

No. A08-1810

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STATE OF MINNESOTA  
IN COURT OF APPEALS

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Elizabeth Friend,

*Respondent -  
Cross-Appellant,*

v.

The Gopher Company, Inc., and Jason Brouwer,

*Appellants -  
Cross-Respondents.*

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RESPONDENT - CROSS APPELLANT'S BRIEF

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## LEGAL ISSUES

- A. The Standard of Review is “clearly erroneous.”
- B. The trial court was correct when it found Defendants/Appellants had discriminated against the Plaintiff/Respondent because of her pregnancy.
- C. The trial court was correct when it held Plaintiff/Respondent was entitled to her reasonable attorneys’ fees.
- D. The trial court was in error when it cut Plaintiff/Respondent’s damages for past lost wages based upon speculation and conjecture.
- E. The trial court was in error when it failed to award Plaintiff/Respondent her reasonable attorneys’ fees and, instead, awarded attorneys’ fees equal to one-third of the total of attorneys’ fees and damages, as if this was a personal injury case.

## STATEMENT OF THE CASE

Plaintiff/Respondent brought suit against Defendants/Appellants for pregnancy discrimination. The case was tried before the Honorable John L. Holahan. The trial court ruled in the Plaintiff's favor, that Defendants had discriminated against the Plaintiff, but the trial court improperly limited the damages. The parties requested amended Findings of Fact/Conclusions of Law and Defendants moved for a new trial. The trial court amended some findings.

Plaintiff, per the trial court's Order, brought a Motion for Attorneys' Fees and Costs, which was granted, in part. However, the trial court did not establish a loadstar amount, nor a reasonable hourly rate. Instead, it set fees as a percentage of the amount awarded to the Plaintiff.

Defendants/Appellants appealed and Plaintiff/Respondent cross-appealed.

## STATEMENT OF FACTS

This is a rare case that has compelling direct evidence of discrimination. At trial, Defendant Brouwer's explanation for his actions was based upon the discriminatory fear that having a pregnant employee would put his business at risk.

Plaintiff was terminated within two weeks of discovering and informing Defendant Brouwer that she was pregnant. The termination occurred on about August 17, 2005. Defendant Brouwer admitted that he was concerned about the impact of Plaintiff's pregnancy upon his business. (Trial transcript, pp. 98-100, 112-113, 117-119, 234-236.) Once he found out that the Plaintiff was pregnant, he was concerned about how this would affect the company. (Trial transcript, p. 98.) He considered whether he should put her in the back room. (Trial transcript, pp. 123-124.) Defendant Brouwer testified that, he felt that in order for his business to run, he had to make changes due to the Plaintiff's pregnancy. (Trial transcript, p. 236.)

Despite the fact that the Plaintiff was only in the first few weeks of her pregnancy, Defendant Brouwer testified he was concerned that her pregnancy was starting during his busiest season, which, he testified, as September, October and November. (Trial transcript, p. 98.) Defendant Brouwer explained:

Well, I figured if I was going into our busy time, either we needed to put Elizabeth in one of the back rooms and allow her to do paperwork back there and bring somebody else in to be the receptionist or try to get a replacement in the morning.

(Trial transcript, p. 123-124.)

Defendants provided no evidence, nor basis, to conclude that the Plaintiff would

not be able to fully perform her job during this time and admitted that he “never had any information from anybody that in her early stage of pregnancy she would or would not be out.” (Trial transcript, p. 98.) He testified that one of the things he considered doing was making the Plaintiff part-time. (Trial transcript, pp. 235-236.)

He then spoke to another female employee about taking over the Plaintiff’s duties and making the Plaintiff part-time. This other employee, however, refused to do this. (Trial transcript, pp. 96, 173.) Defendant Brouwer did not inform the Plaintiff of this conversation, nor ask her whether she needed any accommodation or wanted to be part-time. (Trial transcript, pp. 95, 112.)

Instead, on August 17<sup>th</sup>, while the Plaintiff was at an early morning doctor’s appointment (as ordered by an emergency room physician during her visit the previous day, for pregnancy-related issues), Defendant Brouwer left the Plaintiff a voice message terminating her employment. (Trial transcript, pp. 26-28.) Defendant Brouwer testified that she was terminated because she did not go directly to work on the 17<sup>th</sup>, instead of going to her doctor. (Trial transcript, pp. 103-107.) In that call he stated that he had talked to his wife about pregnancy, making clear that he understood her visit was pregnancy-related. (Trial transcript, pp. 27, 104-105.)

There was no other issue involved in the Plaintiff’s termination. (Trial transcript, pp. 107-108.) Defendant Brouwer’s wife, who maintained the company records, admitted that Plaintiff’s attendance had been what the Defendants wanted during August. (Trial transcript, p. 136.)

The Parties.

Defendant Brouwer was and is the sole owner of Defendant Gopher Company, Inc. (Trial Transcript, pp. 81.) Defendant Gopher Company, Inc., is a roofing, siding and window company. Defendant Brouwer was the person with hiring and firing authority and made other employment decisions for Defendant Gopher Company, Inc. (Trial transcript, p. 81.)

Defendant Brouwer was the decision-maker in both Plaintiff's hiring and termination. (Trial transcript, p. 82.) Plaintiff was hired by Defendants on October 11, 2004. (Exhibit 8.) Plaintiff was a receptionist for Defendants. Plaintiff's job duties included answering phones, filing, photocopying, office cleaning, mail preparation and other tasks. (Trial transcript, p. 203.)

Defendants also had an answering service that answered phone calls when the receptionist was not on duty. (Trial transcript, p. 206.) The sales telemarketing return calls did not come through the receptionist, but went directly to them. (Trial transcript, pp. 240-241.)

Plaintiff was paid \$9 per hour and received \$96.30 per month, which was one-half of her hospitalization. In February 2005, the Plaintiff received a favorable job evaluation. (Findings of Fact, para. 10)(Amended Findings of Fact, para. 11)(Trial transcript, p. 19.) Defendant Brouwer informed her that she would receive a raise after one year of employment.

Medical issues.

Plaintiff experienced some medical issues which necessitated hospitalization, surgery and doctors' appointments. This was known by Defendants. (Trial transcript, pp. 20-21, 83, 93.) Plaintiff testified that Defendant Brouwer was irritated by her doctors' appointments. This included Defendant Brouwer criticizing the Plaintiff when she had surgical stitches removed earlier than anticipated, as they were coming out prematurely. (Trial transcript, pp. 60-62.)

Another female employee had been fired for having too many doctors' excuses, even though Defendants never spoke to the doctor. Male employees, however, were allowed extended leaves. (Trial transcript, pp. 100, 222-223.)

Defendant Brouwer became upset when the Plaintiff needed a subsequent surgery. Defendant Brouwer criticized the Plaintiff in front of others about her medical appointments. These medical issues were resolved prior to Plaintiff's pregnancy. (Trial transcript, pp. 60-62.)

Defendants' alleged discipline of the Plaintiff.

Plaintiff had had a good employment review in February and a promise of a raise at the end of one year. (Trial transcript, pp. 19-20)(Findings of Fact, para. 10)(Amended Findings of Fact, para. 11.) Defendants offered little documentation of any attendance issues. The Defendants offered only one document which they purported to be a warning or discipline of the Plaintiff. It had to do with Plaintiff's attendance. (Trial transcript, pp. 84-87, 93)(Exhibit 104.)

Plaintiff had had a doctor's appointment on June 15, 2005, for which she provided a doctor's note, and surgery on June 24, 2005. (Trial transcript, pp. 90, 92)(Exhibit 103.) Defendants claim that Plaintiff was given a disciplinary warning on June 23, 2005, regarding attendance. (Exhibit 104.) Plaintiff denied ever receiving Exhibit 104. (Trial transcript, pp. 70-71.)

The disciplinary form, Exhibit 104, has a signature line for the employee to acknowledge receipt of it. The Plaintiff's signature, however, is not on Exhibit 104. (Trial transcript, pp. 70-71, 86-87.) Defendant Brouwer claimed that he forgot to obtain the Plaintiff's signature on the form. Defendant Brouwer's trial testimony regarding the timing of Exhibit 104 is as follows:

Q. So the only write-up you ever gave her, that you claim you ever gave her, is she was at the doctor's office on the 15<sup>th</sup> and she had surgery on the 24<sup>th</sup> and the day in between those two events you wrote her up for the one and only time you ever did a report, is that correct?

A. That is correct.

(Trial transcript, pp. 125-126.) There were no write-ups of any kind prior to June 23, 2005, nor thereafter.

Defendant Brouwer was asked the following question:

Q. Of your knowledge, are you aware of a single day that Ms. Friend was not at work where you know she should have been?

A. No, I am not.

(Trial transcript, p. 120.) Defendant Brouwer's wife kept the records for the company and testified that Plaintiff's attendance was what the company wanted in August. (Trial

transcript, p. 136.) Still, the Plaintiff was terminated on the 17<sup>th</sup> of August for going to the doctor for pregnancy-related reasons.

None of the witnesses provided any evidence of any particular day that the Plaintiff was not at work when she could have been. Defendants provided evidence that on some of the days the Plaintiff was not at work, she was not at her doctor's office. These days, however, included days that she was at a funeral, recovering from surgery, ill, or otherwise indisposed.

Defendants provided no basis to conclude that the Plaintiff was simply skipping work. Defendants' assertion that the Plaintiff was only at work about 90% of the time, fails to address what percentage of the time she was away from work because of surgery, preparation for surgery, recovery from surgery or some other legitimate health issue.

