

NO. A08-1810

State of Minnesota  
In Court of Appeals

Elizabeth Friend,

*Respondent,*

vs.

The Gopher Company, Inc. and  
Jason Brouwer,

*Appellants.*

APPELLANTS' BRIEF AND APPENDIX

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

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## LEGAL ISSUES

- I. When a finding is made that a plaintiff would have lost her job due to excessive absenteeism regardless of her pregnancy can she still recover on a claim of pregnancy discrimination because she lost her employment shortly after she learned she was pregnant?

The district court held in the affirmative.

Apposite Authority: *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804 (Minn. Ct. App. 1992); *Hoover v. Norwest Private Mtg. Banking*, 632 N.W.2d 534 (Minn. 2001).

- II. Is it proper to award emotional distress damages nearly three times greater than her compensatory damages when there is little more than generalized statements by the plaintiff as to her claimed distress and no corroborating testimony?

The district court held in the affirmative.

Apposite Authority: *Kohn v. City of Minneapolis*, 583 N.W.2d 7 (Minn. Ct. App. 1998).

- III. Is a party entitled to recover costs for mediation when the parties agreed to split the costs of the mediator and is a party entitled to an award of attorneys' fees when the documentation submitted in connection with the request is not specific as to the task performed and the cause of action to which the work related?

The district court held in the affirmative.

Apposite Authority: *Benson v. Northwest Airlines, Inc.*, 561 N.W.2d 530 (Minn. Ct. App. 1997); *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619 (Minn. 1988).

## STATEMENT OF THE CASE

Respondent brought suit against appellants claiming she was terminated from employment and that her termination violated the Minnesota Human Rights Act because her termination was due to her being pregnant. The matter was tried before the Honorable John L. Holahan. The district court determined respondent's discharge violated the Minnesota Human Rights Act. Appellants brought a motion for Amended Findings of Fact, Conclusions of Law or in the alternative a New Trial which the district court denied. Thereafter, respondent brought a Motion for attorneys' fees and costs which were granted in part.

This appeal followed.

## INTRODUCTION

Appellants The Gopher Company, Inc. (“Gopher”) and Jason Brouwer (“Brouwer”) respectfully submit their appellate brief. Interestingly, appellants agree with many of the Findings set forth by the district court. Yet, while the district court determined appellants violated the Minnesota Human Rights Act, appellants will demonstrate, both factually and legally, this determination was erroneous. There is but one reason Elizabeth Friend no longer works at Gopher – she failed to consistently show for work.

## STATEMENT OF FACT

At first blush, this matter is simple. That is, Elizabeth Friend (“Friend”) was employed by Gopher as a receptionist. She consistently failed to show for work. Given Gopher is in the service industry, it is vital the receptionist appear at work so the telephone could be answered. Her failure to appear is what led to her no longer being employed.

However, Friend learned she was pregnant in late July 2005. It was in the middle of August 2005, after failing to make it to work yet again, that she lost her job. The timing led to a claim of pregnancy discrimination. A claim not supported by the following facts.

### I. THE GOPHER COMPANY.

Brouwer founded Gopher in 1993. Tr. at p. 201. Gopher provides roofing, windows and siding services. *Id.* at p. 81. It provides roofing services for both

residential and commercial customers. *Id.* at p. 201. In the time frame 2004-2005 Brouwer made the hiring as well as the firing decisions for the company. *Id.* at p. 205.

In 2004-2005 the roofing business was very competitive. Tr. at pp. 202-203. As is the case with many businesses, Gopher utilized various methods of marketing in connection with its business. By way of example, Gopher advertised on its corporate vehicles, in the yellow pages, utilized canvassing, flyers and telemarketers. *Id.* at p. 202. No matter the form of advertising Gopher used one telephone number in all of its advertising. *Id.*

Marketing is such an important component of Gopher's business that it employs a director of marketing. Tr. at p. 179. Tim Ward was the director of marketing when Friend worked at Gopher. *Id.* at p. 180. Ward's job involved all aspects of marketing. *Id.* In addition to those items testified to by Brouwer, Gopher also appeared at home shows as part of its marketing campaign. Tr. at pp. 180-181. Regardless of the form of marketing Gopher always provided the same phone number. *Id.* at pp. 180-182. When dialed this phone number would ring in Gopher's front office. *Id.* at p. 182.

In 2004-2005 Gopher would receive approximately 150 telephone calls per day. Tr. at p. 252. Anywhere from 11-16 of these calls would be new sales calls. *Id.* at pp. 241-242. The person responsible for answering these phone calls was the receptionist. *Id.* at p. 202. This position was vital due to its importance in generating new business for the company. *Id.* It was this position that forwarded messages to the director of marketing. *Id.* at p. 182.

It was not just the marketing department that relied on the receptionist. Gopher's project manager relied on the receptionist to receive messages out in the field. Tr. at p. 158. Although it will be described in more detail later, other employees of Gopher relied on the receptionist being present at work because in the event she was not present the job of answering the phones would at times be delegated to them. *See* Tr. at p. 167.

Gopher, naturally enough, requires its employees to appear at work on time. Brouwer's biggest concern was for employees to show for work on time. Tr. at pp. 159, 149. The importance of good attendance was stressed to the employees. *Id.* at p. 182.

Gopher also utilized a process when an employee could not show for work. The employee was to call Brouwer on his cell phone before their shift started. Tr. at p. 206. Brouwer wanted a call on his cell phone to ensure he received the message. *Id.* at pp. 206-207. Brouwer wanted the opportunity to talk with the employee. *Id.* at p. 159. An employee who missed too much work would be discharged. *Id.* at p. 183.

