

CASE NO. A11-2178

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Jaime Rasmussen, Jennifer Moyer
and Kathe Reinhold,

Appellants,

vs.

Two Harbors Fish Co. d/b/a Lou's
Fish House, BWZ Enterprises, LLC d/b/a
B & R Motel and Brian W. Zapolski,
Individually,

Respondents.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The District Court made several crucial legal errors when it ruled that Zapolski's actions towards Appellants did not constitute sexual harassment. Respondents attempt to compound these errors by arguing that the District Court's legal conclusions are instead findings of fact entitled to great deference. However, the District Court is not entitled to such deference, because the District Court's ultimate conclusion – that Zapolski's conduct did not constitute sexual harassment – fundamentally involves the application of law to facts, and therefore is reviewed *de novo*, even if it was denominated as a finding of fact.

The conduct by Zapolski was far more egregious than in many other reported cases, yet the District Court required the Appellants to meet an inappropriately high standard of proof. Echoing the District Court's error, Respondents seem to argue that because Zapolski did not engage in every conceivable kind of harassing action towards the Appellants, that somehow excuses what he did, and means that his actions did not rise to the level of sexual harassment. The absurdity of Respondents' argument is self-evident. This case requires reversal.

STANDARD OF REVIEW

The Respondents argue that all determinations by the District Court that it labels as a finding of fact are reviewed under the clearly erroneous standard. Resp. Br. p. 10-11. This assertion ignores the ruling in *Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 385 (Minn. App. 2005):

Whether one engages in the actions underlying the sexual harassment claim is a question of fact. *Fore v. Health Dimensions, Inc.*, 509 N.W.2d 557, 560 (Minn. App. 1993). But whether such actions constitute sexual harassment under the Statute is a question of law. *Gradine v. College of St. Scholastica*, 426 N.W.2d 459, 463 (Minn. App. 1988), rev. denied (Minn. August, 24, 1988).

Respondents argue that it is a pure question of fact whether the harassment was sufficiently severe and pervasive. In support, Respondents rely on outdated precedent. All of the cases Respondents cite were decided before *Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 385 (Minn. App. 2005), which clarified that whether one engaged in the actions underlying the sexual harassment claim is a question of fact but that it is a question of law whether such actions constitute sexual harassment under the MHRA. If the rule were otherwise, district courts could state their legal conclusions in their findings and thereby make them incorrectly subject to the clearly erroneous standard.

Respondents suggest that Appellants are being inconsistent by challenging the District Court's conclusion of law while accepting the District Court's Finding of Fact that state what actions Zapolski engaged in underlying each of the Appellants sexual harassment claims. To be specific, Rasmussen does not contest the specific findings of the Court relating to Zapolski's harassing conduct found in Findings of Fact 8, 9, 10, 11 and 12, A. Add. p. 27-29; Moyer does not contest the findings regarding Zapolski's conduct toward her as set forth in Findings of Fact 17, 18, 19, 20, 22, A. Add. p. 7-8 and Reinhold does not contest the Court's Findings of Fact of Zapolski's conduct toward her found in Findings of Fact 28, 29, 30, 31, and 32, A. Add. p. 10-12.

Appellants can accept the District Court's Finding of Fact, yet still challenge the erroneous legal conclusions of the District Court -- that Zapolski's actions did not constitute sexual harassment in violation of the MHRA. The Conclusions of Law that Appellants are asking this Court to reverse are found in Findings of Fact 15, 25 and 37. Finding of Fact 37 that concluded that Zapolski's conduct did not constitute sexual harassment towards Reinhold stated:

37. While Zapolski's sexually inappropriate conduct may have been a partial factor in Reinhold's decision to leave her employment in November, 2009, Reinhold fails in her burden to establish that defendants' conduct was based upon Plaintiff's membership in a protected class, and that the conduct so permeated the work place with discriminatory intimidation, ridicule, and insult so as to reasonably affect her employment. Based upon the facts submitted, the Court does not find that the conduct plaintiff complains of, even if totally true, rises to the level of unwelcome sexual harassment actionable under the Minnesota Human Rights Act. The alleged actions were not sufficiently severe or pervasive to reasonably affect the terms and conditions of plaintiff Reinhold's employment.

