

NO. A06-1318

State of Minnesota
In Court of Appeals

Lisa Gagliardi,

Plaintiff-Appellant,

vs.

Ortho-Midwest, Inc.,

Defendant-Respondent.

APPELLANT'S BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

- I. Did the trial court err in granting summary judgment, holding that Ms. Gagliardi failed to establish a prima facie case of sexual harassment despite the totality of Ms. Gagliardi's work environment, which included admitted sexual conduct, sexual comments and nude photos, sexual assault and battery and requests for sex?**

Trial court granted Respondent's motion for summary judgment.

Apposite Cases:

In re Peters, 428 N.W.2d 375, 378 (Minn. 1988);

Munro Holding, LLC, v. Cook, 695 N.W.2d 379, 388 (Minn. Ct. App. 2005);

Costilla v. State, 571 N.W.2d 587 (Minn. Ct. App. 1998);

Tretter v. Liquipak Int'l, Inc., 356 N.W.2d 713, 715 (Minn. Ct. App. 1984).

- II. Did the trial court err in granting summary judgment, holding as a matter of law that Ms. Gagliardi was terminated for failing to satisfactorily perform her job duties, and holding that she failed to produce any evidence of reprisal discrimination when she was terminated four days after the final reporting of sexual harassment?**

Trial court granted Respondent's motion for summary judgment.

Apposite Cases:

Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 378 (Minn. 1990);

Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999);

Dietrich v. Canadian Pac. Ltd., 536 N.W.2d 319, 327 (Minn. 1995);

Potter v. Ernst & Young, 622 N.W.2d 141, 146 (Minn. Ct. App. 2001).

STATEMENT OF THE CASE

Appellant, Lisa Gagliardi, brought suit against Respondent, Ortho-Midwest, Inc., (“Ortho-Midwest”) for sex discrimination and retaliation in violation of the Minnesota Human Rights Act (“MHRA”). Gagliardi’s claims are based upon the sexual harassment she experienced while employed by Respondent, as well as the retaliation she experienced following reports of sexual harassment. The evidence of record establishes that Gagliardi was subjected to unwelcome conduct of a sexual nature. Moreover, the evidence of record establishes that Gagliardi was terminated shortly after reporting that she was sexually harassed.

Ms. Gagliardi appeals the judgment of the Honorable William R. Howard, Hennepin County District Court, entered on May 19, 2006, granting Respondent’s Motion for Summary Judgment on all claims.

The issues before this Court are, in part, specific to Gagliardi – whether she was subjected to unwelcome sexual harassment and reprisal. But also before the Court are broader questions of whether a hostile work environment is properly viewed from the perspective of the employer and what constitutes a “report” for the purposes of a reprisal claim under the MHRA. Put another way, under the MHRA, does a court view the totality of an *employee’s* circumstances in determining whether the employee is subjected to hostile work environment and does the MHRA only protect employees who directly report discrimination or also those for whom a report is made on their behalf?

STATEMENT OF FACTS

The Parties

Ms. Gagliardi was employed by Ortho-Midwest, Inc. as a manufacturer's representative. (A. 57.)¹ Ortho-Midwest, Inc. is a company set up to be the manufacturer's representative for Aircast and Generation II products. (A. 45-46.) Interestingly, Ortho-Midwest has no human resources person or any policies prohibiting sexual harassment. (A. 80-81.)

Ms. Gagliardi was hired by and reported to Craig Carlander, Ortho-Midwest's President and Owner. (A. 45, 47.) In her position, Ms. Gagliardi was to sell Aircast, Inc. and Generation II products to hospitals and doctors, as well as assist Mr. Carlander with computer support for all the reporting requirements of maintaining the Aircast and Generation II product lines. (A. 51.)

Mr. Carlander Hires Ms. Gagliardi

Ms. Gagliardi met Mr. Carlander when he offered to buy her a drink in a hotel bar during a convention. (A. 49.) At the time, Ms. Gagliardi was working as a sales representative in several western states for a different medical product supplier. (A. 4; A. 49.) When Ms. Gagliardi expressed interest in moving back to Minnesota at some point in her career, Mr. Carlander gave her his card and encouraged her to call him. (A. 4.) Over a period of a few years, Ms. Gagliardi called him on several occasions to discuss employment opportunities. (Id.)

¹ All citations are to Appellant's Appendix and will be cited as A. and the relevant page number.

When Ms. Gagliardi contacted Mr. Carlander in December of 2004, Mr. Carlander had just learned that two people working for him were leaving their employment. (A. 50.) With the loss of these individuals, the timing was right to hire Ms. Gagliardi. (A. 51.)

Mr. Carlander and Ms. Gagliardi met on several occasions, over breakfast and lunches, to discuss her employment. (A. 52.) Upon deciding to hire Ms. Gagliardi, Mr. Carlander gave Ms. Gagliardi the option of becoming an independent sales representative, like the rest of his sales staff,² or becoming an employee. (Id.; A. 5.) Ms. Gagliardi informed Mr. Carlander that she would prefer to be an employee. (A. 5; A. 52.)

As mentioned above, Ms. Gagliardi was to sell Aircast, Inc. and Generation II products to hospitals and doctors, as well as assist Mr. Carlander with computer support for all the reporting requirements of maintaining the Aircast and Generation II product lines. (A. 51.) Ms. Gagliardi was to receive \$50,000 per year for working a .8 full-time status, approximately 32 hours per week. (A. 5; A. 53.) On January 15, 2005, Ms. Gagliardi was hired as a manufacturer's representative by Craig Carlander, Ortho-Midwest's President and Owner, who she reported to. (A. 45-47 and 57.)

