

Nos. A05-158 and A05-473

State of Minnesota
In Court of Appeals

Lester Wenigar,

Respondent,

vs.

Lee Johnson, d.b.a. Johnson's,
Johnson's Sanitation, and Stratton Farms,

Appellant.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

1. Whether the district court erred in finding Appellant liable for unpaid overtime compensation pursuant to the state and federal Fair Labor Standards Acts where Respondent was not a covered employee under either Act and Appellant was not a covered employer.

The district court found Appellant liable under both Fair Labor Standards Acts and awarded Respondent \$119,457 in damages.

Apposite authorities:

29 U.S.C. § 203(f).

Minn. Stat. § 177.23, subd. 7(2).

29 U.S.C. § 203(s)(1)(A)(i,ii).

Baldwin v. Iowa Select Farms, L.P.,
6 F. Supp.2d 831 (N.D. Iowa 1998).

2. Whether the district court erred in finding Appellant liable for disability hostile work environment under the Minnesota Human Rights Act where that claim has never been recognized under Minnesota law, Respondent has not demonstrated the existence of a hostile work environment, and Respondent had no evidence of recoverable damages.

The district court found Appellant liable for creating a disability hostile work environment and awarded Respondent \$119,909.50 in damages.

Apposite authorities:

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

Wirig v. Kinney Shoe Corp.,
461 N.W.2d 374 (Minn. 1990).

Minneapolis Police Department v. Minneapolis Comm'n on Civil Rights,
402 N.W.2d 125 (Minn. Ct. App. 1987), *aff'd* 425 N.W.2d 235 (Minn. 1988).

3. Whether the district court erred in finding Appellant liable for intentional infliction of emotional distress where Appellant's conduct was not extreme,

outrageous, intentional or reckless, Respondent did not suffer severe emotional distress, the emotional distress Respondent did suffer was not causally related to Appellant's conduct, and much of the district court's damages award is barred by the statute of limitations.

The district court found Appellant liable for intentional infliction of emotional distress and awarded Respondent \$200,000 in damages.

Apposite authorities:

Hubbard v. United Press International, Inc.,
330 N.W.2d 428 (Minn. 1983).

Langeslag v. KYMN Inc.,
664 N.W.2d 860 (Minn. 2003).

Minn. Stat. § 541.07(1).

STATEMENT OF CASE

Respondent Lester Wenigar ("Wenigar") commenced this case against his former employer, Appellant Lee Johnson ("Johnson"), asserting claims for: (1) violations of the state and federal Fair Labor Standards Acts ("FLSA"), *see* Minn. Stat. § 177.21 – 177.35 and 29 U.S.C. §§ 201-219; (2) disability discrimination in violation of the Minnesota Human Rights Act ("MHRA"), *see* Minn. Stat. Chap. 363A; (3) violations of Minn. Stat. § 181.13; and (4) violations of Minn. Stat. § 181.79. (A.1-7).¹ By order dated December 11, 2002, the district court, the Honorable Linn Slattengren presiding, granted Wenigar leave to amend his complaint to assert a claim for intentional infliction of emotional distress "limited to acts that occurred after September 13, 1999". (A.8-9).

The case was tried to the district court, the Honorable James E. Dehn presiding, on December 17, 18 and 29, 2003, and January 2, 5 and 6, 2004. (A.20). By order dated June 3, 2004, the district court found Johnson liable to Wenigar for intentional infliction of emotional distress, and for violations of the MHRA and the state and federal FLSAs, and awarded Wenigar damages as follows: (1) \$150,000 for past emotional distress; (2) \$50,000 for future emotional distress; (3) \$39,819 for unpaid overtime compensation under the state and federal FLSAs; (4) \$79,638 as liquidated damages under the federal FLSA; and (5) \$119,909.50 "pursuant to the Minnesota Human Rights Act as damages in

¹ In this brief, references to Appellant's Appendix are prefixed "A.", references to the trial transcript are prefixed "T." together with the date of the trial testimony, and references to the trial depositions are prefixed "Dep." together with the deponent's surname.

addition to the amounts already awarded." (A.33). The district court found for Johnson on Wenigar's claims arising under Minn. Stat. §§ 181.13 and 181.79. (*Id.*)

Johnson filed a timely motion for amended findings or a new trial, which the district court denied by order dated November 23, 2004. (A.41). By this same order, the district court denied Wenigar's motion for punitive damages and partially granted his petition for an award of attorneys' disbursements. (*Id.*) Final judgment was entered on February 16, 2005, and these consolidated appeals followed. (A.61-62).

STATEMENT OF FACTS

I. LEE JOHNSON AND HIS BUSINESSES

At the time of trial, defendant Lee Johnson ("Johnson") was seventy-four years old, married and the father of ten children. (1/6/04, T.120). He has been a farmer all his life. (12/29/03, T.63). At all times relevant to this case, he owned a pig farm and was involved with the day-to-day operations of the farm. (1/6/04, T.120). At the time of trial, the farm had approximately 600-700 hogs. (12/17/03, T.44). Until roughly 1998, the farm was located in Andover Minnesota on Bunker Lake Boulevard. (*Id.* at 44). In approximately 1998, Johnson relocated the farm to Isanti, Minnesota. (*Id.* at 44-45).

As part of the farming operation, Johnson had arrangements with various restaurants, grocery stores, hotels and other concerns, whereby for a fee Johnson would collect leftover and discarded food. (*Id.* at 37). The entities would place the discarded food in large buckets or cans, and Johnson and his employees would collect these cans on trucks, bring the discarded food back to the farm, and then feed the discarded food to the pigs. Johnson and his employees collected the food cans Monday through Saturday in large trucks with each collection route taking several hours to complete. For smaller collection routes, a driver would perform the route alone. For larger routes, a helper would accompany and assist the driver. (*See* 12/17/03, T. 56-58, 61-64). The sole purpose for collecting this food was to obtain feed for the pigs. (12/18/03, T.131; 12/29/03 T.45, 64).

Until 2000, Johnson also owned a garbage hauling business, which did business as Johnson Sanitation and/or Leroy Johnson Hauling. (A.127; 12/17/03, T. 38; 1/6/04,

T.120). Johnson Sanitation was a commercial garbage hauler that picked up rubbish and hauled it to landfills. (*Id.*) The rubbish hauling business involved separate and unrelated to the food collection routes whereby Johnson and his employees obtained feed for the pigs. (1/6/04, T.131). In 2000, Johnson sold Johnson Sanitation to Waste Management of Minnesota, Inc. (A.127). Although Johnson owned Johnson Sanitation, he was not involved in its day-to-day operations. (12/17/03, T.121). Instead, Steve Johnson, one of Lee Johnson's sons, operated Johnson Sanitation. (*Id.*)

Johnson did not incorporate either the farm or Johnson Sanitation but instead operated them as sole proprietorships. (A.127). He reported the income for each business on his personal tax returns. (A.97-106).

II. LESTER WENIGAR AND HIS BACKGROUND BEFORE WORKING FOR JOHNSON

At the time of trial, plaintiff Lester Wenigar ("Wenigar") was 57 years old. The district court found that Wenigar has an I.Q. of 54 with limited ability to read and write. (A.21). The district court also found that Wenigar appears able to function at a somewhat higher level as evidenced by his testimony at trial. (*Id.*) Wenigar cannot drive and does not have a driver's license. (1/5/04, T.27-28).

Wenigar was raised on a farm, attending school through the sixth grade when his mother died. (12/29/04, T.89). After his mother died, Wenigar's father moved to the Twin Cities to get a job and Wenigar went to live with his uncle. (12/29/04, T.91; 1/2/04, T.106). Wenigar had no contact with his father from age 10 to 18. (1/2/04, T.106). He did farm chores while living with his uncle until he was 18. (12/29/04, T.92).

Wenigar was drafted at age 18, but was rejected from military service because he could not read and write. (*Id.* at 93). In 1969, Wenigar found a job working at the Rainbow Café as a dishwasher and doing odd jobs. (12/29/04, T.94; 1/2/04, T.113). He worked there for 10 years until the owner died. (12/29/04, T.94). For much of this period, he lived in a room located above the Café. (1/2/04, T.113). Wenigar then worked in a scrap yard for 10 years. (12/29/04, T.997). In 1988, the scrap yard closed and he was out of work for three years. (*Id.* at 98). Wenigar admitted that he would not work someplace where he was not being treated well. (1/2/04, T.116-17).

III. WENIGAR'S EMPLOYMENT WITH JOHNSON

A. Wenigar Has No Complaints About His Employment From 1993 Through 1996

Wenigar started working for Johnson at the farm in 1993. (12/29/03, T.100). Wenigar's friend Dee Dee Thomas helped him find the job. (*Id.*) He was hired to clean the pens, to bed the pigs and to wash the empty food cans. (12/17/03, T.52; 12/29/03, T.103). He also ran a tractor to spread pig manure in the fields. (12/17/03, T.52). Wenigar occasionally fed the pigs but did not generally go on the food collection route. (*Id.* at 53). When he first started working for Johnson, Wenigar worked Mondays through Saturdays. (12/29/03, T.106). He worked from 7:00 in the morning until 4:30 in the afternoon. (*Id.*)

When Wenigar first met Johnson, he thought Johnson was a nice guy. (*Id.* at 103). In Wenigar's words, “[Johnson] treated me pretty good.” (*Id.*) Wenigar testified that before 1997, Johnson was a good boss to him. (1/5/04, T.52-53). At trial, an undated

letter was introduced wherein Wenigar praised Johnson as a good boss. (A.63). Also introduced was a January 1, 1995 letter from Wenigar to Johnson -- addressed "Dear Bud" -- thanking Johnson for a Christmas bonus and praising Johnson as a "good boss". (A.64). Additionally introduced was a letter Wenigar sent to Johnson, addressed "Dear Bud or Dad", and signed "Love, Les." (Ex. 74).

