STATE OF MINNESOTA
IN COURT OF APPEALS
A10-472

Elizabeth Friend,
Respondent,

vs.

Gopher Company, Inc., et al.,
Appellants.

Filed September 14, 2010
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CV-06-17556

Stephen W. Cooper, Stacey R. Everson, The Cooper Law Firm Chartered, Minneapolis, Minnesota (for respondent)

Jack E. Pierce, Pierce Law Firm PA, Minneapolis, Minnesota (for appellants)

Considered and decided by Klaphake, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellants, an employer and its principal, challenge the district court's finding of liability against them under the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01–.41 (2008), for terminating respondent on the basis of her pregnancy.

Appellants also challenge the district court's damages award and attorney-fee award. We affirm.

FACTS

This case arises out of respondent Elizabeth Friend's allegation that her former employer, appellant Gopher Company Inc., and its principal, appellant Jason Brouwer, illegally terminated her employment because she was pregnant. The underlying facts of this case are set forth in detail in this court's previous decision of *Friend v. Gopher Co.*, 771 N.W.2d 33, 35–37 (Minn. App. 2009) (*Friend I*), and are not repeated here.

In *Friend I*, appellants sought review in this court, challenging the district court's liability finding, damages award for mental anguish, and costs award relating to mediation. 771 N.W.2d at 37. By notice of review, respondent challenged the damages award and attorney-fee award. *Id.* This court reversed and remanded on the liability issue, concluding that the district court's findings were insufficient to permit reasoned appellate review because the district court did not make clear whether its liability determination was based on the *McDonnell Douglas* burden-shifting analysis for discrimination claims or the alternative "direct method." *Id.* at 40. This court did not reach the other issues raised by the parties in *Friend I*. *Id*. at 40–41.

On remand, the district court expressly adopted this court's statement of facts in *Friend I*, explained that it found respondent's testimony more reliable than Brouwer's, and found "that Brouwer's testimony that part of his business concerns were . . . the potential impact the pregnancy would have on the business in the future proved Ms. Friend was terminated for being pregnant." The court then clarified that it was applying

the direct method in making its determination and stated that "the Court finds that the circumstantial evidence of Mr. Brouwer stating on a court record that part of his reason for his business decision to terminate [Friend] was her pregnancy is treated as direct evidence of discrimination." The court reserved a decision as to damages pending written arguments from the parties.

Both parties submitted arguments on damages, and appellants also submitted a memorandum challenging the district court's reasoning on liability, arguing that the amended findings did not support a finding of discrimination under the direct method. The district court reaffirmed its decision on liability but abandoned its finding that Friend "would have been lucky to have made it to December 31, 2005 without being fired" and modified its damages award, calculating back-pay damages from the date of respondent's termination through trial, less income earned from other employment, for a net total of $32,570.80 in back-pay damages. The court also withdrew its award of mental-anguish damages, and it increased the attorney-fee award to $48,824.50, stating that it had erred in the original decision by limiting the award to a percentage of the damages because "[r]egardless of the results attained, the work was completed."

The district court entered judgment[1] on January 13, 2010. This appeal follows.

[1] Respondent's complaint contained four causes of action: (I) wrongful termination based on pregnancy discrimination; (II) negligence; (III) intentional infliction of emotional distress; and (IV) negligent infliction of emotional distress. The parties only tried Count I. The district court effectively dismissed the other claims, stating in its order for judgment that "[t]his case presented several claims of action. Plaintiff was successful on one of these claims."

D E C I S I O N

I. Liability

Appellant first argues that the evidence is insufficient to support the district court's finding of illegal discrimination under the direct method. "In an appeal from judgment following a court trial, we defer to the district court's findings of fact unless clearly erroneous." *Id*. at 37 (citing Minn. R. Civ. P. 52.01; *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 528, 441 (Minn. 1983)). "But we do not defer to the district court's decision on purely legal questions." *Id*.

"The Minnesota Human Rights Act (MHRA) prohibits an employer from discharging an employee on the basis of sex, . . . which is expressly defined to include 'pregnancy, childbirth, and disabilities related to pregnancy or childbirth.'" *Id.* (citing Minn. Stat. § 363A.08, subd. 2; quoting Minn. Stat. § 363A.03, subd. 42). Under a claim of wrongful termination due to pregnancy, an employee must prove that her pregnancy "actually motivated" the employer's decision to terminate her employment. *Id.* (quoting *Goins v. West Grp.*, 635 N.W.2d 717, 722 (Minn. 2001)).

In *Friend I*, this court concluded that "a plaintiff may prove a claim under the direct-evidence framework—perhaps more appropriately understood as the direct method—through either direct or circumstantial evidence, or a combination of the two." *Id.* at 40. This court remanded for additional findings on the basis that the district court had not made clear whether it was proceeding under *McDonnell Douglas* or the direct method. *Id.* On remand, the district court addressed this court's concerns by clarifying that it found appellants liable under the direct method based on Brouwer's testimony that

"part of his business concerns were . . . the potential impact the pregnancy would have on the business in the future," and by explaining that it found respondent's testimony "more reliable than Mr. Brouwer's."