#### Plaintiff's pregnancy.

In early August 2005 the Plaintiff discovered that she was pregnant and shared the news with Defendant Brouwer and her coworkers. Defendant Brouwer spoke to the Plaintiff only once about her pregnancy. This was in early August. (Trial transcript, p. 35.) Other than Defendant Brouwer's wife, no employee of Defendants ever continued to be employed more than a couple of months after becoming pregnant. (Trial transcript, pp. 94.) Another female, Amanda Parson, was going to be terminated shortly after announcing she was pregnant, for supposed attendance and attitude problems. (Trial transcript, p. 191.)

Defendant Brouwer's wife, Amy Brouwer, worked full-time for Defendants until

she became pregnant. After becoming pregnant, she only worked one day per week. (Trial transcript, pp. 94-95.) After Mrs. Brouwer's time off for the birth of her child, she returned to a one-day per week schedule. Trial witnesses recalled other female employees who had become pregnant during their employment with Defendants. Their employment also ended shortly after becoming pregnant. (Trial transcript, p. 95.)

Upon learning that the Plaintiff was pregnant, Defendant Brouwer had business concerns about it and what steps he was going to take, because of his business concerns about the Plaintiff's pregnancy. (Trial transcript, p. 93.)

Defendant Brouwer testified that he "never talked with the Plaintiff at all about what [her pregnancy] might require of the company." (Trial transcript, pp. 95-96.) Defendant Brouwer never asked the Plaintiff whether she wanted time off. He never asked the Plaintiff whether she wanted to work part-time. (Trial transcript, pp. 95-96.) Defendant Brouwer never asked the Plaintiff whether she wanted to change her job. (Trial transcript, pp. 95-96.)

Defendant Brouwer never spoke to the Plaintiff's doctors, nor any other medical personnel, about how or if the Plaintiff's pregnancy might affect the Plaintiff's work. (Trial transcript, p. 110.) Instead, Defendant Brouwer discussed the Plaintiff's pregnancy with his wife and the Plaintiff's co-workers and then fired her.

#### Defendant Brouwer's pregnancy-related decision-making.

Defendant Brouwer, based his perceptions about Plaintiff's pregnancy on general office talk. Unbeknownst to the Plaintiff, Defendant Brouwer spoke to another female

employee, Helen Fuller, about job-splitting with the Plaintiff. (Trial transcript, p. 96.)

Shortly after that employee refused Defendant Brouwer's proposal to job-split with the Plaintiff, the Plaintiff was terminated. (Trial transcript, p.96.)

Defendant Brouwer testified that he was concerned that Plaintiff's pregnancy was starting just as his busiest months were approaching. Defendants' busiest months are September, October and November. (Trial transcript, pp. 97-98.) Defendant Brouwer testified that "I figured if I was going into our busy time, either we needed to put Elizabeth in one of the back rooms and allow her to do paper work back there and bring somebody else in to the receptionist or try to get a replacement in the morning." (Trial transcript, p. 123.)

Most females are fully able to work during, at least, their first two trimesters of pregnancy, if not through the entire pregnancy. Defendants provided no evidence whatsoever to form a basis to believe that the Plaintiff would be unable to perform her job functions as a receptionist, due to her pregnancy. She would have been in her late stages of pregnancy in his slow season.

Defendants did not establish that they could not accommodate the Plaintiff's pregnancy. Defendant Brouwer admitted that he "never had any information from anybody that in her early stage of her pregnancy she would or would not be out." (Trial transcript, p. 98.) Mike Ernst, Plaintiff's coworker, testified that Defendant Brouwer discussed with him Plaintiff being placed on part-time status because of her pregnancy. In fact, Plaintiff had a normal pregnancy and, thus, would have needed little, if any,

accommodation. (Trial transcript, p. 57.)

Based on the fact that Plaintiff was pregnant, Defendant Brouwer testified that “in order for the business to run well, now that she was pregnant . . . would require making some changes.” (Trial transcript, p. 99.) Defendant Brouwer agreed that he “thought because she was pregnant, one of the things [he] might do was put her on part time.” (Trial transcript, pp. 235-236.)

Plaintiff’s emergency room visit.

On August 16, 2005, Plaintiff experienced acute stomach pains, which were similar to those that had led to previous medical interventions. She was frightened and concerned for both herself and her unborn child. On August 16, 2005, Plaintiff went to the emergency room and spent most of the day there, having numerous tests and examinations performed. (Trial transcript, pp. 24-26.)

Prior to going to the emergency room, Plaintiff called Defendant Brouwer to inform him that she would not be in to work because she was going to the emergency room due to acute stomach pains. (Trial transcript, pp. 25-27.) When the Plaintiff was discharged from the emergency room, she was instructed by the doctor to see her regular doctor the next day. (Trial transcript, p. 26.)

Plaintiff’s termination.

Plaintiff, again, called Defendant Brouwer and told him that she had been instructed to see her doctor the next day, as the emergency room doctor had concerns about her situation. Defendant Brouwer demanded that the Plaintiff come to work. (Trial

transcript, pp. 26-27.)

Defendant Brouwer, during the phone call, stated that he had spoken to his wife about Plaintiff's pregnancy and his wife informed him that stomach pains are a common occurrence during pregnancy and that Plaintiff needed to get her "ass" back to work.

(Trial transcript, p. 27.) On August 17, 2005, the Plaintiff arranged to get the very first appointment at her doctor's office, so that she could get to work as early as possible.

(Trial transcript, p. 27.)

While the Plaintiff was at her doctor's office, Defendant Brouwer left her a voice message firing her:

The message said, seeing as how I could not get my ass to work that morning that I no longer had a job, he would gather my shit and put it at the front desk for me and I could come in the next day and pick it up.

(Trial transcript, p. 28.)

Defendant Brouwer did not meaningfully dispute the Plaintiff's testimony regarding the chronology of what occurred on August 16 and 17, 2005, and her communications with him on these dates. (Trial transcript, pp. 103-107.) Exhibit 4 includes the doctors' notes from both the Plaintiff's emergency room visit and her doctor's office visit on August 16 and 17, 2005. (Trial transcript, p. 28.)

Nothing other than the Plaintiff's pregnancy-related doctors' visits, relevant to the Plaintiff's termination, occurred in August 2005. (Trial transcript, pp. 29-30.) There was no testimony establishing any undue hardship that Plaintiff's emergency room and doctor's visits caused the Defendants. Defendant Gopher Company, Inc., prepared an

attendance record for the Plaintiff, which is referred to as a “Current Earnings Report.” (Exhibit 3.) At trial, Amy Brouwer examined Exhibit 3 and testified that in August 2005, the Plaintiff’s attendance was consistent with what Defendants expected and wanted from her.

Defendant Brouwer made clear his pregnancy-based motivations when he testified, in response to questions from his attorney, that:

A. Yeah. I guess not specific conversation but I guess I did have a genuine concern to make sure that not only that was she in good health but also that the company was taken care of.

(Trial transcript, p. 71.) Despite having only learned that the Plaintiff was in the early states of her pregnancy, Defendant Brouwer testified in response to a question from his attorney as follows:

Q. When you mean “option,” what are you talking about?

A. Options if I needed to put Amy [Brouwer] back to work maybe, if I needed to find somebody else in the office to take [care] of it, should I turn her into part-time, should I leave her as she is, whatever I had to do to make sure that the company ran smoothly.

(Trial transcript, p. 235.)

Defendants’ witnesses.

Defendants called a number of witnesses. Several witnesses testified that Defendant Gopher Company, Inc., allowed male workers to take extended leaves when needed. At least two of the witnesses called by Defendants testified that Defendant Brouwer was not a good person to work for. One described him as “horrible.” (Trial

transcript, p. 216.)

Witnesses testified that Defendant Brouwer would yell, get angry and other wise treat his employees negatively. (Trial transcript, pp. 163-164, 174, 176.) Although some of the witnesses testified that it was a problem if the Plaintiff was absent from work, no witness had any information as to whether, when the Plaintiff missed work, it was because of legitimate medical issues.

Mr. Ernst testified that the problems occurring when the Plaintiff was absent, were largely because Defendants did not manage the situation properly. (Trial transcript, p. 173.)

Defendants' manager, Dwayne Nelson, testified that he had terminated a female employee because she had too many doctor's notes. (Trial transcript, pp. 222-223.) This was approved by Defendant Brouwer. Mr. Nelson conceded that he had not checked with her doctor, nor any other medical professional, regarding the employee's medical issues. Instead, he relied upon his own belief that she was exaggerating her medical problem.

Defendants' witnesses, including Defendant Brouwer, testified that a male employee was given an extended leave of absence because of a DWI arrest, leading to a sentence which made him unable to work for a lengthy period. (Trial transcript, p. 101.)

Defendants' reasons for their actions.

Although Defendants complained that it was important that their phone lines be answered, Defendants also indicated that they had an answering service and that, during afternoons and evenings, when their telemarketers were working, they would give out the

telemarketers' direct dial numbers, who then took the return phone calls. (Trial transcript, p. 206.) Defendants discriminatorily assumed that a pregnant employee would miss excessive amounts of time from work.

Defendant Brouwer admitted that, one of the things he thought about, was that, in order for his business to run well after the Plaintiff was pregnant, he would need to make changes. (Trial transcript, pp. 99, 119.) He didn't care much what the law said. (Trial transcript, p. 100.) Defendant Brouwer testified, under oath, at his deposition, that "I make decisions on what I feel is right or wrong and what's fair and not fair." When further asked "But not based upon what any particular law may or may not say," he responded "Right." (Trial transcript, p. 100.)

Defendant Brouwer's testimony made clear that he viewed the Plaintiff's pregnancy as a threat to his business and made decisions about the Plaintiff based upon her pregnancy, even though he had no legally-acceptable basis to do so. Defendant Brouwer personally took the actions complained about in this case. Defendant Brouwer also sought assistance from Helen Fuller and other employees in his discriminatory actions.