B. The Alleged Night Watchman's Position

Wenigar testified that, in 1994, Johnson told Wenigar that he "would be a night watchman." (12/29/03, T.108). Wenigar testified that Johnson said that he had trouble with people breaking in and stealing things. (*Id.*) Thereafter, until the farm moved to Isanti, Wenigar slept in a trailer at the Bunker Lake property. (*Id.* at 123). Wenigar testified that he would stay overnight at the farm, and only go home on Saturday nights and come back on Sundays. (*Id.* at 108). Wenigar testified that he did not write down night watch hours on his time card because "Lee told me not to." (*Id.* at 116). He stated that Johnson told him that when the farm "folds down or runs out of business" Wenigar would then be paid for being a night watchman. (*Id.*) When he was working as a night watchman, Wenigar testified that he got three or four hours of sleep a night; and that he would get up at 4:00 in the morning to help get the food collection trucks ready for their routes. (*Id.* at 119).

In the middle of 1998, Wenigar started working at the farm in Isanti. (1/2/04, T.8). Wenigar testified that he was still the night watchman after the move, although Johnson never asked him to be the watchman at Isanti. (*Id.* at 12, 37). Wenigar testified that his routine at Isanti was to rise at 3:00 o'clock, get the food collection trucks loaded

up and then go out with the drivers on the collection routes. (*Id.* at 12). He would get back at 1:00 or 2:00 in the afternoon, do his chores until about 4:00, and then wash cans until 10:00 or 11:00 p.m. (*Id.* at 13). He would try to sleep then, but if he heard a noise, he would get up and walk the yards, which would take him two hours. (*Id.*) Wenigar claims there was never a night when he slept through the whole night. (*Id.*)

Although Wenigar claimed that he was required to stay at the farm as a night watchman, there is no corroborating evidence for this assertion. Several documents were introduced as trial exhibits consisting of hand written notes Wenigar prepared to list the job duties he was performing while working for Johnson. (A.84-94). None of these documents describe the night watchman duties. (A.84-94; 1/5/04, T.45). Further, Wenigar never told any of his co-workers that he was staying on the farm as a night watchman. (1/5/04, T.38). Co-worker Julie Feiertag testified that she saw Wenigar every day at work. (1/6/04, T.75) She stated that she knew Wenigar was staying at the farm overnight at Bunker Lake and in Isanti, and that Wenigar told her the reason he stayed overnight on the farm was that he did not have any transportation back and forth from his home. (*Id.* at 78). Wenigar's co-worker Matt Johnson testified that he was never aware that Wenigar claimed to be a night watchman prior to the start of the litigation. (12/18/03, T.139). Co-worker Bill Haluptzok testified that he never heard Wenigar claim that he was a night watchman although Haluptzok knew that Wenigar stayed overnight sometimes on the farm. (12/17,03, T.129, 133).

As for Johnson, he denied that he instructed Wenigar to sleep at the farm as a night watchman but instead allowed Wenigar to sleep there for Wenigar's own convenience. (12/17/03, T.65; 1/6/04, T.137, 142, 144).

C. Wenigar's Complaints Of His Treatment Beginning 1997

Beginning in 1997, Wenigar testified that his relationship with Johnson changed:

Q. When you first started working for Lee Johnson at the very beginning at Bunker in '93, did you like working for him?

A. Yes.

Q. Was he calling you names and that type of thing when you first started working for him?

A. No, sir.

Q. When you first started working for him did you tell him that you liked him?

A. Yes, I did.

Q. When did all that start to change?

MR. MANNELLA: Lack of foundation for the question because he's saying "when did all that start to change."

THE COURT: Sustained.

Q. (By Mr. Schaff, continuing) When did you begin to not like working there?

A. From the '97 to when I got hurt, to 2000.

(1/2/04, T.59).

Wenigar's testimony painted a bleak but otherwise uncorroborated portrait of his working conditions from 1997 onward.² Wenigar testified that Johnson hollered at him every day and accused him of getting nothing done, when Wenigar was actually doing the work of three men. (1/2/04, T.2). Wenigar was working as hard as he could, but could not get all the work done. (12/29/03, T.122). If Wenigar got behind schedule, Johnson would holler at him for not getting the work done. (1/2/04, T.16). Wenigar testified that he never was allowed to take breaks unless he hid himself in the barn. (*Id.* at 72). He would tell Johnson he wanted a break, but was told the work had to get done. (12/29/03, T.120). If Johnson caught him sitting, he would yell at him and scare him. (*Id.*) Wenigar said that he was scared of Johnson because of "my low I.Q." (*Id.*)

Wenigar testified that while he worked for Johnson, he never took a vacation except on one occasion, and then Johnson made him return to work before the vacation was over. (1.2.04, T.50). Johnson and Wenigar's co-workers would routinely tease and insult Wenigar. (*Id.* at 58-59). Johnson also denied Wenigar's requests for a pay raise. (*Id.* at 55). Wenigar testified that he kept working for Johnson because he was afraid that he would not get another job, as Johnson would tell everyone that Wenigar was stupid and retarded. (12/29/03, T.132).

² At trial, Wenigar's friend Dee Dee Thomas repeated much of Wenigar's testimony regarding his alleged mistreatment by Johnson, however, she also testified that she was only repeating what Wenigar had told her and that she did not have first hand knowledge of the mistreatment. (12/17/03, T.217). For his part, Wenigar testified that he never told Dee Dee Thomas about his alleged troubles with Johnson. (12/6/04, T.4-5).

IV. WENIGAR SUFFERS A WORKPLACE INJURY AND QUILTS HIS JOB

On March 5, 2001, while on the job, Wenigar fell from a truck and claims to have suffered injuries to his head, right shoulder, cervical spine, thoracic spine, lumbar spine, bilateral hips, and rib cage/chest. (A.116; 1,2,04, T.79). He submitted a claim for workers compensation benefits, which was settled by stipulation. (A.115-26). Per the stipulation, Wenigar received a lump sum payment of \$43,000.00, \$13,000.00 of which was paid directly to his workers' compensation attorney. (A.120). In addition, as of May 1, 2003, Wenigar began receiving \$196.03 per week as permanent total disability benefits. (A.121).³ Per the stipulation, Johnson and his workers' compensation insurer also agreed to pay all of Wenigar's medical expenses arising from the March 5, 2001 injury. (*Id.*)

On April 4, 2001, Wenigar quit his job at the farm, advising Johnson to "shove the job up your fucking ass." (12/18/03, T.72; 1/5/04, T.8).

V. MUCH OF WENIGAR'S TESTIMONY IS SELF-CONTRADICTORY OR CONTRADICTED BY THE TESTIMONY OF OTHER WITNESSES

Much of Wenigar's testimony regarding his working conditions from 1997 onward was contradicted by his own testimony and statements or was contradicted by the testimony of other witnesses.

Living conditions. Wenigar testified that his sleeping quarters on the farm were almost uninhabitable. He claimed to have never had a bed and to have slept on two

³ As of October 2001, Wenigar has also received \$1,168.00 per month as social security disability income. (A.121).

chairs. (12/29/03, T.112; 1/5/04, T.74). At Bunker Lake, he testified that he stayed in a trailer without a bathroom. (12/29/03, T.127). At Isanti, he slept in a room near the office, which he testified was too cold in the winter and too hot in the summer. (1/2/04, T.61). He testified that he would sometimes sleep in Johnson's office during the winter, without Johnson's knowledge. (*Id.* at 62). That was heated, and had a bathroom. (*Id.*)

Wenigar's co-worker Feiertag contradicted most of this testimony. She testified that she saw the trailer where Wenigar slept in Bunker Lake. (1/6/04, T.79). She testified that it had a refrigerator, a bathroom, a kitchen and a bedroom with a bed. (*Id.*) Johnson testified that he and his wife lived in the trailer for 18 months. (1/6/04, T.139).

Feiertag testified that at Isanti, Wenigar lived in the same room that Feiertag had lived in for a month with her child and significant other. (1/6/04, T.80). It had a bed in it and shelving and she described it as "comfortable" and adequate. (*Id.* at 80, 92). She testified that she bought a bed for Wenigar to use at Isanti, and during cross-examination, Wenigar conceded that he had a "cot" to sleep on at Isanti. (*Id.* at 27, 80). The bed had linens, which Feiertag washed. (*Id.* at 81). There was a television and hotplate. There was also a microwave and heat. (*Id.*)

Lunch and Dinner Breaks. Wenigar testified that he was never allowed to take meal breaks. (1/2/04, T.46). He claimed that Johnson threw out his food and that Wenigar had to resort to eating food taken from the barrels of pig feed. (*Id.* at 44, 64, 68). He claims there was a microwave in the office but that Johnson told him not to use it because of the electric bill. (*Id.* at 43).

Wenigar's own time records, however, indicate that he commonly took meal breaks. (A.66-83; 1/5/04, T.67-69). Further, a photograph was introduced at trial showing Wenigar eating lunch with another employee. (A.128). As for the claim that Johnson threw out his food, on cross-examination, Wenigar later admitted that he did not know who threw the food away; he simply found that, on one occasion, the food was gone when he got back from working the food collection route. (1/5/04, T.77-78).

Feiertag testified that she saw Wenigar take daily lunch breaks. (1/6/04, T.82). She testified that Wenigar ate a lot of peanut butter and jelly sandwiches, but that Johnson would buy hamburgers or food for all the workers. (*Id.*) She testified that she also saw Wenigar cook spaghetti and other foods at the farm. (*Id.* at 91). Wenigar's co-worker Haluptzok testified that on occasion he and Wenigar would stop for breakfast while working the food collection routes. (12/17/03, T.132).

