

CASE NO. A11-2178

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Jaime Rasmussen, Jennifer Moyer
and Kathe Reinhold,

Appellants,

vs.

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

Respondents.

APPELLANTS' BRIEF AND ADDENDUM

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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

1. **Did the district court err in holding that Zapolski's conduct in the workplace, as set forth in its Findings of Fact, did not have the purpose or effect of substantially interfering with the Appellants' employment or create a hostile or offensive employment environment?**

District Court Judge Cuzzo in his Amended Findings of Fact, Conclusions of Law, Order for Judgment and Decree dated October 5, 2011 ("Amended Findings"), dismissed with prejudice each Appellant's claim of harassment against Respondents stating each Appellant failed to prove they were subject to harassment. A. Add. p. 41, 42; Order ¶¶ 2, 3 and 4.

Most Apposite Cases

Munro Holding, LLC v. Cook, 695 N.W.2d 379 (Minn. App. 2005)
Gillson v. State Dept. of Natural Res., 492 NW.2d 835 (Minn. App. 1992)
Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997)
Gagliardi v. Ortho-Midwest, Inc., 733 N.W.2d 171 (Minn. App. 2007)

2. **Did the district court err by failing to make detailed and specific findings that would enable meaningful review on appeal?**

District Court Judge Cuzzo in his Amended Findings refused to add to his Findings any additional statements and acts of Zapolski that would establish that all three Appellants were subject to harassment although requested to do so in Appellants' Motion for Amended Findings, stating in his accompanying Memorandum that "enough detail was provided to explain to the parties the basis of the Court's original opinion." A. Add. p. 43.

Most Apposite Cases

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

3. **If this Court finds that the Appellants have proven that they were sexually harassed by Zapolski, should Zapolski be held individually liable for aiding and abetting in the sexual harassment of the Appellants pursuant to Minn. Stat. § 383A.14?**

District Court Judge Sandvik denied Respondents' Motion to Dismiss the claims against Zapolski as an individual and held he was liable for aiding and abetting in the

sexual harassment of the Appellants. District Court Judge Cuzzo in his original Order did not decide this issue because he held Appellants failed to prove they were the subject of harassment. A. Add. p. 17. Although Appellants in their Memorandum in Support of Motion to Amend requested that Judge Cuzzo rule on this issue so it could be reviewed on appeal, Judge Cuzzo again held Zapolski wasn't individually liable because Appellants had failed to prove they were the subject of harassment. A. Add. p. 42; Order ¶ 5.

Most Apposite Cases

Citizens United v. Fed. Election Comm'n., 130 S. Ct. 876 (2010)
Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985)

STATEMENT OF THE CASE

The Appellants claim that Brian Zapolski, the sole owner of two business entities that employed them, engaged in conduct during their employment that constituted sexual harassment by creating a hostile work environment as defined in the Minnesota Human Rights Act (“MHRA”), Minn. Stat. § 363A.03, subd. 43. Zapolski's actions created an intimidating, hostile, and offensive employment environment that had the purpose and effect of substantially interfering with the employment of each Appellant. Amended Complaint, A. App. p. 1-7.

The case was originally assigned to the Honorable Kenneth A. Sandvik. Based on Affidavits by each of the Appellants, which formed the basis for their testimony at trial, Judge Sandvik issued an Order on September 14, 2010, granting Appellants’ Motion to Amend their Amended Complaint and allowing each Appellant to add a claim for punitive damages. A. App. p. 30-36. On November 4, 2010, Judge Sandvik denied Respondents’ Motion for Summary Judgment which sought to dismiss Zapolski as an individual defendant. Judge Sandvik retired on January 1, 2011, and the Honorable Michael J. Cuzzo was assigned to the case. A court trial was held on February 16 and 17, 2011.

The district court entered its Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree on May 25, 2011. A. Add. p. 1-18¹ On June 16,

¹ This document was mistakenly mislabeled as “Plaintiffs’ Proposed Findings of Fact,

2011, Appellants filed a Motion to Amend and Supplement the Findings of Fact, Conclusions of Law and Judgment. A. App. p. 53-69. Judge Cuzzo issued an Amended Order on October 5, 2011. On November 30, 2011, the Appellants filed their Notice of Appeal. A. App. p. 92.

Conclusions of Law, Order for Judgment and Judgment and Decree.”

STATEMENT OF FACTS

Introduction

The Appellants have joined in this action to pursue their claims against the Respondents pursuant to the Minnesota Rules of Civil Procedure, Rule 20.01. Because each Appellant asserts a right to relief arising out of the same series of occurrences and there are questions of fact and law common to all, they are permitted to join their claims in one action. Rule 20.01 provides that “[j]udgment may be given for one or more of the Plaintiffs according to their respective rights to relief. . .” Therefore, each Appellant’s sexual harassment claim must be judged separately.

Facts Common to all Three Claims

Two Harbors Fish Co., d/b/a Lou’s Fish House, is a Minnesota corporation that sells retail products, including smoked fish. BWZ Enterprises, LLC is a Minnesota Limited Liability Company that holds real estate, including the motel connected to Lou’s Fish House. Both companies are owned solely by Zapolski. A. Add. p. 26; Amended Finding of Fact No. 2 and 3 (hereinafter “FF No.”).

Two Harbors Fish Co. and BWZ Enterprises are employers under the MHRA. Appellants’ paychecks came from Two Harbors Fish Co., but all Appellants performed services for both Two Harbors Fish Co. and BWZ Enterprises, so both Two Harbors Fish Co. and BWZ Enterprises were Appellants’ employers. A. Add. p. 26; FF No. 5.

Jaime Rasmussen

Jaime Rasmussen and her husband Erik have a 13-year-old son . A. Add. p. 27; FF No. 6; Transcript p. 14, line 1-12 (hereinafter “Tr. p. __ l. __”). Rasmussen worked at Lou’s Fish House from September 2008 until March 15, 2010. Her job duties included cleaning motel rooms, doing laundry for the motel, stocking and selling smoked fish, making brine, splitting wood for smoking, and eventually doing office work, including filing and payroll. She enjoyed her work and enjoyed waiting on customers. A. Add. p. 27; FF No. 7; Tr. p. 15, l. 24-25; p. 16, l. 6, 7, 22-25; p. 17, l. 1-2.

In early 2009, Zapolski’s conversation in the workplace began to include comments and conduct of a sexual nature, which created an uncomfortable work environment for Rasmussen. A. Add. p. 27; FF No. 8; Tr. p. 20, l. 16-23. The district court found this included the following communications and conduct:

1. From early 2009 until she quit, Zapolski frequently would ask Rasmussen what her sexual position preferences were. A. Add. p. 27; FF No. 8; Tr. p. 20, l. 23-25, p. 21, l. 1-6.
2. From early 2009 until she quit, Zapolski would tell her his favorite sexual positions and would describe his sexual dreams. He was very explicit in these descriptions, including telling her he would wake up with an erection. A. Add. p. 27; FF No. 8(b).
3. Starting in early 2009, Zapolski would make coarse and inappropriate comments to her regarding customers, including comments about the breasts and posteriors of female customers. A. Add. p. 28; FF No. 8(c).
4. While Rasmussen worked for Respondents, Zapolski referred to females using the vulgar and derogatory slang “c***s” in her presence. A. Add. p. 28; FF No. 8(d).

5. Starting in early 2009 and until she quit, Zapolski talked in her presence about “blow jobs,” “how good it feels to orgasm,” “pussy,” “g-spot,” “clitoris,” and “getting off.” A. Add. p. 28; FF No. 8(e).
6. In 2009, Zapolski touched her posterior with his hands on two occasions. A. Add. p. 28; FF No. 9(a).
7. On November 10, 2009, Zapolski grabbed her arms allegedly to feel her muscles and put his hand on her shoulders to tell her how strong she was and what a great job she was doing. A. Add. p. 29; FF No. 9(b).
8. In July 2009, Zapolski showed nude photos in a *Playboy* magazine to employees James Olson and Jennifer Moyer and asked them if the girl in the photos looked like Rasmussen. He also showed the nude photos to Rasmussen. A. Add. p. 4; FF No. 10; Tr. p. 23, l. 22-25, p. 24, l. 1-25, p. 25, l. 1-3.
9. Zapolski also discussed a pornographic DVD at work entitled *Squirters 2* and suggested that James Olson and/or Rasmussen take it home and view it and report back to him with an explanation of their observations. A. Add. p. 29; FF No. 11; Tr. p. 25, l. 8-25.
10. Zapolski called Rasmussen names that would imply she was his girlfriend. For example, starting in July 2009, Zapolski would occasionally call her “his girlfriend” to other employees. Starting in 2009, Zapolski called her “honey,” “beautiful,” “sexy,” and similar terms. A. Add. p. 29; FF No. 12; Tr. p. 30, l. 1-6.