#### Plaintiff's Damages.

##### *Plaintiff's income loss.*

Plaintiff was earning \$18,720 per year from Defendants at the time of her termination. Plaintiff also received one-half of the cost of her medical insurance per month. In 2005, the Defendants paid \$96.15 per month towards the Plaintiff's medical

insurance. (Exhibit 5)(Trial transcript, pp. 32.)

Plaintiff sought new employment. Plaintiff was unemployed until November 2006, when she obtained a part-time job working for the St. Paul YMCA, providing for members' child care. To date, the Plaintiff continues to only have part-time employment, between 20 to 30 hours. (Trial transcript, pp. 32-34)(Exhibit 12.)

From August 16, 2005, until the Plaintiff's anniversary date, October 10, 2005, there were 38 week days ( $38 \text{ days} \times 8 \text{ hours per day} = 304 \text{ hours} \times 9 = \$2,736$ ). Two months of the employer-paid portion of Plaintiff's medical insurance would have been \$192.30. Thus, Plaintiff lost \$2,928.30 in income ( $\$2,736 + \$192.30 = \$2,928.30$ ) from August 16, 2005, to October 10, 2005. (Exhibit 12.)

Defendant Brouwer indicated to the Plaintiff that she would receive a raise on her anniversary date of October 11. A 45 cent per hour raise (from \$9.00 per hour to \$9.45 per hour), would be 5%, which is reasonable. There are 2080 work hours each year ( $40 \text{ hours per week} \times 52 \text{ weeks} = 2080 \text{ hours}$ ). For the year from October 11, 2005 to October 10 2006, Plaintiff lost \$19,656 in wages ( $\$9.45 \times 2080 = \$19,656$ ). (Exhibit 12.)

The cost of medical insurance has been rising in double-digit amounts on an annual basis. Using the more conservative estimate of a 7.5% increase, the employer's portion of the medical insurance for the year October 11, 2005, to October 10, 2006, would have been \$1,240.30 ( $\$103.36 \text{ per month} \times 12 \text{ months} = \$1,240.30 \text{ per year}$ ). Thus, from October 11, 2005, to October 10, 2006, Plaintiff lost \$20,896.30 in income ( $\$19,656 + \$1,240.30 = \$20,896.30$ ). (Exhibit 12.)

It is reasonable to conclude that Plaintiff would have received a 5% raise on her second anniversary date, October 11, 2006, which would bring her annual wages for the year from October 11, 2006, to October 10, 2007, to \$20,638.80. It is reasonable to conclude that the employer's portion of Plaintiff's medical insurance as of October 11, 2006, would have increased, at least, 7.5% ,to \$1,333.32 annually. Thus, from October 11, 2006, to October 10, 2007, Plaintiff's income would have been \$21,972.12 (\$20,638.80 + \$1,333.32 = \$21,972.12). (Exhibit 12.)

It is reasonable to conclude that the Plaintiff would have received a 5% raise on her third anniversary date, October 11, 2007, to \$21,670.74. It is reasonable to conclude that the employer's portion of Plaintiff's medical insurance as of October 11, 2007, would have increased, at least, 7.5%, to \$1433.32 annually. Thus, from October 11, 2007, to April 10, 2008, six months, Plaintiff's income would have been \$11,552.03 (\$10,835.37 + \$716.66).

Plaintiff's total lost income to date is as follows:

08/16/05 to 10/10/05 = \$ 2,928.30

10/11/05 to 10/10/06 = \$20,896.30

10/11/06 to 10/10/07 = \$21,792.12

10/11/07 to 04/10/08 = \$11,552.29

TOTAL LOST INCOME    \$57,169.01 (Exhibit 12)(Trial transcript, p. 34.)

Plaintiff does not receive any benefits (other than a YMCA membership) in her current, part-time position. In 2006, Plaintiff earned \$1,398. In 2007, Plaintiff earned \$14,973

(\$1,247.75 per month). In 2008, through April 10, Plaintiff earned \$4,155. Plaintiff's total earnings from 2006 to April 10, 2008, are \$20,426. Plaintiff's net loss of income (wages and medical insurance) from August 16, 2005, to present, is \$36,743.01 ( $\$57,169.01 - \$20,426 = \$36,743.01$ ).

Plaintiff currently earns \$14,973 annually. Had the Plaintiff continued to work for Defendants, she would be receiving an income of about \$23,104.06 annually (\$21,670.74 in wages + \$1,433.32 in medical insurance). This is based upon Plaintiff's 2007/2008 annual income. Thus, suffers a net, annual income loss of \$8,131.06 ( $\$23,104.06 - \$14,973 = \$8,131.06$ ).

It is reasonably certain that the Plaintiff's losses will continue into the future. Two years of lost income, reduced for present value, totals \$16,262.12. Two years of lost income for the Plaintiff is likely under the evidence presented. Thus, the Plaintiff's past and future income loss damages totals \$53,085 ( $\$36,743.01 + \$16,262.12 = \$53,005.13$ ).

*Plaintiff's emotional distress damages.*

Plaintiff lost her job, shortly after becoming pregnant. Plaintiff lost her medical insurance at a time when she really needed it. The reason the Plaintiff lost her job was related to her pregnancy. Thus, the Plaintiff not only suffered the emotional distress of losing her job, due to illegal reasons, she lost her medical insurance.

Plaintiff no longer had medical insurance for herself, her pregnancy and delivery and, thereafter, for her new infant. This was a frightening and troubling predicament for the Plaintiff to be thrust into. It was not until many months thereafter that the Plaintiff

was able to obtain medical assistance from governmental sources. Thus, under the circumstances of this matter, \$125,000 is a reasonable amount to award the Plaintiff for emotional distress damages.

## LEGAL ARGUMENT

### I. STANDARD OF REVIEW.

The standard of review on appeal in this context is whether the trial court's findings of fact are clearly erroneous. Schuyett Inv. Co. v. Anderson, 386 N.W.2d 249, 252 (Minn. Ct. App. 1986). Trial court findings of fact are given great deference and will not be set aside unless they are clearly erroneous. Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999); Minn. R. Civ. P. 52.01.

Due regard must be given to the opportunity of the trial court to judge the credibility of the witnesses. Minn. R. Civ. P. 52.01; Kilton v. Nadler & Associates, 447 N.W.2d 468, 471 (Minn. Ct. App. 1990) (“[t]his court must give due regard to the opportunity of the trial court, as factfinder, to judge the witness’ credibility.”) An appellate court typically defers to the trial court’s findings of fact because it is the trial court that has the advantage of fully hearing the testimony, observing the demeanor of the witnesses as they testify, and acquiring a thorough familiarity with all of the circumstances of the case. Stiff v. Associated Sewing Supply Co., 436 N.W.2d 777, 779 (Minn. 1989.)

Ordinarily, the limited scope of review circumscribes additional fact finding by this Court. Id. This Court would exceed its proper scope of review if it were to base its conclusions on its own interpretation of the evidence and, in effect, try the issues anew and substitute its own findings for those of the trial court. Id. (citing Sefkow v. Sefkow, 427 N.W.2d 203, 210 (Minn.

1988)). Respecting the trial court's determinations is particularly important where, as here, the trial court's findings are so dependent on its evaluation of the credibility of the witnesses. Stiff, 436 N.W.2d at 779 (citing Peterson v. Johnston, 254 N.W.2d 360, 362 (Minn. 1977)). Just as important, evidence on appeal is viewed in the light most favorable to the prevailing party. Weber v. United Parcel Serv., 358 N.W.2d 476, 477 (Minn. Ct. App. 1984).

Furthermore, when reviewing mixed questions of law and fact, this Court will correct erroneous applications of the law, but accords the trial court discretion in its findings of fact and ultimate conclusions. Rehn v. Fischley, 557 N.W.2d 328, 333 (Minn. 1997.) This court, however, is not required to give deference to the trial court's findings on purely legal issues. Frost-Benco Elec. Assn. v. Minnesota Pub. Utils. Comm'n, 358 N.W.2d 639, 642 (Minn. 1984).

However, if the trial court abused its discretion or made conclusions, not based upon the credibility of the evidence, but, rather, upon speculation or conjecture, or ignored recognized law, it should be reversed.

## II. THE TRIAL COURT CORRECTLY CONCLUDED THAT DEFENDANTS HAD ENGAGED IN PREGNANCY DISCRIMINATION.

The Minnesota Human Rights Act (MHRA), Sect. 363A.08, subd. 2, provides, in pertinent part, that:

**Subd. 2. Employer.** . . . [I]t is an unfair employment practice for an employer, because of . . . sex, to:

- (1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
- (2) discharge an employee; or
- (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

The MHRA defines “sex” in Sect. 363A.03, subd. 42:

**Subd. 42. Sex.** “Sex” includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy and childbirth.

The MHRA, Sect. 363A.08, subd. 5, goes further in prohibiting pregnancy discrimination, making it an unfair discriminatory practice:

. . . for an employer, . . . with respect to all employment related purposes, including receipt of benefits under fringe benefit programs, not to treat women affected by pregnancy, childbirth, or disabilities related to pregnancy or childbirth, the same as other persons who are not so affected but who are similar in their ability of inability to work, including a duty to make reasonable accommodations as provided by subdivision 6.

Not only is an employer prohibited from terminating an employee because of pregnancy or pregnancy related disabilities, but, also, an employer may not treat a pregnant employee adversely in any aspect of the employment relationship, because of pregnancy or pregnancy-related disabilities.

In the present case, Defendants redundantly admitted that they were making business decisions about the Plaintiff based upon her pregnancy. Defendants did not provide medical, nor other information, that established a bona fide occupational qualification, nor even a business necessity, to do this. Instead, Defendants acted on their own biases about pregnancy and the belief that pregnancy would incapacitate the Plaintiff. This is exactly what the law prohibits.