Feiertag testified that she saw Wenigar eat foodstuffs that were picked up from grocery stores for feeding to the pigs. (1/6/04, T.83). She testified that she ate these foodstuffs herself, because there was "absolutely nothing wrong with it". (*Id.*) Wenigar's co-worker Matt Johnson told a similar story, testifying that he sometimes saw Wenigar eating donuts or bananas out of the cans. (12/18/03, T.124). As Matt Johnson explained, often the food that would come from grocery stores would come out in trays, or in bags. (*Id.* at 143). Matt Johnson would also take some of the food and eat it because it was fine and edible. (*Id.*) "I mean, you know there's nothing wrong with it, they just took it off their shelves." (*Id.*)

Verbal Abuse. Wenigar testified that Johnson and his co-workers called him "stupid, retarded, no good shit", and said that he came from a retarded family. (1/2/04, T.58). Feiertag, however, testified that she never observed Johnson pick on Wenigar, or call him stupid. (1/6/04, T.87). Feiertag testified that Johnson treated Wenigar well, probably better than most of the other farm employees. (*Id.* at 87, 89). Matt Johnson testified that he observed Wenigar and Johnson working together, and although they had arguments, he saw them get along "really well", too. (12/18/03, T.131). Matt Johnson testified that Wenigar called Johnson "dad", and that Johnson called Wenigar "son" and treated him well. (*Id.* at 132). Matt Johnson testified that he never observed Johnson doing anything to intentionally harm Wenigar. (*Id.* at 144). Haluptzok testified that he was not aware of Johnson ever calling Wenigar names or swearing at him. (12/17/03, T.135).

As for swearing, Feiertag testified that she heard Johnson swear and other employees swear as well. (1/6/04, T.85). She stated that swearing was fairly common at the farm as was hollering. (*Id.* at 86). Matt Johnson testified that Johnson swore at everybody at the farm and that the employees, including Wenigar, from time to time used foul language. (12/18/03, T.132). This was common on the farm; indeed, as noted, when Wenigar quit his employment at the farm he told Johnson to "shove the job up your fucking ass." (12/18/03, T.72, 132; 1/5/04, T.8).

Feiertag testified that she heard employees make jokes about Wenigar's I.Q. (1/6/04, T.91). She heard employees poke fun at Johnson and herself and other drivers, too. (*Id.*) She testified that Wenigar was not picked out of the crowd. (*Id.* at 113). She

also testified that the employees did not tease Wenigar in front of Johnson. (*Id.*) Matt Johnson testified that he never saw anyone make fun of Wenigar because of his I.Q. (12/18/03, T.120).

Matt Johnson testified that he and other employees would throw food at Wenigar "a couple times a month". (*Id.* at 125). The throwing food was a "back and forth type of thing". Wenigar would throw the food back. (*Id.*) Every time Johnson saw his employees throwing food, he told them to stop. (*Id.* at 151).

Paycheck Deductions. Wenigar received his paychecks on Fridays and then would cash them. (1/2/04, T.4). He testified that he would return to the farm and give Johnson money for broken equipment and dead livestock. (*Id.*) He claimed that Johnson demanded money from him every week. (*Id.* at 6). Wenigar testified that most weeks he paid Johnson \$100. (*Id.* at 7).

Feiertag testified that Wenigar never told her that Johnson took cash from Wenigar and that she never observed the practice. (1/6/04, T.90). Further, Wenigar's own time cards reflect that he frequently endorsed the checks over to Dee Dee Thomas or her mother Leah Thomas. (*See* Ex. 90; 1/5/04, T.83).

Wenigar's Work Hours. Wenigar testified that before his injury in March 2001, he was working 18 hours a day for Johnson plus serving as the night watchman. (1/5/04, t.26). However, in a letter dated April 16, 2001, which he submitted in support of his appeal of the denial of his claim for unemployment benefits, Wenigar complained that since January 2001, Johnson had cut his hours "real low". (A.109-11). In a second letter dated April 17, 2001, which Wenigar also submitted to contest the denial of his claim for

unemployment benefits, Wenigar stated that in the latter half of 1999 and all of 2000, he had worked 40-50 hours per week. (A.112-14). In this letter, Wenigar states, "I wanted to work that many hours 40-50 hours a week is fine." (*Id.*) (emphasis in original).

Further, it is undisputed that beginning approximately July 2000 and continuing until he quit his job at the farm, Wenigar was working part of the time for Johnson's nephew Scott Johnson doing food collection work for Scott Johnson's farm. (12/29/03, T.14-16; 1/2/04, T.48-49; 1/6/04, T. 12-13, 15-16, 18-20). For his services, Scott Johnson paid Wenigar a flat rate of \$30.00 per day cash with no deductions. (*Id.* at 15-16).

Wenigar's Emotional Distress. In support of his emotional distress claim, Wenigar claims to have suffered depression, nightmares and sleeping difficulties since 1997. (1/5/04, T.89). His housemate Dee Dee Thomas, however, testified that she had only observed Wenigar cry and appear depressed since 2001. (12/17/03, T.224).

ARGUMENT

I. STANDARD OF REVIEW

As the Minnesota Supreme Court has observed, “[t]he standard for review of a bench trial is broader than the standard for jury verdicts” *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45, 48 (Minn. 1989). The district court's conclusions of law are reviewed de novo, and a reviewing court is not bound by and need not give deference to a district court's decision on a purely legal issue. *See Frost-Benco Elec. Ass'n v. Minnesota Pub. Utils. Comm'n*, 358 N.W.2d 639, 642 (Minn. 1984).

The district court's findings of fact are reviewed under the clearly erroneous standard. See Minn. R. Civ. P. 52.01. A finding of fact is clearly erroneous if it is demonstrated "that it is without substantial evidentiary support or that it was induced by an erroneous view of the law." *Scott v. Forest Lake Chrysler-Plymouth Dodge*, 637 N.W.2d 587, 597 (Minn. Ct. App. 2002) (quoting *Pettibone Minn. Corp. v. Castle*, 311 Minn. 513, 247 N.W.2d 52, 53 (1976)). *See also Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984) (findings are clearly erroneous when against logic and the facts in the record).

II. THE DISTRICT COURT ERRED IN FINDING JOHNSON LIABLE UNDER THE FEDERAL AND STATE FLSAS

A. The Court Erred In Not Applying The Agricultural Exemptions

Wenigar's FLSA claims should have been dismissed with prejudice because Wenigar was "employed in agriculture" and consequently, exempt from the overtime provisions of both the federal and Minnesota FLSAs. *See* 29 U.S.C. § 213(b)(12);

Minn. Stat. § 177.23, subd. 7. The district court, however, concluded that the agricultural exemptions did not apply. This legal conclusion is reviewed by this Court *de novo*, see, e.g., *Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1023 (5th Cir. 1993), and must be reversed.

1. Wenigar Was Exempt Under The Federal FLSA As An "Employee Employed In Agriculture"

The FLSA establishes various labor requirements, such as a minimum wage and overtime pay, for employees "in those workweeks when they are engaged in interstate or foreign commerce or in the production of goods for such commerce." 29 C.F.R. § 780.1. One of the FLSA's requirements is the payment to employees of "one and one-half times the regular rate" for hours worked in excess of forty in a single workweek. 29 U.S.C. § 207(a)(1).

Employers must satisfy the FLSA's requirements unless the Act provides an applicable exemption. One such exemption exists for "any employee employed in agriculture." *Id.* § 213(b)(12). Agriculture is defined as follows:

"Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities ..., the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. § 203(f) (emphasis added). The agricultural exemption was meant to apply broadly and to embrace the "whole field of agriculture". *Maneja v. Waiialua Agric. Co.*,

349 U.S. 254, 260 (1955). Accordingly, Section 203(f)'s definition of agriculture contains two distinct branches, encompassing "farming in both a primary and a secondary sense." *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 300 (1977); *see also* 29 C.F.R. § 780.105.

Primary Agriculture. The first branch of the agriculture definition contains the primary meaning of agriculture, which includes "farming in all its branches" and includes "the raising of ... livestock." 29 U.S.C. § 203(f). There is no question that pig farming fits within this definition of "primary agriculture". The United States Department of Labor ("DOL") has issued interpretive regulations that comprehensively address the federal FLSA's agriculture exemption. These regulations are entitled to judicial deference, as they are "the primary source of guidance for determining the scope and extent of [FLSA] exemptions". *Key West, Inc. v. Winkler*, 95 P.3d 666, 668-69 (Mont. 2004). Accordingly, courts routinely defer to DOL regulations that define and interpret FLSA exemptions. *See Baldwin v. Iowa Select Farms, L.P.*, 6 F. Supp.2d 831, 840-41 (N.D. Iowa 1998) (affording deference to DOL regulations defining and interpreting agriculture exemption).⁴

⁴ *See also Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118, 125-29 (2d Cir. 2004) (affording deference to DOL regulations defining and interpreting FLSA's "companionship services" exemption); *Falken v. Glynn County, Georgia*, 197 F.3d 1341, 1346-53 (11th Cir. 1999) (same as to regulations interpreting exemption for a "public agency ... with respect to the employment of any employee in fire protection activities"); *Key West, Inc. v. Winkler*, 95 P.3d 666, 669 (Mont. 2004) (same as to regulations interpreting "bona fide executive" exemption.)

The DOL's applicable regulations state that the "primary" meaning of agriculture includes "listed" activities, and "[i]f an employee is employed in any of these activities, he is engaged in agriculture regardless of whether he is employed by a farmer or on a farm. " 29 C.F.R. § 780.105(b). Furthermore, the "raising of livestock" is specifically listed within the "primary" meaning of agriculture. See 29 U.S.C. § 203(f); *Hearnsberger v. Gillespie*, 435 F.2d 926, 929 (8th Cir. 1970); *Baldwin*, 6 F. Supp.2d at 840. The pertinent DOL regulations addressing "raising of livestock" are 29 C.F.R. §§ 780.119-780.121. Section 780.119 provides as follows:

Employees are employed in the raising of livestock ... only if their operations relate to animals of the type named and constitute the "raising" of such animals. If these two requirements are met, it makes no difference for what purpose the animals are raised or where the operations are performed.