After her employment began, Ms. Gagliardi became confused as to what exactly her job duties were, despite what Mr. Carlander had told her. (A. 18.) The

² Mr. Carlander has two other independent contractors, Barbara Gentilli and John Bartlett, who represent Wisconsin and the Florida/Alabama region respectively. (A. 46.)

impression that Ms. Gagliardi received was that there were no expectations, but a requirement of the position was that she spend a great deal of time having expensive meals with Mr. Carlander, discussing personal issues. (A. 17.) She did know that she would be spending a great deal of time traveling with Mr. Carlander, but beyond that, Mr. Carlander did not discuss her duties. (A. 53; A. 17-18.) When Ms. Gagliardi asked for a job description, she was told by Mr. Carlander that there was none. (A. 17.) She testified:

What I find to be strange about it is that there really was not a job description. When we would get together for breakfast or dinners or lunches, we rarely talked about work. He never stated what he wanted me to do in a certain day. Sales goals were never discussed. And certainly it's nice to have nice dinners and ride in limos, but when the end result you get fired and it's stated because of job performance, I believe that there was no reason for him to fire me because of job performance. There were many occasions during lunches that he could have told me what his expectations were.

(A.18.)

Ms. Frangipane Warns Ms. Gagliardi

At the beginning of her employment, Mr. Carlander gave Ms. Gagliardi his former sales representative's telephone number and suggested Ms. Gagliardi call her to find out what the job was about. (A. 8.) The former sales representative was Joy Frangipane. (Id.)

When Ms. Gagliardi called Ms. Frangipane, Ms. Frangipane gave Ms. Gagliardi advice on how to deal with Mr. Carlander. Ms. Gagliardi testified:

She asked if I was married. I said, no. She said, well, I just want to let you know that you have to be very firm with Craig to let him

know that you will not be subject to the sexual type of confrontation.

[S]he said that he's very forward and she had to be very firm with him to let him know that – she let him flirt with her, but she had to be firm and stop and just let him know that she wasn't interested in being sexual with him.

(A. 8.) Ms. Frangipane testified that she told Ms. Gagliardi, “[Mr. Carlander] was harmless, that he speaks openly about things, and if she's uncomfortable with anything, that she needs to address that with him.” (A. 93.) She told Ms. Gagliardi, “You have a nice boss and you'll have nice dinners” and “Craig is generous and he likes nice things.” (A. 94.) Ms. Frangipane told Ms. Gagliardi about an incident where Mr. Carlander had invited her to Las Vegas with him, where “no body would know about it.” (A. 8.) Ms. Frangipane also told Ms. Gagliardi that despite Mr. Carlander's behavior, the job was a good one – low expectations and no sales goals. (A. 8; A. 94.)

The Agreement

In addition to the employment arrangement, Mr. Carlander had another agreement with his other female sales representative and employee. (A. 54; A. 95.) The agreement was a “You don't sue me, I don't sue you” agreement, discussed openly with Ms. Frangipane. (Id.) The purpose behind the agreement was to allow Mr. Carlander and his female staff to talk about anything – including discussions of sex and sex with his wife. (A. 93, 95.)

“Too Hot” Email Address

Shortly into her employment with Mr. Carlander, Ms. Gagliardi had a conversation with him about her email address. (A. 14.) At the time, her email address was lisag_2_5@hotmail.com. (A. 98.) Mr. Carlander commented that the address had “2 hot” in it. (A. 14.) Mr. Carlander suggested that she was “too hot.” (A. 15.) This upset Ms. Gagliardi. She testified:

The part I was upset about was that I said I didn’t notice that it had 2 hot in it. And he said, I noticed, and raised his eyebrows and mentioned [it] in a sexual way.

(Id.) Mr. Carlander admits making the comment. (A. 58.)

“Women With Thin Lips Give The Best Blow Jobs”

Within a week of her hire, Ms. Gagliardi traveled with Mr. Carlander to the four-day Aircast National Sales Meeting in San Diego. (A. 8-9; A. 99.) The meeting was designed to train Aircast sales representatives on Aircast products and the strategic focus of Aircast. (A. 59.)

At one of the first dinners at the meeting, Ms. Gagliardi was seated with Barb Gentilli, an independent contractor for Ortho-Midwest, and John Strock, another sales representative, amongst others. (A. 10.) When Ms. Gentilli told another woman at the table that she thought her lips were beautiful, Ms. Gagliardi stated that she wished to have voluptuous lips too. (Id.) After her comment, Mr. Strock leaned over to Ms. Gagliardi and whispered in her ear, “[W]ell, it’s been my experience women with thin lips give the best blow jobs.” (Id.)(emphasis

added). Ms. Gagliardi did not respond to the comment, and left the table shortly thereafter. (A. 10.)

The next night, after Mr. Carlander discussed how another sales representative appeared smitten with Ms. Gagliardi, she shared the comment that Mr. Strock had made the night before. (A. 10.) Mr. Carlander asked Ms. Gagliardi if she wanted to report the comment to Aircast Human Resources. (A. 60.) Ms. Gagliardi told Ms. Carlander that she did not want to get anyone into trouble, but she agreed to allow him to report it to Aircast. (A. 10.)