The law specifically establishes that an employer cannot treat someone worse because of pregnancy or conditions related to pregnancy. See Deneen v. Northwest Airlines, 132 F.3d 431 (8<sup>th</sup> Cir. 1998); Lang v. Star Herald, 107 F.3d 1308, 1311 (8<sup>th</sup> Cir.

1996); Gerd v. United Parcel Service, 934 F.Supp. 357 (D.Colo. 1996); Anderson v. Hunter, Keith, Marshall Co., 417 N.W.2d 619 (Minn. 1988). This includes not only in the terms and conditions of employment, but also with respect to hostile treatment. See also Donaldson v. American Banco Corp., Inc., 945 F.Supp. 1456, 1461 (D.Colo. 1996); Mentch v. Eastern Sav. Bank, FSB, 949 F.Supp. 1236, 1246 (D.Md. 1997).

In Anderson v. Hunter, Keith Marshal and Co., Inc., 417 N.W.2d 619 (Minn. 1988), the Minnesota Supreme Court made clear that the scope of the prohibitions on making decisions about an employee, based upon their being pregnant, is very broad. Anderson was a case, unlike here, where the defendant had ample evidence of legitimate business reasons to terminate the plaintiff, Ms. Anderson. More than a year prior to her termination, the plaintiff had been criticized for not developing a satisfactory filing system, inefficient typing and invoicing, inefficient handling of travel arrangements, as well as her attitude.

The evidence revealed that the Ms. Anderson, thereafter, had delayed billing invoices, creating potential problems with the SEC, which could cost the defendant money. The plaintiff had also converted “frequent flyer” miles earned by her employer to her own and her relatives’ use, even though she had been told not to do so.

After these events had occurred, the plaintiff became pregnant and informed the defendant employer of this. The defendant contended it had decided to fire the plaintiff prior to learning of her pregnancy, but, upon hearing of it, decided to wait until she went on pregnancy leave terminate her.

The Minnesota Supreme Court affirmed the Court of Appeals holding that the defendant was engaged in unlawful pregnancy discrimination. The Court noted that, simply put, Ms. Anderson had left the office in chaos. (Id., at 622). Still, the employer did not fire the employee until after she was pregnant, at which time the employee was discharged. The Court found that the employee’s pregnancy entered into the decision to discharge the employee by evaluating both the timing and the decision itself. (Id., at 622).

The Court explained that, if the pregnancy was a “discernable, discriminatory and causative factor” of the plaintiff’s termination, then unlawful discrimination occurred. The Minnesota Supreme Court rejected the “but for” test that some courts had adopted at that time. It held that, even if the defendant would have taken the same action without the discriminatory motive, it is still liable if the discriminatory motive was a discernable factor in its decision. If an employer has several motives for its action and all, except one, are appropriate, but the one is discriminatory, then the employer’s action constitutes unlawful discrimination.

Subsequent to Anderson, the United States Congress and the United States Supreme Court, adopted the Minnesota Supreme Court’s approach. In Desert Palace, Inc., v. Costa, 123 U.S. 2148 (2003), the United States Supreme Court succinctly stated the test:

An unlawful employment practice is established when the complaining party demonstrates that . . . [an impermissible factor] was a motivating factor for any employment practice even though other factors also

motivated the practice.

The Plaintiff need merely establish that the prohibited reason and the adverse action were **not wholly** unrelated. Simons v. Camden County Board of Education, 757 F.2d 1187, 1189 (11th Cir. 1985). In Ensor v. Painter, 661 F.Supp. 21 (E.D. Tenn. 1987), the court explained:

. . . neither plaintiff appears to have been an ideal employee, both had been tardy, sick and, occasionally, lackadaisical in their work prior to their pregnancies. . . the Court cannot accept that it was mere coincidence that defendant decided to discharge two pregnant workers for misconduct within a matter of days. Therefore, after careful consideration, the Court finds that plaintiffs' pregnancies made a difference in defendant's decision to discharge them and that defendant's articulated reasons are pretextual.

See Zaken v. Boerer, 964 F.2d 1319 (2<sup>nd</sup> Cir.), cert. denied, 113 S.Ct. 467 (1992). Thus, even if Defendants had reasons totally unrelated to Plaintiff's pregnancy for firing her and, thus, had mixed-motives for Plaintiff's termination, if Plaintiff's pregnancy was one of several reasons for her termination, Defendants are still liable.

Pregnancy discrimination may be proven either directly or circumstantially. Direct evidence includes: an admission that pregnancy was considered in business decisions; comments of a discriminatory nature; policies that are discriminatory on their face; or similar evidence. Circumstantial evidence requires no direct evidence, but, instead, consists of a plaintiff showing that she is a member of a protected class and that an adverse employment action befell her.

The defendant then needs to offer a legitimate, non-discriminatory reason for its action(s). If a defendant set out such a reason, then the plaintiff can contest the

believability of that explanation or show that, even if there were non-discriminatory reasons for the defendant's actions(s), a discernable, causative factor in the defendant's action(s), was the plaintiff's pregnancy.

In the present case, Plaintiff has provided both direct and circumstantial evidence of discrimination. A case may also combine both direct and circumstantial evidence to establish discrimination.

#### Direct Evidence.

In this case, Defendant Brouwer made numerous admissions at trial that he considered the Plaintiff's pregnancy in making business decisions about her. He was concerned, without factual basis, that her pregnancy would adversely affect his business. He fired her specifically because she went to the doctor for pregnancy-related problems. This evidence, alone, requires upholding the trial court.

Much weaker statements than were made here, constitute direct evidence of discrimination. Statements that merely imply a discriminatory motive are sufficient. Statements, such as in Elliot v. Montgomery Ward Co., 967 F.2d 1258 (8th Cir. 1992), that the plaintiff would not be able to keep up with how fast the company was growing, was sufficient evidence of age discrimination. The Minnesota Court of Appeals embraced Elliott in Meyer v. Electro Static Finishing, Inc., et al., LEXIS 806 (Minn. App. 1995)(unpublished).

Standing alone, this evidence is sufficient to prevail at trial. (Id.) See also Carol Aman, Jeanette Johnson v. Cort Furniture Rental Corporation, 85 F.3d 1074, (3rd Cir.

1996); Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 (3d Cir. 1990) (quoting Vance v. Southern Bell Tel. and Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989); Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991); and Williams v. Valentec Kisco, Inc., 964 F.2d 723, 728 (8th Cir. 1992).

Even vague comments evidencing a discriminatory attitude are sufficient to prove discrimination:

Hamblin offers ageist comments made by executives of Honeywell and Alliant as evidence of discriminatory corporate culture. . . Other courts have held that evidence of ageist corporate atmosphere, along with other evidence, is sufficient to support a reasonable inference of discrimination. Madel v. FCI Mktg., Inc., 116 F.3d 1247, 1252 (8th Cir. 1997); see also Lam v. Univ. of Hawaii, 164 F.3d 1186, 1188 (9th Cir. 1998). We hold that such evidence is admissible as to the issue of disparate treatment at trial. Discrimination is often the result of subtle, unconscious predispositions. Corporate discrimination does not occur in a vacuum. Discrimination feeds on the actions and statements of those involved in that corporate culture. [N]umerous circuit courts have acknowledged that "age discrimination may simply arise from an unconscious application or stereotyped notions of ability rather than from deliberate desire to remove older employees from the workforce" and on that basis have ruled in the plaintiff's favor.

Hamblin v. Alliant Techsystems, Inc., 636 N.W.2d 150, 153-154 (Minn. App. 2001).

In Scheidecker v. Arvig Enterprises, Inc., 122 F.Supp.2d 103 (D.Minn. 2000), the Court held that a supervisor's comment to a female employee that, women who had a second child did not return from maternity leave, was direct evidence, giving rise to an inference of pregnancy discrimination under the MHRA.

In the present case, Defendant Brouwer directly admits that he considered Plaintiff's pregnancy in employment decisions. Defendants have been caught with the

“smoking gun,” establishing discriminatory motive for Defendants’ actions. Defendant Brouwer repeatedly and unambiguously testified that he believed Plaintiff’s pregnancy threatened his business and that he had to take steps to address it.

Here, Defendants did not imply, but openly stated, that they considered Plaintiff’s pregnancy as a business issue about which he needed to take action. In this case, there is extensive, direct evidence of discrimination, which requires a verdict in the Plaintiff’s favor. Defendant Brouwer admits that upon learning of the Plaintiff’s pregnancy, he immediately concluded that it would require changes to his business and raised business concerns. Defendants made no effort to establish a bona fide occupational qualification (BFOQ), nor even a business necessity, which is a prerequisite to directly using pregnancy, or sine other reason, for business decisions.

Without ever speaking to the Plaintiff about it, nor any medical person, Defendant Brouwer took steps to convert the Plaintiff’s positions to part-time. He also considered changing her job position to something in the back room. He did not base any of this upon any medical information, nor upon any request from the Plaintiff. Instead, he based it upon his own fears and biases as to what effect the Plaintiffs’ pregnancy would have on his business.

On August 16, 2005, the Plaintiff went to the emergency room for severe stomach pains. Defendant Brouwer made clear that he knew this was pregnancy-related, when he stated to the Plaintiff that he had spoken to his wife about the Plaintiff’s pregnancy and concluded that she should be at work, as stomach pains are a normal part of pregnancy.

Defendant Brouwer then fired her while she was at her own doctor, early the next morning.

There is no need for a more involved examination. The direct evidence sustains a verdict in the Plaintiff's favor. Nonetheless, the same result is also required under a McDonnell Douglas analysis..