## II. ELIZABETH FRIEND'S EMPLOYMENT.

Friend learned of the opening for a receptionist at Gopher from her roommate who was a Gopher employee. Tr. at p. 17. Friend asked her to obtain an application which Friend filled out and turned in. *Id.* at p. 180. Brouwer did not interview Friend but he did approve her hiring. *Id.* at p. 182. Friend began work at Gopher on approximately October 11, 2004. Ex. 8.

### A. *Friend's job duties and knowledge of attendance requirements.*

As the receptionist Friend was required to answer phones, stock the backroom, perform filing and copying. Tr. at p. 16. She also had the responsibility of transferring

messages. *Id.* at p. 203. For the sales personnel the transferring of messages was extremely important because of the need to speak with a potential customer to provide a bid to perform work. *Id.* at p. 204.

When Friend began employment Brouwer informed her he expected her to show up on time and if she was not going to be at work to call and inform him. Tr. at p. 206. With respect to not showing up she was to call before her shift started. *Id.* She was provided Brouwer's cell phone number and Friend did not ask for the cell phone number again. *Id.* at pp. 206-207.

Friend was paid on an hourly basis. Ex. 108. Gopher used time cards to keep track of an employees' time. Ex. 109. It was Friend's responsibility to take her time card and place it in the time clock to be stamped. Tr. at p. 39. In addition, periodically Friend would place a notation on her time card in the event she missed work. *Id.* at p. 44.; ex. 109 at p. 16. She made the notation on the card to inform Gopher the reason she missed work. Tr. at p. 44.

At the end of the work week the time cards would be collected and the time worked for that week would be totaled. Tr. at p. 226. They would then be presented to Brouwer so he could keep track of attendance. *Id.* Friend never complained there was an error in her paycheck. *Id.* at pp. 150-151.

Gopher uses a form that employees are to fill out when requesting time off from work. Ex. 101. If an employee needed to take time off they were provided access to the form. Tr. at p. 229. Brouwer requested employees utilize the form so when he was

reviewing the time cards he could determine if any time missed was requested off. *Id.* Friend was specifically instructed to use the form. *Id.*

B. *Friend's work performance.*

As will be detailed in Section II C the main concern regarding Friend's employment was her attendance. However, that was not the only concern. During the time period Friend was employed at Gopher Mike Ernst was the office administrator. Tr. at pp. 165-166. He performed his job within thirty feet of where Friend performed her receptionist duties. *Id.* at p. 166. Ernst complained that Friend lacked professionalism on the phone. Tr. at pp. 168-169. By this he meant she was "cranky on the phone to people. Not as polite as I had hoped." *Id.* at pp. 169-170, ll. 24-1.

C. *Friend's attendance.*

From appellants' perspective the primary issue in this matter is Friend's attendance, or rather the lack thereof. As one former employee stated: "Her attendance was by far the worst I'd seen since I've worked there." Tr. at p. 170, ll. 15-16. Another former employee testified she missed approximately one day per week. *Id.* at p. 216. There were times when Brouwer did not receive advance notice of her absence and at times would not be informed until the next day. *Id.* at p. 208.

The amount of time Friend missed was substantial. The fact this was an issue was known to Friend: she was repeatedly informed of the need to be to work. Given her position, her inability to consistently show for work had a severe impact on Gopher's business as a whole. Each topic will be separately addressed.

1. The time Friend missed from work.

Friend missed a substantial amount of work. While she might not agree to the characterization, there can be no disagreement with the numbers. Friend knew she had the responsibility to punch her time card. Tr. at p. 140; ex. 109. She missed time for doctor's appointments and a funeral. Tr. at pp. 38-39. Yet there are numerous instances where Friend was not at work, her timecards do not indicate why she missed work and she has no recollection of why she missed work. *Id.* at pp. 41, 42, 45.

At other times, she was in the hospital but yet did not inform Gopher why she missed work. Tr. at p. 43. On other occasions she claimed she was at the doctor, however, she later stipulated her medical records indicated she had no doctor's appointment on the day she claimed she was at the doctor. *Id.* at pp. 44, 253.<sup>1</sup> There were numerous dates in which Friend does not know why she missed work. *Id.* at pp. 49, 52, 53.

As previously mentioned, Friend was instructed to contact Brouwer if she was going to miss work. However, there were times when she did not call at all when she missed her shift. Tr. at p. 231. Her poor attendance was observed by others as well. *Id.* at p. 214. In fact, Friend informed other Gopher employees she sometimes missed work due to fights with her boyfriend. *Id.* at p. 172. For the time period in January 2005 when she was in the hospital she did not inform Brouwer why she missed work. *Id.* at pp. 43, 230.

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<sup>1</sup> The date was January 24. Also, she missed the entire day of June 15, 2005 but her doctor's appointment was not until 1:20 p.m. Ex. 109 at p. 36; Tr. at pp. 51, 253.

The most illustrative measure of the time Friend missed from work is to examine how much time she actually missed. Her date of hire was October 11, 2004. Ex. 8. The last day she punched in for work was August 15, 2005. Ex. 109 at p. 44. She was to work 40 hours per week. Tr. at p. 38.

Gopher's utilizes a software program to create a payroll register. Tr. at p. 152; ex. 108. The information on exhibit 108 with respect to the number of hours worked comes directly from the time cards. Tr. at p. 153. Exhibit 115 is a demonstrative exhibit regarding the hours Friend worked at Gopher. The hours worked as shown on exhibit 115 came directly from exhibit 108.

For the entire time she was employed at Gopher, Friend was scheduled to work 1,728 hours. Ex. 115, 108. She actually worked 1,500.89 hours. *Id.* She missed over 227 hours of work. Of the ten months she worked at Gopher she missed work for a period of over five weeks. Put another way, in less than a year Friend missed more than a month of work.