The next morning, Mr. Carlander reported the comment to Michelle Romanenko, Aircast's Human Resources representative. (A. 10; A. 60-61.) When Ms. Romanenko saw Ms. Gagliardi in an elevator, she thanked Ms. Gagliardi for reporting the comment. (A. 10.)

After reporting the comment to Mr. Carlander, Ms. Gagliardi saw Mr. Strock again. (A. 11.) Mr. Carlander gave her no advice on how to deal with Mr. Strock and in fact, admittedly did nothing to prevent Mr. Strock from coming into contact with Ms. Gagliardi. (A. 61-62.)³

Sexual Assault

Further, during the Aircast National Sales Meeting, Ms. Gagliardi was exposed to Jim Fife, an Aircast sales representative from Phoenix. (A. 11.) During many of the information sessions, Mr. Fife sat next to Ms. Gagliardi –

³ Comments of a sexual nature were not foreign to Aircast National Sales Meetings. While she worked with Mr. Carlander, Ms. Frangipane observed a female speaking openly about sex and reported it to Mr. Carlander. (A. 95.)

enough to warrant comments from others suggesting that Mr. Fife was like a “lost puppy.” (A. 11.) Ms. Gagliardi testified that it made her uncomfortable. (Id.)

She testified:

He sat next to me at every meeting for four days that we happened to be in the same room together.

[It s]eemed like he was everywhere I was. If I was in the lounge, he was there.

(A. 11.) At one meeting, Mr. Fife even moved Mr. Carlander’s things just so he could sit next to Ms. Gagliardi, irritating Mr. Carlander. (A. 11-12; see also A. 63 (stating he commented “It appears that you have a fan”).)

During one meeting, the presenters were discussing a partnership between EBI and Aircast. (A. 11.) Wanting to know more, Ms. Gagliardi leaned over to Mr. Fife and asked him if he could explain more about the partnership. (Id.) He said that he would. (Id.)

Later that evening, Ms. Gagliardi received a knock on her hotel room door – it was Mr. Fife. (A. 11.) Mr. Fife told her that he wanted to explain the partnership to her. (Id.) Mr. Fife then entered Ms. Gagliardi’s hotel room. (Id.) As soon as he was in the room, Mr. Fife began touching Ms. Gagliardi inappropriately. (Id.) She testified:

[H]e started putting his arms around me, started kissing me. I pushed him away. He said, I just want to tell you something, when you whispered in my ear this morning, I got a hard-on.

(Id.) Then Mr. Fife touched Ms. Gagliardi’s breasts and buttocks.

He came up to me and put his hands under my dress on my buttock. I pushed him away, he came towards me again, started touching my breasts.

(A. 11.) Ms. Gagliardi pushed him away again, telling him he needed to leave. Mr. Fife would not leave until Ms. Gagliardi agreed to go on a walk on the beach with him.

And so he said, well, please go for a walk on the beach with me, and I said I would just to get him out of the room. So he left out the back door. And as soon as he left, he had called me and said are you ready to go? And I said no, I'm not going to the beach with you.

(A. 11.) Embarrassed, Ms. Gagliardi did not report the incident to Mr. Carlander.

(Id.) Ms. Gagliardi testified that she did not want to report another incident of sexual harassment, as she had worked for Ortho-Midwest for less than two weeks.

(A. 37.)

Ms. Gagliardi Looks "Delicious"

The next day Ms. Gagliardi was again the target of a sexual comment. While waiting in line to get a drink following the Awards Banquet, Ron McNeill, an Aircast Project Manager came up behind Ms. Gagliardi and told her that she looked "delicious." (A. 12.)

After the National Sales Meeting was over, Mr. McNeill began emailing Ms. Gagliardi on a regular basis. (A. 106-122.) Mr. McNeill's emails were originally harmless and Ms. Gagliardi tried to keep them on a friendship level. (A. 30.) Unfortunately, Ms. Gagliardi was unsuccessful. (A. 30.) Mr. McNeill was sending her poems and Valentines, and would call to the point that Ms.

Gagliardi did not answer if she knew it was him. (A. 30.) One of the emails stated:

Like I told you...you looked 'delicious'
but you don't flaunt it ... I like that
you were quiet ... that's nice
sure of yourself ... kind
pretty hands ...
that smile ...
pretty you

(A. 108.)

Another said:

To see again the sparkle in your eyes . . . To tell you how envious I am knowing there is probably some guy out there that gets to smell your skin after a day at the beach . . . to nuzzle his nose in your clean, shiny hair . . . to pepper your belly with baby kisses . . . to touch that spot behind your ear with his lips, and to breath in your warm scent . . . to know beneath that big, lumpy bathrobe there is untold beauty.

(A. 113.)

Mr. McNeill went further to state in yet another email:

You're probably tired of my romantic gibberish, (although my thoughts run amock) . . . and Ronnie-boy at the wheel of his Aircast office computer, trying not to be syrupy romantic to someone . . . I didn't stare too much, did I? . . . what occupies your time (I'm not sure I want to hear anything about the "boyfriend.") . . . You're driving fast and my mind is racing . . . hmmm.

(A. 115.)

Ms. Gagliardi never reported Mr. McNeill's inappropriate emails and comment as Mr. McNeill told Ms. Gagliardi that he and Mr. Carlander were friends. (A. 30.)