29 C.F.R. § 780.119. "Livestock" in turn is defined as follows:

The meaning of the term "livestock" as used in [29 U.S.C. § 203(f)] is confined to the ordinary use of the word and includes only domestic animals ordinarily raised or used on farms ... The term includes the following animals, among others: Cattle (both dairy and beef cattle), sheep, **swine**, horses, mules, donkeys, and goats....

29 C.F.R. § 780.120 (emphasis added). "Raising" of livestock is also defined in the regulations, as follows:

The term "raising" employed with reference to livestock in [29 U.S.C. § 203(f)] includes such operations as the breeding, fattening, feeding, and general care of livestock.

29 C.F.R. § 780.121 (citation omitted).

Applying these regulations, a federal district court concluded that a worker employed as a "sow farm technician" by an industrialized hog producer was an

"employee employed in agriculture" and thus subject to the FLSA's agriculture exemption. See *Baldwin*, 6 F. Supp.2d at 841-43. The court reached this result notwithstanding the fact that the hog producer operated on a massive scale with "seventeen farrow-to-finish hog production farms" that employed 612 full-time and 74 part-time employees. *Id.* at 843. As the court observed, "[n]owhere in the Act was any attempt made to draw a distinction between large and small farms or between mechanized and nonmechanized agriculture." *Id.* at 838 (quoting *Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 261 (1955)).

If an employee working at a massive hog producing operation on the scale presented in *Baldwin* is an "employee employed in agriculture" then Wenigar was also an "employee employed in agriculture" when employed at the farm. Wenigar's duties were all tied to the "fattening, feeding, and general care of livestock", 29 C.F.R. § 780.121, i.e., the pigs on the farm. His primary work duties consisted of cleaning and bedding the pigs, spreading manure in the fields and washing the cans used for collecting the discarded food used to feed the pigs. (12/17/03, T.52, 58; 12/29/03 T.107; 1/2/04 T.27-33). In addition, Wenigar assisted on the food collection routes as needed and occasionally helped feed the pigs. (12/17/03, T.53, 55-56, 127; 12/29/03 T.44; 1/6/03 T.132). As for the food collection routes, the undisputed evidence was that this served one purpose only -- to get food for the pigs. (12/18/03, T.131; 12/29/03 T.45, 64).

Under these facts, Wenigar plainly was an "employee employed in agriculture" and exempt from the federal FLSA's overtime requirements. Nevertheless, the district court refused to apply the agricultural exemption, stating as follows:

[T]estimony was presented which showed that [Johnson] charged for the pick-up of the by-product on the garbage routes, which keeps this business out of the agriculture business. If [Johnson] had picked up the by-product without any charge to be used for the pigs it would then have been part of the farm operation and qualify for the exemption. Since the pick-up of the garbage was a separate, albeit co-mingled, business it doesn't fall under the agricultural exemption.

(A.23).

The district court did not cite any supporting authority for this conclusion. Nor is there any. The fact that Johnson was paid for collecting his pig feed does not mean that Wenigar was not an "employee employed in agriculture". The United States Supreme Court has specifically recognized that the exemption "includes 'extraordinary methods' of agriculture as well as the more conventional ones." *Mitchell v. Budd*, 350 U.S. 473, 480-81 (1956) (quoting *Maneja*, 349 U.S. at 261). In *Maneja*, the United States Supreme Court concluded that the agricultural exemption covered railroad workers employed to haul sugar cane from fields to a processing plant and to also transport farming implements and field laborers. As the supreme court explained:

[W]e cannot hold that merely because Waialua uses a method ordinarily not associated with agriculture -- a railroad -- to transport the cane from the fields to the mill, it has forfeited its agriculture exemption. **Where a farmer thus uses extraordinary methods, we must look to the function performed.** Certainly no one would argue that the agriculture exemption did not apply to farm laborers who took the cane to the plant in wheelbarrows. There is no reason to construe the FLSA so as to discourage modernization in performing this same function.

Maneja, 349 U.S. at 260-61 (emphasis added).

Applying this analysis, if one assumes *arguendo* that Johnson's practice of collecting discarded food to feed his pigs for a fee is "extraordinary", it still fits under the

agricultural exemption as "primary" agriculture when one looks to "the function performed." Here, the "function performed" is collecting food for the pigs, clearly a "primary" agricultural function.

Secondary Agriculture. Moreover, even if Wenigar's work performed in assisting with the food collection was not "primary" agriculture, it would still fit under the agricultural exemption as "secondary" agriculture. As noted, the FLSA's definition of agriculture also includes a second, broader meaning of agriculture, i.e., "farming in ... a secondary sense." *Bayside Enters., Inc.*, 429 U.S. at 300; *see also* 29 C.F.R. § 780.105. This secondary meaning includes other practices that do not themselves fit within the primary meaning of agriculture, but that are nevertheless "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." 29 U.S.C. § 203(f). Applying these criteria, courts have found several practices that are not traditionally associated with farming to be performed "secondarily" as an incident to or in conjunction with farming operations. *See, e.g., Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004) (skinning and trimming of chickens, to obtain pelts or "hackles" containing feathers eventually to be used in fly-tying); *Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1029 (5th Cir. 1993) (employees who load and flush tanks and trailers used to support crop-dusting).

Wenigar's work in the food collection routes meets this definition of "secondary agriculture." Indeed, the DOL has expressly so determined in its interpretive regulations, to wit:

The definition of agriculture clearly covers the transportation by the farmer, as an incident to or in conjunction with his farming activities, of farm implements, supplies, and fieldworkers to and from the fields, regardless of whether such transportation involves travel on or off the farm and regardless of the method used. ... In the case of transportation to the farm of materials or supplies, it seems clear that transportation to the farm by the farmer of materials and supplies for use in his farming operations, such as seed, animal or poultry feed, farm machinery or equipment, etc., would be incidental to the farmer's actual farming operations. **Thus, truckdrivers employed by a farmer to haul feed to the farm for feeding pigs are engaged in "agriculture."**

29 C.F.R. § 780.157(a) (emphasis added).

Notably, this regulation does not state that the result would be any different if a farmer was paid to have truck drivers haul feed to the farm; in either case, the truck drivers' feed-hauling "would be incidental to the farmer's actual farming operations." Nor is there any logical reason for drawing such a distinction. Rather, like all DOL interpretive regulations, § 780.157(a) is entitled to judicial deference, *see, e.g., Baldwin*, 6 F. Supp.2d at 840-41, and the Court should defer to the DOL's considered judgment that Wenigar's feed-hauling activities constitutes, at a minimum, "secondary" agricultural activity.

In sum, Wenigar was, at all times, an "employee employed in agriculture." For this reason alone, his federal FLSA claim fails as a matter of law.

2. Wenigar Was Exempt Under The Minnesota FLSA As An "Individual Employed In Agriculture"

Wenigar was also exempt from coverage under the Minnesota Fair Labor Standards Act. *See* Minn. Stat. §§ 177.21 – 177.35. The state FLSA specifically excludes from the definition of covered employee "any individual employed in

agriculture on a farming unit or operation who is paid a salary greater than the individual would be paid if the individual worked 48 hours at the state minimum wage plus 17 hours at 1-1/2 times the state minimum wage per week". Minn. Stat. § 177.23, subd. 7(2).

The district court awarded Wenigar overtime compensation for a period from September 17, 1999 to April 5, 2001. (A.31). At all times during this period, the state hourly minimum wage was \$5.15 for employees of "large employers" (those with annual gross sales of at least \$500,000) and \$4.90 for "small employers" (those with annual gross sales less than \$500,000). *See* Minn. Stat. § 177.24, subd. 1. To illustrate using the large employer minimum wage,⁵ the evidence is undisputed that during the period from September 17, 1999 to April 5, 2001, Wenigar earned much more than he would have if compensated at a rate of 48 hours at the wage of \$5.15 per hour plus 17 hours at \$7.73 per hour (1-1/2 times \$5.15). If compensated under the statutory formula prescribed by Section 177.23, subd. 7(2), Wenigar would have made \$19,687.72 annually. (Minimum wage of \$5.15 per hour x 48 = \$247.20. \$7.73 x 17 = \$131.41. \$247.20 + \$131.41 = \$378.61. \$378.61 x 52 (weeks) = \$19,687.72). In 1999, however, Wenigar actually earned \$36,540.95, and in 2000, he made \$32,590.69. (A.95-96). Since Wenigar was employed in agriculture and compensated at a rate much greater than he would have been under Section 177.23, subd. 7(2)'s formula, he is excluded from the state FLSA's definition of employee. *See* Minn. Stat. § 177.23, subd. 7(2).

⁵ Johnson submits that he would qualify as a "small employer" under Minn. Stat. § 177.24, however, the result described in the main text above is the same regardless of the minimum wage applied.

B. Johnson's Farm Business Was Not An "Enterprise Engaged In Commerce" And Thus Is Not Covered By The Federal FLSA

The overtime requirements of the federal FLSA only apply to employees that are employed by an enterprise "engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and ... **whose annual gross volume of sales made or business done is not less than \$500,000.**" 29 U.S.C. § 203(s)(1)(A)(i,ii) (emphasis added).

During all times relevant to this case, Johnson's farm never had an annual gross volume of sales of \$500,000 or more. (12/29/03 T.53; 1/6/04 T.160). At trial, Johnson's federal tax returns for years 1997 through 2000 were introduced. (A.97-106). These demonstrated that the farm had gross income of \$340,520 in 1997 (A.98), \$209,620 in 1998 (A.100), \$277,253 in 1999 (A.103), and \$293,908 in 2000. (A.106). This evidence establishes beyond all doubt that the farm never came close to accruing an annual gross volume of sales of \$500,000 or more.