Friend did make notations on some of her time cards as to why she missed work and did provide some doctor's notes indicating why she missed work. Exs. 109, 102, 103. Regardless of the legitimacy of the stated reason for not being at work, Friend's explanation of why she missed work totaled 87.5 hours. Ex. 115. Even with these explanations Friend missed three and one-half weeks of work during her ten months of employment. *Id.*

2. Gopher expresses its concerns to Friend regarding her absenteeism.

Friend's lack of attendance became an issue early on in her employment. As of February 2005 she had missed 88 hours of work. AA. 3. Brouwer observed Friend was either showing up late or not showing up at all. Tr. at p. 207. He spoke to her about her attendance. He told her the importance of her job and the need to have the phones answered. *Id.* After this conversation her attendance improved. *Id.* at pp. 208-209. Unfortunately, her attendance would only improve in the short term. *Id.*

Over the course of the following months Brouwer spoke to Friend on numerous occasions concerning her poor attendance. Tr. at pp. 122-123. Friend herself admits Brouwer frequently discussed with Friend her poor attendance. *Id.* at p. 57. Eventually it got to the point where Brouwer "mentioned to her that if tardiness and the ability not to show up for work didn't end then I was going to have to let her go." *Id.* at p. 209, ll. 13-15.

Friend did supply limited documentation of the reasons behind some of her absenteeism. She provided doctor's notes for March 10 and 17, 2005 and April 21, 2005. Ex. 102. She also provided a doctor's note for June 13, 2005. Ex 103. On one occasion she gave advance written notice of her need to miss work. Ex 101.<sup>2</sup>

Every two to three weeks Brouwer was speaking with Friend regarding her attendance. Tr. at p. 210. "[W]e had quite a bit of problems with absentees from Elizabeth Friend, and it was time to show the position of the company and we needed to

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<sup>2</sup> Brouwer did not receive exhibit 101 until after he had a conversation with Friend regarding her attendance. Tr. at p. 233.

move forward.” *Id.* at p. 122, II 12-15. The position of the company took the form of written discipline.

On June 23, 2005 Brouwer sat down with Friend in his office and discussed her written discipline. Tr. at pp. 210, 222; ex. 104. The situation had come to a head and Brouwer needed to make sure Friend showed for work. Tr. at p. 210.<sup>3</sup>

The form indicates Friend had too many unscheduled days missed. Ex. 104. It also indicates in the event the situation continued Friend would be let go. *Id.* This was explained to Friend. Tr. at p. 231. Friend apologized and indicated it would not happen again. *Id.*; ex. 104.

Friend’s knowledge of Gopher’s concerns regarding her attendance is best summed up as follows:

Q. Prior to August 1, 2005, did you inform Ms. Friend what would happen if she continued to miss work?

A. Yes.

Q. What did you tell her?

A. I told her the importance of her job, the importance of being to work on time, and if she continued to be late or even not show up, I was going to have to make a change.

Q. And what, if anything, did she say in response?

A. She understood.

Q. And how do you know she understood?

A. She told me.

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<sup>3</sup> Brouwer did not have Friend’s doctor’s slip from June 15, her afternoon appointment, when he met with her on June 23. Ex. 103; Tr. at p. 90.

Tr. at p. 124, ll. 7-18.

Friend's lack of attendance severely impacted Gopher. As well be shown, this affect coupled with the lack of attendance provides a legitimate basis for her no longer being employed at Gopher.

3. The effect of Friend's absenteeism.

On those days Friend failed to show for work Brouwer would go around the office and inform everyone Friend was not going to be at work. Tr. at p. 232. Other employees would then be required to assist in answering the phones in addition to their other job duties. *Id.*

There were times Dwayne Nelson's secretary had to fill in for Friend. Tr. at p. 215. He brought up his concerns with Brouwer several times regarding Friend's attendance. *Id.* Nelson's secretary complained to him concerning Friend's absenteeism. *Id.*

Tim Ward also had to spend part of his day answering the phone when Friend was absent. Tr. at pp. 184-185. It made his job tougher because at times he was required to take two calls at once. *Id.* at p. 185. Mike Ernst was also required to answer the phones when Friend was absent. *Id.* at p. 171. He would ask Brouwer to find someone to help with answering the phones. *Id.* In fact, he went so far as to suggest to Brouwer that Friend be let go because he could not cover his position and Friend's. *Id.* at p. 168.

Friend eventually ceased employment with Gopher. It is the circumstances surrounding her departure which led to this lawsuit.

D. *Friend's pregnancy and her cessation of employment.*

In the beginning of August 2005 Friend learned she was pregnant. Tr. at pp. 23-24. She was in the early stages of her pregnancy. *Id.* at p. 24. She informed Brouwer she was pregnant and her testimony was he said congratulations and told her to return to work. *Id.* at pp. 22-23. Other than this single conversation, Brouwer never discussed with Friend her pregnancy. *Id.* at p. 56.

After learning Friend was pregnant Brouwer discussed the matter with his wife. Tr. at p. 93.<sup>4</sup> Based on Friend's poor attendance history he was concerned about the phones being answered. *Id.* at pp. 93-99, 123-124. Brouwer discussed with his wife various options he should consider regarding Friend's employment. *Id.* at p. 235. These options included having his wife come back into the office, finding someone else in the office to handle the phones, having Friend go part-time or leaving her as she was. *Id.* Other options included having Friend work in the backroom doing paperwork. *Id.* at p. 124. The changes were being discussed because Friend was not making it to work. *Id.* at p. 116. There is nothing in the record demonstrating, even indicating, Gopher was considering terminating Friend because she was pregnant.