During the time that Rasmussen worked for Respondents, her husband was laid off from his job, so she was the only one working in her family. She had a 12-year-old son. It was because of her economic circumstances that she did not quit until March 15, 2010. A. Add. p. 29; FF No. 13; Tr. p. 33, l. 14-18. The district court found Rasmussen’s testimony was substantially credible. A. Add. p. 30; FF No. 14. However, the district court inexplicably failed to include in its Amended Findings many of the most egregious statements and actions by Zapolski that created a hostile work environment for

Rasmussen, even though requested to do so in Appellants' Motion for Amended

Findings. Rasmussen testified that Zapolski:

1. Told her that he woke up with a "hard-on" and that he would have to make love to his pillow because no one was next to him when he woke up. Tr. p. 21, l. 18-22.
2. Made comments like "Wow, look at the tits on that one," and "Look at that nice ass," in reference to customers. Tr. p. 23, l. 11-12.
3. Would quite often call women cunts. Tr. p. 28, l. 9-15.
4. If a nice looking woman came into the store as a customer Zapolski would whisper to her, "Do you think she will go in a room with me and fuck." Tr. p. 28, l. 1-4.
5. Told her that another employee had given him a "blow job" for his birthday. Tr. p. 31, l. 21-25.
6. While at work Zapolski grabbed her from behind and put his crotch on her posterior. Her face got beet red and she tried to get him off of her. She screamed for him to get off of her and felt violated. This was in front of James Olson whose testimony confirmed her account of this incident. Tr. p. 22, l. 1-25, p. 23, l. 1-5.
7. After a conversation with a customer regarding long beef jerky strips, Zapolski grabbed his pants at the zipper and said to Rasmussen, "I'll show you something big and long." Tr. p. 28, l. 23-25, p. 29, l. 1-14.

Jennifer Moyer

When Jennifer Moyer worked for Lou's Fish House from May to August 2009, she was 21 years of age. She has a daughter born on February 6, 2008. She is the sole supporter of both herself and her child. In May 2009, she was also working at Pamida and cleaning rooms for Superior Shores. She was hired

in May 2009 to work primarily on the weekends taking care of the retail store. In addition, she also at times cleaned motel rooms. A. Add. p. 7; FF No. 16; Tr. p. 84-90.

The district court found that Zapolski made the following statements and took the following actions directed at Moyer:

1. Within two weeks of the commencement of her employment, Zapolski asked her how her sex life was. A. Add. p. 31; FF No. 17(a).
2. Within two weeks of the commencement of her employment, Zapolski told her that a girl her age should be having lots of sex. A. Add. p. 7; FF No. 17(b).
3. Twice during her employment, Zapolski bragged to her about his sexual prowess with other women. A. Add. p. 31; FF No. 17(c); Tr. p. 92, l. 6, 7.
4. Within two weeks of the commencement of her employment and throughout her employment, Zapolski occasionally made comments of a sexual nature about other people. A. Add. p. 32; FF No. 71(d).
5. Moyer testified that she “thinks” Zapolski may have patted her posterior once during the tenure of her employment. On another occasion, he grabbed her waist. She did not feel this was accidental. A. Add. p. 32; FF No. 18; Tr. p. 96, l. 22-25, p. 97, l. 1-7.
6. In July 2009, Zapolski showed her nude photos in a *Playboy* magazine and asked her if the person in the nude pictures looked like Jaime Rasmussen. A. Add. p. 32; FF No. 19; Tr. p. 97, l. 12-15.
7. Zapolski attempted to have Moyer solicit other young women to have sex with him. About a month after Moyer started working for Respondents, for approximately a week, Zapolski asked her to hook him up with her friends, who were all in their early 20s or younger, or with her sister who was about 30. After Moyer told Zapolski that her sister was not available, he stopped inquiring about it. A. Add. p. 32; FF No. 20.
8. Zapolski directed Moyer to accompany him on a trip to Duluth so that she would be able to buy supplies if necessary. Before going into a retail store, he said to Moyer words to the effect, “You know what people

are thinking don't you; they think we're a couple." A. Add. p. 32; FF No. 22; Tr. p. 100, l. 24-25, p. 101, l. 1-8.

The district court found that Moyer was moderately credible. A. Add. p. 9; FF No.

25. However, the district court failed to include in its Amended Findings many of the most egregious statements and actions by Zapolski that were directed at Moyer even though requested to in her Motion for Amended Findings. A. App. p. 57, 58. Moyer testified:

1. Zapolski would talk about how many times he made women orgasm in one setting. Tr. p. 92, l. 6, 7.
2. Zapolski "...had mentioned he would even be willing to pay for it," referring to Zapolski's attempt to have Moyer solicit other young women to have sex with him. Tr. p. 93, l. 18-20.
3. Within two weeks of the commencement of her employment Zapolski would ask her if her boyfriend was good at sex. Tr. p. 92, l. 15-20.
4. Throughout her employment Zapolski made comments about female customers to her such as, "Look at the tits on that one." Tr. p. 94, l. 22-25, p. 95, l. 1-2.
5. Within two weeks of her employment when Zapolski would call her at work he would ask, "How's my little horny one?" Tr. p. 95, l. 16-19.
6. Zapolski attempted to portray Moyer as his girlfriend. For example, one time when she was working with a male co-worker Zapolski said to him, "What are you doing with my girlfriend?" referring to Moyer. Tr. p. 98, l. 17-23.
7. Zapolski would tell her he would be willing to even pay for it if Moyer would hook him up with her sister or young friends. Tr. p. 94, l. 14-21.
8. One time a lady brought in an application looking for work and gave it to Zapolski. After the applicant left Zapolski asked Moyer if she thought

the applicant would give him a blow job if he hired her. Tr. p. 99, l. 4-25, p. 100, l. 1-6.

Kathe Reinhold

Kathe Reinhold was not married at the time of trial. She has a 19-year-old son

In October 2001, she moved to Silver Bay, Minnesota. After moving to Silver Bay, she had a variety of jobs, including paper routes, cleaning at Lutsen Ski Area, working as a cook's helper for the school district, working as a desk clerk, and earning some money as a self-employed interior design advisor. A. Add. p. 33; FF No. 26; Tr. p. 122, l. 17-25, p. 123, l. 1, 4-6, p. 124, l. 6-25, p. 125, l. 1-10.

In the fall of 2009, she saw an ad at Lou's Fish House for "Help Wanted" and put in an application. She was hired and started work in early November 2009. Although she enjoyed the work and needed employment, she quit after six days. A. Add. p. 34; FF No. 27; Tr. p. 125, l. 13-19, p. 126, l. 7-14.

The district court found that Zapolski made the following comments and took the following actions toward Reinhold:

1. On her very first day of employment, Zapolski stated to her words to the effect that, "You don't need to be in a relationship or be in love to have sex all night." A. Add. 34; FF No. 28(a); Tr. p. 127, l. 14-19.
2. On her second day of work, Zapolski started to talk about orgasms. A. Add. p. 34; FF No. 28(b); Tr. p. 128, l. 2-7.
3. During her brief employment with Respondents, Zapolski would state to her that everyone should have an orgasm as it is the best feeling in the world. A. Add. p. 34; FF No. 28(c); Tr. p. 128, l. 5-7.

4. On a daily basis during her brief employment, Zapolski would talk about sex. A. Add. p. 34; FF No. 28(d).
5. Zapolski insisted that her 17-year-old son was having sexual relations with his girlfriend and gave her advice to give him condoms. A. Add. p. 34; FF No. 28(e); Tr. p. 131, l. 9-17.
6. Zapolski had advised Reinhold that vulgar talk was not uncommon in the workplace. A. Add. p. 34; FF No. 29(f).
7. On her second day of employment, Zapolski grabbed her by the shoulders and squeezed. She was working in the kitchen/smoker learning to prepare fish. A. Add. p. 34, 35; FF No. 29(a).
8. While she was at work, Zapolski would take her by the hand and lead her to her next task. She felt this was an attempt to control her. A. Add. p. 35; FF No. 29(b); Tr. p. 129, l. 2-17.
9. On the first and second days of her employment, Zapolski attempted to get a dinner date with her. When later asked, she agreed to have dinner with Zapolski on the condition that she could bring her sister and that they would all pay their own tickets. Zapolski then backed off wanting to have dinner with her. A. Add. p. 35; FF No. 30(a); Tr. p. 132, l. 5-18.
10. One Sunday, she happened upon Zapolski at a Pamida while not on duty. Zapolski stated to her that it would be a perfect day to watch a football game on television and make love. She felt like he was inviting her and felt violated because he was her employer. A. Add. p. 35; FF No. 30(b); Tr. p. 135, l. 1-2.
11. One day during her employment, Zapolski called her on the phone and asked her if she would kiss him when he came to work. She told him "no." A. Add. p. 35; FF No. 30(c); Tr. p. 137, l. 19-22.
12. When she was at work, Zapolski would call her "sweetie." She told him she did not like being called sweetie. He stated he was going to call her that, and she told him she would not like that. A. Add. p. 35; FF No. 30(d); Tr. p. 138, l. 4-12.
13. Zapolski's talk at work about sex included Zapolski's description to her about the sex life of others and discussions about the size of men's genitals. A. Add. p. 36; FF. No. 31.