Notwithstanding this evidence, the district court concluded that Johnson's farm was an "enterprise engaged in commerce." It did so by combining the income from the farm with the gross sales from Johnson's waste hauling business, Johnson Sanitation. (A.24). In so doing, the district court committed reversible legal error.

First, even when combined with the gross sales from Johnson Sanitation, the farm's gross sales did not equal or exceed \$500,000 for most of the time period for which the district court awarded FLSA damages. The district court awarded Wenigar FLSA

damages for the period from September 17, 1999 to April 5, 2001. (A.31). Although the farm and Johnson Sanitation had combined gross annual sales in excess of \$500,000 for 1999 -- \$680,188 (\$402,935 gross sales from Johnson Sanitation + \$277,253 farm gross income), *see* A.101-03, the farm and Johnson Sanitation did not have combined gross sales of at least \$500,000 in 2000. Instead, in that year the two businesses had combined gross sales of \$394,621 (\$100,713 from Johnson Sanitation + \$293,908 farm gross income). (*See* A.104-06). Further, Johnson sold Johnson Sanitation in 2000. (A.127; 12/17/03 T.38, 44). As a consequence, the district court could not combine farm gross income with Johnson Sanitation's gross sales for the year 2001.

Second, the governing law makes clear that the farm and Johnson Sanitation are not businesses that can be combined to form an "enterprise engaged in commerce" under the FLSA. "'Enterprise' means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." 29 U.S.C. § 203(r)(1). To be considered a single enterprise under the FLSA, two or more businesses must satisfy each of three elements. They must (1) perform related activities; (2) under unified operations or common control; and, (3) for a common business purpose. *See Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 518 (1973); *Nelson v. Long Lines Ltd.*, 335 F. Supp.2d 944, 965 (N.D. Iowa 2004).

Here, the farm and Johnson Sanitation were under common control, but their activities were not related. As Johnson testified, the sanitation business was different from the hog business. (1/6/04, T.131). The rubbish would be picked up and taken to a landfill, and never taken back to the farm. (*Id.*) The state and federal government

inspected the farm operation, and there were limitations on what Johnson could feed to the pigs. (*Id.*)⁶ The controlling law demonstrates that the farm and Johnson's Sanitation cannot be considered to have related activities. In this respect, the DOL's interpretive regulations, which are entitled to judicial deference, provide as follows:

The mere fact that [businesses] are under common ownership is not, by itself, sufficient to bring them within the same enterprise. Thus, where a manufacturing business is carried on separately from and wholly independently of a retail business, with neither serving the business purpose of the other, they are separate businesses even if they are under common ownership.

29 C.F.R. § 779.209(b).

[I]t is clear that even a single individual or corporation may perform activities for different business purposes. * * * Thus the reports of the House of Representatives cite, as an example of this, the case of a single company which owns several retail apparel stores and is also engaged in the lumbering business. It concludes that these activities are not part of a single enterprise.

29 C.F.R. § 779.212 (citations omitted).

Applying these principles, courts have declined to find that two or more commonly owned but unrelated businesses constituted single enterprises. *See Nelson*, 335 F. Supp.2d at 966 (holding company and resort); *Griffin v. Daniel*, 768 F. Supp. 532,

⁶ *See also* Minn. Stat. § 35.76 ("No person may feed garbage to livestock or poultry until it has been thoroughly heated to at least 212 degrees Fahrenheit for a continuous period of at least 30 minutes unless it is treated in some other manner which is approved in writing by the board as being equally effective for the protection of public health and the control of livestock diseases, and no person may knowingly permit livestock or poultry owned or controlled by that person to have access to any garbage which has not been heated or otherwise treated pursuant to this section.")

536-37 (W. D. Va. 1991) (restaurant, trailer park and grocery store). Nor were the farm and Johnson Sanitation related.

As for the third element, "common business purpose", this is generally found where the businesses have related activities and common control. *See Chao v. A-One Medical Services, Inc.*, 346 F.3d 908, 916 (9th Cir. 2003). Since the farm and Johnson Sanitation do not have related activities, they also do not share a common business purpose.

Accordingly, since the farm never had gross annual sales in excess of \$500,000, Wenigar was not employed by an "enterprise engaged in commerce", and for this additional reason, Wenigar's federal FLSA claim must fail for lack of subject matter jurisdiction. *See Lamont v. Frank Soup Bowl, Inc.*, No. 99 Civ. 12482 (JSM), 2001 WL 521815, at *4 (S.D.N.Y., May 16, 2001); *Jensen v. Johnson County Youth Baseball League*, 838 F. Supp. 1437, 1443 (D. Kan. 1993).

C. The District Court Abused Its Discretion In Awarding Wenigar FLSA Liquidated Damages As Johnson Is Entitled To The Benefit Of The "Good Faith" Defense To Liquidated (Double) Damages

The district court awarded \$79,638 as liquidated double damages under the FLSA. *See* 29 U.S.C. § 260. It is clear, however, that such damages are not appropriate when the employer fails to pay required amounts based on a good faith belief that he was not required to do so. *See* 29 U.S.C. § 260 ("if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair

Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages").

Here, the unrebutted testimony from Johnson was that he thought he was paying Wenigar appropriately in reliance on his accountant's advice. (See 1/6/04, T.121-136, 163). Reliance on an accountant's advice satisfies the good faith test. See *Martin v. David T. Saunders Construction Co.*, 813 F. Supp. 893, 903 (D. Mass. 1992); *Lane v. M's Pub, Inc.*, 435 F. Supp. 917, 920 (D. Neb. 1977). Moreover, it is clear from the record that Johnson **did** pay Wenigar time-and-a-half overtime for the time in excess of 48 hours per week that Wenigar recorded on his time cards. (1/6/04 T.134-35). For example, in the month of January 1999, Wenigar was paid time-and-a-half for 159 hours of overtime. (A.74-79). A FLSA penalty award, therefore, is not appropriate in this case, and the district court abused its discretion in awarding Wenigar liquidated damages.

D. The District Court Erroneously Found That Wenigar Worked 24 Hours A Day, Six Days A Week

The district court found that Wenigar worked 24 hours a day, six days a week while employed by Johnson. (A.30). Wenigar's own time records and the fact that he worked for Scott Johnson for much of the time at issue rebutted this finding. (See A.6, 66-83; 12/17/03 T.174). Wenigar could not, as a matter of law (and common sense), be working at the same time for both Scott Johnson and Lee Johnson. Additionally, when he submitted a claim for unemployment compensation, Wenigar listed as a reason for quitting that his hours had been reduced. (A.109-11). This document never mentions night watchman work, and only speaks of reduced hours as the result of a new can

washer. (*See also* A.112: “Last year and a half I have been working around 40-50 hours or so a week and that was fine.”)

The time records also showed that, contrary to his claims, Wenigar did take lunch breaks during the time he was working on an hourly basis. (*See* A.66-83). These breaks were noted in Wenigar’s own handwriting, and the absence of a break (viz. “no lunch”) is also noted repeatedly in Wenigar’s own writing. (*See also* A.84-94). The district court’s findings and conclusions do not account for these evidentiary discrepancies, accepting completely the unfounded assertion that Wenigar was forced to work 24 hours a day.

The only evidence for the claim that Wenigar was asked to work as a night watchman came from Wenigar himself. Other than Wenigar’s trial testimony, none of the evidence supported the claim. It is not reflected in the time records Wenigar completed; and is not mentioned in any of the written records that Wenigar prepared to document his activities. No extrinsic evidence was submitted regarding the reasons for “night watchman” such as history of break-ins or other things against which Wenigar was supposed to guard. At the same time, evidence showed that Johnson did allow employees to live on property if there was some reason personal to them that made it convenient. Feiertag testified that she lived in the same room at Isanti farm that Wenigar had, and Johnson’s un rebutted testimony was that he himself lived in the house trailer at Bunker Lake for 18 months.

III. THE DISTRICT COURT ERRED IN FINDING JOHNSON LIABLE UNDER THE MHRA

The district court erred in finding and concluding that Johnson is liable under the MHRA for Wenigar's disability discrimination claim.

A. The MHRA Does Not Include A Cause Of Action For Disability Hostile Work Environment

Until trial in this case, Wenigar's disability discrimination claim was based upon the factual premise that Johnson discriminated against him by paying him less than similarly situated, non-disabled employees. Johnson's defense to this claim was that he paid Wenigar less than other employees because the other employees had vocational attributes that Wenigar did not have -- most notably, the ability to drive and complete the paperwork involved in collecting the discarded food used to feed the pigs. The district court found and concluded that these were legitimate and believable bases for paying Wenigar less than the other employees. (A.29, 32). Accordingly, the district court did not find that Johnson discriminated against Wenigar by paying him less than other similarly situated employees.

Nevertheless, the district court did find Johnson liable for disability discrimination, specifically for "disability hostile work environment". In so doing, the district court exceeded the bounds of its authority. The MHRA expressly provides a cause of action for hostile work environment caused by sexual harassment. See Minn. Stat. § 363A.03, subds. 13 and 43. Following this statutory directive, the Minnesota Supreme Court has endorsed a cause of action for sexually harassing hostile work environments. See *Cummings v. Koehnen*, 568 N.W.2d 418, 423 (Minn. 1997). In

addition, the supreme court has assumed, without expressly deciding, that the MHRA's bar against sexual harassing hostile work environments is broad enough to include a cause of action for harassment based on sexual orientation that gives rise to a hostile work environment. *See Goins v. West Group*, 635 N.W.2d 717, 625 n.6 (Minn. 2001).

