

APPELLATE COURT CASE NUMBER A11-2178
STATE OF MINNESOTA
IN COURT OF APPEALS

Jaime Rasmussen, Jennifer Moyer
and Kathe Reinhold,

Appellants,

v.

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

Respondents.

Respondents' Brief

Andrew & Bransky, P.A.
Thomas F. Andrew (MN 2628)
Jane C. Poole (MN 391069)
300 Lonsdale Building
302 West Superior Street
Duluth, Minnesota 55802
Phone: (218) 722-1764

Attorneys for Appellants

Johnson, Killen & Seiler, P.A.
Joseph J. Roby, Jr. (MN 9240X)
800 Wells Fargo Center
230 West Superior Street
Duluth, Minnesota 55802
Phone: (218) 722-6331

Attorneys for Respondents

Table of Contents

	Page
Table of Authorities	ii
Legal Issue	1
Statement of the Case	1
Statement of Facts	2
Standard of Review	10
Argument	11
The District Court did not clearly err in twice finding that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment.	
Conclusion	23
Certificate of Brief Length	25

Table of Authorities

	Page
Statutes	
Minn. Stat. ch. 363A	1
Minn. Stat. § 363A.03, subd. 13,	1, 11
Minn. Stat. § 363A.03, subd. 43	1, 11
Minn. Stat. § 363A.08, subd. 2(c)	1, 11
Minn. Stat. § 363A.33, subd. 1	11
Cases	
<i>Beach v. Yellow Freight Sys.</i> , 312 F.3d 391 (8 th Cir. 2002)	13, 14, 21
<i>Bersie v. Zycad Corp.</i> , 417 N.W.2d 288 (Minn. Ct. App. 1987), <i>rev. denied</i> , (Minn. May 5, 1988)	14
<i>Blue Water Corp., Inc. v. O'Toole</i> , 336 N.W.2d 279 (Minn. 1983)	13
<i>Bougie v. Sibley Manor, Inc.</i> , 504 N.W.2d 493 (Minn. Ct. App. 1993)	14
<i>Colenburg v. Starcon Int'l, Inc.</i> , 619 F.3d 986 (8 th Cir. 2010)	16
<i>Continental Cas. Co. v. Knowlton</i> , 232 N.W.2d 789 (Minn. 1975)	10
<i>Cummings v. Koehnen</i> , 568 N.W.2d 418 (Minn. 1997)	13, 14
<i>Fletcher v. St. Paul Pioneer Press</i> , 589 N.W.2d 96 (Minn. 1999)	10, 12
<i>Freyholtz v. Blackduck Sch. Dist. No. 32</i> , 613 N.W.2d 757 (Minn. 2000)	12
<i>Frieler v. Carlson Marketing Group, Inc.</i> , 751 N.W.2d 558 (Minn. 2008)	11, 13
<i>Gagliardi v. Ortho-Midwest, Inc.</i> , 733 N.W.2d 171 (Minn. Ct. App. 2007)	20
<i>Geist-Miller v. Mitchell</i> , 783 N.W.2d 197 (Minn. Ct. App. 2010)	1, 13, 16, 20, 21

<i>Goins. v. West Group</i> , 635 N.W.2d 717 (Minn. 2001)	1, 11, 12, 13, 15, 16
<i>Harris v. Forklift Sys., Inc.</i> , 501 U.S. 17 (1993)	13, 16, 19
<i>Hoyle v. Freightliner, LLC</i> , 650 F.3d 321 (4 th Cir. 2011)	1, 13
<i>Hoyt Prop., Inc. v. Prod. Resource Group, L.L.C.</i> , 736 N.W.2d 313 (Minn. 2007)	21
<i>Klink v. Ramsey County</i> , 397 N.W.2d 894 (Minn. Ct. App. 1986), <i>rev. denied</i> , (Minn. Feb. 13, 1987), <i>rev'd on other grounds</i> , <i>Cummings v. Koehnen</i> , 568 N.W.2d 418 (Minn. 1997)	14
<i>Nielsen v. City of St. Paul</i> , 88 N.W.2d 853 (Minn. 1958)	10
<i>Rosenfeld v. Rosenfeld</i> , 249 N.W.2d 168 (Minn. 1976)	22
<i>Sigurdson v. Isanti County</i> , 386 N.W.2d 715 (Minn. 1986)	1, 10, 22

Rules

Minn. R. Civ. P. 52.01	10, 12, 14, 17
------------------------	----------------

Legal Issue

Did the District Court clearly err in twice finding that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment?

(1) **How the issue was raised in the District Court:** As a factual element of the Employees' causes of action for workplace hostile environment sexual harassment under the Minnesota Human Rights Act.

(2) **Concise statement of District Court's ruling:** The alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment.

(3) **How the issue was subsequently preserved for appeal:** Embedded in, and necessary to, the judgment.