Ms. Brouwer remembers a discussion regarding finding someone to work while Friend was gone having her baby. Tr. at pp. 138, 155-156. There were discussions about a possible job share. *Id.* at p. 144. However there were no discussions concerning Friend being fired, and Ms. Brouwer was of the belief Friend was not terminated. *Id.* at

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<sup>4</sup> Brouwer did not discuss Friend's pregnancy with any other Gopher employees. Tr. at pp. 172, 185.

p. 133. Even so, the reason discussions were had about changing Friend's job was not because she was pregnant but "because she wasn't making it to work." *Id.* at p. 116, l. 8. In the end it did not matter; Gopher did not exercise or even discuss these options with Friend because her lack of attendance continued. *Id.* at p. 276.

Friend again missed work on August 9, 2005. Ex. 109 at p. 44. She did not see a doctor on August 9. Tr. at p. 253. She indicated on her time card she had a doctor's appointment on August 10, 2005. Ex. 109 at p. 44. She does not recall telling Brouwer she had a doctor's appointment for the 10<sup>th</sup>. Tr. at p. 56. Brouwer testified Friend did not inform him of the appointment. *Id.* at p. 234.

Naturally the parties' recollection of Friend's last day of employment differ. However, the differences in recollection do not lead to a difference in result. There is no dispute Friend did not show for work on August 16, 2005. Ex. 109 at p. 44. At trial Friend produced a doctor's note indicating that at some point in time on the 16<sup>th</sup> she was at the hospital. Ex. 4.

On or about August 16 Brouwer was in his vehicle. Tr. at p. 234. Friend did not appear for work that day. *Id.* Friend called Brouwer stating "I suppose I don't have a job anymore do I? .... [Brouwer] said, that is correct, and that was it." *Id.* at pp. 234-235, ll. 25-2.

Friend's testimony differs. She claims she called Brouwer and told him she would not be in and that he said okay and to contact him with what she learned. Tr. at pp. 25-26. She called again that same day stating she would not be in the following day. *Id.* at p. 26. She then claims Brouwer told her stomach pains are a normal part of pregnancy

and she should get back to work. *Id.* at p. 27. However, there is nothing contained in the record in which Friend informed Brouwer the reason she was at the emergency room was due to stomach pains. In fact, under questioning from respondent's counsel, Brouwer stated he heard nothing from Friend regarding her pregnancy. *Id.* at p. 112. Friend then claims when she returned home there was a message on her answering machine telling her she no longer had a job. *Id.* at p. 28. After the 16<sup>th</sup> or 17<sup>th</sup> of August 2005 Friend had no conversations with Brouwer. Tr. at p. 235.

E. *Friend's claimed emotional distress.*

The bulk of the damages awarded to Friend constituted emotional distress damages. *See* AA 17. Friend was the only witness to testify concerning her claimed emotional distress. She raised as a concern that after her employment ceased she no longer had medical coverage and this fact was stressful. Tr. at p. 31. Yet, as of December 28, 2005 she had health insurance through Medica. Ex. 116.<sup>5</sup> She testified she was on a stricter budget and that she stayed at home. Tr. at p. 35. She claimed she was pessimistic about the future and her self-esteem was lowered. *Id.* at p. 35.

There were no witnesses to corroborate any of this testimony. There was no testimony about any specific impact on respondent's relationships with other people.

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<sup>5</sup> The admission of exhibit 116 was discussed at the conclusion of testimony. Tr. at pp. 255-258. The exhibit was provided to the district court in connection with appellants' post-trial submission. Ltr. from Jack E. Pierce to Hon. John L. Holahan dated Apr. 11, 2008. Contrary to respondent's counsel's assertions that the medical coverage was through Minn Care and dealt only with respondent's unborn child, *see* Tr. at pp. 255, 258, the insurance is through Medica and covers "Medical/Comprehensive Dental." Ex. 116. Though admittedly not in the record, it stands to reason and common sense an unborn child would not need comprehensive dental coverage.

### III. THE DISTRICT COURT'S DECISIONS.

This matter was tried before the Honorable John L. Holahan on March 10 and 11, 2008. AA 1. Appellants do not dispute the majority of the district court's factual findings. As will be shown, even those factual findings which are disputed do not give rise to liability.

The district court found that all Gopher's employees are informed to arrive at work on time and to contact Gopher prior to their shift starting if they cannot make it to work. AA 2 at para. 11. As it specifically relates to Friend, she was provided Brouwer's cell phone number in the event she was going to miss work. *Id.* at para. 12.

Soon after she began employment there were issues related to her attendance. AA. 3 at para. 17. From the time she started through February 4, 2005, approximately three and one-half months, "[s]he was at work only 86% of the time she was scheduled to be there. She missed a total of 88 hours -- more than two weeks of work." *Id.* On some of the days she was not at work she was not at the doctor's office. *Id.* at para. 22.

When he learned of Friend's pregnancy Brouwer discussed the situation with his wife. AA. 4 at para. 28. As to the events surrounding the middle of August 2005 the district court was not exactly clear. It stated that on August 16, 2005 plaintiff went to the emergency room. AA 5 at para. 31. However, the district court did not find Friend informed Gopher why she was not at work, rather, the district court states Friend "claims" she contacted Brouwer. *Id.* at para. 32. According to the district court, Brouwer left a message with Friend indicating stomach pains were common during

pregnancy. *Id.* at para. 33.<sup>6</sup> “On August 17, 2005, while the Plaintiff was at her physician’s office, she *claims* that Defendant Brouwer left a voice message on her cell phone discharging her from her duties with Gopher employment.” *Id.* at para. 36 (emphasis supplied).