A. Add. p. 36, 37. Nearly identical language stating the District Court's legal conclusions regarding Zapolski's sexually inappropriate conduct toward Rasmussen and Moyer are stated in FF No. 15 and 25. A. Add. p. 30-31, 33.

When the District Court concluded that actions by the Defendant did not constitute sexual harassment under the MHRA, it was no longer making a finding of fact, but was construing and interpreting the MHRA. Construction or interpretation of the MHRA is reviewed *de novo*. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 566 (Minn.

2008). The District Court's Finding of Fact 15, 25 and 37 should be reviewed *de novo* because they led directly to the Court's Order dismissing each of the Appellants' claims of harassment on the ground that each of them "failed to prove she was subject to harassment." Order ¶¶ 2, 3 and 4; A. Add. p. 41, 42.

An additional reason why this Court should review Findings of Fact 15, 25 and 37 *de novo* is that these Findings are manifestly controlled or influenced by errors of law. An appellate court will not be bound by and will review the findings of the trial court, even though supported by the weight of the evidence, if such findings are manifestly controlled or influenced by errors of law. *Lee v. Delmont*, 228 Minn. 101, 36 N.W.2d 530, 534 (1949). The Court made the same point in *Witcher Construction Co. v. Estes II Ltd. Partnership*, 465 N.W.2d 404, 406 (Minn. App. 1991):

But findings of fact that are influenced by an error of law may be set aside by the reviewing court. *Olson v. Olson*, 236 Minn. 363, 365, 53 N.W.2d 29, 31 (1952). Here, appellant challenges the trial court's refusal to recognize as a matter of law that separate contracts complete unto themselves divide a project into two separate improvements. If the trial court were incorrect in rejecting this proposition, it has made an error of law that this court may reverse.

Judge Cuzzo's Findings of Fact No. 15, 25 and 37 are all based upon the same error of law, namely that each of the Appellants supposedly had to establish that Zapolski's conduct was based upon their membership in a protected class. For example, in Finding 37 the Court stated ". . . Reinhold fails in her burden to establish that Defendants' conduct was based upon Plaintiffs' membership in a protected class"

The Court's findings and conclusions of law plainly are based on the district court's erroneous assumption that "... the law requires that the Court examine whether the comments were the result of Plaintiffs membership in a protected class." A. Add. p. 46. As we have demonstrated in our initial brief, it is no longer necessary for a Plaintiff bringing a sexual harassment claim under the MHRA to prove that the harassment occurred because of their sex. See *Cummings v. Koehnen*, 568 N.W.2d 418 (Minn. 1997); App. Br. at 22-27.

The District Court's Findings of Fact 15, 25 and 37 were also influenced by its error of law because the Court incorrectly believed that Appellants' needed to prove psychological harm as an element of their sexual harassment claims. App. Br. pp. 18-22.

Furthermore, the District Court based its Findings of Fact 15, 25 and 37 on an erroneous understanding of what Appellants must prove to show sexual harassment. The Court stated at page 5 of its Memorandum that accompanied its Order as follows:

Plaintiffs did not prove that this threshold was met. None sought counseling. None were explicitly sexually propositioned. Incidents of inappropriate touching were infrequent and questionable. Sexual comments by Zapolski were widespread throughout the employment setting and not merely directed at females. (Emphasis added).

A. Add. p. 49. The Court erred when it held that to make a finding of sexual harassment under the MHRA; an employer/owner must explicitly sexually proposition or inappropriately touch his employees.

Courts have found much less egregious conduct than that endured by the Appellants to constitute sexual harassment. See e.g., *Tretter v. Liquipak*, 356 N.W.2d 713, 715 (Minn. App. 1984) (“offensive comments, leering and touching” constitutes sexual harassment under the MHRA); *Rorie v. United Parcel Service, Inc.*, 151 F.3d 757 (8th Cir. 1998) (holding summary judgment inappropriate where supervisor pats female employee on the back, brushes up against her, and tells her she smells good); *Hathaway v. Runyon*, 132 F.2d 1214 (8th Cir. 1997) (reversing a judgment for defendant where supervisor engaged in touching of plaintiff two times – pinching plaintiff and hitting her buttocks with a clipboard); *Kopp v. Samaritan Health Systems, Inc.*, 13 F.3d 264 (8th Cir. 1993)(holding conduct including swearing at female employees and using vulgar language could create hostile working environment); *Beach v. Yellow Freight System*, 312 F.2d 391 (8th Cir. 2002) (holding that the presence of only sexual graffiti in 70% of defendant’s trailers was pervasive to establish liability under the MHRA). Indeed a single incident of harassment may be actionable under the MHRA. *Johns v. Harborage I, Ltd.*, 585 N.W.2d 853, 861 (Minn. App. 1998); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986).