14. On Reinhold's last day of work, November 15, 2009, she had been splitting and stacking wood. When she came into the office, Zapolski started to pick wood shavings from the chest area of her sweater. Shortly after this, she left for her lunch break and decided to terminate her employment. A. Add. p. 36; FF No. 32; Tr. p. 130, l. 3-13.

The district court found Reinhold's testimony was substantially credible. A. Add. p. 36; FF No. 35. However, the district court failed to make findings that Zapolski's statements and actions directed to Reinhold included the following, even though specifically asked to do in her Motion for Amended Findings:

1. Zapolski asked her if she liked having sex. Tr. p. 132, l. 22-25, p. 133, l. 1.

2. One day Zapolski informed Reinhold that there used to be a couple in town who wanted to do nothing but "screw" and that when you drove by them in their car, her legs would be up in the air. Zapolski said this woman was mentally not all there and when he was driving home with them from swimming there was a dog "... he said the dog was licking her pussy." Tr. p. 133, l. 11-25, p. 134, l. 1.

3. Zapolski also made a comment to Reinhold about how many "inches" most women were happy with and that six inches "... would be perfect for you." Tr. p. 134, l. 10-15.

Credibility Determinations

As stated above, the court found the Appellants to be either substantially or moderately credible witnesses. Although Zapolski denied all of the Appellants' allegations, the court stated that it did not believe Zapolski's testimony was truthful and generally disregarded his denials. The district court also noted the testimony of Seth Palmer, a male co-worker of Appellants, and found that he was a generally credible witness. Palmer's testimony corroborated the testimony of the Appellants. A. Add. p.

37, 38; FF No. 38-44. Other witnesses who testified at trial were found to be of little to no assistance to the court in resolving the Appellants' claims.

Unwelcome Conduct

All three Appellants by their comments and actions made it clear to Zapolski that what he was saying or doing was unwelcome. Rasmussen did the following to inform Zapolski that his comments or actions were unwelcome:

1. When he touched her on her posterior she told him not to touch her. Tr. p. 22, l. 8-17.
2. When he made sexual comments about his customers she told him, "that's not nice, those are your customers." Tr. p. 23, l. 15-18.
3. When he showed her the nude centerfold in the *Playboy* magazine and said that the woman looked like her she responded, "That's disgusting. I don't need to hear that." Tr. p. 24, l. 11-21.
4. When he used the word cunt to describe his ex-girlfriend and her daughter she told him she didn't like that word. Tr. p. 28, l. 19-22.
5. When he grabbed her arms to see how big her muscles were she told him that she did not appreciate that type of physical contact. Tr. p. 29, l. 17-25.
6. When he would call her names like sweetie, honey, sexy, beautiful and his girl she would tell him, "my name is Jaime, don't call me those things." Tr. p. 30, l. 12-13.
7. When he would use words such as orgasm, pussy, g-spot, clitoris, and hard-on she would tell him, "I don't want to hear those things. That's gross." Tr. p. 30, l. 19-25, p. 31. l. 1.

Although Jennifer Moyer was only 21 when she started working for Zapolski and wanted to keep her job, she informed him that his words and actions were unwelcomed by the following:

1. When Zapolski would tell her how many times he could make a woman orgasm she would, “. . . give him the look of disgust.” She didn’t want to encourage this type of talk so she would either walk away or try to go back if there were customers that came in. Tr. p. 92, l. 6-14.
2. She never responded to Zapolski and never talked about her sex life. Tr. p. 92, l. 15-23.
3. When Zapolski asked her if she would hook him up with her girlfriends and that he would even be willing to pay for it she, “. . . just kind of laughed it off like he was joking. . .” Tr. p. 93, l. 21-24.
4. When he showed her a nude photo in a *Playboy* magazine and asked her if the girl looked like Jaime Rasmussen she, “didn’t want to look at it, she tried to get it out of her face.” She moved her head and tried to look away from it and get away. Tr. p. 98, l. 3-11.
5. When he told another employee that she was his girlfriend she responded, “Excuse me, I’m not your girlfriend.” Tr. p. 98, l. 21-25.
6. Even when Moyer didn’t directly inform Zapolski his comments were unwelcome, such as when he asked her if an applicant would give him a blow job if he hired her, she felt gross and disgusted and responded that she didn’t know. Tr. p. 100, l. 1-12.

Further evidence that Moyer found Zapolski’s conduct unwelcome is the fact that the day she quit her employment she went to the Two Harbors Police Department and filed a Complaint against Zapolski. Tr. p. 104, l. 7-25, p. 105, l. 1-21. Because Moyer felt uncomfortable with the way Zapolski was looking at her and the comments he made, she started to wear loose fitting baggy clothes in an attempt to “grunge” herself down. Tr. p. 110, l. 2-25, p. 111, l. 1-6. Moyer testified that she was not more assertive in informing Zapolski that his comments and actions were unwelcome because she was scared that she would lose her job. Tr. p. 117, l. 11-15.

Although Zapolski's harassment caused Reinhold quit after only six days of work for Respondents, she conveyed to Zapolski that his talk about sex and inappropriate touching were unwelcome by the following:

1. When Zapolski told her that you didn't have to be in love to still have sex all night, she didn't respond. Tr. p. 127, l. 14-22.
2. When he asked her if she liked to have sex she told him she didn't like being touched by people that I don't know very well. Tr. p. 128, l. 11-13. She went on to tell him that she was very modest, that she was a Swedish person, that her entire family did not touch a lot and were more quiet and modest people. Tr. p. 128, l. 16-21.
3. On the last day of work when he was picking wood slivers off the chest area of her sweater she stepped back and said, "I can take care of that." Tr. p. 130, l. 3-11.
4. When he tried to tell her that her 17-year-old son was having sex and she needed to get him condoms she told him that this was between her son and herself and that it was none of his business. Tr. p. 131, l. 10-21.
5. When Zapolski told her the story about the dog licking a retarded woman's pussy "and she was getting off on it" she said, "This is a very strange place," and walked straight out of the building. Tr. p. 133, l. 11-25, p. 134, l. 1-6.
6. When Zapolski told her that it was a perfect day to watch football and make love she responded, "Well I've got to get going. I'm going home to watch football by myself." Tr. p. 134, l. 25, p. 135, l. 1-5.
7. When he called her on the phone and asked her if she would give him a kiss when he came in she answered "No." Tr. p. 137, l. 19-21.
8. When he told her he was going to start calling her "sweets" she told him to just call her Kathe. Tr. p. 138, l. 4-12.

When Reinhold quit she wrote a letter to Zapolski the same day explaining that she chose not to work there anymore because of his sexual harassing behavior. Tr. p.

139, l. 19-25, p. 140, l. 1. She also went to the Two Harbors Police Station and was told that there was nothing the police could do about Zapolski's conduct. Tr. p. 143, l. 20-25, p. 144, l. 1-4.

ARGUMENT

Introduction

The three Appellants in this case were subjected to sexual conduct and communication in the workplace that went beyond mere "coarse and boorish" talk. Zapolski's behavior toward each Appellant was both subjectively offensive and objectively offensive to any reasonable woman. The Appellants' testimony, the basis of which was found to be sufficient for punitive damages, supported every Finding of Fact requested by Appellants in their Motion for Amended Findings. This type of workplace harassment is exactly the kind of conduct that the MHRA was designed to prevent, and the district court erred in dismissing the Appellants' claims.