(4) **Most apposite cases, not to exceed four, and the most apposite constitutional and statutory provisions:**

Geist-Miller v. Mitchell, 783 N.W.2d 197 (Minn. Ct. App. 2010)

Goins. v. West Group, 635 N.W.2d 717 (Minn. 2001)

Hoyle v. Freightliner, LLC, 650 F.3d 321 (4th Cir. 2011)

Sigurdson v. Isanti County, 386 N.W.2d 715 (Minn. 1986)

Minn. Stat. §§ 363A.03, subd. 13, 363A.03, subd. 43, 363A.08, subd. 2(c)

Statement of the Case

This is a case of alleged workplace hostile environment sexual harassment under the Minnesota Human Rights Act, Minn. Stat. ch. 363A, ("MHRA"). The case was tried to the bench in Lake County District Court, Sixth Judicial District, the Honorable Michael J. Cuzzo presiding. The District Court found that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term,

condition, or privilege of employment. Add. 1. Appellants then moved the District Court for amended findings. But for two minor matters,¹ the District Court denied the motion, finding (again) that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment. Add. 25. Judgment for dismissal with prejudice was entered in favor of respondents. This appeal followed.

Statement of Facts

Respondents Two Harbors Fish Company and BWZ Enterprises, LLC, (the “Employers”), are small businesses located in Two Harbors. FF 2, 3, Add. 26. The former sells retail fish and seafood products and the latter operates a motel. *Id.* Respondent Brian W. Zapolski² owns both and works for both. *Id.* Appellants, (the “Employees”), also worked for both. FF 5, Add. 26.

The District Court found that Mr. Zapolski acted in an inappropriate manner in the workplace. Mr. Zapolski respectfully maintains his denial of any wrongdoing. But he understands that the outcome of this appeal does not depend on whether he did or did not act as alleged. The judgment must be affirmed not because Mr. Zapolski did anything wrong, but instead because even if he did (which he respectfully denies), the District

¹ First, the District Court clarified, with the consent of the Employers and Mr. Zapolski, that both respondent business entities employed the Employees; and, second, the District Court added what it characterized as an “unnecessary” finding that Ms. Moyer was a “moderately credible” witness. FF 5, 25, Add. 26, 33.

² Respondents have never agreed that Mr. Zapolski is a proper party to this case. He personally did not employ the Employees. Respondents moved the District Court to grant Mr. Zapolski summary judgment. The District Court denied the motion and the case proceeded to trial. Respondents prevailed at trial, thus, as the District Court noted, obviating concerns over Mr. Zapolski’s status as a party. Add. 42, 43.

Court did not clearly err in twice finding that the Employees did not prove *another* element of their causes of action. Therefore, there is no point in burdening this Statement of Facts with a point-by-point rebuttal of each alleged incident of inappropriate conduct.

In any event, whatever did or did not happen in the workplace, the Employees eventually quit. FF 13, 15, 25, 37, Add. 29, 30, 33, 36. They then sued, lost at trial, moved for amended findings, lost again, and now appeal.

* * * *

As mentioned above, the District Court twice found that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment. FF 15, 25, 37, Add. 30, 33, 36; Memorandum of Law Add. 48-49. Specifically with respect to Ms. Rasmussen, the District Court found:

Based on 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 under the Minnesota Human Rights Act. The alleged actions were not sufficiently severe or pervasive to reasonably affect the terms and conditions of Rasmussen's employment.

FF 15, Add. 30 (*italics added*). At a minimum, the District Court based these findings on the following:

- Ms. Rasmussen worked for the Employers for only 18 months, and none of the alleged inappropriate conduct took place during the first six months. FF 7, Add. 27. TR 15-16, 20, 51.
- Ms. Rasmussen “enjoyed her work at Lou’s Fish House and enjoyed waiting on the customers.” FF 7, 14, Add. 27, 30. TR 20, 60, 75.

- Mr. Zapolski often worked in a building (the smoker building) separate from the building in which Ms. Rasmussen worked (the retail store), or in the receiving room, or in his office. TR 49, 50.
- Mr. Zapolski never worked in the motel building when Ms. Rasmussen worked there. TR 49, 50.
- The alleged verbal inappropriate conduct only made Ms. Rasmussen feel “uncomfortable.” FF 8, 8a, 8b, 8f, 9, 9c, 10, 12, Add. 27, 28, 29. TR 20 (“embarrassing”), 23 (“embarrassed and ashamed”), 28 (“ashamed . . . humiliated, embarrassed”).
- Certain of the alleged verbal inappropriate conduct was not directed at Ms. Rasmussen. FF 8d, Add. 28. TR 31, 56, 194-96.
- The alleged verbal inappropriate conduct occurred in the presence of other employees, including male employees, was used throughout the business, and was not directed solely at female employees. FF 8h, Add. 28. TR 28, 29, 31, 53, 56, 137.
- Ms. Rasmussen’s testimony that she objected to certain alleged verbal comments “was not credible.” FF 12b, Add. 29.
- “[H]er testimony that she recommended Jennifer Moyer apply for a position with defendants in the summer of 2009 calls into question the severity and frequency of the allegedly offensive comments and behaviors as perceived by Rasmussen. It is hard to reconcile this recommendation with Rasmussen’s testimony that she had started to take notes regarding Zapolski’s behavior in

early 2009, months before Moyer started working for defendants.” FF 14, Add. 30. TR 35, 88 (Ms. Moyer confirming that Ms. Rasmussen recommended applying for work with the Employers).

