

No. A08-1810

STATE OF MINNESOTA
IN COURT OF APPEALS

Elizabeth Friend,

*Respondent -
Cross-Appellant,*

v.

The Gopher Company, Inc , and Jason Brouwer,

*Appellants -
Cross-Respondents.*

RESPONDENT - CROSS APPELLANT'S REPLY 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).

OVERVIEW

Two weeks after the Plaintiff told her employer that she was pregnant, she was fired. This was because she went to her doctor, for pregnancy-related reasons. Defendants did this while she was actually at her doctor's office, by leaving a voice message on the Plaintiff's phone. (Trial transcript, pp. 25-28, 104-107.) This is a direct violation of Minn.Stat. sec. 363A.08, subds. 2 and 5, and 363A.03, subd. 42. See Anderson v. Hunter, Keith, Marshall Co., 417 N.W.2d 619 (Minn. 1988.) Nothing else need be provided to support the trial court's finding of discrimination.

There is much more evidence, however. Defendants admitted that they believed Plaintiff's pregnancy could adversely affect his business. (93, 98-99, 119.)

1. Defendants could not identify a single female who was able to continue working there after becoming pregnant. (Trial transcript, pp. 191, 194.) Further, at least one other female was terminated for supposed attitude and attendance problems, within a month of becoming pregnant. (Trial transcript, p. 191.) Defendants, however, tolerated lengthy leaves for a non-pregnant male, who had been jailed for a DUI.
2. Defendants made repeated statements that they were concerned about the impact Plaintiff's pregnancy would have on their business during their busy time.
3. Without consulting Plaintiff, nor any medical person, Defendants made plans to cut the Plaintiff's hours and move her to the back room. Instead, he simply fired her.

Defendants have not established that Plaintiff had any improper absences.

Defendants make the lynchpin of their argument that Plaintiff missed work about 10% of the time during her employment. Defendants, however, offer no evidence that any of these absences were improper. Even if they were, concerns that her pregnancy would adversely affect her work, would not be a defense to firing the Plaintiff. Anderson, supra. Defendant Brouwer testified:

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

A. No, I am not.

* * *

Q. So the only write up that you ever gave her, that you claim you ever gave her, is she was at that she was at the doctor's office on the 15th and she had surgery on the 25th, 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. 116, 120, 126.) Plaintiff's testimony was that she took time off for medically-related reasons, a funeral and a visit from her sister. (Trial transcript, p. 39.)

During her employment, Plaintiff had several serious medical issues. She had several surgeries, exploratory surgeries, doctors' appointments, and recuperation periods. (Trial transcript, pp. 20, 83.) Fortunately, these issues had been successfully resolved prior to the Plaintiff's pregnancy.

Defendants, in their vague references to the Plaintiff's absences, do not point to a single day that the Plaintiff was not at work when she should have been. In contrast,

Plaintiff established that Defendants resented the Plaintiff's doctors' appointments and criticized her for them. (Trial transcript, pp. 59-62.)

Defendants' manager admitted that an employee should not be terminated for going to the doctor. (Trial transcript, p. 194.) Another female employee, however, was terminated for having too many doctors' appointments. (Trial transcript, pp. 222-223.)

Defendants did not document, nor testify to, any day Plaintiff was off, where they requested, but did not receive, a doctor's slip, or other acceptable documentation. There is only one occasion where Defendants even contend that they gave a written notice to the Plaintiff about attendance.

Plaintiff denies that she received it and it is unsigned. There is no written warning of any sort after this and Defendant Brouwer's wife admits that the Plaintiff's attendance met their standards in August. (Trial transcript, p. 136.)

Rather than presenting any evidence to establish habitual absenteeism, or even non-justified absences, Defendants, instead, make the generalization that the Plaintiff missed a lot of work. Defendants make no effort to establish that the absences were unjustified.

Defendants, in an attempt to turn their lack of evidence, that Plaintiff had any improper absences, around, argue that the Plaintiff did not provide an explanation as to why she was not at work. At trial, Defendants had no evidence that the Plaintiff ever failed to explain any absences to Defendants.

There was no document, nor testimony from Defendants, indicating Plaintiff did not call in before her absences, stating the reason therefore, or answer questions or provide any evidence or documents regarding her absences that Defendants sought. Instead, Defendants throw meaningless numbers around, without showing what the reason(s) for the time off was.

Plaintiff provided doctors' slips for her August 16th and 17th absences, the days for which she was terminated, as well as for her June 15th and June 23rd absences, the days for which she was written-up, along with slips for other days. (Trial transcript, pp. 84-87, 93) (Exhibit 104.) She has testified, both during her deposition and at trial, under oath, that she did not miss any days for improper reasons. (Trial transcript, pp. 38-39.)

Defendants' testimony did not rebut this.

Most employers, if they actually think that an employee is not at work for improper reasons, will require a written explanation from the employee and will document their concerns. Here, Defendants did not do that. This is likely because Defendants knew why the Plaintiff was away. Defendants knew about the Plaintiff's medical issues, doctors' appointments and reasons for her time off.