Mr. Carlander Dozes On Ms. Gagliardi's Bed

After the Aircast National Sales Meeting, Mr. Carlander and Ms. Gagliardi traveled straight to the Generation II National Sales Meeting in Seattle. (A. 16; A. 99-105.)

Following the conclusion of the Generation II meeting, Mr. Carlander and Ms. Gagliardi had several hours before their flight. (A. 17.) After all of the meetings and travel, Ms. Gagliardi wanted to rest in her room. (Id.) Mr. Carlander, however, wanted to check out of a hotel room and wait with Ms. Gagliardi prior to their dinner plans with Ms. Gentilli and Mr. Bartlett. (A. 65; A. 17.) Mr. Carlander first suggested that Ms. Gagliardi check out of her room, and wait until dinner in his room. Ms. Gagliardi declined, stating she was tired. (A. 17.) Mr. Carlander then checked out of his room and brought his bags to Ms. Gagliardi's room. (A. 17.)

When Mr. Carlander got to Ms. Gagliardi's room, he laid down on her bed and started watching a movie. (A. 17; A. 66.) With only a queen-sized bed and a small chair, Ms. Gagliardi was uncomfortable staying in the room with him. (A. 39.) She testified:

I feel that he wanted me to stay there with him and spend time with him in the room because he started watching a movie and asked for me to get him a drink, a Pepsi. And so I brought the drink back to him and left. And he was watching the Terminal, a movie, and before the movie was over, he left the room and came out and was looking for me.

(A. 17; see also A. 66 (stating he “dozed in and out” while laying on her bed).) Ms. Gagliardi felt that it was inappropriate for Mr. Carlander to check out of his room and come and stay in hers. (A. 17.) As Ms. Gagliardi felt uncomfortable about the situation, she left the room and helped Mr. Bartlett with a spreadsheet he was creating. (A. 17.)

Alone, Mr. Carlander Places His Head in Ms. Gagliardi’s Lap

That evening, after dinner with Mr. Bartlett and Ms. Gentilli, Mr. Carlander suggested that he and Ms. Gagliardi have their car drive them around Seattle before their flight left. (A. 66.) Ms. Gagliardi was seated in the back seat of the car with Mr. Carlander. (A. 19.) As usual, Mr. Carlander sat very close to her. (A. 17.) Then, Mr. Carlander laid down with his head in Ms. Gagliardi’s lap. (A. 19, 40; A. 66.) Mr. Carlander’s face was up with his body perpendicular to Ms. Gagliardi. (A. 40; A. 66-67.) Again, Ms. Gagliardi was uncomfortable with Mr. Carlander’s conduct. (A. 17.) She testified, “Because it was in a very private place, it was dark, it was just not something that a boss should do.” (A. 40.)

The Calendar

One day, between traveling,⁴ Ms. Gagliardi met Mr. Carlander at his home in the Bear Path community in Eden Prairie. (A. 16). While there, Mr. Carlander explained to Ms. Gagliardi that his wife had made him a 2004 calendar of herself for his 50th Birthday. (Id.) Mr. Carlander stated that in order for Mrs. Carlander

⁴ After approximately two weeks in the office, Ms. Gagliardi was again traveling for her position. On the 15th and 16th of February 2005, Ms. Gagliardi was in Houston for an Aircast training meeting. (A. 123; A. 5.)

to get the quality of calendar she wanted, she needed to order at least 250 calendars. (A. 55.) Because of the supply, Mr. Carlander gave his friends and employees copies of the calendar – including Ms. Frangipane and Mr. Carlander’s attorney in this case, Stephen Andersen. (A. 56; A. 90.) Mr. Carlander showed the calendar to Ms. Gagliardi. (A. 16.) The calendar included pictures of Mrs. Carlander nude with her breasts exposed and in numerous sexually provocative poses. (A. 124-138.) Despite that it was 2005, rendering the 2004 calendar useless, and that Ms. Gagliardi was an employee, Mr. Carlander gave Ms. Gagliardi a copy of the 2004 calendar. (A. 16; A. 59 (testifying that he told Ms. Gagliardi “I do not want this to be misconstrued or have this come back to haunt me in any way”).) Ms. Gagliardi took the calendar because she was afraid it would make him feel bad if she did not. (A. 16.) Shortly thereafter, she threw the calendar away. (Id.)

“Sharing a Room” In Washington, D.C.

After working with Mr. Carlander for just one month and less than a week from returning from a training meeting in Houston, Ms. Gagliardi was again told that she would be traveling. (A. 20; see also A. 99-105.) This trip was for the American Academy of Orthopedic Surgeons. (A. 19.) It was a surprise to Ms. Gagliardi that she was being asked to attend the meeting, as she was a new hire. (A. 20.) Ms. Gagliardi learned that the reason she was being asked to attend the meeting was because Mr. Strock was no longer going to attend. (A. Id.; A. 139.)

Since Mr. Carlander was attending the Daytona 500, he planned on meeting Ms. Gagliardi at the airport so they could share a car to their respective hotels. (A. 68, 70; A. 20.) Ms. Gagliardi received reservations, paid for by Aircast, at the Holiday Inn. (A. 70.) Mr. Carlander was staying at the Park Hyatt. (A. 70.) The car drove both Ms. Gagliardi and Mr. Carlander to his hotel first. (A. 20.)