- “The severity and frequency of Zapolski’s inappropriate comments and behavior are further questioned by Rasmussen’s attendance at non-required holiday parties put on by Zapolski, by the infrequency of alleged physical contact (plaintiff alleges four occasions over 1 ½ years), and by the absence of allegations of inappropriate behavior on the part of Zapolski on an overnight trip to North Dakota taken by the two for business purposes. An occasion such as the trip would have seemingly invited Zapolski to engage in the type of behaviors alleged by plaintiffs, but Rasmussen alleges no inappropriate conduct while alone at night or while driving alone with Zapolski.” FF 14, Add. 30. TR 20, 32, 33, 52-54, 55, 57, 59.
- Despite the alleged inappropriate conduct, Ms. Rasmussen made little or no efforts to find work elsewhere. FF 15, Add. 30. TR 58-59.
- “Rasmussen sought no counseling as a result of the alleged behavior of Zapolski, despite alleging fear, weight gain, anxiety, etc.” FF 14, Add. 30. TR 59, 74. “I didn’t feel I needed to.” TR 74.
- “Plaintiff testified that Zapolski never conditioned her employment on participating in any sexual banter or performing any sexual acts.” FF 14, Add. 30. TR 54, 56.

- “She testified that she never lost a raise, promotion, or hours for any failure to participate in talk of a sexual nature.” FF 14, Add. 30. TR 55, 56.
- “She further testified that Zapolski never requested sex with her.” FF 14, Add. 30. TR 56.
- Nor did Mr. Zapolski ever threaten Ms. Rasmussen for not having sex with him, for not allowing him to touch her, or for not conversing with him about sex. TR 70.
- “She testified that she suffered no emotional distress other than a generalized statement of trusting older men less.” FF 14, Add. 30. TR 44.

Specifically with respect to Ms. Moyer, the District Court found:

Based on 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 under the Minnesota Human Rights Act. The alleged actions were not sufficiently severe or pervasive to reasonably affect the terms and conditions of Moyer’s employment.

FF 25, Add. 33 (*italics added*). At a minimum, the District Court based these findings on the following:

- Ms. Moyer worked for the Employers for only four months. FF 16, Add. 31. TR 86, 90, 101.
- Ms. Moyer worked part-time, evenings and weekends, and for most of her shift she was alone. TR 89, 114, 115.
- She liked working for the Employers. TR 108.

- The alleged verbal inappropriate conduct only made Ms. Moyer feel “uncomfortable.” FF 17, Add. 31. TR 92 (“disgust”), TR 95, 98 (“uncomfortable”).
- Ms. Moyer laughed at some of the alleged inappropriate comments. TR 114.
- Ms. Moyer “thinks” Mr. Zapolski might have patted her buttocks once, and admits even that incident might have been accidental given the confined space in that part of the store. FF 18, Add. 32. TR 114.
- After Ms. Moyer refused to introduce Mr. Zapolski to her sister, he stopped inquiring about it. FF 20, Add. 22. TR 120.
- “Moyer never told Zapolski his comments or actions were offensive to her.” FF 21, Add. 32. TR 117.
- “Moyer testified she never suffered adversely in her employment. She never lost pay or a promotion while employed by defendants.” FF 23, Add. 32. TR 117.
- Mr. Zapolski did not offer Ms. Moyer more hours or continued employment if she would arrange dates for him with her friends. TR 116.
- “She was never asked to perform sexual acts or engage in sexual banter.” FF 23, Add. 32. TR 116, 117.
- “Moyer’s decision to terminate her employment was precipitated, at least in part, by Zapolski’s discipline regarding Moyer’s use of her cell phone at work.” FF 25, Add. 33. TR 101, 102, 118.

- As for alleged distress, Ms. Moyer mentioned only a vague discomfort around older men. TR 111.
- She sought no treatment or counseling. TR 112.

Specifically with respect to Ms. Reinhold, the District Court found:

Based on 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 under the Minnesota Human Rights Act. The alleged actions were not sufficiently severe or pervasive to reasonably affect the terms and conditions of Reinhold's employment.