The McDonnell Douglas test.

A plaintiff may prove her case circumstantially by applying the McDonnell Douglas test. In employment discrimination cases “[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes” because a shrewd employer will not leave a trail of direct inculpatory evidence for the plaintiff to bring into court. United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). Recognizing that the “smoking-gun” case is often unavailable, the Supreme Court has developed a second, indirect method of proof, by which a plaintiff can satisfy her burden, using circumstantial evidence. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

The analysis has been summarized as follows:

First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant ‘to articulate some legitimate, nondiscriminatory reason for the employee’s rejection.’ Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981)(emphasis

added), quoting McDonnell Douglas Corp. v. Green, *supra*.

The McDonnell Douglas analysis consists of three steps. The steps are:

- (1) Plaintiff presents a prima facie case, if done then,
- (2) Defendants present a legitimate non-discriminatory explanation, if done then,
- (3) Plaintiff presents information that the supposed non-discriminatory reason is a pretext for discrimination or discriminatory motives also played a roll in its actions.

Anderson v. Hunter, Keith, Marshall and Co. Inc. 417 N.W.2d 619 (Minn. 1988).

“The prima facie case may be established by direct evidence of discriminatory motive or, when direct evidence is lacking, by indirect evidence through which a discriminatory motive may be inferred.” LeBlond v. Greenball Corporation, 942 F.Supp. 1210, 1215 (D.C. Minn. 1996); and Sigurdson v. Isanti County, 386 N.W.2d 715, 716,720 (Minn. 1996).

A prima facie case may be established circumstantially by:

- a) evidence that the plaintiff was a member of a protected class, which is conceded here (the Plaintiff was pregnant);
- b) the plaintiff met the stated qualifications for the job (which was not contested); and
- c) the plaintiff suffered an adverse employment consequence (the Plaintiff was fired).

Rider v. Olivia Public School System No. 653, 432 N.W.2d 777 (Minn. App. 1988.)

The evidence is virtually un rebutted that the Plaintiff satisfied these criteria.

Defendants concede that Plaintiff was pregnant, that she met the stated requirements of

the job and that she was told not to return to the job. The burden, therefore, shifts to the Defendants to demonstrate a legitimate non-discriminatory reason for their actions.

Michurski v. City of Mpls., 2002 WL 1791983 MN Appeal (unpublished at pg. 4 of 4):

Once a prima facie case is made out, a defendant may avoid summary judgment by proffering a reason which would allow a trier of fact rationally to conclude that the employment decision has not been motivated by discriminatory animus. The reason must be proffered by admissible evidence, be of a character to justify a judgment for the defendant, and must be clear and reasonably specific enough to enable the plaintiff to rebut the proffered reason as pretextual. In the words of the Burdine Court, the defendant's evidence must 'serve simultaneously to meet the plaintiff's prima facie case by representing a legitimate reason for the action and to frame the factual issue with sufficient clarity so that plaintiff will have a full and fair opportunity to demonstrate pretext.'

Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 711, HN 12 (Minn. 1992)(citations omitted), citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

Defendants did not establish a legitimate, non-discriminatory reason for their actions.

"If the plaintiff makes out a prima facie case, the burden of production shifts to the defendant who, in order to avoid summary judgment, must produce admissible evidence sufficient to allow a reasonable trier of fact to conclude that there was a legitimate, nondiscriminatory reason for the discharge." Hoover v. Norwest, 632 N.W.2d 534, 542 (Minn. 2001). Defendants have failed to do that.

In this case, Defendants admit that they were motivated by the Plaintiff's pregnancy. Defendant Brouwer testified that, because of Plaintiff's pregnancy occurring just before the busy season, he was concerned that she would need time off during this time. Defendant Brouwer testified that he was, therefore, going to have to make changes

because of the Plaintiff's pregnancy.

Defendants provided no medical, nor other, evidence to establish that the Plaintiff was likely to be off work more often than other employees, or that she was any more likely to miss more time, now that she was pregnant, than she had missed previously. In fact, the Plaintiff had a normal pregnancy and delivered in what would have been the Defendants' slow season. Defendants did not even establish what level of absenteeism would constitute a business hardship. Defendants' evidence on this point was based solely on Defendant Brouwer's own fears and biases. This does not constitute a legitimate, non-discriminatory reason. To the contrary, it is exactly what the law prohibits an employer from doing.

If a defendant wishes to say that a plaintiff's protected status, gender, pregnancy, age, etc., was a legitimate reason to discriminate against them, in order to prevail at trial, that defendant must prove a BFOQ. Here, Defendants made no effort to do so. Defendant Brouwer merely responded to his own biases, to which he frankly admitted, whether they were legal or not.

Defendants did not present any evidence to establish a bona fide occupational qualification, nor even a business necessity. Instead, Defendants merely presented vague fears and biases that having a pregnant receptionist would adversely affect their business. Defendants also claimed that the Plaintiff's termination was due to her missing too many work days, unrelated to her pregnancy. Most of these missed days were related to now-corrected medical conditions, which is not a legitimate basis for termination. Defendants,

however, had not terminated the Plaintiff for these missed days prior to her pregnancy.

Anderson, infra.

Defendant Brouwer's testimony was that the Plaintiff's job ended because she went to the emergency room and to her own doctor on August 16 and 17, 2005, rather than to work. This was for pregnancy-related reasons.

Defendant Brouwer claimed that this was job abandonment. He told the Plaintiff that his wife had told him that stomach pains or cramps are a part of pregnancy and not to go to the doctor, but to work. Defendant Brouwer, therefore, knew that the visits were pregnancy related. He left Plaintiff a voice message informing her that she was fired. He, therefore, made it clear that the Plaintiff was terminated.

Defendant Brouwer admitted that nothing else was occurring on August 16 or 17, 2005, that prompted the Plaintiff's termination. Even if the Plaintiff's general attendance was an issue, the Plaintiff's termination was for going to doctors for pregnancy related reasons, at a time when Defendant Brouwer was worried that the Plaintiff would be a liability, because of her pregnancy. Defendants did not argue, nor present any evidence of, any other legitimate, nondiscriminatory reason for their actions. Thus, Defendants failed to present one. This requires upholding the trial court.

Pretext.

Subjective claims that are not anchored in any concrete facts, are exactly the sort of claims that courts have long rejected from constituting a legitimate, non-discriminatory reason and as being pretextual. A person who is biased against a group, be it pregnant

women or minorities, is likely to view them less favorably and accept stereotypes about them. That is why courts look for objective criteria to constitute a persuasive reason for employment decisions. The use of subjective criteria is highly suspicious. Hill v. Seaboard Coastline Railroad, 885 F.2d 804 (11th Cir. 1989); Parson v. Kaiser Aluminum, 575 F.2d 1374 (5th Cir. 1978); and Pettway v. Amer. Cast Iron, 494 F.2d 211 (8th Cir. 1974).

Subjective criteria “are particularly easy for an employer to invent in an effort to sabotage a plaintiff’s *prima facie* case and mask discrimination.” Lyoach v. Anheuser Bush, 130 F.3rd 612 (8th Cir. 1998); Burney v. City of Pawtucket, 559 F.Supp. 1089 (R.I. 1983); Cohen v. West Haven Bd. Of Police Comms., 638 F.2d 496 (2nd Cir. 1980); and Harless v. Buck, 619 F.2d 611 (6th Cir. 1980).

“The Plaintiff sustains the 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.’” Texas Dept. of Community Affairs v. Burdine, *supra*; McGrath v. TCF Bank Savings, 509 N.W.2d 365, 366 (Minn. 1993). Here, as was previously discussed, Plaintiff has proven her case through direct evidence. Even if Defendants’ claim that the Plaintiff was fired because of absences, unrelated to pregnancy, is accepted as a legitimate, nondiscriminatory reason for Plaintiff’s termination, it is pretextual. False justification by a defendant, alone, can support a finding of discriminatory intent. Reeves, v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000).

Here, Plaintiff was fired within two weeks of informing her employer that she was pregnant. No other significant event happened in the time between her announcement that she was pregnant and her termination, that was not pregnancy related. This fact is more than sufficient to sustain a verdict, all on its own. Tretter v. Liquipak International, Inc., 356 N.W.2d 713 (Minn.App. 1984). Beyond this, a defendant's failure to have documentation to support its claim of employee misbehavior, renders those claims unpersuasive when pregnant employees are fired. Scheidecker v. Arvig Enterprises, 122 F.Supp.2d 1031 (D.Minn. 2000).

The Minnesota Supreme Court has explained that the mere closeness in time of a basis to discriminate and an adverse employment consequence satisfies a plaintiff's burden of proof that a causal connection exists between the adverse employment action and the prohibited reason. See Tretter v. Liquipak International, Inc., 356 N.W.2d 713 (Minn.App. 1984). See also Minnesota Ass'n of Nurse Anesthetists v. Unity Hospital, 59 F.3d 80, 83 (8th Cir. 1995); Thompson v. Campbell, 845 F.Supp. 665, 675 (D. Minn. 1994); and Hubbard v. United Press International, Inc., 330 N.W.2d 428, 445 (Minn. 1983).

Here, the Plaintiff has presented far more than a temporal link. Defendant Brouwer's testimony clearly states that he was motivated to act by Plaintiff's pregnancy. The Plaintiff was not fired before she was pregnant. She was fired after she became pregnant and had to miss work for a pregnancy related doctor's appointment. If Defendants actually felt that the Plaintiff was not a good employee, for reasons unrelated

to her pregnancy, she would have been fired earlier. Anderson, supra.

The only events of any significance that happened after August 1<sup>st</sup> was that the Plaintiff announced her pregnancy and that she had to go to the emergency room and her own doctor because of it. The Plaintiff was immediately fired, via voice mail, while at her doctor's office, because, at that moment, she was not at work.