When they arrived at the Park Hyatt, Mr. Carlander asked the driver to pull both his and Ms. Gagliardi's bags out of the car and have them taken up to his room. (A. 20; 70.) Mr. Carlander told Ms. Gagliardi that he wanted her to come with him to see what his room was like. (A. 21.) Ms. Gagliardi thought it was strange, as she had overheard Mr. Carlander making the reservations for the room, so he knew what it looked like. (A. 21.)

After both sets of bags were brought to the room, Ms. Gagliardi stated that she better go to her hotel and check in. (A. 21.) She testified:

The only thing that was said, then, I said, I better go to my hotel. And he said, well, you better call the driver, *almost as though he was offended that I wasn't just going to stay there.*

(Id.)(emphasis added). Ms. Gagliardi believed that Mr. Carlander wanted her to stay in his room. (A. 40.) Ms. Gagliardi then called the driver, took her bags downstairs, and checked into her hotel. (Id.)

Mr. Carlander testified that he wanted Ms. Gagliardi to see the room in hopes that it was a two-room suite that she could share with him as he had shared suites with another female employee. (A. 70.)

An Extra Bathrobe for Her

The next day, Ms. Gagliardi was in Mr. Carlander's room doing some computer work. (A. 22.) When time approached for dinner, Mr. Carlander told Ms. Gagliardi, "If it were just me, I would stay here in my bathrobe and order room service." (A. 76.) He then told Ms. Gagliardi that he had requested an extra robe for her. (A. 22.) Mr. Carlander testified, "There was an extra robe for her if she wanted it." (A. 76.) Ms. Gagliardi declined and they had dinner in the hotel restaurant. (Id.)

That night, Ms. Gagliardi received a telephone call that her son was ill. (A. 23.) Early the next morning, Ms. Gagliardi told Mr. Carlander that she was leaving the meeting to go home to check on her son. (A. 76.)

Mr. Carlander Openly Admits His Behavior

Mr. Carlander admits the following facts:

- Defendant's owner gave Plaintiff, Lisa Gagliardi, partially nude pictures of his wife; (A. 55.)
- Defendant's owner placed his head in Ms. Gagliardi's lap during a nighttime drive through Seattle; (A. 66.)
- Defendant's owner suggested having Ms. Gagliardi share a hotel suite with him; (A. 70.)
- Defendant's owner told Ms. Gagliardi that he liked to eat room service in his bathrobe and told her there was a bathrobe for her; (A. 76.)
- Defendant knew of a sexually harassing comment made by a third-party but required Ms. Gagliardi to come into additional contact with the third party; (A. 61.)

- Defendant's owner laid on Ms. Gagliardi's hotel room bed; (A. 66.)
- Defendant's owner told Ms. Gagliardi that she was "too hot"; (A. 58.)
- Defendant's owner had a "You don't sue me, I don't sue you" arrangement with staff so he could engage in sexual discussions; and (A. 54.)
- Defendant's owner is known as the "Hugh Hefner of Aircast". (A. 81-82.)

Mr. Vegdahl Reports Sexual Harassment To Aircast

That same night that Ms. Gagliardi learned her son was ill, Ms. Gagliardi also learned that her boyfriend, Kurt Vegdahl, had found emails that Mr. McNeill had sent Ms. Gagliardi. (A. 23.) Naturally upset, Mr. Vegdahl called Ms. Gagliardi. (A. 23.) At this point, Ms. Gagliardi told Mr. Vegdahl about nearly all the incidents of harassment. (Id.)

Mr. Vegdahl then contacted Mr. McNeill via email and confronted him about his emails to Ms. Gagliardi. (A. 140-141.) He also spoke with Mr. McNeill on the telephone. (Id.) When Mr. Vegdahl spoke with Mr. McNeill, Mr. McNeill accepted the blame for the emails. (A. 142)

Still upset the next day, February 24, 2005, Mr. Vegdahl contacted Ms. Romanenka at Aircast via facsimile and email to complain of sexual harassment on behalf of Ms. Gagliardi. (A. 143; A. 144-145; A. 40.) In his email complaint, Mr. Vegdahl outlined several of the incidences of sexual harassment, including the "blow job" comment. (A. 144.) Mr. Vegdahl also faxed several of Mr. McNeill's

emails to Ms. Romanenko. (A. 143.) Importantly, Ortho-Midwest has no human resources person or any policies prohibiting sexual harassment. (A. 80, 81.)

Ms. Gagliardi testified that Mr. Vegdahl contacted Aircast because the perpetrators of the sexual conduct were Aircast employees and “he felt that Aircast should know.” (A. 40.) Mr. Vegdahl stated that he knew she was concerned about reporting more sexual harassment as she was a new employee and had already complained about sexual harassment on another occasion. (A. 142.) In fact, those were the exact reasons Ms. Gagliardi had not reported the conduct. She testified:

To me it was embarrassing to have – I had already reported John Strock the day before. And it would have been embarrassing to report another incident of sexual harassment in one meeting, you know, just starting a new job, a new company. I didn’t want to be thought of as the girl that’s causing problems or making things up.

(A. 39; see also A. 37.)

Less than six hours after his email complaint, Mr. Vegdahl received a response from Ms. Romanenko, informing him she could not discuss any investigation into his allegations. (A. 144.)

Termination

Four days later, on the evening of February 28, 2005, Ms. Gagliardi was terminated. (A. 147.)