By its terms, however, the MHRA does not make actionable a hostile work environment arising from any basis other than sexual harassment. Perhaps for this reason, the Minnesota Supreme Court has never construed the MHRA to provide a legal cause of action for disability hostile work environment. Moreover, neither the district court nor this Court is a law-making body; indeed, this Court has emphasized that it is an error correcting body, and does not make law. *See, e.g., Johnson v. Johnson*, 611 N.W.2d 823, 825 (Minn. Ct. App. 2000) ("Appellant argues that this court should create a law imposing on Minnesota sellers of motor vehicles a duty to determine the license and insurance status of car purchasers. Creating such a law, however, is beyond the scope of this court's authority"); *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 83 (Minn. Ct. App. 1989) (declining to recognize a cause of action not yet recognized previously by the courts or created by legislative action because "[t]he function of this court is primarily decisional and error correcting, rather than legislative or doctrinal").

Since neither the Minnesota Legislature nor the Minnesota Supreme Court has elected to create or recognize a cause of action under the MHRA for disability hostile work environment, the district court erred both in creating a claim for disability hostile work environment and in finding Johnson liable under this new cause of action.

B. Alternatively, Wenigar Has Not Satisfied The Elements Of A Hostile Work Environment Claim

Even if a disability hostile work environment claim exists under the MHRA, Wenigar still failed to establish each of the claim's essential elements.

As explained by the Minnesota Supreme Court:

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

Goins, 635 N.W.2d at 625. At a minimum, Wenigar failed to establish the first, third and fourth of these elements.

1. Wenigar is not a member of a protected group

Wenigar's MHRA hostile work environment fails because he cannot demonstrate that he is a member of a protected group -- in his case, that he is "disabled" under the MHRA. A disabled person is one who: "(1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." Minn. Stat. § 363A.03, subd. 12; *Hoover v. Norwest Private Mortgage Banking*, 632 N.W.2d 534, 543 (Minn. 2001). The degree to which a condition limits one or more major life activities is evaluated based on the plaintiff's specific circumstances. *Hoover*, 632 N.W.2d at 543.

The evidence at trial showed that while Wenigar had difficulty reading and writing, he was able to and did hold productive jobs for long periods of time. He worked

for ten years at a stretch in jobs prior to working for Johnson. Wenigar's expert witness, Dr. Phipps-Yonas, testified that Wenigar had cognitive limitations. (12/18/03, T.40). Dr. Phipps-Yonas and Doctor Rebecca Thomley, Wenigar's treating psychologist, commented on his limitations, however, neither testified that he was disabled or materially limited as a consequence of those limitations. It was also clear from the record that Wenigar was, in fact, able to function quite well. Wenigar worked on a farm until he was 18 (12/18/03, T. 92), at the Rainbow Café for ten years, (T.94), at a scrap yard for ten years (T.97), and at the Johnson farm for eight years, up until the time that he was injured and not able to work because of physical limitations.

Furthermore, while Wenigar's tested I.Q. was low, witnesses testified, and the Court concluded, that Wenigar's functional IQ was higher than his tested I.Q. The fact that Wenigar could and did work productively prior to his physical injury negates any finding of disability. *See Frank v. Plaza Construction Corp.*, 186 F. Supp.2d 420 (S.D.N.Y. 2002) (testimony of "difficulty with reading and writing" constitutes "no evidence" of a substantial impairment of a major life activity); *Lancaster v. City of Mobile, Alabama*, No. 94-1016-BH-C, 1996 WL 741371, at *3 n.6 (S.D. Ala. 1996) ("increased difficulty" in reading and writing was insufficient to establish disability; summary judgment granted).

Moreover, the district court erred in concluding that Johnson regarded Wenigar as being disabled. (See A.31). While Johnson and others might have known Wenigar was "slow," being slow is not a disability. The employer must regard the employee as disabled; merely knowing that the employee is "slow" or illiterate does not equate to

regarding him as disabled. *See Morisky v. Broward County*, 80 F.3d 445, 448 (11th Cir. 1996). Nor do co-worker insults and taunts conclusively demonstrate that an employer regards an employee as disabled. *See Roberts v. Dimension Aviation*, 319 F. Supp.2d 985, 990 (D. Ariz. 2004) (coworkers' referring to terminated employee by insulting terms including, "Del" (short for "Deliverance"), "stupid", "retarded" and "fag", "walleye" and "one eye", were insufficient to show that employee was regarded as disabled). Wenigar adduced no evidence at trial that Johnson regarded him as "disabled", as opposed to merely "slow".

2. Any harassment was not based on Wenigar's alleged disability

At trial, Wenigar adduced evidence that Johnson and Wenigar's co-workers referred to Wenigar as "stupid", "dumb ass", "brain dead", "idiot" "retard", "moron", "no good shit", "dumb fucker", and the like. (12/17/03, T.110, 128-29, 189; 1/2/04, T.58-59). Wenigar did not, however, adduce any testimony that these persons insulted him because of his alleged disability. Instead, the evidence at trial suggested that the farm was a coarse environment, and that pretty much everyone who worked there -- including Wenigar and Johnson -- exchanged profanities and insults. (12/18/03, T.122, 124, 132, 146; 1/6/04, T.85, 112, 146). Indeed, when Wenigar advised Johnson that he was quitting, he did so with the statement, "shove the job up your fucking ass." (12/18/03, T.72).

The mere fact that a purportedly disabled employee is subjected to harassing insults does not establish either that the harassment was based upon the alleged disability

or that the harassment created a legally actionable hostile work environment. *See Shaver v. Independent Stave Co.*, 350 F.3d 716, 721-22 (8th Cir. 2003) (co-workers' verbal harassment of former employee with epilepsy, by calling him "stupid" and "platehead" after learning that he had a metal plate in his skull, and supervisors' alleged denial of promotions because they believed employee was "too stupid," although subjectively offensive, did not rise to the level of an objectively offensive environment, as required for employee to establish hostile work environment claims); *St. Hilaire v. Minco Products, Inc.*, 288 F. Supp.2d 999, 1006-07 (D. Minn. 2003) (co-workers' remarks that employee with Tourette's Syndrome was "strange," "weird," "retarded," "a baby," "immature," "a whiner," "a thorn in [a co-worker's] thigh," and "a pain in the ass", while demonstrating "incivility and poor judgment", were nevertheless, "at most, an account of the unfortunate, yet ordinary tribulations of the modern workplace"); *Gonzalez v. City of Minneapolis*, 267 F. Supp.2d 1004, 1015 (D. Minn. 2003) (co-workers comments that employee was a "fag," "wimp," "sissy," "useless," "worthless," and a "spic" did not amount to actionable harassment on account of disability or national origin); *Roberts*, 319 F. Supp.2d at 990 (coworkers' referring to terminated employee by insulting terms including, "Del" (short for "Deliverance"), "stupid", "retarded" and "fag", "walleye" and "one eye", were insufficient to show that employee was harassed because of his alleged disability). Wenigar's evidence demonstrates that he experienced nothing more than the routine verbal rough-and-tumble of an "unrefined" workplace.

3. The alleged harassment did not affect the terms, conditions or privileges of Wenigar's employment

The Minnesota Supreme Court has stated that, "[e]ven if a plaintiff demonstrates discriminatory harassment, such conduct is not actionable unless it is 'so severe or pervasive' as to 'alter the conditions of the [plaintiff's] employment and create an abusive working environment.'" *Goins*, 635 N.W.2d at 625 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)). Here, Wenigar has no evidence that the purported harassment in any way affected the terms, conditions or privileges of his employment.

First, it bears emphasis that this is not a constructive discharge case -- the typical scenario for a hostile work environment claim. "A constructive discharge occurs when an employee resigns in order to escape intolerable working conditions caused by illegal discrimination." *Navarre v. South Washington County Schools*, 652 N.W.2d 9, 32 (Minn. 2002) (internal quotations omitted). The district court found that Wenigar, "quit his employment on April 1, 2001 due to pain [arising from his March 5, 2001 injury] and limited work hours." (A.21). Accordingly, it is undisputed that Wenigar was not forced from his job because of the alleged harassment.

Second, there is no evidence that the alleged harassment resulted in any change of the terms, conditions or privileges of Wenigar's employment. In this respect, Wenigar testified that the harassment did not begin until 1997. (1/2/04, T.59). There is no evidence that the terms, conditions or privileges of Wenigar's employment changed as of 1997 or any time thereafter. His job duties and work conditions remained constant.

Accordingly, there is no evidence that the alleged harassment affected the terms, conditions or privileges of Wenigar's employment.

Third, there is no evidence that the alleged verbal harassment -- in and of itself -- affected the terms, privileges or conditions of Wenigar's employment. As explained above, the evidence adduced at trial demonstrates that Wenigar experienced -- and participated in -- nothing more than the routine verbal back-and-forth associated with the coarse nature of pig farm operations. As the Eighth Circuit Court of Appeals recently explained in a similar context:

[W]e have repeatedly emphasized that anti-discrimination laws do not create a general civility code. *See, e.g., Mems v. City of St. Paul, Dep't of Fire & Safety Servs.*, 327 F.3d 771, 782 (8th Cir. 2003). Conduct that is merely rude, abrasive, unkind, or insensitive does not come within the scope of the law.

Shaver, 350 F.3d at 721.

In sum, Wenigar did not adduce evidence to sustain several of the essential elements of a MHRA hostile work environment claim. Wenigar is not disabled, he was not "harassed" on account of his purported disability, and the harassment did not affect any terms, conditions or privileges of his employment.

C. There Was No Basis For The District Court To Award Wenigar MHRA Damages

In its findings, the district court found "it is appropriate to award Plaintiff \$119,909.50 pursuant to the Minnesota Human Rights Act as damages in addition to the amounts already awarded. (\$150,000 emotional distress + \$50,000 future distress +

\$39,819 = \$239,819 x 50%)." (A.31). Johnson respectfully submits that there is no basis for any award of MHRA damages.