The time the Plaintiff missed at work, prior to August, was not shown to be improper. Rather, it appeared to be appropriate time off, due to medical problems. Even if it wasn't, it was not why she was fired. The trial testimony was clear. The Plaintiff was terminated for what occurred on August 16 and 17, 2005. Thus, even if other factors played a role in the Plaintiff's termination, her pregnancy and pregnancy related medical care, were discernable, causative factors in her termination. As such, Defendants' explanation is a pretext for discrimination. Reeves, supra.

Even if legitimate reasons exist for not firing someone, if an illegitimate reason is a discernable, causative factor in the decision, then the action is discriminatory. Anderson v. Hunter, Keith, Marshall and Co., 417 N.W.2d 619, 628 (Minn. 1988). In Anderson, strong, proper reasons existed for terminating the plaintiff, including poor work performance, bad attitude, and theft, but there also existed possible improper motives. Thus a verdict for the plaintiff was justified. The United States Supreme Court firmly embraced this standard. Desert Palace, Inc. v. Costa, 123 S.Ct. 2148 (2003); and 42 U.S.C. Section 2000e-2(m). Costa also makes clear that the mixed-motive test applies equally to direct and indirect evidence cases. See also Feges, supra; Hoover v. Norwest,

632 N.W.2d 534, 542 (Minn. 2001).

III. ALTHOUGH THE TRIAL COURT CORRECTLY FOUND THAT DEFENDANTS DISCRIMINATED AGAINST THE PLAINTIFF, THE TRIAL COURT FAILED TO AWARD FULL AND COMPLETE DAMAGES, AS IS REQUIRED.

Minnesota Statute § 363A.33, subd. 6, states “if the Court finds that the respondent has engaged in an unfair discrimination practice; it **shall** issue an order directing appropriate relief as provided by section 363A.29 subd. 3 to 6.” Minn. Stat. §363A.33, subd. 6 (2005) (emphasis added).

Minnesota Statute § 363A.29, subd. 4, states in pertinent part:

The administrative law judge shall order any respondent found to be in violation of any provision of sections 363A.08 to 363A.19, and 363A.28, subdivision 10, to pay a civil penalty to the state. This penalty is in addition to compensatory and punitive damages to be paid to an aggrieved party. The administration law judge shall determine the amount of civil penalty to be paid, taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent. . . In all cases where the administrative law judge finds that the respondent has engaged in an unfair discriminatory practice, the administrative law judge shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained. In all cases, the administrative law judge may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney’s fees, in addition to punitive damages in an amount not more than \$8,500.

Minn. Stat. § 363A.29, subd. 4 (2005). The law has a presumption in favor of full and complete relief to a plaintiff. Gaddy v. Abex Corp., 884 F.2d 312, 318 (7<sup>th</sup> Cir. 1989).

The goal is to make a discrimination plaintiff whole.

The MHRA has very broad provisions to make a plaintiff whole after being

victimized by discrimination. Minn. Stat. § 363A.01, et seq. Here, the trial court failed to award the appropriate damages and, instead, based upon speculation and conjecture, dramatically reduced Plaintiff's damages. Plaintiff is entitled to "compensatory damages in an amount up to three times the actual damages sustained. . .damages for mental anguish or suffering. . . and reasonable attorney's fees. . ." Minn. Stat. § 363A.29, subd. 4.

Backpay.

Plaintiff lost \$36,743 in wages and benefits. Under the law, the back pay period continues, despite intermittent employment from other employers, unless a plaintiff obtains a position of equal or higher pay, which is comparable in terms of working conditions. Darnell v. City of Jasper, 730 F.2d 653 (11th Cir. 1985).

Although a wrongfully-discharged employee must use reasonable efforts to mitigate her damages, the burden of proof on failure to mitigate is on Defendants. Muldrew v. Anheuser-Busch, Inc., 728 F.2d 989, 992 (8<sup>th</sup> Cir. 1984). See also Edwards v. Occidental Chem. Corp., 892 F.2d 1442, 1449 (9<sup>th</sup> Cir. 1990.) This Court has long-ago held that if an employee who was the victim of discriminatory discharge was unemployed for a period, they are entitled to full compensation to restore them to the place they would have been, absent unlawful discrimination. State by Johnson v. Porter Farms, 382 N.W.2d 543, 550 (Minn. App. 1986). Here, the trial court failed to do this and, instead, greatly reduced Plaintiff's damages without sufficient factual support for doing so. Additionally, a plaintiff need not accept, nor stay, in a position that is not comparable.

Carreno v. New York Housing Auth., 890 F.2d 69 (2nd Cir. 1989); United States v. City of Chicago, 853 F.2d 572 (7th Cir. 1988); and Sellers v. Belgado Community College, 839 F.2d 1132 (5th Cir. 1988). The burden remains squarely on the Defendants to prove failure to mitigate. EEOC v. Gurnee Inn Corp., 914 F.2d 815 (7th Cir.1990).

A successful plaintiff is entitled to prejudgement interest on all lost wage claims. Baufield v. Safelite Grass Corp., 831 F.Supp. 731 (D. Minn. 1993). Here, the trial court improperly failed to even award back pay beyond a few months, when the evidence clearly established Plaintiff had a year and-a-half of lost wages. There was no evidence that Plaintiff would have missed excessive days while pregnant. Her previous medical problems were over and her attendance in August was appropriate.

Not only had Defendants not terminated her prior to her pregnancy, they had very little, if any, discipline of her prior to her pregnancy. There was no evidence to support the trial court's cut-off date.

The trial court concluded that Plaintiff was at work slightly less than 90% of the time, but does not address what portion of the days she missed were because of her hospitalizations, surgeries and/or recuperation from such.

When the trial court concludes that Plaintiff would not have been employed past December, the trial court has no factual basis for this. In fact, after Plaintiff had concluded her medical problems and hospitalizations, her attendance was acceptable. The record reflects that, similarly, she had a normal pregnancy. Thus, there was no factual basis to support the trial court's speculation that she would have been absent for

reasons unrelated to pregnancy, to allow the court to conclude that Defendants had proven that Plaintiff would have been terminated by December.

The trial court's reduction was arbitrary. It abused its discretion, as it was unsupported by any evidence and was not even argued by Appellants.

Emotional Distress.

The trial court's award of emotional distress damages was very modest and fully supported by the record. There is no need for expert testimony to support an award for mental anguish damages. Gillson v. State Dept. of Natural Resources, 492 N.W.2d 835 (Minn. App. 1995); Bradley v. Hubbard Broadcasting, Inc., 471 N.W.2d 670 (Minn. App. 1991). Minnesota Statute §363A.29, specifically provides for the award of damages for mental anguish. Jenson v. Eveleth Taconite Co., 130 F.3d 1287 (8<sup>th</sup> Cir. 1997.)

Plaintiff's emotional well-being declined significantly as a result of Defendants' treatment of her. There is no evidence which suggests any other reason for Plaintiff's emotional distress other than Defendants' actions. The trial testimony is ample to support an award of damages for emotional distress. Gillson v. State Dept. Of Natural Resources, 492 N.W.2d 835 (Minn. App. 1995); Bradley v. Hubbard Broadcasting, Inc., 471 N.W.2d 670, rev. denied (Minn. App. 1991.) See also Navarre v. South Washington County Schools, 652N.W.2d 9 (Minn 2002.) Defendants challenge to the trial court's modest award of emotional distress damages is without merit.

IV THE TRIAL COURT PROPERLY AWARDED ATTORNEYS' FEES, BUT ERRED IN ITS ANALYSIS OF HOW TO DETERMINE THE AMOUNT.

The trial court properly awarded attorneys' fees, but improperly limited them.

Under the MHRA, a prevailing plaintiff should be awarded their reasonable attorneys' fees and costs. Minnesota Statute §363A.29, subd. 4; § 363A.33, subd. 7; Giuliani v. Stuart Corp., 512 N.W.2d 589 (Minn. App. 1994); Shepard v. City of St. Paul, 380 N.W.2d 140, 143 (Minn. App. 1985)(“attorney for successful civil rights plaintiffs should recover a fully compensatory fee”); and Ray v. Miller Meester Advertising, Inc., 664 N.W.2d 355 aff'd 684 N.W.2d 404 (Minn. 2004.)

The trial court properly awarded attorneys' fees, but, instead of following the appropriate test for fees, treated the matter as if it were a personal injury case and awarded a percentage of the judgment as fees.

A reasonable rate.

Whether the requested fees are reasonable is based upon several well-recognized factors. Hensley v. Eckerhart, 461 U.S. 424 (1983). See also Andersen v. Hunter. Keith. Marshall & Co., 417 N.W.2d 619, 628-629 (Minn. 1988). The factors include the claimant's attorneys' billing rates and the “rates charged by attorneys of like skill and for similar work in the general locality in which the litigation takes place.” Jorstad v. IDS Reality Trust, 643 F.2d 1305, 1313 (8th Cir. 1981). The base hourly rate is that charged by lawyers practicing in the pertinent area of the law, not what a general practitioner or local attorney in a particular town may charge Pollar v. Judson Steel Corp., 49 F.3d 224

(N.D. Cal 1985)

This Court has instructed that “attorneys for successful civil rights claimants should recover a fully compensatory fee.” Shepard v. City of St. Paul, 380 N.W.2d 140, 143 (Minn. App. 1985).

In Anderson, supra, the Minnesota Supreme Court articulated the standard of analysis for fee petitions. The amount is determined by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. (Id.).