Prior to her termination, Mr. Carlander received a telephone call from Mary Kuh, one of Aircast’s trainers familiar with Aircast’s Human Resources department. (A. 79). In her conversation with Mr. Carlander, Ms. Kuh asked Mr.

Carlander if he had received the faxes from Ms. Gagliardi. (Id.) When Mr. Carlander told her that he had not, she told him that it was a Human Resources issue. (Id.) Mr. Carlander testified:

I confirmed that I did not receive them and I was unaware of them, and stated to Mary – because she was thinking that if I had received them, that it would have been my responsibility to do something with them. I was confirming that I, in fact, did not have them or have knowledge of them, and that she should certainly forward them to Human Resources, and that was the end of the conversation.

(Id.) Later that evening, Mr. Carlander sent an email to Ms. Kuh stating that Ms. Gagliardi would not be attending a training session. (A. 146.)

With knowledge of a human resources issue emanating from faxes sent directly to Aircast, Mr. Carlander terminated Ms. Gagliardi's employment effective March 1, 2005. (A. 79; A. 147.)

SUMMARY OF THE ARGUMENT

In granting summary judgment, the district court made several significant rulings challenged here. The court concluded that Ms. Gagliardi had not demonstrated any genuine material fact dispute on any of her claims and that Ortho-Midwest was entitled to summary judgment as a matter of law. These conclusions are both legally and factually wrong. Ms. Gagliardi provided more than ample evidence to create, at a minimum, genuine issues of fact on her claims. The district court ignored the overwhelming evidence that the Ms. Gagliardi was sexually harassed and that Ortho-Midwest should have known of the sexual harassment. Moreover, the district court ignored the strong Minnesota public

policy that the MHRA be liberally interpreted in allowing Ortho-Midwest to retaliate against Ms. Gagliardi for the report of sexual harassment. The court refused to view the evidence in a light most favorable to Ms. Gagliardi. However, at summary judgment, a district court must give all reasonable inferences to the nonmoving party. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 112 (Minn. 1992). Had the district court done so, Ms. Gagliardi's claims could not have been dismissed on summary judgment. There is sufficient evidence demonstrating that genuine disputes of material fact exist as to Ms. Gagliardi's claims. Summary judgment must be reversed.

ARGUMENT

I. STANDARD OF REVIEW.

On appeal, a grant of summary judgment is reviewed *de novo* and affirmed only where there is no genuine dispute of material fact and the district court did not err in its application of the law. Zip Sort, Inc. v. Commissioner of Revenue, 567 N.W.2d 34, 37 (Minn. 1997). The Minnesota Supreme Court has held that on appeal an appellate court should resolve any doubt as to the existence of a material fact in favor of finding the existence of a fact issue. State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 571 (Minn. 1994). No deference is given to the district court's application of the law. Gramling v. Memorial Blood Ctrs., 601 N.W.2d 457, 459 (Minn. Ct. App. 1999). A moving party is entitled to summary judgment only upon showing that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. See Fabio v. Bellomo, 504

N.W.2d 758, 761 (Minn. 1993); Minn. R. Civ. P. 56.03. The burden is on the party moving for summary judgment to show that there are no issues of material fact. W.J.L. v. Bugge, 573 N.W.2d 677, 680 (Minn. 1998). All evidence must be viewed in the light most favorable to the nonmoving party, and any doubt as to whether an issue of material fact exists is resolved in favor of the nonmoving party. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 112 (Minn. 1992). Further, the court is not authorized to make credibility determinations in deciding whether to grant summary judgment. Powell v. Anderson, 660 N.W.2d 107 (Minn. 2003). Indeed, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." Williams v. Curtis, 501 N.W.2d 653, 656 (Minn. Ct. App. 1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986)); see also Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981) (holding factual inferences, credibility, and the weight of the evidence are all questions for the finder of fact).

Summary judgment is not intended to substitute for a trial when there are factual issues to be determined. DLH, Inc. v. Russ, 566 N.W.2d 60, 69-70 (Minn. 1997). Rather, a district court's function is not to decide issues of fact, but to determine whether genuine factual issues exist. Id. To oppose summary judgment, the nonmoving party need only show evidence of material factual disputes and need not prove the issue. Johnson v. Group Health Plan, Inc., 994 F.2d 543, 545 (8th Cir. 1993).

II. THE DISTRICT COURT'S ORDER SHOULD BE REVERSED.

A. The District Court Erred In Holding That Ms. Gagliardi Failed To Establish A *Prima Facie* Case Of Sexual Harassment.

The MHRA defines discrimination to include sexual harassment. See Minn. Stat. § 363A.03, subd. 13. "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, . . . or creating an intimidating, hostile or offensive employment . . . environment. Minn. Stat. § 363A.03, subd. 43. The district court determined that Ms. Gagliardi's sexual harassment claim failed. In making this determination, the district court overlooked the standard of review, refused to consider several of the acts of sexual harassment, did not view Ms. Gagliardi's claim from her perspective, and made impermissible credibility determinations. The district court's decision should be reversed. Summary judgment was not appropriate on Ms. Gagliardi's sexual harassment claims.

1. Ortho-Midwest is liable for the acts of Mr. Carlander as well as Ortho-Midwest's customers.

In determining that Ms. Gagliardi's sexual harassment claim failed, the district court refused to consider the behavior of Messrs. Strock, McNeill, and Fife. (A. 160-161.) This refusal was reversible error.