In *Wirig v. Kinney Show Corporation*, 448 N.W.2d 526 (Minn. App. 1990) affirmed, 461 N.W.2d 374 (1990), the Minnesota Court of Appeals upheld not only Wirig’s claim for sexual harassment but also her claim for punitive damages based on evidence that on several occasions a fellow employee pinched or patted her on her buttocks, called her sexually offensive names, put his arm around her, and asked her out

on dates. Similarly, Judge Sandvik allowed the Appellants to amend their Complaint to add a claim for punitive damages based upon their Affidavits that set forth Zapolski's sexually harassing conduct and were the basis of their trial testimony.

Types of conduct that generally do not rise to the level of actionable harassment include asking an employee to dinner once or paying a personal compliment with no discussion of sexual favors, innocent flirtation, and isolated incidents which have no adverse effect on employment. *See, e.g., Bersie v. Zycad Corp.*, 417 N.W.2d 288 (Minn. App. 1987) (calling employees "sweetheart" and "doll", sexual joking, and close physical proximity of one occasion do not support claim for sexual harassment); *Klink v. Ramsey County*, 397 N.W.2d 894 (Minn. App. 1986) (dismissing plaintiff's claim of sexual harassment predicated on use of foul language outside of work area, not directed at or used with or referenced to her, which she overheard, and her inadvertent viewing of objectionable materials such as magazines, and photographs which were kept in offices, desk drawers, lockers which she was not invited to see).

The District Court applied an incorrect legal standard when it concluded that Zapolski's undisputed actions did not rise to the level of sexual harassment. The District Court's conclusion must be reversed.

PERVASIVE AND SEVERE

Respondents argue that Appellants claims fail because the conduct by Zapolski was not so pervasive and severe that it affected a term, condition or privilege of their employment. Resp. Br. at 11-18. This argument is utterly without merit. Zapolski's

harassing conduct towards Rasmussen, as found by the District Court and in Rasmussen's trial testimony were detailed in pages 6 – 9 of Appellant's brief; as to Moyer at p. 9 and 11, and as to Reinhold at pp. 11-13.

Jaime Rasmussen

Zapolski asked her embarrassing questions such as her sexual preference and how she liked it about once a week. Tr. p. 20, l. 23-25; p. 21, l. 1-3. About weekly, he told her about his sexual preferences and his favorite sexual positions and sexual dreams. Tr. p. 20, l. 11-24; Tr. p. 52, l. 16-19. On a weekly basis he would make comments about customers included statements like "Wow, look at the tits on that one," or "Look at that nice ass." Tr. p. 23, l. 6-14; p. 58, l. 6-13. He quite often used the derogatory word for women of "cunt" in her presence. Tr. p. 28, l. 9-15. At work, besides telling others that Rasmussen was his girl, he would call her sweetie, honey, sexy and beautiful. Tr. p. 38, l. 1-6. He asked Rasmussen about sex. Tr. p. 51, l. 14-16; Tr. p. 52, l. 16-19. He called her his girl approximately once a week. Tr. p. 57, l. 20-22. He talked in her presence about "blow jobs," "how good it feels to orgasm," "pussy," "g-spot," "clitoris," and "getting off." Tr. p. 30, l. 19-25. He showed her and other employees photos in a Playboy magazine and asked her if it didn't look like her. FF No. 10, A. Add. p. 29. Zapolski asked Rasmussen to view a pornographic DVD. FF No. 11, A. Add. p. 29.

An example of how severe Zapolski's conduct towards Rasmussen was is shown by the incident when he grabbed Rasmussen from behind and put his crotch on her

posterior. She screamed at him to get off and felt violated. Olson, a fellow employee, saw this incident. Tr. p. 22, l. 1-25; p. 23, l. 1-5.

Jennifer Moyer

A review of the Court's factual findings and Moyer's testimony regarding statements and conduct directed at Moyer during the approximately three months she worked for Respondents shows that Zapolski's sexually harassing conduct towards her was so pervasive and severe that it affected a term, condition, or privilege of her employment.