A. Number of Hours.

The Claimant in this case claims a total of approximately 196.4 attorney hours. See Affidavit of Stephen W. Cooper, which identifies dates, specific hours and specific services provided. (See Exhibit A.) The amount of hours include investigation, research, drafting documents, obtaining discovery, bringing a motion to compel, reviewing discovery, preparation for trial, as well as the trial itself and post-trial submissions.<sup>1</sup> The “hours expended” by the claimant’s counsel may be accepted at face-value, unless challenged by the opposing side.

B. Costs.

A prevailing plaintiff, under § 363A.01, et seq., is entitled to all reasonable costs incurred in pursuit of the case. This is broader than the provisions of Minn. Stat §549.04, which provides: “. . . the prevailing party . . . shall be allowed reasonable disbursements

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<sup>1</sup>Although they are compensable hours, the Plaintiff has not included any hours spent on her Petition for Attorneys’ Fees and Costs and supporting documentation.

paid or incurred.” Benrek v. Textron, Inc., 479 N.W.2d 719, 723-724 (Minn. App. 1992), Baufield v. Safelite Glass Corp., 831 F.Supp. 713 at 720 (D.Minn. 1993).

The law and methodology of the fee computation.

The attorney fees provision of Minn. Stat. § 363A.29, subd. 4, gives the Court broad discretion to award reasonable fees and expenses to a prevailing claimant. Ray, supra, Guiliani v. Stuart Corp., 512 N.W.2d 589 (Minn. App. 1994). The starting point in determining a reasonable fee is “the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate.” Hensley, supra, 461 U.S. at 433. See also Blanchard v. Bergeron, 489 U.S. 87 (1989) and Blum v. Stenson, 465 U.S. 886, 888 (1984). This amount, known as the "lodestar" amount, is presumed to be a reasonable fee.

As the Supreme Court noted in its oft-quoted benchmark decision in City of Riverside v. Rivera, 477 U.S. 561, 574-75 106 S.Ct. 2686 (1986):

As an initial matter, we reject the notion that civil rights action for damages constitutes nothing more than a private tort suit benefitting only the individual plaintiffs whose rights were violated. Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms. See Carey v. Piphus, 435 U.S. 247, 266 (1978). And Congress has determined that "the public as a whole has an interest in the vindication of the rights conferred by the statutes enumerated in Section 1988, over and above the value of a civil rights remedy to a particular plaintiff . . ." Hensely, 461 U.S. at 444, n.4 (BRENNAN, J., concurring in part and dissenting in part). Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damage awards. In addition, the damages a plaintiff recovers contributes significantly to the deterrence of civil rights violations in the future . . .

Congress expressly recognized that a plaintiff who obtained relief in a civil rights lawsuit “Does so not for himself alone but also as a ‘private attorney general,’ vindicating the policy that Congress considered of the highest importance.” House Report at 2 (quoting Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). “If the citizen does not have the resources, his day in Court is denied him; the congressional policy which seeks to assert and vindicate goes un-vindicated; and the entire Nation, not just the individual citizen, suffers.” 122 Cong.Rec.33313 (1976)(remarks of Sen. Tunney).

Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. Id., 106 S.Ct. at 2694-2695.

. . . Congress enacted Section 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process. See House Report, at 3. These victims ordinarily cannot afford to purchase legal services at the rates set by the private market. See Id., at 1 (“[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts”); Id., 106 S.Ct. at 2695.

. Rivera, supra, 477 U.S. at 574.

The purpose of the MHRA is to allow injured parties to pursue their claims.

Victims rarely, if ever, have the financial resources that a major corporation has to pay the hourly fees that are required for a trial. Defendant’s attorneys were undoubtedly promptly paid, regardless of the outcome, win or lose.

Conversely, attorneys who take cases for a complainant know: 1) they will recover fees only if they prevail; and 2) payment will be received months and years after the services are performed. Therefore, prevailing complainants must receive, as a matter of course, their full fees if competent counsel are going to be willing to represent complainants and enforce the discrimination laws. This is particularly true in pregnancy

cases, where cases are both legally and factually complicated, but where plaintiffs seldom prevail.

A. The law on compensable time.

The Courts have approved, as compensable, a broad range of tasks.

Compensable tasks pertinent to this litigation include:

1. Time spent prior to the filing of a lawsuit.

Dowdell v. City of Apopka, Florida, 698 F.2d 1181, 1188 (11th Cir. 1983).

2. The use of more than one attorney.

Moore v. City of De Moines, Iowa, 766 F.2d 343, 345 (8th Cir. 1985), cert. denied, 474 U.S. 1060 (1986); Meriwether v. Coughlin, 727 F.Supp. 823, 827-28 (S.D.N.Y. 1989); Bohen v. City of East Chicago, 666 F.Supp. 154,157 (N.D. Ind. 1987). In the present case, Respondents generally had two attorneys present. Plaintiff had two present only on four of the twelve days in trial.

3. Time spent in conferences with lawyers and in organizing and reorganizing the case file.

Blum v. Witco Chem. Corp., 829 F.2d 367, 378 (3rd Cir. 1987), aff'd in part, rev'd in part, on other grounds, 888 F.2d 975 (1989).

4. Time spent preparing a fee application, negotiating fees and litigating fees.

Jones v. MacMillan Bloedel Containers Inc., 685 F.2d 236, 239 (8th Cir. 1982)(citations omitted); See generally Chalmers v. City of Los Angeles, 796 F.2d 1205, 1214 (9th Cir. 1986); Durett v. Cohen, 790 F.2d 360, 363 (3rd Cir. 1986).

5. Time of law clerks and legal assistants.

Missouri v. Jenkins, 491 U.S. 274, (1989); U.S. Football League v. Nat'l Football League, 704 F.Supp. 474, 482-83 (S.D.N.Y. 1989). After deciding that attorney's fees awards could include time billed by paralegals and other

non-lawyers, the Supreme Court in Jenkins went on to address “[t]he more difficult question [of] how the work of paralegals is to be valued in calculating the overall attorney’s fee.” Id. The Court concluded that “the prevailing practice in a given community” is to govern whether paralegals’ time is billed separately, and whether it is billed at cost or at market rates. Id., 491 U.S. at 288-289, 109 S.Ct. at 2471-72.

B. A reasonable rate.

Whether the requested fees are reasonable is determined by the Court based upon several well-recognized factors. Hensley, supra; Andersen, supra, at 628-629. See also Burrell v. Kubes Dental Care, No. C1-95-2604 (Minn. App. July 9, 1996)(unpublished). These include the Plaintiff’s attorneys’ billing rates and the “rates charged by attorneys of like skill and for similar work in the general locality in which the litigation takes place.” Jorstad v. IDS Reality Trust, 643 F.2d 1305, 1313 (8th Cir. 1981).

The Minnesota Court of Appeals has held that “attorneys for successful civil rights plaintiffs should recover a fully compensatory fee.” Shepard v. City of St. Paul, 380 N.W.2d 140, 143 (Minn. App. 1985). Fees are to be awarded to a plaintiff when he or she prevails. New York Gaslight Club v. Carey, 447 U.S. 723 (1980). “The court’s discretion to deny a fee award to a prevailing plaintiff is narrow.” Id., at n.7. Unless a case involves “special circumstances,” fees should be awarded. Id., at n.9.

Additionally, attorneys’ fees are not based on the dollars won. Sigurdson v. Isanti County, 386 N.W.2d 715, 722 (Minn. 1986).<sup>2</sup> As pointed out by our Court of Appeals in

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<sup>2</sup>See also City of Riverside v. Rivera, 477 U.S. 561 (1986) (damages \$33,350; attorney’s fees \$245,000). See also Conan v. Prudential Insurance Co., 935 F.2d 522 (2d Cir. 1991).

Giuliani v. Stuart Corp., 512 N.W.2d 589 (Minn. App. 1994), “In light of the complexity of these cases, often involving modest damages, it is not surprising nor particularly material that the attorneys fees in this case exceed the amount of damages.” Giuliani at 596. They are awarded “to encourage victims of discrimination to bring suit . . . and to make legal counsel available in these cases.” See Bridges v. Eastman Kodak Co., 102 F.3d 56 (2d Cir. 1996) (\$20,000 judgment; \$753,202 in attorneys fees). “Attorneys who prevail in discrimination cases before our Courts serve an important public function which accomplishes a social objective identified by the Human Rights Act.” Giuliani, at 597.

Employment cases are extremely complex and require maintaining specialized libraries, training and knowledge. This is particularly true in pregnancy cases. As with this case, they are vigorously defended. In most courts in Minnesota, employment cases are automatically classified as complex.

The reasonable hourly rate is appropriately determined by considering who the attorney is handling the case. The Court must take into consideration the experience of that attorney. Nanetti v. Univ. Of Ill., 944 F.2d 1416 (7th Cir. 1991). See also Walker v. Ralston Purina Co., 409 F.Supp 101 (N.D. Ga. 1976). An attorney’s normal billing rate, expertise, and reputation all support the reasonableness of the hourly fee. Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 403 U.S. 711 (1987)(Justice O’Connor concurring).

Plaintiff’s attorneys’ fees are consistent with those charged by other similarly-experienced and knowledgeable, Minnesota employment lawyers. Plaintiff’s lead counsel,

Mr. Cooper, has a long and diverse background in legal employment issues and trial practice, dating back over 30 years to 1976, when he joined the Neighborhood Justice Center, which focuses on providing legal representation in trials. Mr. Cooper tried to verdict well over a hundred jury trials and many, many more contested bench trials and hearings during his time with the NJC.

This expertise grew through his role as the State's Commissioner of Human Rights, from 1987 through 1991, where he oversaw 5,000 investigations of alleged violations of the MHRA and matured in his current practice, focusing on employment law cases, which he started over fifteen years ago. Since then, he has conducted over fifty Human Rights trials, including jury, judge and arbitration matters. He has also taught numerous CLE's and law school classes in this and other areas of the law. (See Cooper Affidavit.) He has been recognized as one of Minnesota's leading attorneys by various organizations which compile such lists.