As described in the preceding section *supra*, Wenigar did not establish that Johnson violated the MHRA. Furthermore, even if Wenigar had a viable hostile work environment claim, the damages award of \$119,909.50 remains factually and legally unsupportable. The purpose of relief under the MHRA "is to place individuals discriminated against in the same position they would have been in had no discrimination occurred." *Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. Lodge 364 v. State by Balfour*, 303 Minn. 178, 195, 229 N.W.2d 3, 13 (1975). Awarding Wenigar \$119,909.50 in MHRA damages in addition to the damages the district court otherwise awarded will not place Wenigar in the same position as he would be had the alleged harassment not occurred -- rather, it will provide Wenigar with an enormous windfall.

In *Minneapolis Police Department v. Minneapolis Comm'n on Civil Rights*, 402 N.W.2d 125 (Minn. Ct. App. 1987), *aff'd* 425 N.W.2d 235 (Minn. 1988), this Court reversed an employment discrimination damages award for "violation of civil rights". *Id.* at 132-33. As the Court explained:

Neither the Human Rights Act nor case law authorized damages incurred for violation of civil rights. Minn.Stat. § 363.071, subd. 2; Minneapolis, Minn., Code of Ordinances § 141.50(1) (1984).

If the violation of an individual's civil rights does not result in actual injury, an award of damages is inappropriate. *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986). An actual compensable injury means physical injury, monetary expenses, lost earnings, impairment of reputation, personal humiliation, or

mental anguish. *Id.* * * * Accordingly, the MCCR's award of damages based in part on a civil rights violation was an error of law.

Id. at 132-33.

Applying this principle, it is clear that the district court erred in awarding Wenigar \$119,909.50 as MHRA damages. Wenigar did not suffer any hard economic damages as a result of the alleged harassment. As noted above, the district court found that Wenigar "quit his employment on April 1, 2001 due to pain [arising from his March 5, 2001 injury] and limited work hours" (A.21), and not on account of the alleged harassment. In addition, the district court rejected Wenigar's argument that Johnson discriminated against him by paying him less than other employees; instead, the district court concluded that Johnson's reasons for paying Wenigar less than the other employees were "legitimate and believable." (A.32). Further, before trial, Wenigar stipulated that he "has not, and will not pursue wage loss for any periods after [his] employment terminated with Defendant." (A.107-08).

Nor can the district court's MHRA damages award be justified as damages for physical injury. Before trial, Wenigar entered into the following stipulations with Johnson:

1. Plaintiff has not, and will not, pursue recovery for unpaid medical expenses related to workplace physical injuries;
2. Plaintiff has not, and will not, pursue damages to recover for physical injuries incurred at Defendants' workplace;
3. Plaintiff has not, and will not, pursue emotional distress claims directly related to the physical injuries incurred at work[.]

(A.107-08). These stipulations bar any MHRA claim that Wenigar might have for damages arising from physical injuries or related medical expenses. In fact, any damages claim Wenigar might have for physical injury is further barred by his workers' compensation settlement and award for his March 5, 2001 physical injuries. (See A.115-26). With respect to these physical injuries, Wenigar elected to pursue the exclusive remedies afforded by the Workers' Compensation Act, as a consequence, he is precluded from seeking additional relief for these injuries under the MHRA. See Minn. Stat. § 176.031; *Minneapolis Police Department*, 402 N.W.2d at 133. As for damages for impaired reputation or personal humiliation, Wenigar did not adduce any evidence at trial to support such claims.

Finally, the district court's MHRA damages award cannot be justified as damages for "mental anguish or suffering" See Minn. Stat. § 363A.29, sub. 4(a). Separate and apart from the MHRA claim, the district court awarded Wenigar \$200,000 as emotional distress damages. Wenigar was certainly free to pursue alternative claims for emotional distress style damages under tort and MHRA theories. See *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 378 (Minn. 1990). But it is firmly established that he cannot recover for emotional distress/mental anguish or suffering under both claims. *Id.* at 379. To do so would award Wenigar a **double** recovery, and this is impermissible. *Id.*; see also *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 745 (Minn. 1997); *Redalen v. Farm Bureau Life Insurance Co.*, 504 N.W.2d 237, 238 (Minn. Ct. App. 1993).

In sum, there was no basis for the award of \$119,909.50 as MHRA damages. Damages under the MHRA must compensate the plaintiff for actual harm and Wenigar has no evidence of actual harm. *Minneapolis Police Department*, 402 N.W.2d at 132-33.

IV. THE DISTRICT COURT'S AWARD OF ATTORNEY FEES AND COSTS MUST BE REVERSED SINCE WENIGAR CANNOT PREVAIL ON HIS FLSA OR MHRA CLAIMS

In its November 23, 2004 order, the district court awarded Wenigar \$75,000 in attorneys fees and \$11,939.96 in costs and disbursements. These awards must be reversed because they are solely premised upon Wenigar's ostensible status as a prevailing party under the FLSA and MHRA. *See* Minn. Stat. § 363A.33, subd. 7; Minn. Stat. § 177.27, subd. 10; 29 U.S.C. § 216(b). As is set forth in Sections II and III *infra*, the district court erred in finding and concluding that Johnson is liable under the MHRA or the state or federal FLSAs. Since Wenigar cannot prevail on these statutory claims, the district court's attorneys fees and cost awards must be set aside.

V. THE DISTRICT COURT ERRED IN FINDING JOHNSON LIABLE FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Intentional infliction of emotional distress consists of four distinct elements:

(1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) it must cause emotional distress; and (4) the distress must be severe.

Hubbard v. United Press International, Inc., 330 N.W.2d 428, 438-39 (Minn. 1983).

Intentional infliction of emotional distress is "sharply limited to cases involving particularly egregious facts" and a "high threshold standard of proof" is required to submit the claim to a jury. *Id.* at 439.

A. Johnson's Conduct Was Not Extreme, Outrageous, Intentional Or Reckless

Conduct is "extreme and outrageous" when it is "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." *Hubbard*, 330 N.W.2d at 439. Wenigar worked on a pig farm. Pig farming is hard, often unpleasant work. The mere fact that Wenigar's job duties were sometimes unpleasant -- e.g., cleaning animal excrement, disposing of dead pigs, and the like -- does not mean that his employer engaged in extreme, outrageous or reckless conduct. Nor does the fact that the job involved long hours.

Further, the farm was not a charm school. Everybody swore and everybody raised his or her voice. Although Wenigar claims he was singled out for particular abuse and insults, three of his co-workers, Matt Johnson, Feiertag and Haluptzok contradicted his testimony. Instead, Feiertag and Matt Johnson testified that Lee Johnson treated Wenigar well. Notably, in *Langeslag v. KYMN Inc.*, 664 N.W.2d 860 (Minn. 2003), the supreme court held that the defendant did not behave outrageously or atrociously by calling the plaintiff "just about every unkind name I could think of. Some of the more common ones, asshole, son of a bitch, bastard, very frequently in his presence." *Id.* at 867. *See also Hill v. Scott*, 349 F.3d 1068, 1075 (8th Cir. 2003) (police officer's comment to plaintiff, "[f]uck you[,] [g]et your Black ass in the house" did not rise to level of intentional infliction of emotional distress under Minnesota law). *Cf., Shaffer v. Burger King Corp.*, No. Civ.A. 99-2562, 2001 WL 1167392, at *2 (E.D. Pa., Sept. 28, 2001) (co-worker mistreatment of low I.Q. plaintiff not severe enough to meet high threshold for

intentional infliction of emotional distress). Further, the supreme court in *Langeslag* was not persuaded that the defendant acted extremely or atrociously although "[m]any times she would charge into [the plaintiff's] space and get very, very close to him and just look right up into his face within inches of each other and shout at him." *Id.* at 867-68.

Additionally, in finding Johnson liable for intentional infliction of emotional distress, the district court inexplicably relied upon evidence that it rejected in connection with Wenigar's other claims having nowhere near the stringent legal thresholds of proof as has the cause of action for intentional infliction of emotional distress. The district court rejected Wenigar's claim that he suffered disability discrimination when Johnson paid him less than other employees, concluding that Johnson's reasons for paying Wenigar less were legitimate and believable. (A.21, 32). But the district court then proceeded to conclude that Johnson acted extremely and outrageously by his "refusal to acknowledge [Wenigar's] numerous requests for pay raises" (*Id.*)

Likewise, the district court rejected Wenigar's claim under Minn. Stat. § 181.79 for recovery of unlawful deductions for faulty workmanship, loss, theft or damage, which was premised upon Wenigar's claim that Johnson regularly forced him to pay back \$100 to pay for damaged property, concluding that "there is insufficient testimony to show or calculate the exact monies collected by [Johnson]". (A.30). While concluding that Wenigar failed to meet his burden of proof with respect to this relatively straightforward statutory claim, the district court nevertheless stated that "the activity of ongoing conversion by [Johnson] of one hundred dollar amounts was considered in the Intentional

Infliction of Emotional Distress claim." (A.31). The district court never explained or reconciled these inconsistent findings.

Lastly, the district court accepted without qualification Wenigar's often self-contradictory or otherwise controverted evidence of abuse and maltreatment. For example, the district court accepted Wenigar's testimony about his living conditions at the farm without even addressing the contradictory testimony of Feiertag and Johnson, both of whom testified that Wenigar's living quarters were comfortable and adequate -- indeed, they lived in these quarters themselves at intervals. The district court noted that Wenigar ate food from the collection cans while never mentioning the fact that Feiertag and Matt Johnson testified that the food was perfectly edible and that they commonly ate food from the cans. Lastly, the district court accepted Wenigar's claim that he was "forced" to stay overnight at the farm as a night watchman while never mentioning Feiertag's testimony that Wenigar told her that he stayed at the farm because he did not have any transportation back and forth from his home.

To sum up, the district court's findings and conclusion that Johnson engaged in extreme, outrageous, reckless and intentional conduct cannot be sustained and must be reversed.