The pervasiveness of Zapolski's conduct is proved by the fact that at least twice he asked her why a girl her age wasn't having enough sex. Tr. p. 91, l. 10-19. Tr. p. 93, l. 2-7. He would talk about his sex life and tell her stories that had happened to him and other women. Tr. p. 91, l. 23-25. Zapolski told Moyer how many times he could make women orgasm in one setting. Tr. p.92, l. 2-13. Zapolski "bugged" Moyer about hooking him up with her girlfriends and sister and indicated he would be willing to pay for it for about a week. Tr. p. 93, l. 1-25; p. 94, l. 1-21. Zapolski made comments about customers' tits and ass. Tr. p. 94, l. 22-25; p. 95, l. 1-5. About four times Zapolski called Moyer and asked her "How's my little Horney one?" Tr. p. 95, l. 16-22. Zapolski asked Moyer if she thought an applicant would give him a blow-job if he hired her. Tr. p. 99, l. 4-25; Tr. p. 100, l. 1-2. Zapolski grabbed Moyer by her waist. Tr. p. 96, l. 18-25; Tr. p. 97, l. 7. Zapolski showed her a photo of an unclothed woman in a Playboy magazine and asked her if it look like Jaime Rasmussen. Tr. p. 97, l. 11-25; Tr. p. 98, l. 1-14. Zapolski

told another employee Moyer was his girlfriend. Tr. p. 98, l. 17-25. And Zapolski told Moyer he thought other people thought they were sleeping together. Tr. p. 101, l. 6-9.

The severity of Zapolski's conduct is shown by Zapolski's attempt to have Moyer, then age 21, solicit her young friends and 30 year old sister to have sex with him and telling her that he would be willing to pay for it. This conduct by itself would be enough to justify any young woman quitting their employment because of the hostile work environment created by her employer.

Kathe Reinhold

The pervasiveness of the hostile work environment created by Zapolski for Reinhold is shown by the following: On Reinhold's first day Zapolski told Reinhold that he felt you could not be in love but still have sex all night. Tr. p. 127, l. 10-19. On her second day he told her that everyone should be able to have an orgasm and that it is the best feeling in the world. Tr. p. 128, l. 2-7. Zapolski asked her if she liked to have sex. Tr. p. 128, l. 8-13. Zapolski led her about by her finger. Tr. p. 129, l. 2-8. On about three occasions Zapolski brought up to Reinhold that he thought her son was having sex with his girlfriend and that she needed to get him some condoms. Tr. p. 131, l. 9-17. On the first three days Reinhold worked Zapolski asked her out to dinner. Tr. p. 132, l. 5-15. Every single day that she worked there Zapolski started the sex talk. Tr. p. 138, l. 1-3. Three or four times he called her sweets while she worked there even though she had told him she didn't like that. Tr. p. 138, l. 4-16. On her last day he picked wood shavings off

the chest area of her sweater. Tr. p. 130, l. 1-013. And, he asked her if she liked having sex. Tr. p. 132, l. 22-23; p. 133, l. 1-9.

The severity of Zapolski's conduct towards Reinhold is shown by telling her it was a perfect day to watch football and have sex. Tr. p. 134, l. 16-25; p. 135, l. 1-8. He also told her a story about a dog licking a retarded woman's "pussy," and told her how many "inches" would be perfect for her. Tr. p. 133, l. 11-25; p. 134, l. 1-8; Tr. p. 134, l. 9-14.

Respondents somehow claim that the District Court's Findings support its conclusion that Zapolski's actions were not sufficiently severe or pervasive to reasonably affect the terms and conditions of each of the Appellants' employment. These claims do not hold up to any level of scrutiny. For example, while it is true that none of the alleged inappropriate conduct took place in the first six months of Rasmussen's employment, that does not change the fact that she endured a hostile environment for the last year of her employment. Resp. Br. p. 3. While it is true that Rasmussen enjoyed her work and waiting on customers, that does not change the fact that Zapolski's conduct affected the terms and conditions of her employment. Resp. Br. p. 3. While it is true that some verbal inappropriate conduct was not directed at Rasmussen, it did not mean that Zapolski's talking about women as cunts, referring to customer's tits and asses, etc. did not create a hostile work environment. While it is true that Rasmussen recommended to Jennifer Moyer that she apply for a position with Respondents she did so because she ". . . didn't think that he would do that to someone way younger than me." Resp. Br. p. 4;

