is clear is that on numerous occasions Friend could not provide an explanation as to why she was not at work. Tr. at pp. 44, 49, 51, 52, 53. The math also is not that difficult. *See* Resp. Br. at p. 8. Friend was scheduled to work 1,728 hours. Ex. 115 she actually worked 1,500.89 hours. *Id.* Thus, she missed over 13% of the time she was supposed to be at work. She provided an explanation for 87.5 hours of the work she missed. *Id.* Subtracting this time, 139.61 hours of missed work was unaccounted. This equates to just over 8% of the time she was scheduled she missed work for which there was not provided an explanation – nearly 3 ½ weeks. *Id.*

Respondent attempts to cast Gopher in the light of an employer who fires everyone who becomes pregnant. Resp. Br. at pp. 8-9. An assertion not supported by the record. First, at the time of trial Gopher had in its employ someone who was

pregnant dispelling the notion “no employee of Defendants ever continued to be employed more than a couple of months after becoming pregnant.” Tr. at p. 193; Resp. Br. at p. 8. As for Amanda Parson, Timothy Ward was considering letting her go, not “going to be terminated” and there is nothing in the record to contradict the claim she quit. Tr. at p. 191; Resp. Br. at p. 8.

Perhaps most telling as it relates to respondent’s mischaracterization of the record is the following statement: “[t]rial witnesses recalled other female employees who had become pregnant during their employment with Defendants. Their employment also ended shortly after becoming pregnant.” Resp. Br. at p. 9. What witnesses? The citation to the record is part of the examination of Jason Brouwer. The most that can be gleaned from this testimony is at some point in time there was *one* person who became pregnant and left. Tr. at p. 45. No testimony she was terminated because she was pregnant. Just that she left.

Understandably respondent desires to focus on the fact she was pregnant rather than her attendance issues. Regardless of the lack of evidence regarding the ability of a female to work during various stages of her pregnancy, *see* Resp. Br. at p. 10, respondent’s inability to perform her job was a direct function of her not showing up for work, not a function of her being pregnant. A point not even discussed by respondent. As for the “options” referred to on page 13 of respondent’s brief, respondent conveniently failed to inform the Court Brouwer did not have the opportunity to implement any of these options because the respondent failed to show for work and thereafter was no longer employed. Tr. 235-236.

Respondent's damage analysis is interesting, although entirely unsupported by the record. It has previously been discussed she was not guaranteed a raise. *See* Resp. Br. at p. 16. Not only is there no evidence in the record concerning an increase in health insurance costs for the respondent, respondent again fails to address the fact the record indicates respondent did have health insurance as of December 28, 2005. Ex. 116.⁴ There is also nothing in the record to indicate respondent would have received a raise, let alone as the district court pointed out kept her job due to her absenteeism. Resp. Br. at p. 17; AA 5 at para. 37.

Respondent failed to cite to any portion of the record when discussing her claimed emotional distress. *See* Resp. Br. at pp. 18-19. As was detailed earlier, respondent did have medical insurance. Even more quizzical is respondent's recitation of the impact of insurance when her counsel stated at trial "[t]he fact that four months later she for the first time now is able, by learning of state programs and pursuing those state programs, to finally get that limited portion of her health care covered, that is to say, the part that deals with the unborn child, is not *relevant* to anything that is in dispute in this case." Tr. at p. 258, ll. 5-10 (emphasis supplied).

What is perhaps most telling regarding respondent's submission is not what it says but what it fails to say. Respondent did not address the importance of the receptionist position. Respondent does not discuss the fact she was told on numerous occasions not only was it necessary for her to show for work but if she

⁴ Respondent's assertions concerning the lack of insurance for herself and her newborn child are likewise without merit. Resp. Br. at p. 18.

was not going to make it into work she was to call before her shift started and on numerous times failed to call when she missed work.

Respondent's discussion concerning her cessation of employment is also incomplete. While true there were discussions concerning options to employ during respondent's pregnancy, these options could not be implemented let alone discussed with respondent because she again failed to show for work. Tr. at pp. 234-235.

Based on the actual record, and the law, the district court should be reversed.

ARGUMENT

As with her statement of facts, respondent presents an argument that is based more on her desire of what the record reveals and what the law states than what is actually true. Respondent is no longer employed at Gopher for one reason and one reason alone: she did not show up for work. The fact respondent does not even squarely address this issue is akin to admission by silence. For Gopher provided a legitimate reason for Friend no longer being employed, Friend on the other hand provided no reasonable argument to show that this reason was pretextual.

I. RESPONDENT WAS NOT DISCRIMINATED AGAINST BECAUSE SHE WAS PREGNANT.

Respondent's argument on this issue is predicated on a matter not contained in the record. Respondent claims appellants were making "business decisions about the Plaintiff based upon her pregnancy" and that they "acted on their own biases about pregnancy" Resp. Br. at p. 21. However, no decision was ever

made. Sure, Brouwer was discussing with his wife respondent's pregnancy, but the issue of what to do when respondent had to take off to have her child was never implemented. In fact, not one reference in the record contains any indication whatsoever that appellants were contemplating discharging respondent because of her pregnancy. Instead, as the record demonstrates, Friend again failed to show up for work. No business decision was made – it could not have been. For Friend took it upon herself to make the decision for everyone – she left employment.