Even though it later found liability, the district court stated “[e]ven if Plaintiff had not become pregnant, the Court is well satisfied that she would have been lucky to have made it to December 31, 2005 without being fired.” AA 5 at para. 37. The district court then calculated damages through December 31, 2005 and discounted the amount based on Friend’s attendance. AA 5-6 at paras. 38-40. Throughout its Findings and Conclusions of Law the district court made one statement concerning Friend’s claim of emotional distress: “There was testimony of her absenteeism beyond medical reasons and of her failure to inform her employer on those specific occasions as to why she was not at work. Under these circumstances, \$20,000 is a reasonable amount to award the Plaintiff for emotional distress damages.” AA 6 at para. 41.

The district court’s Conclusions of Law provide nothing in the way of substantive analysis. It mentions appellants were making decisions based on respondent’s pregnancy yet does not indicate whether any such decision was made. AA. 6 at para. 4. The district court then stated appellants met their burden of showing legitimate reasons for Friend’s termination. AA 7 at para. 7. However, no analysis was provided whatsoever as to

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<sup>6</sup> As mentioned earlier, nothing is contained in the record to indicated Friend informed Brouwer she was experiencing stomach pains.

whether Friend met her burden. For the appellants need not provide a legitimate reason until such time as Friend meets her burden.

Even more absent is the reasoning behind the district court's determination the respondent was "a victim of intentional discrimination for her pregnancy." AA. 8 at para. 7. According to the district court this determination is based on Gopher's concerns of the potential impact by Friend's pregnancy in the future. AA. 7 at para. 7. Yet, nowhere in the district court's decision is there any indication at all that any decision was made regarding Friend's employment with Gopher let alone a decision based on her pregnancy.

Appellants brought a Motion for Amended Findings or in the alternation a new trial. The majority of the factual determination made by the district court remained the same. *Compare* AA 1-6, 9-14. The additions made by the district court are non-sensical. As additional support for its award of emotional distress damages the district court added facts that had absolutely no connection with Friend. To support the award for "mental anguish" the district court referenced Brouwer spoke to his wife, that another employee missed work for a DUI and was not terminated,<sup>7</sup> and that no other pregnant women were retained by Gopher other than Ms. Brouwer.<sup>8</sup> AA. 14 at para. 34. How these items, even if true, could possibly relate to Friend is unknown and seemingly strains logic.

In an effort to support the idea Friend was discriminated against the district court contradicts itself. "This Court finds that Plaintiff had been missing work *occasionally*,

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<sup>7</sup>The individual involved was a salesman. Tr. at p. 101. The individual was not paid for the time off and his job duties did not require him to answer the phone. *Id.* at p. 123.

<sup>8</sup>This statement by the district court is incorrect. At the time of trial Gopher had in its employ a woman who was pregnant and had not been terminated. Tr. at p. 193.

but that her pregnancy was the factor that had changed causing Defendant to terminate her employment.” AA. 17 at para. 10 (emphasis supplied). Occasionally? In less than four months she missed more than two weeks of work. AA II at para. 9. She “would have been lucky to have made it to December 31, 2005 without being fired.” AA. 13 at para. 29. She was employed for ten months and missed nearly a month and a half of work. Ex. 115. It makes one wonder what is excessive if Friends’ attendance history constitutes occasional absenteeism.

### ARGUMENT

Elizabeth Friend is no longer employed by Gopher because she failed to abide by the most basic requirement of all employers - appearing for work. The exhibits and the district court’s factual findings leave no doubt with respect to her lack of fulfilling this basic requirement. The fact she lost her job shortly after learning she was pregnant was merely coincidence rather than the basis for any claimed termination. The district court should be reversed and judgment entered in favor of appellants.

#### I. STANDARD OF REVIEW.

In an action tried upon the facts without a jury, findings of fact will not be set aside unless clearly erroneous. Minn. R. Civ. P. 52.01. If the findings are “manifestly contrary to the weight of the evidence as a whole” the decision of the district court must be reversed. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). Findings of fact are clearly erroneous if the reviewing court is left with the conviction a mistake has been made. *Id.*

The reviewing court is not bound by and need not give deference to the district court's conclusions of law. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minnesota*, 664 N.W.2d 303, 311 (Minn. 2003). The reviewing court reviews questions of law de novo. *Id.*

II. GOPHER AND BROUWER DID NOT VIOLATE THE MINNESOTA HUMAN RIGHTS ACT.

The district court determined Gopher and Brouwer violated the Minnesota Human Rights Act ("the Act") by discharging Friend because she was pregnant. Minn. Stat. §363A.08, subd. 2 (2) and 363A.03, subd. 42.

In cases involving the Act the Court is to employ the analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Lindgren v. Harmon Glass Co.*, 489 N.W.2d 804, 808 (Minn. Ct. App. 1992). To make out her prima facie case Friend must show she: "(1) is a member of the protected class; (2) was qualified for the position from which she was discharged; and (3) was replaced by a non-member of the protected class." *Feges v. Perkins Restaurants, Inc.*, 483 N.W.2d. 701, 711 (Minn. 1992) (citation omitted).

In the event Friend meets her burden, the appellants must then show a nondiscriminatory reason for her no longer being employed. *Hanenburg v. Principal Mut. Life Ins. Co.*, 118 F.3d 570, 574 (8<sup>th</sup> Cir. 1997) (citation omitted). "If the defendant produces such a legitimate reason, the presumption of discrimination evaporates and the plaintiff must prove her case by proving that it is more likely than not that the proffered reason is (1) a pretext for discrimination or (2) not worthy of belief." *Feges*, 483 N.W.2d

at 711 (citation omitted). In the event a legitimate nondiscriminatory reason is offered the prima facie case is no longer relevant and the respondent must then demonstrate the reason provided was not in fact the true reason for the employment decision. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-508 (1993).