The receptionist position.

Defendants continuously stress the special importance of the Plaintiff's position. They argue that, it was so essential, the Defendants could not risk her being absent for any reason, including pregnancy.

Actually, Plaintiff had a typical receptionist position. She did photocopying, phone answering and a variety of other tasks. (Trial transcript, p. 203.) When she was absent, other secretaries or employees answered the phone. (Trial transcript, p. 206.)

An answering service was available and telemarketers answered their own call-back calls. (Trial transcript, pp. 240-241.) Most striking, however, was that when the Plaintiff was terminated, despite the fact that Defendants were entering into their busiest season, the Plaintiff was not replaced for many months. This simply was not a key position.

Defendants argue that they never actually moved the Plaintiff into the back room, nor placed her on part-time status. Thus, they claim that they had no discriminatory motive.

Mr. Ernst testified that Defendants informed him they were planning to make the Plaintiff part-time. (Trial transcript, pp. 172-173.) The only reason this did not occur, is that Defendants utilized a more discriminatory solution. Defendants simply fired the Plaintiff, because she was pregnant and was at the doctor's office for pregnancy-related reasons, making her a zero-time employee. Defendants offer no other explanation as to why, on August 17th, 2004, Plaintiff was fired, other than she was not at work, because she was seeing her doctor for pregnancy-related reasons.

The trial court was in error when it ruled that Plaintiff would be fired in five months.

Defendants failed to point to any evidence that support the trial court's finding that, even if she were not pregnant, she would have been fired in five months. The Defendants did not testify to this, nor did any other witness.

A. The trial court was in error when it ruled that the Plaintiff would have been fired for absences that had not even occurred.

The trial court speculated that the Plaintiff would miss work in the future, i.e., September, October, November and December, if she was not pregnant. The trial court had no evidentiary basis for this future speculation. The trial court further speculated that Defendants would have fired her for these missed days.

The medical issues that had led to Plaintiff's need for medical attention had been resolved. Her last surgery was June 23rd. Even Defendants' Counsel was only able to show one day off in July and Defendants' record keeper testified that the Plaintiff's attendance in August met Defendants' standards. (Trial transcript, pp. 52, 136.) The Plaintiff's only days off in August were pregnancy-related.

The trial court gave no other basis for cutting the Plaintiff's damages for actual past lost wages, other than its unsupported claim that the Plaintiff would have been terminated in December for absences that never occurred. The trial court stated this as a conclusion and did not set out any logic, nor facts, to prove that Plaintiff would have been absent in the future or that Defendants would fire her.

B. The trial court failed to set out case law or facts to support its cutting of damages based upon future speculation.

The MHRA and standard jury instruction require that a prevailing Plaintiff receive “is entitled to the amount of money that will fully compensate them for the damage suffered. Gaddy v. Abex Corp., 884 F.2d 312, 318 (7th Cir. 1989.) Here, the trial court cut this off based upon complete conjecture, with no supporting evidence, nor case law.

Plaintiff is entitled to her actual, lost wages through trial. It was an abuse of discretion for the trial court not to award them to her. The trial court, as it did, need not award future damages and need not award a multiplier. However, in this case, the trial court failed to award actual past, lost wage damages, with no legal basis whatsoever to do so. Defendants failed to cite any case, nor evidence, to justify this action.

ATTORNEYS’ FEES

The trial court simply failed to determine the loadstar amount for attorneys’ fees. The trial court made reference to Defendants’ Counsel’s challenge to Plaintiff’s attorneys’ fees, but did not determine how many hours were reasonable and necessary in pursuing this matter. Defendants’ Counsel admits that he did not challenge Plaintiff’s hourly rate. (Defendants’ Reply Brief, at 14.) Thus, the only issue before the trial court was what was the number of hours, i.e., the loadstar, by which to multiply the hourly fee.

The trial court abandoned its responsibility in this regard by simply using a percentage of the judgment, as if in a personal injury case, as its sole basis for fees. Employment cases are very complex and vigorously defended. This Court and the

Minnesota and United States Supreme Courts have long-recognized that Congress and the State Legislature included attorney fees language in civil rights laws so that such litigation would be able to proceed.

In this case, despite winning the case, Plaintiff's Counsel received an amount for fees that caused the loss of tens of thousands of dollars in fees, resulting in significant, actual loss to the firm. Plaintiff's Counsel already shoulders the burden of receiving no compensation in cases that are lost. It is completely inconsistent with the MHRA to require a plaintiff's counsel to shoulder substantial losses on the cases that are won.

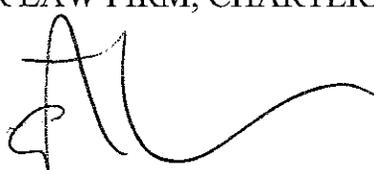
CONCLUSION

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

March 30, 2009

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