This fact is directly contrary to respondent's claim there was direct evidence of discrimination. See Resp. Br. at p. 25. Unlike *Elliot v. Montgomery Ward Co.*, 967 F.2d 1258 (8th Cir. 1992) this is not a case in which there was a statement made to the employee which is alleged to have been discriminatory. *Id.* at 1262. Brouwer did not discuss Friend's pregnancy with her and the only comment he made concerning her announcement that she was pregnant was congratulations. This can hardly be evidence of direct discrimination.

The same holds true as to respondent's attempt to analogize this case with *Scheidecker v. Arvig Enterprises, Inc.*, 122 F.Supp.2d 1031 (D. Minn. 2000). Resp. Br. at p. 26. In *Scheidecker* the plaintiff was "warned ... more children may affect her ability to receive promotions." *Scheidecker*, 122 F.Supp.2d at 1037. She was informed that once a woman has two children she should not return to work. *Id.* There was evidence of "the contemporaneous terminations of other

pregnant employees” *Id.* at 1042. None of these facts are present in this matter, or anything closely resembling these facts.

Rather, Friend lost her job because her attendance record was horrific. At no time did Brouwer say Friend’s pregnancy “threatened” his business and did not take “steps to convert [her] position[] to part-time.” Resp. Br. at p. 27. It may be redundant, but given the number of times respondent has utilized the claim Brouwer did something active to support her claims, it must be repeated. Appellants did not take any steps at all with respect to Friend’s pregnancy. They did not get the opportunity to implement any options. Options which, by the way, were designed to accommodate her when it came time for her to deliver her child. Respondent’s argument attempting to show direct evidence of discrimination is specious at best. The same holds true for her attempt to satisfy the *McDonnell Douglas* test.

First, in no way has appellants conceded that Friend “met the stated requirements of the job and that she was told not to return to the job.” Resp. Br. at pp. 28-29. Appellants spent over three pages in their brief directly addressing this issue. *See* App. Br. at pp. 21-24. In the interest of brevity, these arguments will not be repeated again.

However, what does bear repeating is that there was a legitimate reason for Friend no longer being employed. It is undisputed that an employee can be terminated if she fails to show for work. *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8th Cir. 1998); *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804,

808 (Minn. Ct. App. 1992); *Clearwater v. Ind. School Dist.* 166, 233 F.3d 1122, 1127 (8th Cir. 2000). Friend failed to show for her work. Her inability to comply with the basic requirement of any job, that is showing for work, occurred from the beginning of her employment. To claim there was no non-discriminatory reason for appellants' actions is wholly without merit. Resp. Br. at p. 30.⁵

Respondent's discussion concerning the timing of her leaving as it relates to the timing of learning she was pregnant is wrong as a matter of law. *See* Resp. Br. at pp. 34-35. First, "timing alone is insufficient to show a pretextual motive rebutting a legitimate, non-discriminatory reason for an adverse employment reaction." *Green v. Franklin Nat'l Bank of Minneapolis*, 459 F.3d 903, 816 (8th Cir. 2006). None of the cases cited by respondent disagrees with this statement.

Tretter v. Liquipak Int'l, Inc., 356 N.W.2d 713 (Minn. Ct. App. 1984) involved an employee complaining of sexual harassment by her supervisor and then being later demoted. *Id.* at 715. This is not a case of reprisal discrimination. Friend did not engage in statutorily protected conduct. Tretter was the only employee with 11 years of service to be terminated. *Id.* Liquipak when it again hired someone to work in Tretter's department, instead of hiring Tretter hired someone with no prior experience. *Id.* This matter before this Court has no relationship to *Tretter* even under respondent's strained view of the facts.

⁵ To argue that appearing for work is not "a business necessity" is obviously the manner in which Friend treated her employment with Gopher, but not reality. *See* Resp. Br. at p. 31.

Respondent's citation to *Minnesota Ass'n of Nurse Anesthetists v. Unity Hospital*, 59 F.3d 80 (8th Cir. 1995) is quizzical. See Resp. Br. at p. 34. This case involved a claim under the whistleblower statute, Minnesota Statute §181.932. *Minnesota Ass'n of Nurse Anesthetists*, 59 F.3d at 81. The entire opinion dealt with whether the plaintiffs were entitled to a preliminary injunction. On page 83 of the opinion, the page cited by the respondent, the issue of closeness in time is not discussed.

Next, respondent cites *Thompson v. Campbell*, 845 F.Supp. 665 (D. Minn. 1994). Resp. Br. at p. 34. This case dealt with the Whistleblower Act as well. *Thompson*, 845 F. Supp. at 675. In fact, *Thompson* holds "that an inference of retaliatory motive is not justified by virtue of the timing of Thompson's discharge alone." *Id.* Thus, it is clear the state of the law with respect to timing is just as claimed by appellants as shown by a case cited by respondent.