Respondent failed to meet her initial burden of making her prima facie case. Even more compelling is respondent's inability to demonstrate the reason for her no longer being employed, excessive absenteeism, was merely pretextual. Each will be separately discussed.

A. *Respondent failed to meet her initial burden.*

Respondent satisfies the first prong of the analysis in that she was a member of a protected class. However, she cannot satisfy the second prong that she was qualified for the position in which she was allegedly discharged. This involves a two-part analysis. She must have been qualified and she must have been discharged.

"Regular and reliable attendance is an essential element of most jobs." *Nesser v. Trans World Airlines, Inc.*, 160 F.3d 442, 445 (8<sup>th</sup> Cir. 1998). There can be no legitimate dispute the receptionist position at Gopher required the receptionist show for work. Her main job was to answer the telephone. Friend was employed from October 2004 through August 2005. During this time period she missed over 227 hours of work. Ex. 115. This equates to over five and one-half weeks. Even when factoring in the explanations provided by Friend, legitimate or not, she missed three and one-half weeks of work. *Id.*

Friend was aware from the day she started work she was expected to show for work. It would strain logic to argue otherwise. She admits on numerous occasions

Brouwer spoke to her regarding her attendance; in the ten months she was at Gopher she missed work for more than one month. It is hard to fathom how this attendance record could meet any employer's expectations. Not only was she not showing for work, as Ernst testified she was not discharging her duties professionally.

Respondent may argue she was qualified for the position merely because she had the physical ability to answer the phone regardless of whether she actually arrived at work to perform this task. "In determining whether or not [plaintiff] was qualified for her position, we do not simply examine her ability to perform. Rather, [plaintiff] must demonstrate that she was actually performing her job at a level that met her employer's legitimate expectations." *Whitley v. Peer Review Systems, Inc.*, 211 F.3d 1053, 1055 (8<sup>th</sup> Cir. 2000). Simply put Friend was not qualified for the position. She did not show for work.

To hold otherwise would in essence eliminate an employer's ability to require an employee appear at work. For if an employee has the physical ability to perform their designated task, but simply fails to show for work, they nonetheless would satisfy the second prong of the *McDonnell Douglas* test. Being qualified for the position, at least as it relates to attendance, would no longer be an element of the plaintiff's prima facie case.

The law does, however, require attendance to be qualified for the position. Friend did not meet this basic requirement. Because she did not demonstrate she was qualified for the position she did not meet her burden and the district court should have dismissed her claims. *Johnson v. Loram Maintenance of Way, Inc.*, 83 F.Supp.2d 1007, 1016 (D.

Minn. 2000) (poor attendance and other factors bearing on job performance led to a finding the employee was not qualified for the position).

There is also the question of whether Friend was actually discharged. The testimony does not leave one with a firm conviction she was terminated rather than she quit her employment. Brouwer informed Friend she would no longer have a job in the event she continued to miss work. On August 16 when she called Friend started the conversation by affirmatively indicating she no longer had a job. Such a statement indicates she quit employment rather than her being discharged.

Lastly on the topic of whether Friend met her burden is the question of whether there was evidence introduced at trial indicating she was replaced by a non-member of the protected class. No evidence was introduced at trial the receptionist position was filled after Friend left let alone evidence it was filled with a non-member of the protected class.

Elizabeth Friend failed to sustain her burden of demonstrating she proved the second and third prong of the *McDonnell Douglas* test. Thus, her claim should be dismissed and there is no need to examine whether the reasons she is no longer employed by Gopher were pretextual. Regardless, the evidence clearly showed Gopher had a legitimate non-discriminatory reason for Friend no longer being employed.<sup>9</sup>

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<sup>9</sup> The pretext analysis assumes respondent met her burden pursuant to *McDonnell Douglas* and was discharged. In discussing the issue of pretext respondents will assume there is a determination she was discharged. This should not be taken as a concession she was discharged – respondents do not concede that point.

Yet, even prior to engaging in a discussion on pretext, the issue of the district court's lack of findings on this issue must be explored. A district court has an affirmative obligation to set forth findings with respect to each of the three part of the analysis. *Sigurdson v. Isanti County*, 386 N.W.2d 715, 722 (Minn. 1986). However, there were no findings whatsoever on whether Friend was actually qualified for the position. There were no findings on whether the position was filled with a non-member of the protected class. Instead, the district court skipped this part of the analysis and went directly to the question of whether Gopher's discharge of Friend was based on legitimate reasons. As will be demonstrated it was, however, even prior to getting there the district court is required to engage in the three-part analysis of *McDonnell Douglas* – it did not.

B. *Respondent was legitimately discharged from employment.*

The failure to appear for work when required is a legitimate basis for termination. *Lindgren*, 489 N.W.2d at 808. Even if the absences were caused by a disability, which is not the case here, does not lead to the conclusion the termination was discriminatory. *Id.* at 809. On the contrary, when the job requires regular attendance absenteeism is a legitimate reason for termination. *Id.*

The district court determined Gopher provided a legitimate explanation for Friend's termination, "namely her unexcused absences from work." AA. 7 It is difficult to imagine how Friend's lack of attendance is not a legitimate reason for termination or

was not sufficiently egregious to warrant termination.<sup>10</sup> As such Friend had the burden of proving her attendance was not the real reason she was terminated. *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555, 557 (Minn.1996).

There are various ways an employee could demonstrate the proffered reason was pretextual. She could show the reason had no basis in fact, that she received a favorable review shortly before being terminated, that Gopher changed its explanation as to why she was terminated or there was a deviation from policy. *Stallings v. Hussman Corp.*, 447 F.3d 1041, 1052 (8<sup>th</sup> Cir. 2006). That being said, “[a] proffered, non-discriminatory reason need not, in the end, be correct if the employer honestly believed the asserted grounds at the time of termination.” *Twymon v. Wells Fargo & Co.*, 462 F.3d 925, 935 (8<sup>th</sup> Cir. 2006).