We conclude that the evidence is sufficient to support the district court's finding that appellants terminated respondent because she was pregnant. The record contains evidence that Brouwer was concerned about how respondent's pregnancy would impact his business, and that he was considering changing respondent's job duties or reducing her hours without ever discussing with her how the pregnancy might impact her ability or desire to work. Brouwer's remarks, although not directly targeted to termination, were made shortly before the termination and reflect his judgment that respondent—because of her pregnancy—could not continue to work in her full-time receptionist position. Moreover, Brouwer terminated respondent immediately following her failure to comply with his instruction that she report to work despite her pregnancy-related doctor's appointment. The evidence supports the district court's finding that respondent's "pregnancy was the fact that had changed causing [appellants] to terminate her employment," and that respondent "was terminated for being pregnant."

This case is similar to the case of *Deenen v. Nw. Airlines, Inc.*, in which the Eighth Circuit held that the evidence was sufficient to support a jury's verdict that an employer intentionally discriminated against an employee on the basis of a pregnancy-related medical condition when it refused to allow her to return to work. 132 F.3d 431, 438 (8th Cir. 1998). In *Deenen*, the employee was recalled to work after a layoff, but about a week before she was scheduled to return, she had some complications with her

pregnancy. *Id.* at 433. When the employer learned of the complications, it first told the employee that she would not be allowed to return to work because of her complications, and then that she could return if she had a doctor's note. *Id.* at 433–34. The employee presented a doctor's note restricting her to "light duty," but the employer rejected it, explaining that the job required the employee to be able to lift up to 75-pound bags. *Id.* at 434. The employee said that she was not able to lift 75-pound bags even when she was not pregnant, but the employer would not allow her to work without a doctor's note verifying that she could perform all the job functions. *Id.* Four months later, after the employee gave birth, the employer again recalled her to work, but did not ask if she was pregnant and did not require any verification that she could lift 75 pounds. *Id.*

As in *Deenen*, the primary factor in this case affecting whether appellants allowed respondent to work was her pregnancy. In *Deenen*, although the employee had never been able to lift 75 pounds, the work requirement was not enforced until she became pregnant, and when she was no longer pregnant, the employer dropped the enforcement of the requirement. Here, although the evidence reflects that respondent had a history of attendance problems, appellants did not terminate respondent until she missed work due to her pregnancy, and Amy Brouwer testified that respondent's attendance was otherwise good in August. We conclude that the evidence in this case supports the district court's finding that appellants' adverse treatment of respondent was caused by her pregnancy.

II. Damages

Appellants next contend that the district court abused its discretion in calculating damages. Appellants argue that there is no evidence to support the award of back pay and that respondent failed to mitigate her damages.

The district court has "broad discretion in determining appropriate damages." *Friend I*, 771 N.W.2d at 40. The MHRA broadly allows the district court to award "compensatory damages in an amount up to three times the actual damages sustained." Minn. Stat. § 363A.29, subd. 4. The Minnesota Supreme Court has construed this actual-damages provision to encompass an award of back pay. *Ray v. Miller Meester Adver., Inc.*, 684 N.W.2d 404, 408 (Minn. 2004). Compensatory damages under the MHRA are to be determined in a manner consistent with common-law damages principles. *Id.* at 409.

Under these principles, the plaintiff has "the burden of proving damages caused by the defendant by a fair preponderance of the evidence." *Canada by Landy v. McCarthy*, 567 N.W.2d 496, 507 (Minn. 1997). "The plaintiff must demonstrate with reasonable certainty the nature and probable duration of the injuries sustained." *Id.* "[T]here can be no recovery for damages which are remote, conjectural, or speculative." *Carpenter v. Nelson*, 257 Minn. 424, 428, 101 N.W.2d 918, 921 (1960). "[D]etermining whether, and at what point, an award of backpay would become speculative" rests within the district court's discretion. *Friend I*, 771 N.W.2d at 41 (citing *Jackson v. Reiling*, 311 Minn. 562, 563, 249 N.W.2d 896, 897 (1977)).

The district court found that respondent is "entitled to $32,570.80 in damages that will restore her to the place where she would have been, had the discrimination not occurred." The court calculated respondent's damages by multiplying her annual compensation of $19,873.80 by 2-2/3 years (the time that passed between the date of termination and trial) to arrive at a total of $52,996.80. The court then subtracted $20,420, the amount it found that respondent earned through other employment, resulting in net damages of $32,570.80.

The district court's back-pay award is consistent with the evidence in the record. While appellants are correct that respondent did not expressly testify about her pay, the record includes respondent's pay stubs and information about the costs of her health insurance, from which the district court could have deduced her compensation. Appellants object to the court basing respondent's back-pay award on a full 40-hour work week, arguing that respondent would not have worked (and been paid for) a full 40 hours. Respondent disputed appellants' claim that she missed work for nonmedical reasons, maintaining that her only nonmedical absences were for a funeral and a few hours to visit her sister in the hospital. The district court expressly credited respondent's testimony over Brouwer's.