FF 37, Add. 36 (italics added). At a minimum, the District Court based these findings on the following:

- Ms. Reinhold worked for the Employers for only five and one-half days. FF 27, Add. 34. TR 154.
- During a good deal of that time, Mr. Zapolski was away from the workplace deer hunting. TR 161.
- “[S]he enjoyed the work.” FF 27, Add. 34. TR 126, 139.
- When Mr. Zapolski warned Ms. Reinhold that people sometimes use vulgar language in the workplace, Ms. Reinhold responded, “I swear sometimes too.” TR 152.
- “Reinhold admitted that she never asked Zapolski to stop talking about sex but only stated that she was modest and preferred not to talk that way.” FF 28g, Add. 34. TR 128, 160.
- Ms. Reinhold accepted a dinner invitation from Mr. Zapolski if her sister could attend as well and each paid their own expense. FF 30a, Add. 35. TR 132.

- “Reinhold admitted that Zapolski expressed no anger when she ignored his comments.” FF 30b, Add. 35. TR 162.
- The alleged verbal inappropriate conduct only made Ms. Reinhold feel “uncomfortable.” FF 31, Add. 36. TR 129, 133.
- A number of the alleged comments “were not uniquely directed to Reinhold or to women employees of defendants but were part of the coarse and boorish talk fostered by Zapolski throughout the workplace.” FF 31, Add. 36. TR 137.
- “Plaintiff Reinhold testified that her employment was never conditioned on participating in sexual banter or on performing sexual acts.” FF 33, Add. 36. TR 159.
- She did not suffer an alteration of hours, loss of promotion, or loss of pay. TR 159.
- “Plaintiff Reinhold also testified she had no lasting psychological effects from her five days of employment. She sought no treatment or counseling.” FF 36, Add. 36. TR 146.

Regarding all three Employees, the District Court found:

- Co-worker James “Olson credibly testified that coarse talk was ‘normal’ within the work environment.” FF 40, Add. 37. TR 183, 185, 186.
- Co-worker Seth “Palmer’s testimony confirms that Zapolski’s coarse talk was throughout the workplace.” FF 43, Add. 38. TR 194-96, 198.

- “Much of the conduct of which plaintiffs complain was endured by males and females alike in the work environment.” Memorandum of Law, Add. 45. TR 117, 183, 185, 186, 194-96, 198.

Standard of Review

The District Court twice found that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment. FF 15, 25, 37, Add. 30, 33, 36; Memorandum of Law Add. 48-49. The Employees challenge these findings. Appellants’ Brief 33, 36, 38. Therefore, the clearly erroneous standard of review governs this appeal under Minn. R. Civ. P. 52.01:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

In *Sigurdson v. Isanti County*, 386 N.W.2d 715, 721 (Minn. 1986), the Supreme Court expanded on Rule 52.01’s mention of witness credibility, with particular reference to these kinds of cases:

Employment discrimination cases often involve intricate factual issues in which only the trial court, with its opportunity to observe the witnesses firsthand, can meaningfully assess the weight and credibility of the evidence. We have traditionally accorded great deference to the trial court in making findings of fact . . . An appellate court cannot judge the credibility of a witness or the weight, if any, to be given to testimony. [citations omitted]

See also Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101, 102 (Minn. 1999) (another MHRA case; findings are “clearly erroneous only if the reviewing court is ‘left with the definite and firm conviction that a mistake has been made.’” [citation omitted]); *Continental Cas. Co. v. Knowlton*, 232 N.W.2d 789, 794 (Minn. 1975) (must view the evidence “in the light most favorable to the findings.”); *Nielsen v. City of St.*

Paul, 88 N.W.2d 853, 864 (Minn. 1958) (findings “will not be reversed on appeal unless they are manifestly and palpably contrary to the evidence”).³

Argument

The District Court did not clearly err in twice finding that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment.

The MHRA makes it an unfair employment practice for an employer to create or tolerate a sexually hostile work environment. Minn. Stat. §§ 363A.03, subd. 13, 363A.03, subd. 43, 363A.08, subd. 2(c), 363A.33, subd. 1. In *Goins. v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001), the Supreme Court listed the elements of the cause of action:

To prevail on a hostile work environment claim, a plaintiff must establish that (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on membership in a protected group; (4) the harassment affected a term, condition or privilege of her employment; and (5) the employer knew of or should have known of the harassment and failed to take appropriate remedial action.

See also Frieler v. Carlson Marketing Group, Inc., 751 N.W.2d 558, 751, n. 11 (Minn. 2008).

The Employees apparently believe that element (2) – incidents of inappropriate conduct – is at issue in this appeal. Their brief devotes considerable space to duplicative enumerations of the alleged incidents. It appears that the Employees are attempting to shock or disgust this Court into ruling that, had this Court been the finder of fact, it would

³ Because of this onerous standard of review, Mr. Zapolski does not challenge the District Court’s findings that led to dismissal of his defamation counterclaim. Add. 42.

have found in favor of the Employees. This Court, however, is well aware of its limited role under Rule 52.01's standard of review. "An appellate court may not reverse a trial court due to mere disagreement with its findings." *Fletcher*, 589 N.W.2d at 102. Even if "different inferences can justifiably be drawn from the same evidence in the case, the inference drawn by the factfinder will not be disturbed on appeal." *Freyholtz v. Blackduck Sch. Dist. No. 32*, 613 N.W.2d 757, 758 (Minn. 2000).