Friend may argue the timing of her discharge supports a finding of pretext. However, the timing of a decision to terminate an employee is not evidence of pretext standing alone. *Quick v. Wal-Mart Stores, Inc.*, 441 F.3d 606, 610 (8<sup>th</sup> Cir. 2006)(quotation omitted). “[T]iming alone is insufficient to show a pretextual motive rebutting a legitimate, non-discriminatory reason for an adverse employment action.” *Green v. Franklin Nat’l Bank of Minneapolis*, 459 F.3d 903, 916 (8<sup>th</sup> Cir. 2006). This is particularly true here: there is insufficient evidence to indicate there was a discharge; and the circumstances surrounding the telephone call which led to her no longer being employed does not have any indicia that the reasoning was based on her being pregnant.

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<sup>10</sup> Friend was an at-will employee. Thus, she could be terminated for any reason provided the reason is not prohibited by law. *White v. Winona State Univ.*, 474 N.W. 2d 410, 412 (Minn. Ct. App. 1991); Minn. Stat. §363A.08, subd. 2(2).

The sole case utilized by the district court in reaching its decision was *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619 (Minn. 1988). See AA at p. 7. *Anderson* is easily distinguishable from this matter. In *Anderson* the employee was provided a raise and bonus. *Anderson*, 417 N.W.2d at 621. No such evidence exists in this matter.

The employer in *Anderson* made a decision to terminate the employee. *Id.* at 622. No such evidence is present here indicating Gopher previously determined to fire Friend. The employer in *Anderson* told the employee that it would be inconvenient for her to miss work because of her pregnancy. *Id.* Gopher made no such representations to Friend. In *Anderson* there was a decision by the employer to terminate the employee after she began her maternity leave. *Id.* No such evidence is present here. They also devised a plan to state the employee wanted to permanently resign. *Id.* No such evidence is present here.

*Anderson* also required the district court to make an explicit finding as it relates to Friend's burden of demonstrating the actions of Gopher were pretextual. *Id.* at 627. This requires the district court to make a finding that either Gopher's actions were motivated by Friend's pregnancy, or that its explanation for her not being employed was not due to her excessive absenteeism and this claim is not believable. *Sigurdson*, 386 N.W.2d at 720 (citation omitted). Gopher's claim that Friend is not employed due to her excessive absenteeism is believable. The district court implicitly stated as such when it found that she would have been fired regardless of her pregnancy. In *Anderson* the trial court made the determination the employee's pregnancy was a causative factor of her termination.

*Anderson*, 417 N.W.2d at 622. No such finding is present here. In fact, the district court did not make explicit findings as required by *Sigurdson* on any of the elements of Friend's claim.

This matter is more analogous to *Lindgren* than it is *Anderson*. For here, "[Gopher] presented undisputed evidence [Friend's] absenteeism was excessive and her job required regular attendance." *Lindgren*, 489 N.W.2d at 808. Nor was there any dispute as to how this affected her job performance and Gopher's operations. "[Friend's] absenteeism plainly affected her job performance because her job required regular attendance. Accordingly, [Gopher] has shown its reason for terminating her was legitimate and nondiscriminatory." *Id.* at 809. "[A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Hoover v. Norwest Private Mtg. Banking*, 632 N.W.2d 534, 546 (Minn. 2001).

In this matter there is abundant evidence of the nondiscriminatory reason for Friend no longer being employed by Gopher. *See Clearwater v. Ind. School Dist.* 166, 231 F.3d 1122, 1127 (8<sup>th</sup> Cir. 2000)(numerous well-documented episodes of late arrivals defeats a claim the stated reason for termination was pretextual in the absence of evidence to the contrary). Regardless, respondent provided no evidence the stated reason was untrue. Thus, it is respectfully requested the Court reverse the district court and

determine that as a matter of law Gopher did not violate the Minnesota Human Rights Act.

III. THE AWARD OF EMOTIONAL DISTRESS DAMAGES WAS NOT WARRANTED BY THE TESTIMONY AND THE LAW.

The district court awarded \$20,000 in damages for emotional distress. In the event this Court upholds the determination of liability, it is respectfully requested it reverse the district court's award of emotional distress damages. This award was erroneous as a matter of law.

The Act allows for the recovery of damages for mental anguish or suffering. Minn. Stat. §363A.29, subd. 4. However, there must be evidence contained within the record to support the award of mental anguish damages. *State by Cooper v. Mower County Social Services*, 434 N.W.2d 494, 500 (Minn. Ct. App. 1989). In *Mower* an award of \$2,000 in mental anguish damages was upheld were there was evidence the plaintiff was frustrated, angry, depressed, her relationship with her husband was affected, she had to ask her co-workers for welfare and her relationship with others was affected. *Id.* at 499.

In *Kohn v. City of Minneapolis*, 583 N.W.2d 7 (Minn. Ct. App. 1998) an award of mental anguish damages was supported by evidence provided by the plaintiff, his wife and his mother. *Id.* at 14. The plaintiff had severe disappointment, frustration, anxiety and anger. His relationship with his children was harmed, he isolated himself from his family. *Id.* at 15. In *Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670 (Minn. Ct. App. 1991) an award of \$1,000 for emotional distress was upheld were there was

“extensive testimony of her diminished self-worth and the deterioration of her relationship with her children ....” *Id.* at 677.