I. THE DISTRICT COURT ERRED IN HOLDING, BASED UPON ITS FINDINGS OF FACT, THAT THE TOTALITY OF ZAPOLSKI'S CONDUCT DID NOT CONSTITUTE SEXUAL HARASSMENT

A. Standard of Review

In determining whether the district court erred in holding, based upon its Findings of Fact, that the totality of Zapolski's conduct did not constitute sexual harassment, the Appellants accept the court's Findings of Fact but state that the court erred in applying the MHRA's definition of a hostile work environment to those undisputed facts. This

Court has independently reviewed the application of undisputed facts to the interpretation of the MHRA as a question of law. *Munro Holding, LLC v. Cook*, 695 N.W.2d 379, 385 (Minn. App. 2005). The Minnesota Supreme Court has held that when an appellate court must construe or interpret the MHRA, the court's review is *de novo*. *Frieler v. Carlson Mktg Group, Inc.*, 751 N.W.2d 558, 566 (Minn. 2008). Therefore, this Court should review the district court's decision that Zapolski did not create a hostile work environment *de novo*.

The district court's holding that Appellants need to prove psychological harm as an element of their sexual harassment claims and that Zapolski's conduct was based on sex are legal conclusions. Appellate courts need not give deference to a district court's legal conclusions and may correct erroneous applications of the law. *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 890 (Minn. 2010).

B. The district court erred in holding that Appellants needed to prove psychological harm as an element of their sexual harassment claims

The district court made multiple comments on the lack of psychological harm suffered by the Appellants and the fact that none sought medical treatment or counseling. For example, the court discussed Rasmussen's credibility and found that Rasmussen "sought no counseling as a result of the alleged behavior of Zapolski, despite alleging fear, weight gain, anxiety, etc." A. Add. p. 30; FF No. 14. The court further found that Rasmussen "testified that she suffered no emotional distress other than a generalized statement of trusting older men less. She sought no treatment for any effects of her

employment, such as psychological counseling or medical care.” A. Add. p. 30; FF No. 14.

Similarly, the court found that Reinhold “had no lasting psychological effects” and that “she sought no treatment or counseling.” A. Add. p. 36; FF No. 36.

Moyer testified that she would have liked to talk to someone about the issues that occurred because of Zapolski’s sexual harassment but that she couldn’t afford counseling. Tr. p. 112. Despite this testimony, the court made no specific finding with regard to whether Moyer would have liked counseling.

In the court’s Memorandum of Law accompanying its Amended Findings, the court stated that none of the Appellants sought counseling to support its conclusion that Appellants failed to prove a hostile work environment. A. Add. p. 49. The court’s determination—that Zapolski’s actions did not create a hostile work environment—was based partly on the fact none of the Appellants sought counseling and that was a legal error. The court ignored the economic reality that all three of the Appellants were the sole supporters of their families while working for Respondents, that none of them had health insurance, and that they could not afford counseling.

The issue of whether a plaintiff is required to prove psychological harm as an element of a hostile work environment claim was addressed by the United States Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). The Supreme Court held that “[a] discriminatorily abusive work environment, even one that does not

seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.” *Id.* at 22. Whether a work environment is "hostile" or "abusive" can only be determined by “looking at all the circumstances.” *Id.* The Court held that “while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.” *Id.*

The district court placed improper emphasis on the fact that none of the Appellants sought psychological treatment or medical care as a result of Zapolski’s harassing behavior. The Appellants were not required to show that they were so psychologically damaged by Zapolski’s conduct that they had to receive psychological counseling or medical treatment. As stated by the Supreme Court, an anti-discrimination law “comes into play before the harassing conduct leads to a nervous breakdown.” *Id.*

Appellate courts interpreting the MHRA have followed the *Harris* holding that psychological harm is not a required element of a hostile work environment claim. In *Mathieu v. Gopher News Co.*, 273 F.3d 769, 783 (8th Cir. 2001), in upholding an award of \$165,000.00 for emotional distress, the court stated:

Gopher News asserts the only evidence supporting an award of emotional distress was Mathieu’s self-serving testimony. It notes there was no evidence from any medical professionals to the effect that Mathieu suffered mental anguish or that he required treatment for such a condition. It urges this as insufficient evidence to support the jury’s award, or alternatively, that the award is excessive based on Mathieu’s vague and ill-defined assertions.

Gopher News' assertion that Mathieu was obligated to offer expert testimony to justify an award for emotional distress misses the mark. In *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997), we held that "a plaintiff's own testimony, along with the circumstances of a particular case, can suffice to sustain the plaintiff's burden." *Id.* at 1065 (citation omitted). As the magistrate judge recognized, the import of this holding is that the testimony of the medical expert is not a prerequisite for recovery for emotional harm. At trial, Mathieu's testimony in this regard apparently was effective. The magistrate judge noted that Mathieu lost his job of 34 years, was forced to reduce his standard of living, and had become depressed. The magistrate judge noted that those facts, presented through Mathieu's testimony, were "more than sufficient to support the Jury's emotional distress award." (Emphasis added).

Recoverable pain and suffering does not have to be severe or accompanied by physical injury. A trial court can award damages based on subjective testimony alone. *Gillson v. State Dept. of Natural Resources*, 492 N.W.2d 835, 842 (Minn. App. 1992). *See also Bradley v. Hubbard Broadcasting, Inc.*, 471 N.W.2d 670, 677 (Minn. App. 1991) (diminished sense of self-worth and deterioration of relationship with children grounds for mental anguish award).

Here, each of the Appellants testified as to the effect of Zapolski's conduct on their well-being and their testimony supports a compensatory damage award for mental anguish and suffering pursuant to Minn. Stat. § 363A.29, subd. 4. Put another way, the sexual harassment laws apply not only to those who have health insurance and the ability

to seek and pay for treatment; the law also exists to protect persons who do not have the means or the insurance to seek counseling or treatment.

C. The district court erred in holding that Appellants have to prove Zapolski's conduct was based on sex

The district court erred by concluding that because Zapolski's "coarse and boorish" conduct was often witnessed both by male and female employees, it was not harassment "based on sex" and thus did not support a finding of a hostile work environment. Specifically, the court stated the following:

h. Zapolski's comments of the nature described in paragraphs a-g above were also made to and in the presence of other employees, including male employees. Crude and boorish talk of this nature was used by Zapolski throughout the business and was not solely directed to female employees.

A. Add. p. 28; FF. No. 8h.

Discussing Reinhold's claim the district court stated, "[c]omments of this nature were not uniquely directed to Reinhold or to women employees of defendant, but were part of the coarse and boorish talk fostered by Zapolski throughout the workplace." A. Add. p. 36; FF No. 31.

In Finding of Fact 15, the court stated that Rasmussen failed "in her burden to establish that defendants' conduct was based upon plaintiff's membership in a protected class. . ." The court made similar findings that other Appellants failed in their burden to prove Respondents' conduct was based on their membership in a protected class. With regard to Moyer, the district court stated this in Finding of Fact 25 and stated the same

regarding Reinhold in Findings of Fact 31 and 37. A. Add. p. 33, 36-37. All of these findings and conclusions are based on the district court's erroneous assumption that ". . . the law requires that the Court examine whether the comments were the result of the Plaintiffs membership in a protected class." A. Add. p. 46.

In the district court's Memorandum of Law, the court stated "[t]o 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." A. Add. p. 46. However, in its discussion of why the Appellants failed to prove their sexual harassment claims, the district court stated "[s]exual comments by Zapolski were widespread throughout the employment setting and not merely directed at females." A. Add. p. 49. Therefore, it appears that the court's finding that male employees observed Zapolski's conduct affected its determination that the Appellants failed to prove their harassment claims.

The Minnesota Supreme Court ruled in *Cummings v. Koehnen*, 568 N.W.2d 418 (Minn. 1997) that under the MHRA it is not necessary for a plaintiff bringing a sexual harassment claim to prove that the harassment occurred based on sex, in addition to proving the statutory elements of the claim. The court noted that when the MHRA was first passed it did not prohibit sexual harassment specifically, it only prohibited discrimination based on sex but at a later date Minn. Stat. § 363.01, subd. 41 (now Minn.

Stat. § 363A.03, subd. 43) was added to the MHRA. Minn. Stat. § 363A.03, subd. 43 specifically provides as follows:

Subd. 43. **Sexual harassment.** “Sexual harassment” includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

(1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations, or public services, education or housing;

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual’s employment, public accommodations, or public services, education, or housing; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment, public accommodations or public services, education or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. (Emphasis added).

The court in *Cummings* squarely stated that the issue before it was whether a sexual harassment claimant has to prove that the harassment was “because of sex.”