The MHRA makes it an unfair discriminatory practice to discriminate against someone on the basis of sex. Minn. Stat. § 363A.12. A plaintiff need not,

however, establish the motivation for the harassment--that is, there is no requirement that the plaintiff claim that the harassment was motivated by sexual interest in plaintiff. Montgomery v. Indep. Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1088 (D. Minn. 2000) (noting it makes no difference whether the harassment was motivated by sexual interest or by a desire to humiliate the plaintiff) (citing Cummings v. Koehnen, 568 N.W.2d 418, 423 (Minn. 1997)). The MHRA does not require that plaintiff establish motive at all; rather, a court must consider only whether the alleged conduct falls within a list of specific behaviors included under the MHRA's broad definition of sexual harassment. Id. Importantly, the Minnesota Supreme Court has held **the perspective of the victim must be considered** when judging the hostility of the environment. See In re Peters, 428 N.W.2d 375, 378 (Minn. 1988) (citing Bundy v. Jackson, 641 F.2d 934, 945 (D.C. Cir. 1981)). The presence of hostility is determined by examining **the totality of the circumstances**, which individually may seem inconsequential, but together depict a hostile or offensive environment. Continental Can Co. v. State, 297 N.W.2d 241, 249 (Minn. 1980); Giuliani v. Stuart Corp., 512 N.W.2d 589, 594 (Minn. Ct. App. 1994) (citing Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404-05, 91 L. Ed. 2d 49 (1986)). Here, the Court refused to consider Ms. Gagliardi's perspective when it concluded it would not consider the behavior of Messrs. Strock, McNeill, and Fife. In doing so, the district court incorrectly applied Minnesota law and must be reversed.

a. Respondent can be held liable for the acts of third parties.

In determining that Ms. Gagliardi's sexual harassment claim did not survive summary judgment, the district court concluded that only the conduct of Mr. Carlander could be considered. However, liability for sexual harassment exists for employers even when the sexual harassment is perpetrated by third parties when the employer knows or should have known about the harassment. Costilla v. State, 571 N.W.2d 587 (Minn. Ct. App. 1998).⁵ Additionally, Ortho-Midwest is deemed to have knowledge of the harassment by Mr. Carlander. See Tretter v. Liquipak Int'l, Inc., 356 N.W.2d 713, 715 (Minn. Ct. App. 1984) (employer is liable where it knew or should have known of supervisor's acts of harassment but did not discipline supervisor or improve victim's work environment); see also McNabb v. Cub Foods, 352 N.W.2d 378, 383 (Minn. 1984) (manager's knowledge that a co-employee was harassing the plaintiff was imputed to the employer).

To establish a *prima facie* case of sexual harassment based on a hostile work environment, a plaintiff must show that (1) the conduct is unwelcome; (2) the conduct consists of "sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature"; (3) the conduct is sufficiently pervasive so as to substantially

⁵ The element of employer knowledge was removed from the Minnesota Human Rights Act in 2001. Compare Minn. Stat. § 363.03 subd. 41 (2000) with Minn. Stat. § 363.03 subd. 41 (2001). A plain reading of the statute eliminates this element in a plaintiff's *prima facie* case of sexual harassment.

interfere with the plaintiff's employment or to create a hostile, intimidating, or offensive work environment; and (4) "the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." Cummings, 568 N.W.2d 418, 424 (Minn. 1997) (quotation omitted); see also Minn. Stat. § 363A.03, subd. 43. Here, the district court determined that Mr. Carlander should not have known of the harassment other than his own. (A. 161.) The district court erred in making this determination.

Ms. Gagliardi presented evidence that Mr. Carlander, at a minimum, *should have known* that sexual conduct occurred at the Aircast National Sales meeting for several reasons. First, Ms. Frangipane told him that such conduct occurred. (A. 95.) Second, Ms. Gagliardi reported Mr. Strock's "blow job" comment directly to Mr. Carlander, yet he did nothing to protect Ms. Gagliardi from coming into contact with Mr. Strock after the comment was made. (A. 61-62.) Mr. Carlander testified:

A: I don't recall giving her any advice on how to deal with him. That said, knowing that it had been reported, I can be relatively sure that action was being – that conversations and actions were being taken that it would not continue to be an issue. I didn't—

Q: So, as her employer, you reported the comment to Aircast, but that's all you did?

A: I made specific arrangements to report the comment and I did, and that is what I saw as my – saw as the right thing to do and my responsibility.

A: **I don't recall doing anything else.**⁶

(A. 61-62) (emphasis added). Third, Mr. Carlander himself observed the “lost puppy” conduct of Mr. Fife and commented about it to Ms. Gagliardi. (A. 11, 63.) Finally, Mr. Carlander is aware of his sexual harassment of Ms. Gagliardi.

While the district court found it significant that Ms. Gagliardi did not complain about all the sexual harassment she experienced at the hands of third parties, it seems clear that had she complained nothing would have been done. In similar situations courts have recognized the futility of making reports of sexual harassment. Munro Holding, LLC, v. Cook, 695 N.W.2d 379, 388 (Minn. Ct. App. 2005) (“if upon reporting, an employee is given no assurance that the problem will be corrected, the employee has good reason to quit.”). Accordingly, “[i]f an employer-owner, who typically would bear the responsibility to initiate action against a harassing party, is in fact the harassing party, the employee does not have a reasonable expectation that the owner will end the harassment.” Id. (citing Kay v. Peter Motor Co., 483 N.W.2d 481, 484 n.1 (Minn. Ct. App. 1992)). Summary judgment was not appropriate.

b. The conduct was sexual harassment.