In this case there was little testimony supporting Friend’s claim of emotional distress. She claimed stress due to the lack of medical insurance coverage. However, as exhibit 116 demonstrates she did have medical insurance. She testified she was on a stricter budget and she was pessimistic about the future. There was no testimony concerning any impact her termination had on her relationships with others. Her testimony was not corroborated and can best be described as self-serving. *See Kohn*, 583 N.W.2d at 15 (damages awarded for loss of reputation were reversed when “[t]he only witness who testified as to Kohn’s loss of reputation was Kohn himself”).

There is also the issue with respect to the amount of damages awarded. Eventually, the district court awarded Friend \$6,766.64 in compensatory damages. AA 14 at para. 6. Given the lack of corroborating testimony and the very generalized statements concerning the claimed effect of her termination, the award of \$20,000 in emotional distress damages is excessive.

#### IV. THE FEES AND COSTS AND DISBURSEMENTS AWARDED TO RESPONDENT.

In the event the Court reverses the district court’s determination of liability it necessarily follows the award of fees and costs to the respondent should be reversed as well. If not, it is respectfully requested this Court modify a portion of the costs awarded to respondent and reverse and remand on the issue of attorneys’ fees.

As to the costs, respondent sought an award of \$7,134.19 in costs. Pl. Pet. for Fees and Costs dated Aug. 28, 2008 at p. 13. The district court awarded the full amount of costs requested. AA 21. Part of the costs sought were \$787.50 representing one-half of the mediator fees. Aff. of Stephen W. Cooper dated August 28, 2008 at ex. B. However, because there was an agreement to allocate fees with the mediator it is not a cost which can be recovered. *Benson v. Northwest Airlines, Inc.*, 561 N.W.2d 530, 541 (Minn. Ct. App. 1997).

Respondent bears the burden of establishing entitlement and documenting the appropriate hours and hourly rates. *Laube v. Allen*, 506 F. Supp. 2d 969, 976 (M. Dist. Ala. 2007). “This burden includes supplying the court with specific and detailed evidence from which it can determine the reasonable hourly rate, maintaining records to show the time spent on the different claims, and setting out with sufficient particularity the general subject matter of the time expenditures so that the district court can assess the time claimed for such activity.” *Id.*

The first step in the analysis to recover attorneys’ fees “involves a determination of the so-called lodestar figure.” *Anderson*, 417 N.W.2d at 628 (Minn. 1988). “This figure is determined by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate.” *Id.* “This analysis requires that the trial court exclude from the initial lodestar calculation hours that were not reasonably expended.” *Id.* at 629. The trial court must “specifically scrutinized the hours expended claim to determine the reasonableness of that item.” *Id.* The trial court cannot merely accept at face value the hours expended representation made by the attorney. *Id.* at 628.

The district court did reduce the amount of attorneys' fees sought by respondent AA 21. However, as the district court notes the time entries submitted by respondent were not specific. *Id.* The entries do not contain the necessary specificity to allow an analysis of the claimed activity, and they also do not specify which of the claims brought by Friend the time expended relates to. There also were numerous time entries in which two attorneys were charging time for the same item. *Id.*

Respondent also sought compensation for work performed by a non-attorney. *Aff.* of Stephen W. Cooper dated August 28, 2008 at ex. A, p. 13. "Tasks not traditionally done by an attorney should be included in the routine office overhead normally absorbed by the practicing attorney." *Laube*, 506 F. Supp. 2d at 985.

In the event this Court reverses the award of emotional distress damages, but affirms the award of compensatory damages, there should be an examination into the award of attorneys' fees as it relates to the award of damages. As the district court noted, "[t]his case presented several claims of action. Plaintiff was successful on one of those claims, but for considerably less than what she requested." AA 21. While the legality of an award of attorneys' fees in the event it is determined the district court should be affirmed on the issue of a violation of the Act is settled, it is still the respondent's burden to establish entitlement by documentation as to the time spent with sufficient particularity to allow an analysis of the time spent for unsuccessful claims versus successful claims as well as the proportionality of the requested award versus the actual award.

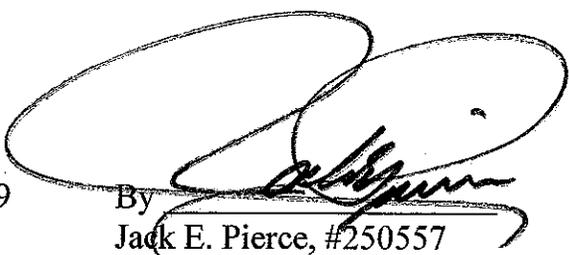
CONCLUSION

For the reasons stated herein, it is respectfully requested the district court's finding Gopher and Brouwer engaged in discrimination when Elizabeth Friend lost her job at Gopher be reversed.

Respectfully submitted,

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Dated: January 14, 2009

  
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STATE OF MINNESOTA  
IN COURT OF APPEALS

Elizabeth Friend,

*Respondent,*

vs.

CERTIFICATE OF BRIEF LENGTH

The Gopher Company, Inc. and  
Jason Brouwer,

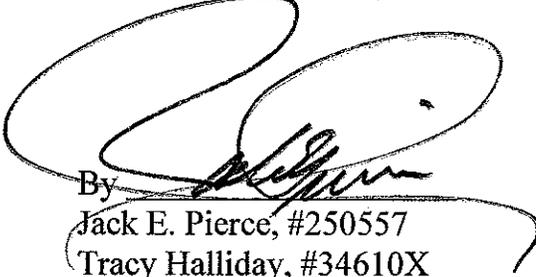
APPELLATE CASE NO. A08-1810

*Appellants.*

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs.1 and 3, for a brief produced with a proportional font. The length of this brief is 8,492 words. This brief was prepared using Microsoft Word 2007.

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