Specifically, we are asked to consider whether a sexual harassment plaintiff must prove, in addition to the elements of sexual harassment set forth in Section 363.01, Subd. 41, that the harassment was ‘because of sex,’ an apparent requirement of Section 363.03, Subd. 1(2) . . . Thus we must determine whether the legislature intended that proof of the elements of Minn. Stat. § 363.01, Subd. 41, is enough to establish a claim of same gender sexual harassment or whether a plaintiff must offer additional evidence that the behavior was “based on

sex” specifically that it affected one gender differently than the other or that the harasser was homosexual.

Cummings, 568 N.W.2d at 421-22. The court ruled that a plaintiff who proves the elements of sexual harassment as set forth in Section 363.01, subd. 41 (now Minn. Stat. § 363A.03, subd. 43) does not have to prove the harassment was because of sex:

We are persuaded that *Cummings* is correct in his argument that the “because of sex” requirement of Section 363.03, Subd. 1(2) is rendered superfluous in sexual harassment claims by a specific statutory definitions of discrimination and sexual harassment. ‘The term ‘discriminate’ includes segregate or separate and, for the purposes of discrimination based on sex, it includes sexual harassment.’ Minn. Stat. § 363.01, Subd. 14.1.²

This definition makes it clear that sexual harassment is “discrimination based on sex.” The actionable language of Section 363.03, Subd. 1(2), that it is unlawful, “for an employer, because of . . . sex . . . to discriminate,” means, in a sexual harassment case, that it is unlawful “for an employer to sexually harass.” Thus it is not necessary for a sexual harassment plaintiff to prove that the harassment occurred “because of sex,” in addition to proving the elements of sexual harassment as set forth in Section 363.01, Subd. 41. (Emphasis added)

Id. at 422.

In rejecting the claim that a plaintiff has to show that the harassment affects one gender differently than the other, the court stated:

² Minn. Stat. § 363.01, subd. 14 is now codified as Minn. Stat. § 363A.03, subd. 13. It provides that the term “discriminate” includes segregate or separate and, for purposes of discrimination based on sex, it includes sexual harassment.

Requiring a Plaintiff to show that conduct not only met the elements of sexual harassment, but also resulted in the differential treatment of male and female employees would lead to absurd results. Such a requirement would leave two classes of employees unprotected from sexual harassment in the work place: employees who work in a single gender workplace and employees who work within “an equal opportunity harasser,” who harasses sexually both males and females. There is nothing in the MHRA to indicate the legislature intended the leave these classes of employees unprotected, and we cannot presume the legislature intended such an absurd result. See Minn. Stat. § 645.17(1) (in interpreting statutes, the court must presume the “legislature does not intend a result that is absurd”). (Emphasis added).

Id. at 422-23.

The district court essentially ruled that Zapolski could avoid liability for his sexual harassment because he was “an equal opportunity harasser” whose “coarse and boorish” speech and conduct was directed towards all employees. There are two flaws with this argument. First, as discussed by the court in *Cummings*, under the MHRA definition of sexual harassment, a plaintiff does not have to prove that harassment was “based on sex.” That requirement only applies to sexual harassment hostile-work-environment claims that are brought under Title VII, a federal law. Second, even under Title VII, using terms like “cunts” to refer to females and touching only the female employee’s posteriors is sufficient to show harassment “based on sex.” See *Kopp v. Samaritan Health System, Inc.*, 13 F.3d 264 (8th Cir. 1994); *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). Therefore, the district court plainly erred in failing to amend its decision to reflect the fact that Appellants are not required to prove that the sexual harassment they

endured was based on sex. This additional hurdle is not support under Minnesota law, because sexual harassment is “discrimination based on sex,” as defined in Minn. Stat. § 363A.03, subd. 13.

D. The district court erred in holding each of the Appellants failed to establish their sexual harassment claims

To establish a *prima facie* case of sexual harassment based on a hostile work environment under the MHRA, a plaintiff must show that (1) the conduct is unwelcome; (2) the conduct consists of “sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature;” (3) the conduct is sufficiently pervasive so as to substantially interfere with the plaintiff’s employment or to create a hostile, intimidating, or offensive work environment; and (4) “the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.” *Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997) (citations omitted). Here, because Zapolski was responsible for all of the harassment, there is no question of the employers’ knowledge of the harassment.

1. Jaime Rasmussen has established her sexual harassment claim

a. The conduct was sexual harassment

The MHRA defines sexual harassment to include “unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature.” Minn. Stat. § 363A.03, subd. 43. During

the approximately 18 months of Rasmussen's employment, the district court found she suffered the following conduct:

- Zapolski frequently asked what her favorite sexual position preferences were.
- Zapolski told her what his favorite sexual positions were.
- Zapolski would describe his sexual dreams, including that he would wake up with an erection.
- Zapolski would make comments about the busts and posteriors of female customers.
- Zapolski referred to females using the vulgar and derogatory slang "c***s."
- Zapolski would make comments to her about "blow jobs," "how good it feels to orgasm," "pussy," "g-spot," "clitoris," and "getting off."
- Zapolski touched her posterior with both hands on two occasions.
- Zapolski showed Rasmussen a nude photo in a *Playboy* magazine and asked her if it didn't look like her.
- Zapolski also showed the nude photo to her co-workers and asked if it looked like Rasmussen.

There simply can be no question that this conduct falls within the definition of sexual harassment under the MHRA, Minn. Stat. § 363A.03, subd. 43; it includes sexually motivated physical contact and verbal and physical conduct and communication of a sexual nature.

In *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 964 (8th Cir. 1993), the court noted that sexual harassment can take place in many different ways and that a female worker need not be propositioned, touched offensively, or harassed by sexual innuendo; "[i]ntimidation and hostility toward women because they are women can

obviously result from conduct other than explicit sexual advances.” The conduct at issue in *Burns* included directing terms such as bitch, slut, and cunt at the plaintiff. As the court put it, “a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be demeaning and disconcerting as the harshest of racial epithets... [n]o female worker must endure continual verbal abuse.” *Id.* at 966.

Thus even if Zapolski’s conduct had only consisted of his verbal utterances, it constituted sexual harassment that Rasmussen should not have had to endure for the privilege of being allowed to work to support her family.

b. The conduct was severe and pervasive

The sexual harassment Rasmussen experienced was “sufficiently severe or pervasive so as to alter the conditions of [her] employment and create an abusive working environment.” *Klink v. Ramsey County*, 397 N.W.2d 894, 901 (Minn. App. 1986). To determine whether an environment is sufficiently hostile or abusive to support a claim under the MHRA, this Court looks 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.’” *Wenigar v. Johnson*, 712 N.W.2d 190, 207 (Minn. App. 2006) (citation omitted). The work 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.” *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001) (citation omitted). Even a single incident may be sufficient to prove sexual harassment. *Moring v. AR Dept. of Correction*, 243 F.3d 452 (8th Cir. 2001).

The district court apparently was troubled by the case of *Geist-Miller v. Mitchell*, 783 N.W.2d 197 (Minn. App. 2010), and specifically asked the parties’ attorneys to explain why this Court held that the conduct in *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171 (Minn. App. 2007) created a hostile work environment, while the conduct in *Geist-Miller* was found to be insufficient.

In *Geist-Miller*, the plaintiff worked for the defendant for 9 years before the alleged harassing conduct began during the last year of her employment:

The majority of [plaintiff’s] harassment allegations involve [defendant’s] inappropriate sexual banter and unsuccessful pursuit of a relationship with her – types of conduct that lack the severity and level of interference required by *Goins*, 635 N.W.2d at 725-26, to create a hostile work environment.

It was only on Geist-Miller’s deposition correction sheet that she identified “. . . several additional incidents of harassment, including for the first time, incidents of unwanted touching.” *Id.* at 199-200. These incidents of unwanted touching were far more serious than the verbal statements plaintiff testified to in her deposition. Although the Court held that even taking into account these additional allegations plaintiff failed to present evidence of a hostile work environment, it is obvious that her failure to include these incidents of unwanted touching in her deposition raised doubt as to her veracity.

In addition to her lack of credibility, Geist-Miller never quit her employment because the defendant created a hostile work environment. Instead, she “continued in her employment until it was terminated for a non-discriminatory reason.” *Id.* at 204. This influenced the Court’s ultimate holding that there was not “evidence that [the defendant’s behavior] interfered with [plaintiff’s] ability to perform her job,” and therefore that she failed to provide sufficient evidence that the harassment was sufficiently severe or pervasive to be actionable. *Id.*

In contrast, the allegations in *Gagliardi* were more severe than those in *Geist-Miller*:

Gagliardi rests on an effect-on-employment determination on distinguishable allegations, that the plaintiff’s supervisor, during a business trip, asked her to come to his hotel room before going to dinner and, when she declined, came to her room and laid down in her bed; sat very close to her and put his head in her lap during a limousine ride; gave her a calendar with sexually suggestive photographs of his wife; and during another business trip, asked that her baggage be taken to his room and suggested that they both change into bathrobes and order room service.