In any event, the District Court's findings obviated any need for this Court to review element (2). Speaking of "the conduct plaintiff complains of," the District Court, for analytical purposes, made the assumption that the Employees' allegations about the alleged inappropriate conduct were "totally true."⁴ FF 15, 25, 37, Add. 30, 33, 36. But just because, for analytical purposes, the District Court gave the Employees the benefit of the doubt on element (2), or even if every alleged incident of inappropriate conduct actually occurred as claimed by the Employees, it does not follow that the Employees must win the case, as their brief demands. To win the case, the Employees had four other elements to prove.

When the District Court examined those other elements, it focused on element (4) in the Supreme Court's list – that to prevail a plaintiff must prove that "(4) the harassment affected a term, condition or privilege of her employment" *Goins*, 635 N.W.2d at 725. This is the element on which the District Court twice found against the Employees. FF 15, 25, 37, Add. 30, 33, 36; Memorandum of Law, Add. 48-49. The District Court's findings on element (4), in and of themselves, ended the case in favor of

⁴ This is an additional reason why there is no point in burdening this brief's Statement of Facts with a point-by-point rebuttal of each alleged incident of inappropriate conduct.

the Employers and Mr. Zapolski because “[f]ailure of proof on any one element defeats recovery.” *Blue Water Corp., Inc. v. O’Toole*, 336 N.W.2d 279, 282 (Minn. 1983). Again, it doesn’t make any difference whether the Employees proved element (2).

Thus, the issue on appeal, as stated earlier, is whether the District Court clearly erred in twice finding on element (4) that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment.

To see why this issue must be resolved in favor of the Employers and Mr. Zapolski, observe, first, that under element (4) “the harassment affect[s] a term, condition or privilege of her employment” only if it is severe or pervasive:

Even if a plaintiff demonstrates discriminatory harassment, such conduct is not actionable unless it is “so severe or pervasive” as to “alter the conditions of the [plaintiff’s] employment and create an abusive working environment.” [citations omitted]

Goins, 635 N.W.2d at 725. See also *Frieler*, 751 N.W.2d at 751, n. 11; *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 202-03 (Minn. Ct. App. 2010); *Harris v. Forklift Sys., Inc.*, 501 U.S. 17, 21 (1993) (workplace must be “permeated with ‘discriminatory intimidation, ridicule, and insult.’” (citation omitted)). In *Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997), after listing the elements of a sexual harassment claim, including the “sufficiently pervasive” requirement, the Supreme Court said, “This is a high threshold.”

Observe, second, that “the question of whether harassment was sufficiently severe or pervasive is ‘quintessentially a question of fact.’” *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 333 (4th Cir. 2011). See also *Beach v. Yellow Freight Sys.*, 312 F.3d 391, 397

(8th Cir. 2002) (MHRA case). This quintessential question of fact brings this appeal squarely within Rule 52.01's clearly erroneous standard of review, and there is plenty of on-point precedent to that effect. *See e.g. Bougie v. Sibley Manor, Inc.*, 504 N.W.2d 493, 499 (Minn. Ct. App. 1993) (severity and pervasiveness findings not clearly erroneous); *Bersie v. Zycad Corp.*, 417 N.W.2d 288, 291-92 (Minn. Ct. App. 1987) (same), *rev. denied*, (Minn. May 5, 1988); *Klink v. Ramsey County*, 397 N.W.2d 894, 902 (Minn. Ct. App. 1986) (same), *rev. denied*, (Minn. Feb. 13, 1987), *rev'd on other grounds*, *Cummings v. Koehnen*, 568 N.W.2d at 420, n. 2; *Beach*, 312 F.3d at 397 (MHRA case; same).

On page 17 of their brief, the Employees concede that they “accept the court’s Findings of Fact.” And yet, on pages 33, 36, and 38 of their brief the Employees challenge head-on the District Court’s findings as to severity and pervasiveness. They say, “By any reasonable standard, the conduct was severe. . . . By any reasonable standard, this conduct was pervasive.” Appellants’ Brief 33. *See also* Appellants’ Brief 36, 38.

If this Court takes the Employees at their word when they say they accept the District Court’s findings, this Court need not analyze this appeal any further. Because severity or pervasiveness is essential to proving element (4) of the Employees’ causes of action; and because whether inappropriate conduct was sufficiently severe or pervasive is quintessentially a question of fact; and because the District Court twice found those facts against the Employees; and because the Employees accept the District Court’s findings according to their brief, this appeal is over. The District Court’s judgment must be affirmed.