Claimant's co-Counsel, Stacey Everson, has been a lawyer for over 17 years. She has focused the majority of that time on discrimination law and has done the discovery and assisted in the trial of numerous discrimination cases, including jury trials, judge trials and arbitrations. She previously worked as a law clerk for the Honorable Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit.

The Court may also use a multiplier of fees if it feels the case so warrants. Liberles v. Daniels, 619 F.Supp 1016 (N.D. Ill. 1986)(50% enhancement). In light of Claimant's Counsels' experience and skill, Claimant's Counsels' hourly fee is reasonable for this

matter. (See Cooper Affidavit).

Currently, Claimant's Counsel, Stephen W. Cooper, bills at the rate of \$395.00 per hour. Mr. Cooper bills his individual clients at this rate. In this case Mr. Cooper has billed at that rate. In the matters of Haynes v. Arcadia (January 6, 2006), LaBonte v. TEAM Industries, et al. (June 28, 2006), and Peterson v. Ford Motor Company (October 11, 2006), Mr. Cooper was awarded \$350.00 per hour. Stacey R. Everson, who now bills at \$285.00 per hour, has been awarded \$265.00 per hour. Karl Cooper has been the investigator for the Cooper Law Firm for over fifteen years and bills at the rate of \$90.00 per hour. A rate of \$90.00 per hour was approved in the above-cited awards.

Cara Van Dell was our lead paralegal. She is an experienced paralegal who bills at the rate of \$90.00 per hour which was similarly approved. Erin Pickar, a less-experienced paralegal, was billed at the rate of \$50.00 per hour.

In undertaking a discrimination case, significant risks are incurred by the firm. Defendant vigorously contested this lawsuit. If a plaintiff loses, their counsel is often not compensated at all for their time.

The hourly rates being sought in this case are within the range of rates for comparably-experienced attorneys in the Minneapolis/St. Paul market. Hence, they are reasonable rates. Furthermore, the rates sought are consistent with fees awarded by other courts in this district in similar cases. See Evans v. First Minnesota Savings Bank, Civ 4-87-668 (D.Minn. 1992). See also Baufield v. Safelite Glass Co., 831 F.Supp. 713 (D.Minn. 1993).

In Haynes v. Arcadia, the arbitrator awarded the discrimination claimant \$80,000 and awarded The Cooper Law Firm \$164,855 in fees and \$8,343.11 in costs. In Peterson v. Ford Motor Company, the federal court awarded the plaintiff \$28,282.40 and awarded The Cooper Law Firm \$212,534.00 in fees and \$24,960.00 in costs.

In a case arising nearly two decades ago, Gopher Oil Co. Inc. v. Union Oil Co. of California, 757 F.Supp. 998 (D.Minn. 1991), Judge Doty held that a private party is entitled to attorney's fees in a successful suit under state and federal environmental legislation. In Gopher Oil, Judge Doty awarded the plaintiff attorney's fees for preparing the fee petition. In addition, Judge Doty held that it was appropriate to base the fee award on the present and current hourly rates, rather than historical rates or rates prevailing at the time various work was done on the case. Gopher Oil Inc., 757 F.Supp. at 1010. See also Piekarski v. Home Owners Savings Bank F.S.B., 755 F.Supp. 859 (D. Minn. 1991). The fees sought in this case are consistent with those charged by other attorneys who specialize in plaintiff's employment and civil rights law in Minnesota, with similar experience and record of courtroom achievement. The fees, therefore, should be approved.

C. Compensation for delay in payment.

In Gopher Oil Co., supra, Judge Doty recognized that claimant's are entitled to be compensated for the fact that no fees are paid to a claimant's counsel until the end of the case. In this case, no attorneys' fees have been paid since its inception.

In the Eighth Circuit, delay in payment is compensated for by multiplying all unpaid hours by the current (2005) hourly rates. Jenkins v. Missouri, 838 F.2d 260 (8th Cir. 1988),

affd, 491 U.S. 274, 105 L.Ed.2d 229, 239-40 (1989).<sup>3</sup> See also Catlett v. Missouri Highway and Transp. Comm'n, 828 F.2d 1260, 1271 (8th Cir. 1987), cert. denied, 485 U.S. 1021 (1988).<sup>4</sup> Accordingly, the attorneys' fees in this case have been calculated by multiplying all hours by current hourly rates.

Reduction of hours.

Courts have repeatedly made clear that a plaintiff's attorneys' fees should not be reduced because of overlapping or related claims, even when the plaintiff loses those claims. Lipsett v. Blanco, 975 F.2d 934 (1st Cir. 1992). See also Domingo v. New England Fish Co., 727 F.2d 1429, modified 742 F.2d 530 (9th Cir. 1984) and Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8<sup>th</sup> Cir. 1970)(award of fees even when lost because valuable service performed).

In Hensley, supra, 461 U.S. at 435 n.11, the United States Supreme Court rejected the argument that the lodestar should be reduced by the percentage of non-covered claims. Such is not the law.

Only if the unsuccessful claims are "distinct in all respects from his successful

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<sup>3</sup> In Missouri v. Jenkins, the U.S. Supreme Court affirmed an upward adjustment for delay in payment, expressly holding "[A]n appropriate adjustment for delay in payment - whether by the application of current rather than historic hourly rates or otherwise - is within the contemplation of the [Fees Act]." 105 L.Ed.2d at 240.

<sup>4</sup> See also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 483 U.S. 711 (1987); King v. Palmer, 906 F.2d 762 (D.C. Cir. 1990); and Norman v. Housing Auth. of Montgomery, 836 F.2d 1292 (11th Cir. 1988).

claim, the hours spent on the unsuccessful claim should be excluded.” Hensley, supra, Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8<sup>th</sup> Cir. 1970)(award of fees to plaintiff even when lost). Thus, any request to reduce hours has been specifically rejected by the Supreme Court.

In Dewars v. City of Princeton, 1995 WL 747884 (Minn. App. 1995), the trial court stated that Dewars’ “claims involved a common core of facts . . .” The Dewars Court noted that in Giuliani v. Stuart Corp., 512 N.W.2d 589, 596 (Minn. App. 1994), although the plaintiff prevailed on only one of three claims, the trial court’s award of attorney fees in excess of the amount of damages recovered was affirmed:

In light of the complexity of [discrimination] cases, often involving modest damages, it is not surprising nor particularly material that the attorney fees \* \* \* exceed the amount of damages awarded.

(Dewars, supra, at \*14.) In the present case, the core of facts was the same for all legal theories.

The Dewars Court went on to state that attorneys who prevail in discrimination cases “serve an important public function which accomplishes a social objective identified by the Human Rights Act.” (citing Giuliani, at 596-97). The Court concluded that the trial court did not abuse its broad discretion by awarding attorney fees, costs and disbursements. See also Bridges v. Eastman Kodak, Co., 102 F.3d 56 (2<sup>nd</sup> Cir. 1996)(\$20,000 judgment justified attorneys’ fees of \$753,202.00).

Additionally, in Foster v. Board of School Commissioners, 810 F.2d 1021 (11<sup>th</sup> Cir. 1987), the Court noted that time spent on uncovered counts, if overlapping the covered

ones, must be compensable to the attorneys. If another claim is intertwined, then a plaintiff's counsel is entitled to all hours expended. Abrams v. Lightolier, 50 F.3d 1204 (3rd Cir. 1995).

The courts have frequently reiterated that hours spent in part on uncovered claims must be compensated if those claims are not clearly unrelated to the covered claim. Altman v. Port Authority, 879 F.Supp 345 (S.D.N.Y. 1995). See also Odima v. Westin Tucson Hotel, 53 F.3d 1484 (9th Cir. 1995). Here, all claims were completely intertwined.

In this case, a single core of facts gives rise to all claims. None of the counts were dismissed by the Court. Plaintiff, consistent with Wirig v. Kinney Shoe, 461 N.W.2d 374 (Minn. 1990), elected to pursue the MHRA claims and drop the other claims, because the facts and damages for all claims were the same or largely overlapping. The hours expended would not have been altered whether or not these claims were made. Those counts merely provide alternative legal theories and did not give rise to non-overlapping factual situations. The same days of hearings, trial and other actions still would have been necessary.

#### Use of more than one attorney at trial.

Plaintiff streamlined this case and tried it in its entirety over parts of two succeeding days. Such cases often take a week or more to try. This was only possible because of the assistance of a skilled, experienced associate who assured that witnesses and exhibits were promptly and efficiently presented. Fees for the use of more than one attorney have been repeatedly recognized. See Moore v. City of De Moines, Iowa, 766 F.2d 343, 345 (8th Cir.

1985), cert. denied, 474 U.S. 1060 (1986); Meriwether v. Coughlin, 727 F.Supp. 823, 827-28 (S.D.N.Y. 1989); Bohen v. City of East Chicago, 666 F.Supp. 154,157 (N.D. Ind. 1987); and Ralston v. Northern Indiana Publishing Service Company, 54 F.E.P. 226 (N.D.Ind. 1990). In the present case, not only was it reasonable to use two trial attorneys, but it cut costs and preserved the Court's time.

Time accounting.

Attached to the Affidavit of Stephen W. Cooper is the time spent by Plaintiff's attorneys from inception through the present time in litigating this case.

CONCLUSION

For the reasons stated herein, it is respectfully requested the trial court's finding be upheld as to its findings of pregnancy discrimination and the award of attorneys' fees, but be modified as to the amount of Respondent's damages and attorneys' fees.

Respectfully submitted.

THE COOPER LAW FIRM, CHARTERED

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