Geist-Miller, 783 N.W.2d at 204. The Court in *Gagliardi* reasoned that, “[c]onsidered from Gagliardi’s perspective, these facts tend to support the contention that almost immediately after Gagliardi joined Ortho-Midwest, the company’s owner, to whom she reported directly, began interacting with her unprofessionally and sexually in the workplace or on work-related trips.” 733 N.W.2d at 180. Also, the plaintiff in *Gagliardi*

quit her employment by prematurely terminating a business trip and never returning to the workplace. *Id.* at 182.

In finding that Zapolski's conduct did not create a hostile work environment; the court relied almost entirely upon the *Geist-Miller* case. However, in contrast to the plaintiff in *Geist-Miller*, the Appellants were all found to be credible witnesses by the district court. All three Appellants testified in accordance with their previous Affidavits and no additional allegations were brought forward after their sworn Affidavits were given or their depositions were taken. Also, all three Appellants quit their employment rather than continuing to work under the hostile environment created by Zapolski. Therefore, *Geist-Miller* is readily distinguishable from this case and the trial court erred by basing its decision on it.

In *Beach v. Yellow Freight Sys.*, 312 F.3d 391 (8th Cir. 2002) the harassment took the form of workplace graffiti that stated such things as "Al Beach sucks cock," "Al Beach is gay," and sexually explicit drawings. The court held that in order to constitute severe or pervasive harassment, the conduct must be so severe as to "substantially interfere with the plaintiff's employment or create a hostile, intimidating or offensive work environment." *Id.* at 396 (Emphasis added). The district court held that while the graffiti did not interfere with Beach's employment, it did create a hostile work environment based on its determination that the graffiti was subjectively offensive to

Beach and objectively offensive because of its graphic sexual nature and frequent and persistent appearance at the workplace. *Id.* at 397.

Turning to the present case, the district court found Zapolski did the following to Rasmussen:

1. Referred to females with the vulgar and derogatory slang “c***s.”
2. Touched her posterior with his hands on two occasions.
3. Showed nude photos from a *Playboy* magazine to her and co-workers and asked if the girl in the photo didn’t look like her.
4. Asked her to review a pornographic DVD entitled “*Squirters 2.*”

By any reasonable standard, the conduct was severe.

The district court found that Zapolski did the following towards Rasmussen:

1. Frequently asked her what her favorite sexual positions were.
2. Frequently told her his favorite sexual positions and that he would wake up with an erection.
3. Frequently made comments about the busts and posteriors of customers.
4. Regularly made comments about “blow jobs,” “how good it feels to orgasm,” “pussy,” “g-spot,” “clitoris,” and “getting off.”

By any reasonable standard, this conduct was pervasive.

In this case the totality of Zapolski’s inappropriate sexual statements and conduct must lead this Court to a determination that Zapolski’s conduct was sufficiently severe and pervasive so as to alter the conditions of Rasmussen’s employment or create an abusive working environment. The conduct was both subjectively offensive and

objectively offensive to a reasonable person. If sexually graphic graffiti was found to be objectively offensive in *Beach*, then the conduct here—referring to women as cunts, showing nude centerfolds, and speaking about blowjobs, orgasms, and other sexual acts to an employee—is certainly “objectively offensive.”

c. The conduct was unwelcome

The threshold for determining that conduct is unwelcome “is that the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive.” *Beach*, 312 F.3d at 396. As *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) and later cases demonstrate, ‘unwelcome’ cannot be equated with ‘involuntary.’ The Supreme Court has stated, “the fact that the sex-related conduct was ‘voluntary’ in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit.” *Id.* at 68. The distinction between voluntary and unwelcome recognizes that victims of sexual harassment may acquiesce in the harassment as a way of coping with it, because they are afraid to raise the issue with their employer, or for some other legitimate reason. All three of the Appellants were forced by financial necessity to endure the hostile work environment created by Zapolski.

Respondents offered no evidence that Rasmussen invited or solicited Zapolski’s behavior. Moreover, Rasmussen presented significant evidence that the conduct she suffered was undesirable and offensive. *See infra.* p. 14. Finally, the district court found

that all three Appellants were subjected to coarse sexual talk, gesture, and conduct they did not welcome. A. Add. p. 19.

2. Jennifer Moyer has established her sexual harassment claim

a. The conduct was sexual harassment

Zapolski's conduct towards Moyer included the following, as found by the district court:

- Zapolski asked Moyer how her sex life was.
- Zapolski told Moyer that a girl her age (21) should be having lots of sex.
- Zapolski bragged to her about his sexual prowess with other women.
- Zapolski made comments of a sexual nature about other people to her.
- Zapolski patted her on her posterior and grabbed her by the waist.
- Zapolski showed her nude photos in a *Playboy* magazine and asked if the person didn't look like a female coworker.
- Zapolski asked Moyer to solicit both her young friends and her sister to have sex.

As with Rasmussen, *infra* p. 27-28, there simply can be no question that this conduct falls within the definition of sexual harassment under the MHRA, Minn. Stat. § 363A.03, subd. 43, because it includes sexually motivated physical contact and verbal and physical conduct and communication of a sexual nature.

b. The conduct was severe and pervasive

The federal and states cases interpreting the MHRA and discussing whether specific conduct is sufficiently severe or pervasive so as to alter the conditions of employment or create an abusive working environment, as cited above, make it clear that

Zapolski's conduct towards Moyer plainly crossed the line in support of a finding of a hostile work environment. The court found Zapolski did the following:

1. Patted Moyer on her posterior and grabbed her waist.
2. Asked Moyer how her sex life was and told Moyer that a girl her age should be having lots of sex.
3. Zapolski showed Moyer nude photos in a *Playboy* magazine.
4. Zapolski asked Moyer to hook up with her young friends and sister to have sex.

By any reasonable standard, the conduct was severe.

The court found Zapolski did the following to Moyer:

1. At least twice he asked her why a girl her age isn't having enough sex. Tr. p. 91, l. 17-19.
2. At least twice he asked her why a girl her age wasn't having more sex. Tr. p. 93, l. 2-8.
3. He "bugged" her for about a week about hooking him up with girlfriends or her sister until Moyer told him her sister wasn't interested. Tr. p. 93, l. 18-25 and p. 94, l. 1-21.

By any reasonable standard, the conduct was pervasive.

The pervasiveness of Zapolski's conduct towards Moyer is even more apparent when the numerous incidents that she testified to, but were omitted from the court's findings, are added to the court's findings. The conduct was severe and pervasive enough to cause Moyer to quit her employment and to go to the Police Department and file a Complaint against Zapolski.

c. The conduct was unwelcome

See Statement of Facts, *infra* p. 15, and the district court's determination that Zapolski's conduct was unwelcome. A. Add. p. 19.

3. Kathe Reinhold has established her sexual harassment claim

a. The conduct was sexual harassment

Although Reinhold could only stand Zapolski's conduct for six working days, it is clear that the following conduct constituted sexual harassment:

- Zapolski told Reinhold "you don't need to be in a relationship or be in love to have sex all night."
- Zapolski talked about orgasms and how having an orgasm is the best feeling in the world.
- Zapolski told Reinhold that she should buy condoms for her 17-year-old son.
- Grabbed Reinhold by the shoulders and squeezed and took her by the hand from task to task.
- Asked Reinhold repeatedly for a dinner date.
- While off-duty Zapolski told Reinhold it would be a perfect day to watch a football game on television and make love.
- Zapolski asked Reinhold if she would kiss him when he came to work.
- Zapolski described the sex life of others and discussed the size of men's genitals.
- Zapolski picked wood splinters off the chest area of Reinhold's sweater.

As with Rasmussen, *infra* p. 27-28, there simply can be no question that this conduct falls within the definition of sexual harassment under the MHRA, Minn. Stat. § 363A.03, subd. 43, as it includes sexually motivated physical contact and verbal and physical conduct and communication of a sexual nature.

b. The conduct was both severe and pervasive

The court found that Zapolski did the following:

1. Stated that a person did not need to be in a relationship or be in love to have sex all night.
2. Talked about orgasms, how having an orgasm is the best feeling in the world.
3. Told Reinhold to buy condoms for her 17-year-old son.
4. Repeatedly asked Reinhold for a dinner date.
5. Told Reinhold that it is a perfect day to watch a football game on television and make love.
6. Described the sex life of others.
7. Discussed men's genitals.