But if the Employees are allowed to proceed with their head-on challenge to the District Court's findings as to severity and pervasiveness, the same result follows. The record here is replete with more than enough evidence showing that the District Court did not clearly err in twice finding that, regarding element (4), the alleged inappropriate conduct was not so severe or pervasive so as to affect a term, condition or privilege of employment.

According to *Goins*:

In ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at the totality of the circumstances, including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”
[citations omitted]

Goins, 635 N.W.2d at 725. The District Court correctly applied the *Goins* totality analysis (twice):

Defendant’s conduct must be severe or pervasive and create an abusive working environment. [citation omitted] The plaintiffs must clear the high threshold of actionable harm by showing that the workplace is permeated with discriminatory intimidation, ridicule, and insult. [citation omitted] 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. Moyer and Reinhold admitted they never complained of Zapolski’s behavior. Rasmussen’s recommendation that Moyer apply for work with defendants is inconsistent with her rigid testimony that the working conditions were humiliating.

Memorandum of Law, Add. 48-49 (underlining in original).

To the District Court’s summation can be added: The alleged inappropriate conduct was limited to alleged verbal comments and isolated alleged touching incidents, involved no coercion or threats, often was not directed at the Employees, was not

physically threatening, and often amounted to no more than alleged offensive utterances. None of the Employees experienced loss or diminution of wages, raises, promotions, hours, or other benefits of employment. There was no evidence that the alleged inappropriate conduct interfered with the Employee's work performance. All three testified that they liked their jobs. And, the Employees' resignations were prompted only in part by the alleged inappropriate conduct. FF 15, 25, 37, Add. 30, 33 36.

In sum, far from suffering from clear error, the District Court's findings as to severity and pervasiveness are well supported.

Further addressing element (4) in the *Goins* case, the Supreme Court stated that a work environment is not offensive unless the alleged victim perceives it to be so:

The objectionable environment "must be both objectively and *subjectively* offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so." [citations omitted]

Goins, 635 N.W.2d at 725 (italics added). See also *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 203 (Minn. Ct. App. 2010); *Colenburg v. Starcon Int'l, Inc.*, 619 F.3d 986, 994 (8th Cir. 2010) (MHRA case). In short, "[I]f the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment." *Harris*, 510 U.S. at 21-22.

The best way to tell if an alleged victim subjectively perceived an offensive work environment is to watch him or her talk about it. The person's physical and emotional demeanor traits and behaviors while recounting the events may very well say more than the words spoken. The District Court had the opportunity to watch the Employees testify about what allegedly happened in the workplace and how it allegedly affected them. Their demeanor easily could have caused the District Court to find that the Employees

did not subjectively perceive an offensive work environment. For example, with respect to Ms. Rasmussen, the District Court found that some of her testimony “calls into question the severity and frequency of the allegedly offensive comments and behaviors *as perceived by Rasmussen.*” FF 14, Add. 30 (italics added). Because none of the Employees’ testimonial demeanor traits and behaviors appear in the record, this Court must give “due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01

Another way to tell if an alleged victim subjectively perceived an offensive work environment is to observe whether the person has a tendency to exaggerate favorable facts or to downplay unfavorable facts. If such a tendency is seen, a fact finder reasonably can conclude that that alleged victim is over-stating his or her subjective perception of the work environment.

Here, the District Court found that Ms. Rasmussen’s testimony was “substantially,” but not necessarily totally, credible, FF 14, Add. 30; that Ms. Moyer’s testimony was only “moderately” credible, FF 25, Add. 33; and that Ms. Reinhold’s testimony was “substantially,” but not necessarily totally, credible, FF 35, Add. 36.

Ms. Rasmussen, on the one hand, claimed to have been greatly bothered by the alleged inappropriate conduct. On the other hand, she was not bothered enough to discourage Ms. Moyer from applying for work with the Employer, and, in fact, did so. FF 14, Add. 30; TR 35, 88. As for Ms. Moyer, she admitted that Mr. Zapolski “ranted” at her for texting while on duty, which led to an argument and Ms. Moyer crying. TR 101, 102. She quit the same day, TR 103, and now blames an offensive work environment, as though the dust-up over texting had nothing to do with it. FF 25, Add.

33. Ms. Reinhold was shown at trial to have exaggerated the length of time she worked for the Employer, to have understated her replacement earned income in her interrogatory answers, and to have lied on her employment application about a criminal conviction for medical assistance fraud. TR 154-59; FF 34, 35, Add. 36.

With these testimonial defects, the District Court, as the finder of fact, easily could have chosen to discount the Employee's claims of a subjectively offensive work environment while, at the same time, giving credence to the Employees' testimony about the alleged inappropriate conduct itself. This shows again that even if the Employees convinced the District Court that they proved element (2), they did not convince the District Court that they proved element (4).