And even though respondent had missed work due to medical problems prior to her termination, the evidence suggests that respondent's medical problems were largely resolved, and that she would not have continued to miss work for medical reasons during the weeks between discharge and trial. The district court's calculation of respondent's

back-pay award, based on a 40-hour week, was therefore reasonable. We conclude that the district court did not abuse its discretion in calculating respondent's damages.

Appellants point out, and we agree, that the record lacks direct evidence to support the district court's finding that respondent earned $20,420 through other employment—this figure appears only in respondent's post-appeal memorandum of law. But respondent offered Exhibit 12 at trial as a summary of her lost income from the date of termination through trial, and Exhibit 12 states that respondent earned $19,966 through other employment. Although appellants objected to Exhibit 12 on the bases of foundation and speculation about the number of hours that respondent would have worked and whether her pay would have increased, they offered no evidence at trial about respondent's earnings or how they should affect her damages. In response to appellants' objection, the court stated, "I am going to consider it not as a factual exhibit, but what the plaintiff's position is just simply to what her wish list would be. So on that basis, I accept it. It is more argument than anything, but since it is a court trial exhibit 12 is received."

Aside from Exhibit 12, respondent testified that she worked 25 to 30 hours a week from November 2006 at least through trial in March 2008, and the court could have estimated a deduction for respondent's earnings based on the nature of the job and the hours worked. Even if the district court relied upon Exhibit 12—evidence arguably not in the record—to calculate respondent's back-pay award, we decline to reverse the district court's reduction of respondent's back-pay award because appellants benefited by the court's reduction, and respondent has not challenged it. *See* Minn. R. Civ. P. 61

(stating that harmless error is to be ignored). Because the record contains sufficient evidence to support the court's damages reduction, we conclude that the court did not abuse its discretion in arriving at the net back-pay award of $32,570.80.

III. Attorney Fees and Mediation Costs

Appellants argue that the district court abused its discretion in its award of attorney fees to respondent.

Attorney fees are recoverable in MHRA discrimination claims under Minn. Stat. § 363A.33, subd. 7. Minnesota has adopted the federal lodestar analysis for calculation of attorney fees. *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 628 (Minn. 1988) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983)). Under that analysis, the district court must first determine "the so-called 'lodestar' figure . . . by multiplying the 'number of hours reasonably expended on the litigation . . . by a reasonable hourly rate.'" *Id.* (quoting *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939). The court must exclude any hours not reasonably expended. *Hensley*, 461 U.S. at 434, 103 S. Ct. at 1939. The court must then determine whether any other factors justify departure from the requested amount, such as the results obtained. *Id.* at 434, 103 S. Ct. at 1940. We review attorney-fee awards for an abuse of discretion. *Friend I*, 771 N.W.2d at 41.

Here, the district court expressly applied the lodestar analysis and determined that 57.7 hours billed by respondent's attorneys for "trial prep" were unreasonable because the hours were not sufficiently documented. Appellants argue that the award is inappropriate because it is $16,000 higher than respondent's principal damage award. The *Hensley* analysis permits reduction for the results obtained under two frameworks.

First, if there are several unrelated claims litigated in the same suit and not all claims are successful, fees should not be recovered for time spent on the unsuccessful claims. *Hensley*, 461 U.S. at 435, 103 S. Ct. at 1940 ("The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim."). But if the claims in the case are related, i.e., they "involve a common core of facts" or are "based on related legal theories," then "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." *Id.* In such a situation, the court "should focus on the significance of the overall relief obtained by the plaintiff in relation to the hours reasonably expended on the litigation." *Id.*

This case falls into the second category—all four claims that respondent initially asserted arose out of the same facts. In practice, however, respondent pursued only the discrimination claim, which was successful. While some of the hours that respondent's counsel expended may have related to the additional claims that respondent did not pursue, the district court took this into account when it noted, in its discussion of the fee award, that "[t]his case presented several claims of action. Plaintiff was successful on one of these claims." The court then went on to deduct 57.7 hours' worth of fees, as discussed above.

Hensley does not provide support for appellants' suggestion that the attorney-fee award should be limited to a percentage of principal damages. Respondent was wholly successful on her primary claim—appellants were found liable and required to pay

compensatory damages. The district court found that, aside from the 57.7 hours it deducted, the hours were reasonably expended pursuing respondent's claim and the rate was reasonable. The mere fact that this calculation results in a figure arithmetically greater than the principal damages award does not render the calculation inconsistent with the lodestar analysis. Nothing in the district court's reasoning suggests that it abused its discretion in its attorney-fee award to respondent.

Appellants' only reference to the district court's award of costs to respondent is found in a footnote in their brief. In that footnote, appellants appear to complain only about the court's award of a mediator's fee to respondent, citing *Benson v. Nw. Airlines, Inc.*, 561 N.W.2d 530, 541 (Minn. App. 1997), *review denied* (Minn. June 11, 1997). We do not address appellants' argument except to note that "[t]he trial court is accorded broad discretion in awarding expenses of litigation and the court's findings and awards will not be disturbed absent a clear abuse of discretion." *Cheyenne Land Co. v. Wilde*, 463 N.W.2d 539, 540 (Minn. App. 1990). Neither appellants' argument nor the record about the mediation fee is adequately developed to enable meaningful review under this standard.

Affirmed.