Lastly is *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428 (Minn. 1983). See Resp. Br. at p. 34. This case too was one of a claim of retaliatory discharge. *Hubbard*, 330 N.W.2d at 445. In *Hubbard* the employee was discharged two days after service of the complaint. This was sufficient to show retaliatory motive for the prima facie case. *Id.* Clearly this is not the case here. Regardless, the court found UPI met its burden by showing the decision to terminate Hubbard was based on his inability to perform his job satisfactorily. *Id.*

Likewise, even if Friend's leaving is called a termination, it certainly was justified by her inability to show for work. Respondent did not even address her

lack of attendance. Her absences did not “appear[] to be appropriate time off, due to medical problems.” Resp. Br. at p. 35. On the contrary, of the over 227 hours of work she missed, respondent was only able to account for 87.5 of these hours. Ex. 115. It strains logic to argue the time she missed from work “was not shown to be improper.” Resp. Br. at p. 35. She herself testified that she was told she needed to show for work. Witnesses that were adverse to Gopher at trial stated her attendance was the worst they had seen. These same witnesses testified to the impact of her not showing for work on their jobs and the jobs of the rest of the staff. Missing work is improper. It is a legitimate basis for termination. Friend did not satisfy her burden, and even if she did Gopher showed the decision for her not being employed was based on a non-discriminatory reason. Respondent failed as a matter of fact and law to show that the reason, her inability to show for work, was pretextual. The district court should be reversed.

II. RESPONDENT’S REQUESTED RELIEF.

At the outset it should be noted respondent did not move the district court for Amended Findings pursuant to Rule 52.02 of the Rules of Civil Procedure to increase her damages. Assuming for the sake of argument the district court is upheld, its determination of damages on the wage loss claim should be upheld. It certainly had factual support to render its decision. Respondent was a problem employee for the entirety of her employment as it related to attendance.

As to the issue of mitigation, respondent testified she provided two applications for employment. Tr. at p. 58. While at trial she mentioned other

applications, however, in her deposition these were the only two that she could recall. *Id.* Given all of the other credibility issues as it relates to respondent as detailed in appellants' opening brief, the district court was surely in a position to determine that respondent was not credible on the issue of mitigation and found she did not mitigate her damages because she did not actively seek work.

Respondent's discussion on her emotional distress claim was a non-response response to the arguments set forth by appellants. *See* Resp. Br. at p. 39. Appellants set forth all of the facts introduced at trial for which respondent claimed she suffered emotional distress. App. Br. at p. 15. They also provided the legal analysis demonstrating these facts do not justify an award of emotional distress damages in the amount of \$20,000. *Id.* at pp. 28-29. Because no substantive response was provided by respondent, appellants respectfully refer the Court to those portions of appellants' brief dealing with the claimed emotional distress. *Id.* at pp. 28-29.

III. RESPONDENT'S REQUEST FOR ATTORNEYS' FEES.

Respondent's argument on attorneys' fees seems to be one gleaned from not this case but a different case. There were not "twelve days in trial" as respondent claims. Resp. Br. at p. 44. This matter took but two days to try.⁶

While a good portion of respondent's brief on attorneys' fees was edifying, it did

⁶ Respondent apparently does not disagree that she was not entitled to those portion of her costs associated with the mediator since it was not discussed in her brief. *See Benson v. Northwest Airlines, Inc.*, 561 N.W.2d 530, 541 (Minn. Ct. App. 1997).

not address the issues raised by appellants. For example, appellants did not challenge the hourly rate sought by respondent's counsel. *See* Resp. Br. at p. 40. Regardless, in the event this Court affirms the finding of liability, it should reverse and remand on the issue of attorneys' fees.

As the district court noted, the time entries by respondent were not specific and there were numerous times the attorneys were charging for the same work. AA 21. Respondent did bring a motion to compel, but it was not granted. It must be kept in mind "[a] district court's decision on the reasonableness of costs is subject to review under an abuse of discretion standard." *Giuliani v. Stuart Corp*, 512 N.W.2d 589, (Minn. Ct. App. 1994)(citation omitted). The trial court is required to examine duplication of work as well as other excessive hours. *Shepard v. The City of St. Paul*, 380 N.W.2d 140, 145 (Minn. Ct. App. 1985). Likewise, the amount of damages awarded to a plaintiff is always relevant as a factor when determining an amount to award for attorneys' fees. *City of Riverside v. Rivera*, 477 U.S. 561, 574 (1986).

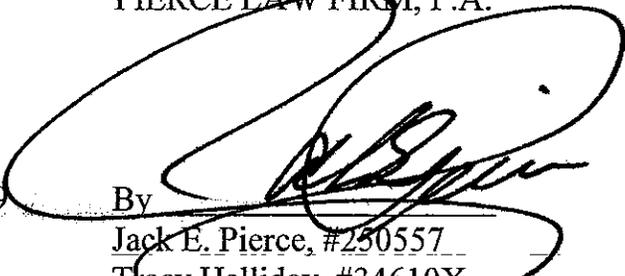
CONCLUSION

For the reasons stated herein as well as those contained in appellants' opening brief, it is respectfully requested the district court be reversed.

Respectfully submitted,

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