Without a subjective perception by the Employees of an offensive work environment, the alleged incidents of inappropriate conduct were, by definition, not severe or pervasive as to them, thus resulting in a failure of proof on element (4). And because these findings by the District Court were based substantially on witness credibility, they are not clearly erroneous and this Court cannot disturb them.

* * * *

Turning now to arguments made in the Employees' brief:

The Employees first argue that the District Court erroneously required them to prove psychological harm and erroneously gave significance to the absence of any treatment or counseling. Not so. The District Court correctly cited the lack of psychological harm, treatment, and counseling in support of its findings that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to adversely affect a

term, condition, or privilege of employment. The evidence (or lack of it) is highly probative for that purpose.

Imagine for a moment that the Employees *did* produce convincing evidence of psychological harm, treatment, and counseling. If so, the Employees would be justified in using the evidence to show how severe or pervasive the alleged inappropriate conduct was, and to prove their subjective perceptions of the work environment. But when they are unable to produce such evidence, the opposite inferences are also fair game. As the United State Supreme Court said, “The effect on the employee’s psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive.” *Harris*, 510 U.S. at 23.

Second, the Employees argue that the District Court erred in holding that the Employees had to prove that the alleged inappropriate conduct was based on sex. This is a puzzling argument. In its memorandum of law, the District Court stated:

Was the Harassment Based on Sex? . . . To the extent that sexual banter by a male made in the presence of females has a disparate impact on the females and may create a sexually charged atmosphere, the Court finds that the majority of the sexual comments are based on sex.

Add. 45-46 (underlining in original). Thus, whether or not the Employees were required by law to prove the “based on sex” criterion, the District Court found that they did.

This second argument also misses the mark for another reason. Even if the District Court erred on this point, the alleged error doesn’t diminish the District Court’s finding on element (4) of the Employees’ causes of action – that the alleged inappropriate conduct was not so severe or pervasive so as to affect a term, condition or privilege of employment. The finding on element (4) disposes of the causes of action in and of itself.

The second argument is also wrong for the same reason the first argument is wrong – the Employees’ incorrect characterization of why the District Court cited certain evidence in its findings. The District Court cited Mr. Zapolski’s alleged inappropriate conduct towards men and women alike not to show that it was not based on sex, but rather to show that the alleged inappropriate conduct was not sufficiently severe or pervasive so as to create an offensive work environment. Surely, evidence of who is on the receiving end of the alleged inappropriate conduct is probative for that purpose.

Third, the Employees argue that the District Court erred in holding that they failed to establish their causes of action. The Employer’s and Mr. Zapolski’s responses are set forth above, with particular reference to the District Court’s finding that the Employees failed to prove element (4) of their causes of action.

The Employers and Mr. Zapolski further observe that two of the cases discussed by the Employees were summary judgment cases. *Geist-Miller v. Mitchell*, 783 N.W.2d 197 (Minn. Ct. App. 2010); *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171 (Minn. Ct. App. 2007). In an appeal following a trial on the merits, governed by the clearly erroneous standard of review, the outcome of a summary judgment motion in some other case affords no guidance. In *Gagliardi*, this Court made the point when it partially reversed a summary judgment and remanded that part of the case because “resolution of the claim depends on factual determinations.” *Gagliardi*, 733 N.W.2d at 183 (italics added).

In discussing *Geist-Miller*, the Employees refer to the *Geist-Miller* district court’s evaluation of the plaintiff’s “veracity” and “lack of credibility.” Appellants’ Brief. 30-31. The Employees then argue that they had more credibility than the plaintiff in *Geist-*

Miller and that, therefore, the District Court here should not have cited *Geist-Miller*. This is another puzzling argument. In a summary judgment proceeding district courts are forbidden from “weighing the evidence and assessing credibility.” *Hoyt Prop., Inc. v. Prod. Resource Group, L.L.C.*, 736 N.W.2d 313, 320 (Minn. 2007). Thus, it makes no sense for the Employees to compare their trial credibility to the undetermined, indeed unknown, credibility of the summary judgment plaintiff in *Geist-Miller*.

The other case discussed by the Employees, *Beach v. Yellow Freight Sys., supra*, actually supports the position of the Employers and Mr. Zapolski and is cited earlier in this brief. In *Beach*, after a bench trial under the MHRA the Eighth Circuit Court of Appeals held that the federal district court did not clearly err in making its findings as to severity and pervasiveness. *Beach* is yet another case that applied the clearly erroneous standard of review, giving deference to the lower court’s severity and pervasiveness findings.