Trans. p. 35, l. 17-20. While it is true that Rasmussen sought no counseling as a result of the alleged behavior of Zapolski, despite alleging fear, weight gain, anxiety, etc., that simply is proof that the District Court's erred in holding that Appellants needed to prove psychological harm as an element of their sexual harassment claims. App. Br. p. 18-21. And while Zapolski never explicitly conditioned Rasmussen's employment on participating in any sexual banter, or performing sexual acts, Zapolski's outrageous conduct still created a hostile work environment for Rasmussen. Respondents' argument in this regard is similar to arguing that a murderer should be forgiven because he did not torture his victim before killing him. Respondents seem to be arguing that because Zapolski did not perform every possible harassing action, that sexual harassment did not take place.

The Respondents' argument as to the reasons given by the District Court for its finding that Zapolski did not create a hostile work environment for Moyer are just as unconvincing. App. Br. p. 6-8. The fact that Moyer could only stand working for Zapolski for four months does not detract from the fact that throughout almost all of her employment Zapolski created a hostile work environment for her. The fact that she liked her job duties doesn't mean that she wasn't affected by the hostile work environment created by Zapolski's sexual talk and actions. Resp. Br. p. 6. The fact that Zapolski quit asking her about hooking him up with her young friends and sister and that he would be even willing to pay for it doesn't detract from the fact that he repeatedly made these inquiries for about a week. Moyer explained that she did not specifically tell Zapolski his

comments or actions were offensive to her because “I didn’t want to lose my job. I was scared that I could lose my job for it.” Tr. p. 117; Resp. Br. p. 7. We stress that Moyer and the other two Appellants were the sole support of their children. The fact that Zapolski did not offer Moyer more hours or continued employment if she would arrange dates for him with her friends doesn’t detract from the fact he made these inappropriate inquiries. Resp. Br. p. 7. The Court’s finding that Zapolski never asked Moyer to perform sexual acts or for her to engage in sexual banter does not excuse his conduct. Resp. Br. p. 7.

The reasons that the Respondent cites for the District Court’s finding that Zapolski did not create a hostile work environment for Reinhold are as lacking in merit as those cited for Rasmussen and Moyer. Resp. Br. p. 8-9. The fact that Reinhold enjoyed her job duties for the Respondents only emphasizes the fact that Zapolski’s conduct was so outrageous that although she needed the job and liked the work, she had to quit because of the hostile work environment. Resp. Br. p. 8; Tr. p. 126, l. 7-14. The fact that when Zapolski told Reinhold that sometimes people talk vulgar at the office that she admitted swearing at times does not indicate that she condoned Zapolski’s gross and disgusting talk about a sex. Resp. Br. p. 8; Tr. p. 152, l. 6-11. Again, the fact that she sought no treatment or counseling does not support a finding that Zapolski’s conduct did not create a hostile work environment for her. Resp. Br. p. 9.

Respondents complain that Appellants are attempting to shock or disgust this Court by enumerating Zapolski’s harassing conduct. Resp. Br. at p. 11. But Appellants

do not recite the actions of Zapolski to shock or disgust this Court, but to make it clear why this Court should determine that Zapolski's conduct had ". . . the purpose or effect of substantially interfering with (the Appellants) employment." Minn. Stat. § 363A.03, Subd. 43(3). It is necessary to detail Zapolski's conduct so this Court can determine if his communications and conduct of a sexual nature created an intimidating, hostile or offensive employment environment for each of the Appellants.

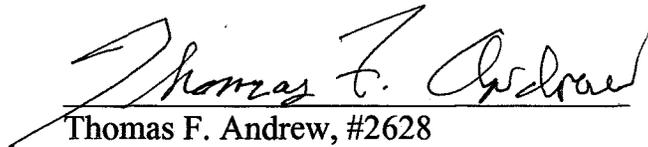
CONCLUSION

Zapolski consistently and repeatedly harassed the Appellants, and the District Court's decision – which was premised on requiring an almost impossibly high standard of proof from the Appellants – should be reversed.

Dated: February 20, 2012

Respectfully submitted,

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