When the incidents that were testified to but omitted from the court's findings are added to the above, the severity of the conduct is clear. Zapolski's sexual harassment towards Reinhold was pervasive because her testimony shows that he engaged in inappropriate sexual contact or communication every day that she worked for Respondents.

c. The conduct was unwelcome.

See Statement of Facts, *infra* p. 16-17, and the district court's determination that Zapolski's conduct was unwelcome. A. Add. p. 19.

II. THE DISTRICT COURT ERRED IN FAILING TO MAKE DETAILED FINDINGS ON SPECIFIC FACTS WHILE FINDING APPELLANTS TO BE CREDIBLE AND DISCREDITING ZAPOLSKI'S TESTIMONY

A. The Appellants' sexual harassment claims brought under the MHRA required the district court to make highly specified findings to allow for meaningful appellate review

The district court's Findings of Fact are sufficient to require reversal of the district court's decision that Appellants were not subject to sexual harassment. However, those Findings should have been more detailed in order to better permit appellate review of this case. The issue of whether the district court erred in failing to make detailed and specific findings is a legal question involving the interpretation of Minn. R. Civ. P. 52.01 and should be decided by this court *de novo*.

In Appellants' Motion to Amend and Supplement the Findings of Fact, Appellants asked the district court to not censor the testimony in its Findings of Fact and to add those statements and acts of Zapolski that constituted the more outrageous examples of Zapolski's inappropriate sexual statements and conduct toward each of the Appellants. A. App. p. 53-61. In its Amended Findings, the district court made no additions to its Findings and did not change the censored version of its original Findings.

An example of the court's censoring of the Findings was its statement that Zapolski used the derogatory slang "c***s" in the presence of Rasmussen, while Rasmussen's actual testimony was that he used the word "cunts" in her presence. A. Add. p. 28; FF No. 8(d); Tr. p. 28, l. 9-15. Another example is the court's Finding that

Zapolski told Rasmussen that “. . . he would wake up with an erection.” A. Add. p. 27, FF No. 8(b). Rasmussen’s testimony was that Zapolski told her “. . . he woke up with a hard-on.” Tr. p. 21, l. 15-17. The court found that Zapolski bragged to Moyer about his sexual prowess with other women. A. Add. p. 32; FF No. 17(c). Moyer’s actual testimony was that Zapolski would talk about how many times he made women orgasm in one setting. Tr. p. 92, l. 6, 7. The court found that Zapolski asked Moyer “to hook him up with her friends who were all in their early twenties or younger, or with her sister who is about 30.” A. Add. p. 32, FF No. 20. The court left out that Moyer also testified that Zapolski said “. . . he would even be willing to pay for it.” Tr. p. 93, l. 18-20.

The district court found that Zapolski described to Reinhold “. . . the sex life of others and discussion about the size of men’s genitals.” A. Add. p. 36, FF No. 31. Reinhold’s testimony was that Zapolski told her a story about a couple in town who wanted to do nothing but “screw” and that the woman who was “mentally not all there” and “. . . he said the dog was licking her pussy.” Tr. p. 133, l. 11-25, p. 134, l. 1. With regard to the discussion about men’s genitals, Reinhold’s testimony was that Zapolski told her how many “inches” most women were happy with and that six inches “. . . would be perfect for you.” Tr. p. 134, l. 10-15.

In addition to censoring testimony, the court completely omitted from its Findings many of Zapolski’s most grievous statements and conduct. For example, the following

additional facts were supported by Rasmussen's testimony but omitted from the court's

Findings:

- Zapolski asked Rasmussen about a customer "do you think she will go in a room with me and fuck." Tr. p. 28, l. 1-4.
- Zapolski told Rasmussen another employee had given him a "blow-job" for his birthday. Tr. p. 31, l. 21-25.
- Zapolski grabbed Rasmussen from behind and put his crotch on her posterior. She got beet red and screamed for him to get off of her. Tr. p. 22, l. 22-25, p. 23.
- After a conversation with a customer regarding long beef jerky strips, Zapolski grabbed his pants at the zipper and said to Rasmussen "I'll show you something big and long." Tr. p. 29, l. 2-12.

Examples of the failure to include details about Zapolski's statements and conduct toward Moyer include:

- Zapolski asked Moyer if her boyfriend was good at sex. Tr. p. 92, l. 15-20.
- Zapolski made comments about female customers to her such as "Look at the tits on that one." Tr. p. 94, l. 22-25, p. 95, l. 1-2.
- When Zapolski called Moyer at work he would ask "How's my little horny one?" Tr. p. 95, l. 16-19.
- Zapolski attempted to portray Moyer as his girlfriend. Tr. p. 98, l. 17-23.
- Zapolski told Moyer he would be willing to even pay for it if she would hook him up with her sister or young friends. Tr. p. 93, l. 18-20.
- After a job applicant left, Zapolski asked Moyer if she thought the applicant would give him a "blow-job" if he hired her. Tr. p. 99, l. 4-25; p. 100, l. 1-6.

The court left out of its Findings Reinhold's testimony that Zapolski asked her if she liked having sex. Tr. p. 128, l. 11.

Minn. R. Civ. P. 52.01 states: “In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specifically . . .” Findings must include enough detail and specificity to support the order and to allow proper review by the appellate court. *Northwest Publications, Inc. v. Anderson*, 259 N.W.2d 254 (Minn. 1977); *In Re Amitad, Inc.*, 397 N.W.2d 594 (Minn. App. 1986). In *Wallin v. Wallin*, 290 Minn. 261, 187 N.W.2d 627 (Minn. 1971), it was held that some types of cases require findings to be specified to a high degree of particularity to allow for meaningful appellate review. The *Wallin* case involved a child custody dispute, but cases involving sexual harassment claims also require findings to be specified to a high degree of particularity in order for there to be meaningful appellate review.

The Minnesota Supreme Court has emphasized that particularized findings are crucial in cases like this under the MHRA. In *Sigurdson v. Isanti County*, 386 N.W.2d 715 (Minn. 1986), a woman’s sexual discrimination in employment claim was remanded to the district court because the district court’s findings of fact were inadequate. In a situation strikingly similar to this case, the Supreme Court in *Sigurdson* discussed the trial court’s failure to make important findings when the testimony at trial was undisputed:

The trial court does not mention in its findings of fact the seemingly discriminatory statements by Boettcher that he did not like to send women out to do field work and that assessing was not women’s work. These statements, which were not denied at trial, would appear to indicate that Plaintiff

had established a *prima facie* case with direct evidence of a discriminatory motive.

Sigurdson, 386 N.W.2d at 721. Here, the missing statements in the district court's Findings of Fact were the additional sexually explicit statements and conduct by Zapolski that showed a hostile work environment.

In explaining why the court should make explicit findings in cases brought under the MHRA, the *Sigurdson* court stated:

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, recognizing that much must be necessarily be left to the sound judgment and discretion because it has the advantages of fully hearing the testimony and acquiring a thorough familiarity with all the circumstances of the case. . . . Because of the significance of factual issues in employment discrimination cases and the attendant deference that must be accorded trial courts in making their determinations on these issues, it is important that the basis for the court's decision be set forth clearly and explicitly so that an appellate court can conduct effective and meaningful review.

Id. Here, the district court found the testimony of all three of the Appellants credible and discredited the testimony of Zapolski. It cannot be logically argued that the court's failure to include Zapolski's most egregious statements and actions was because the court did not find that they occurred.

A trial judge determining the facts in a sexual discrimination case based upon a hostile work environment cannot “sugar coat” or “clean up the facts” because the statements and stories told by the harasser are not appropriately repeated in “polite” society. For this court to review whether Zapolski’s conduct created a hostile work environment for the Appellants, the district court must set forth the actual facts as testified to at trial.

In *Sigurdson*, the Supreme Court pointed out that two members of the Court of Appeals agreed with the decision of the trial court while a third member reviewing the same record concluded that the trial court’s findings were clearly erroneous. In reviewing this, the Supreme Court stated:

That responsible and intelligent persons, after careful consideration of the evidence presented, can come to diametrically opposed conclusions on the ultimate issue, clearly indicates the necessity of an explicit understanding of the analysis by which the trial court reached its decision. Only in this way can we meaningfully assess whether the law, including the appropriate burdens of production and persuasion, have been correctly applied to the facts. For this reason, we reverse the judgment of the court of appeals on this issue, vacate the trial court’s judgment and remand for new findings and conclusions.