For their fourth argument, the Employees accuse the District Court of making insufficiently detailed findings. The Employees say that by not mentioning certain testimony about alleged inappropriate conduct the District Court either ignored the testimony or gave no significance to it. Actually, the opposite happened. The District Court made it clear that the alleged inappropriate conduct the Employees complained of, “even if totally true,” was not, as a matter of fact, sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment. FF 15, 25, 37 at Add. 30, 33, 36; Memorandum of Law Add. 48-49. Thus, the District Court gave the Employees the benefit of the doubt on every alleged incident of inappropriate conduct, whether or not the specific incident was listed in the findings. And, remember, the District Court did

so twice, once in the original findings, Add. 1, and again in the findings issued in response to the post-trial motion to amend the findings, Add. 25.

Most importantly, the District Court's findings are more than sufficient and, indeed, are a model of how comprehensive findings should look. The Court went beyond what is required in a bench trial. The Supreme Court has said:

We do not hold that the trial court must make a specific finding on each of the statutory factors, nor do we hold that each factor must be specifically addressed by the trial court. It is sufficient if the findings as a whole reflect that the trial court has taken the statutory factors into consideration, in so far as they are relevant, in reaching its decision.

Rosenfeld v. Rosenfeld, 249 N.W.2d 168, 171-72 (Minn. 1976). In short, just because the District Court *could* make a finding does not mean that it *must* make a finding, if the findings already made adequately support the outcome.

The Employees suggest that this Court take guidance from *Sigurdson* when evaluating the sufficiency of the District Court's findings. The Employers and Mr. Zapolski join in that suggestion. In *Sigurdson*, a sex discrimination case, the district court failed to follow, and did not even mention, the governing *McDonnell-Douglas* analytical framework. As a result, findings were missing or off-point, making appellate review difficult:

It is simply not clear from the trial court's findings and conclusions that the court correctly applied the law regarding a plaintiff's prima facie case and applied the appropriate burdens of persuasion and production. As this case illustrates, lack of explicit application of the *McDonnell Douglas* analysis can present significant problems on review.

Sigurdson, 386 N.W.2d at 721. By contrast, the District Court here explicitly cited and applied the correct case law analysis (*Goins* and related cases) and made findings that match the elements set forth in the case law.

For their fifth argument the Employees contend that the totality of Mr. Zapolski's alleged inappropriate conduct supports a holding that they were subjected to sex harassment. This contention is based on the surprising assertion that "There is no dispute about the underlying facts of this case." Appellants' Brief 45. The underlying facts most assuredly include the fact of whether the alleged inappropriate conduct was or was not sufficiently severe or pervasive so as to adversely affect a term, condition, or privilege of employment, *i.e.*, element (4). The Employees contend the alleged inappropriate conduct *was* sufficiently severe and pervasive. Appellants' Brief 33, 36, 38. The Employers and Mr. Zapolski contend it was *not*. The District Court twice found those disputed facts in favor of the Employers and Mr. Zapolski, disposing of this fifth argument.

Sixth, the Employees argue that Mr. Zapolski should be held individually liable under an aiding and abetting theory. This Court will not need to reach this issue because the Employees, as twice found by the District Court, failed to prove element (4) of their causes of action, thus mooted any inquiry into which of the respondents should be liable.

Conclusion

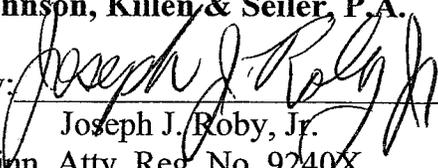
The record must be viewed in the light most favorable to the District Court's findings, the District Court's findings must be given great deference, and the District Court must be given due regard for its opportunity to see, hear, and judge the credibility of the witnesses. Therefore, it simply cannot be said that the District Court clearly erred in twice making its severity and pervasiveness findings, or that one is left with a definite and firm conviction that a mistake has been made, or that the District Court's severity and pervasiveness findings are manifestly and palpably contrary to the evidence.

The judgment of the District Court must be affirmed.

Respectfully submitted,

Dated: February 8, 2012

Johnson, Killen & Seiler, P.A.

By: 

Joseph J. Roby, Jr.

Minn. Atty. Reg. No. 9240X

800 Wells Fargo Center

230 West Superior Street

Duluth, Minnesota 55802

(218) 722-6331

jroby@duluthlaw.com

Attorneys for Respondents

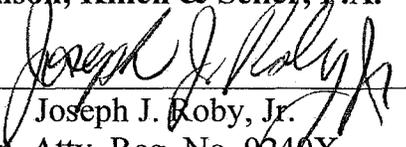
Certificate of Brief Length

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3, for a brief produced with proportional font. The length of this brief (exclusive of the Table of Contents and the Table of Authorities) is 6246 words. This brief was prepared using Microsoft Office Word 2003.

Respectfully submitted,

Dated: February 8, 2012

Johnson, Killen & Seiler, P.A.

By: 

Joseph J. Roby, Jr.

Minn. Atty. Reg. No. 9240X

800 Wells Fargo Center

230 West Superior Street

Duluth, Minnesota 55802

(218) 722-6331

jroby@duluthlaw.com

Attorneys for Respondents