B. Wenigar Did Not Suffer Severe Distress Attributable To Johnson's Conduct, As Opposed To Other Causes

The distress Wenigar complained of -- i.e., nightmares, sleep disturbances, crying, depression, etc. -- is of the sort that Minnesota courts have routinely found wanting as evidence of severe emotional distress. *See, e.g., Langeslag*, 664 N.W.2d at 869

(incessant stomach pain, hair loss, weight loss, impotence, sleeplessness, aggravated eczema and diabetes) *Hubbard*, 330 N.W.2d at 440 (depression, vomiting, stomach disorders, skin rash and high blood pressure); *Elstrom v. Independent Sch. Dist. No. 270*, 533 N.W.2d 51, 57 (Minn. Ct. App. 1995) (insomnia, crying spells, depression, fear of answering phone or door); *Eklund v. Vincent Brass and Aluminum Co.*, 351 N.W.2d 371, 379 (Minn. Ct. App. 1984) (depression, unsteady nerves, sleeplessness, inability to socialize).

Furthermore, it was Wenigar's burden at trial to prove that his purportedly severe emotional distress was causally linked to Johnson's conduct to a reasonable degree of medical or psychological certainty. *See Langeslag*, 664 N.W.2d at 869-70. Wenigar did not make this causal showing -- at least not in his case-in-chief. Although evidence was presented that Wenigar suffered from post-traumatic stress disorder ("PTSD"), neither Dr. Thomley nor Dr. Phipps-Yonas gave an opinion in Wenigar's case in chief that Wenigar's PTSD was, to a reasonable degree of medical or psychological certainty, caused by the treatment that Wenigar claims to have been subjected to while working for Johnson. The Court sustained an objection to that specific question when posed to Dr. Thomley, (12/18/03, T.27-8), and the question was never repeated. While Dr. Phipps-Yonas gave a diagnosis of PTSD, (12/18/03, T.40), and stated generally her opinion that "experiences that [Wenigar] had at the farm and with Mr. Johnson and some of the other folks that worked at the farm" constituted the traumatic stressor for PTSD (*id.* at 46), she never opined that Johnson's alleged conduct specifically was a cause to a reasonable degree of medical or psychological certainty. Based on this record, Wenigar

failed, as a matter of law, to establish that Johnson's alleged conduct -- as opposed to other factors -- caused Wenigar's emotional distress. *See Langeslag*, 664 N.W.2d at 869-70 (Minn. 2003).

During Johnson's case-in-chief, his testifying psychiatric witness, Thomas G. Gratzer, M.D., opined that Wenigar does not suffer from PTSD. (Gratzer Dep. 18, 24). Dr. Gratzer also opined that Wenigar does not have a discreet psychiatric condition or disorder attributable to any treatment he received while working for Johnson. (*Id.* at 19).

Over Johnson's objection, the district court allowed Dr. Phipps-Yonas to testify in rebuttal by post-trial deposition. During rebuttal, Dr. Phipps-Yonas was specifically asked if the opinion that she had stated at trial was stated to a reasonable degree of medical certainty. (Phipps-Yonas Dep. 23). The district court sustained Johnson's objection on the ground of improper rebuttal. (*Id.*) The question was then repeated, as was the objection ("I am going to object. On top of everything, there's a lack of foundation as to whether she can testify to a medical certainty.") (*Id.* at 23-24). This time, the district court overruled the objection. (*Id.* at 24).

It is not clear if the district court's ruling was made only as to the foundation objection. What is clear, however, is that to the extent that Wenigar claims that the flaws in Dr. Phipps-Yonas' trial opinion were cured by her rebuttal testimony, the testimony was clearly improper rebuttal. As explained by the Minnesota Supreme Court:

Rebuttal evidence properly is that which explains away, contradicts, or otherwise refutes the defendant's evidence 'by any process which consists merely in diminishing or negating the force' of it. 1 Greenleaf Ev. (16th Ed.) 600. It does not permit mere repetition of evidence in chief (*Nelson v. Farrish*, 143 Minn. 368, 173 N. W. 715), nor simple 'confirmation of the

original case,' the purpose being 'to cut down the case on the part of the defense and not to confirm that of the prosecution' (Minnesota & Dakota Cattle Co. v. C. & N. W. Ry. Co., 108 Minn. 470, 122 N. W. 493). It is not good practice to permit witnesses merely to reiterate their testimony under guise of rebuttal. *People v. Van Ewan*, 111 Cal. 144, 43 P. 520.

Mathews v. Chicago & N.W. Ry. Co., 162 Minn. 313, 318, 202 N.W. 896, 898-99 (1925); *see also Molkenbur v. Hart*, 411 N.W.2d 249, 252 (Minn. Ct. App. 1987) (cumulative, confirming testimony not proper rebuttal).⁷ Dr. Phipps-Yonas's testimony went beyond the scope of permissible rebuttal, and the district court erred in admitting any of her testimony, but particularly any opinion on causation.

Lastly, Wenigar failed to present sufficient evidence by which the district court could distinguish between all of the other possible causes for PTSD, including, but not limited to, Wenigar's family life, his work-related injuries, and the normal rough treatment that the evidence clearly showed all workers in this agricultural enterprise were subject to. The job was, quite simply, not a very pleasant one. That does not, however, provide a basis for liability.

C. The Court Erred By Awarding Emotional Distress Damages From 1996 To Present

The district court found that "it is appropriate to award Plaintiff \$150,000 for the emotional distress he suffered from 1996 to the present." (A.30-31). Thus, the district

⁷ *Accord Osborne v. Mollman Water Conditioning, Inc.*, 65 P.3d 632, 638 (Okla. Ct. App. 2002) ("In the conduct of a trial, '[i]t is the duty of the plaintiff to present all of his evidence to make out his case in chief before resting, and it is not permissible to permit the plaintiff to introduce a portion of his evidence in chief and then to wait to see what the evidence on the part of the defendant is before introducing the rest of his evidence.'" (quoting *Poppy v. Duggan*, 235 P. 165, 166 (Okla. 1925))).

court found that Wenigar was entitled to emotional distress damages resulting from a period of 101 months -- i.e., from January 1, 1996 through June 4, 2004. This finding was directly contrary to Wenigar's own testimony, and the other evidence. Wenigar testified that things were fine until 1997. (1/2/04, T.59; *see also* A.63-64).

The district court's award of damages for 101 months is also contrary to the two-year statute of limitation for claims of intentional infliction of emotional distress. Minn. Stat. § 541.07(1); *see also Wild v. Rarig*, 302 Minn. 419, 447, 234 N.W.2d 775, 793 (1975). Indeed, when granting Wenigar's motion for leave to amend to assert the intentional infliction of emotional distress claim, the district court expressly stated that Wenigar's "claim for recover intentional infliction of emotional distress is limited to acts that occurred after September 13, 1999" -- i.e., two years before Wenigar served his original complaint on September 13, 2001. (A.8-9). Nor can the pre-September 13, 1999 emotional distress award be saved by the "continuing violation" doctrine, as that doctrine has no application to common law tort claims.

At a minimum, therefore, the award of present emotional distress damages must be reduced by approximately 45% (\$67,500) -- i.e., to account for the 44½ months from January 1, 1996 through September 13, 1999 for which the district court erroneously awarded emotional distress damages.

CONCLUSION

When presiding over a bench trial, a district court may not disregard the law or contradictory facts so as to dispense the sort of justice the court feels is appropriate. Unfortunately, that is what the district court did here. The district court accepted Wenigar's extravagant testimony at face value while disregarding all contradictory evidence -- even the contradictory evidence from Wenigar's own mouth.

Compounding this error, the district court found Johnson liable under the federal and state Fair Labor Standard Acts although it is clear that, as a matter of law, Wenigar was exempt from the provisions of both Acts. In addition, the district court found Johnson liable under the Minnesota Human Rights Act pursuant to a legal theory that has not been adopted by the Minnesota Legislature or recognized by the Minnesota Supreme Court.

The district court also awarded Wenigar six-figure MHRA damages even though Wenigar had not proven any entitlement to MHRA damages and under circumstances that resulted in a double recovery. Lastly, the district court found Johnson liable for intentional infliction of emotional distress despite the fact that Wenigar did not come anywhere near to carrying his burden of proof on this demanding and disfavored tort.

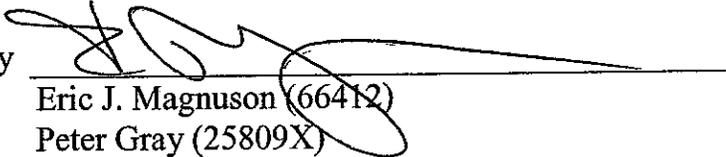
The judgment against Johnson should be reversed in all respects -- liability, damages, and attorneys' fees and costs -- and the case remanded for entry of judgment in Johnson's favor.

Respectfully submitted,

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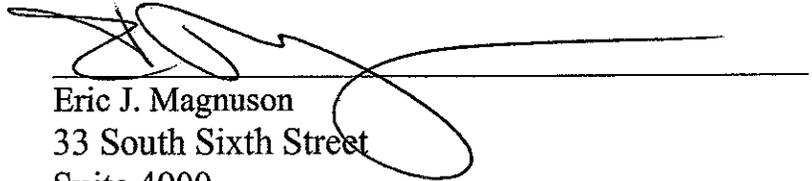
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the Minn. R. Civ. App. P. 132.01, subd. 3, for a brief produced using the following font:

Proportional serif font, 13-point or larger.

The length of this brief is 13,805 words. This brief was prepared using Microsoft Word 2000.

A handwritten signature in black ink, appearing to read "Eric J. Magnuson", is written over a horizontal line. The signature is stylized and extends to the right of the line.

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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) (with amendments effective July 1, 2007).