Id. at 722. The same problem is presented in this case because of the incomplete and “cleaned up” facts found by the district court. Judge Sandvik, based on the Affidavits of the Appellants found “. . . that each Plaintiff had presented clear and convincing evidence that Defendants showed deliberate disregard for their rights to be free from sexual

harassment.” A. App. 36. The testimony of the three Appellants at trial included the same facts that were in their Affidavits and presented to Judge Sandvik, and Appellants even added additional detail regarding those facts. However, the district court, while holding the Appellants’ testimony was credible, omitted important facts and then held that each of them had failed to prove they were the subject of harassment. A. Add. p. 41, 42; Order ¶¶ 2, 3 and 4.

B. The totality of Zapolski’s conduct, as found by the district court and testified to at trial, supports a holding that Appellants were subject to sexual harassment

There is no dispute about the underlying facts in this case. The district court found the Appellants to be credible, found Zapolski’s testimony to be untruthful, and made Findings of Fact about Zapolski’s conduct towards the Appellants. These Findings alone, which are not in dispute, mandate a Finding that Zapolski sexually harassed the Appellants. However, as discussed above, the district court inexplicably failed to make complete Findings about all of the conduct that constituted sexual harassment of the Appellants. It is almost as if the district court was uncomfortable detailing the more egregious statements and conduct of Zapolski in its Findings of Fact.

The district court’s Findings are incomplete and deny this Court the ability to fully review the judgment below. *See infra, Sigurdson*, 386 N.W.2d 715. Ultimately, the Appellants disagree with the court’s legal conclusion that each of the Appellants failed to prove sexual harassment. Although the district court’s Findings alone are sufficient to

support Appellants' claims, when the censored and omitted incidents described in detail above, *infra* p. 39-41, are added to the court's Findings of Fact, it must be said that Zapolski's conduct substantially interfered with each of the Appellants' employment and created an intimidating, hostile, and offensive employment environment.

Appellants' Motion for Amended Findings presented the district court with the opportunity to add to its sanitized findings but the court refused to do so. Therefore, if this Court finds that based on the Findings of Fact by district court that the Appellants have failed to prove a hostile work environment, the Court should vacate this Judgment and remand for new findings and conclusions.

III. ZAPOLSKI SHOULD BE HELD INDIVIDUALLY LIABLE FOR AIDING AND ABETTING IN THE SEXUAL HARASSMENT OF APPELLANTS

Whether Zapolski should be held individually liable for aiding and abetting in the sexual harassment of Appellants is a purely legal issue that should be decided *de novo* by this Court.

Prior to trial, Respondents sought to dismiss the claims against Zapolski as an individual. Judge Sandvik denied this Motion on November 4, 2010. A. App. 46-52.

After trial in his original Order, Judge Cuzzo held that:

5. Plaintiffs' claim of aiding and abetting against Defendant Brian Zapolski are hereby dismissed with prejudice, as Plaintiffs failed to prove they were the subject of harassment.

A. Add. p. 17-18.

In Appellants' Memorandum in Support of Motion to Amend, Appellants requested that Judge Cuzzo make a ruling on their aiding and abetting claim against Zapolski so that if an appeal of this case was necessary, the Court would be able to decide all of the contested legal issues. A. App. p. 74. The district court ignored this request and again held Zapolski was not individually liable because Appellants had failed to prove they were the subject of harassment. A. Add. p. 42; Order ¶ 5. If this Court finds that the Appellants proved that they were the subject of harassment then it should determine the aiding and abetting issue so that another appeal is not necessary and to prevent Zapolski from protecting his assets by moving them from his business entities to his individual ownership.

Appellants' claims are based exclusively on the MHRA. The MHRA contains a specific provision holding persons liable for aiding and abetting in any of the practices forbidden by the MHRA. There is no similar provision in federal law under Title VII or other federal civil rights statutes.

Minn. Stat. § 363A.14 provides, in relevant part:

It is an unfair discriminatory practice for any person:

(1) Intentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter; (Emphasis added)

The statute plainly allows an individual person to be held liable for "aiding and abetting" another person to engage in any of the practices forbidden by the MHRA. Note that the

statute uses the term “person” (which can include a corporate entity) rather than a “natural person” or “individual” (which would not include a corporate entity).

Zapolski has argued that he cannot be held liable under the aiding and abetting provision of the MHRA, claiming that an “individual must have acted ‘in concert’ with someone else became (sic) an employee cannot aid and abet him or herself.” Memorandum in Support of Summary Judgment, p. 3. What Zapolski seems to assert is that for purposes of the MHRA, the corporate entities Two Harbors Fish Co. and BWZ Enterprises must be ignored (of course, he will argue they must be recognized for all other purposes including shielding him from personal liability). But if Zapolski wants the law to recognize the separate status of Two Harbors Fish Co. and BWZ Enterprises, then he can’t pick and choose when those entities have a separate existence and when they don’t.

Two Harbors Fish Co. and BWZ Enterprises are “persons” within the meaning of Minn. Stat. § 363A.14. When the Minnesota legislature wants to provide that only human beings are to be subject to a statute, it has used terms such as “individual.” For example, the Health Care Directives statute uses the phrase “an individual age 18 or older.” Minn. Stat. § 145C.01, subs. 2 and 8. In a number of federal statutes, “person” is specifically defined to include corporations. *See* 29 U.S.C.A. § 152 (National Labor Relations Act); 11 U.S.C.A. § 101 (Bankruptcy Code).

A corporation is a “person” within the meaning of Fourteenth Amendment equal protection clause. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985). The Supreme Court recently held that the political speech of corporations should be treated the same under the First Amendment as the political speech of “natural persons.” *Citizens United v. Fed. Election Comm’n.*, 130 S.Ct. 876 (2010). If corporations are to be given the same rights as “natural persons,” they are subject to the same responsibilities and must be recognized as separate and distinct from their stockholders when it is to their detriment (such as applying the aiding and abetting provisions of the MHRA) the same as when it is to their benefit.

Respondents have argued that it is “logically impossible” for Zapolski, the sole owner of Two Harbors Fish Co. and BWZ Enterprises, to aid and abet the alleged discriminatory conduct. They argue that an individual must have acted “in concert” with someone else, and that when Zapolski committed sexual harassment he was acting as the corporation and not acting in concert with someone else. But Zapolski should not be able to claim that his business entities are separate and distinct from himself for purposes of limiting his liability, but that they are one and the same as him when applying the “aiding and abetting” provision of the MHRA. As stated by Judge Sandvik:

Plaintiffs argue, and this Court agrees, that Defendant Zapolski is trying to have it both ways by claiming now that he and his business entities are one and the same and therefore cannot have acted “in concert” under an aiding and abetting theory but if Plaintiffs were to secure a judgment against the Two Harbors Fish Co. and BWZ Enterprises,

LLC, that he is separate and distinct from them and not responsible for liabilities. That position is not logical and this Court finds that Defendant Zapolski cannot be one and the same with his businesses entities for purposes of the aiding and abetting provision of the MHRA and then separate from them in order to shield himself from personal liability.

A. App. p. 52. Zapolski has not conceded that for purposes of liability he is personally liable for any acts of his business entities, so his attempts to ignore the separate status of the business entities are without merit.

CONCLUSION

Appellants ask this Court to vacate the Judgment of the district court and direct the district court to enter Judgment on the issue of liability in favor of each of the Appellants based upon a holding that Zapolski's conduct in the workplace, as set forth in the district court's Findings of Fact, created for each Appellant an intimidating, hostile and offensive employment environment and substantially interfered with their employment in violation of the MHRA. The case should then be remanded to the district court to determine compensatory and punitive damages. If this Court determines that Appellants have proven a violation of the MHRA by Zapolski then this Court should also determine that Zapolski is individually liable for aiding and abetting in the sexual harassment of the Appellants pursuant to Minn. Stat. § 383A.14.

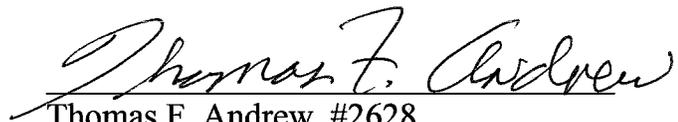
If this Court determines that the district court's Findings of Fact as to Zapolski's conduct do not establish a violation of the MHRA then the Judgment of the district court should be vacated and the case should be remanded with a direction that the district court

make detailed and specific findings and based on those findings reevaluate its decision if Zapolski's conduct violated the MHRA.

Dated: January 27, 2012

Respectfully submitted,

ANDREW & BRANSKY, P.A.

A handwritten signature in cursive script that reads "Thomas F. Andrew". The signature is written in black ink and is positioned above the printed name and contact information.

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