Ms. Gagliardi experienced conduct of a sexual nature that constituted sexual harassment. The MHRA defines sexual harassment to include “unwelcome

⁶ Given that Mr. Carlander did nothing to prevent the harassment of which he was aware, it cannot be seriously argued that Ortho-Midwest took timely and appropriate action. The district court did not address this issue at summary judgment.

sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature.” Minn. Stat. § 363A.03 (2005). Here, in the six weeks of her employment, Ms. Gagliardi suffered the following conduct:

- A sexual assault by Mr. Fife;
- Mr. Strock telling Ms. Gagliardi that in his experience “women with thin lips give the best blow jobs”;
- Mr. McNeill informing Ms. Gagliardi that she looked “delicious”;
- Mr. McNeill sending emails suggesting that they have a personal relationship;
- Mr. Carlander pointing out that her email address was “too hot”;
- Mr. Carlander’s desire to have an agreement with his female employees that they not sue each other for sexual talk;
- Mr. Carlander informing her that he liked to eat dinner in his bathrobe and that there was an extra bathrobe for her;
- Mr. Carlander bringing her bags to his hotel room, being offended that she did not want to stay in his room, and terminating her shortly thereafter;
- Mr. Carlander placing his head in her lap during a nighttime car ride;
- Mr. Carlander insisting on spending time in her hotel room and questioning her when she did not want to stay in the room with him; and
- Mr. Carlander giving Ms. Gagliardi a calendar of nude and sexually suggestive pictures of his wife.⁷

⁷ It is worth noting that giving the calendar to Ms. Gagliardi served no purpose as it was a calendar for the previous year.

There simply can be no question that this conduct constitutes sexual harassment under the MHRA. Minn. Stat. § 363A.03 subd. 43 (2005). See e.g. Tretter, 356 N.W.2d at 715 (holding “offensive comments, leering and touching” constitutes sexual harassment under the MHRA); see also Rorie v. United Parcel Service, Inc., 151 F.3d 757 (8th Cir. 1998) (holding summary judgment inappropriate where supervisor pats female employee on the back, brushes up against her, and tells her she smells good); Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1997) (reversing a judgment for defendant where supervisor engaged in touching of plaintiff two times – pinching plaintiff and hitting her buttocks with a clipboard); Kopp v. Samaritan Health Systems, Inc., 13 F.3d 264 (8th Cir. 1993) (holding conduct including swearing at female employees and using vulgar language could create hostile working environment); see also Beach v. Yellow Freight System, 312 F.3d 391 (8th Cir. 2002) (holding that the presence of only sexual graffiti in 70% of defendant’s trailers was pervasive to establish liability under the MHRA).

c. The conduct was both pervasive and severe.

The sexual harassment Ms. Gagliardi experienced was “sufficiently severe or pervasive so as to alter the conditions of [her] employment and create an abusive working environment.” Klink v. Ramsey County, 397 N.W.2d 894, 901 (Minn. Ct. App. 1987). “To determine whether an environment is sufficiently hostile, courts are directed to look at the totality of the circumstances, including frequency and severity of conduct, whether the conduct is physically threatening

or humiliating or merely offensive, and whether the employee's work performance suffers." Welsh v. Millennium Eng'g Corp., 2005 WL 626622, *2 (Minn. Ct. App. 2005) (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998)).⁸ "[A] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Johns v. Harborage I, Ltd., 585 N.W.2d 853, 861 (Minn. Ct. App. 1998). Whether conduct rises to the level of sexual harassment is usually a factual determination for the factfinder. Moring v. Ark. Dept. of Corr., 243 F.3d 452, 456 (8th Cir. 2001).

Significantly, a single incident of harassment may be actionable under the MHRA. Johns, 585 N.W.2d at 861 ("even a single incident of sexual assault sufficiently alters the conditions of the victim's employment and clearly creates an abusive relationship"); see also Moring, 243 F.3d at 456 (8th Cir. 2001) ("[W]e are unaware of any rule of law holding that a single incident can never be sufficiently severe to be hostile-work-environment sexual harassment."); Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 969-70 (D. Minn. 1998) ("We are also mindful, however, of those exceptional cases in which a single episode of sexual harassment, such as a sexual assault, proved to be sufficient to state a claim of a hostile work environment sexual harassment."). In this case, the evidence of record shows that Ms. Gagliardi was subjected to sexual

⁸ All unpublished cases cited in Ms. Gagliardi's brief are included in the Appendix.

harassment, including an assault, which was both severe and pervasive. In this case any reasonable finder of fact could conclude that Ms. Gagliardi was subjected to sexual harassment, including an assault, which created a hostile working environment.

d. The sexual harassment was unwelcome.

In determining that Ms. Gagliardi's sexual harassment claim did not survive summary judgment, the district court determined that Ms. Gagliardi did not indicate that Mr. Carlander's behavior was unwelcome.⁹ Conduct is unwelcome where "the employee did not solicit or incite it, and the employee regarded the conduct as undesirable or offensive." Myers v. State, 2000 Minn. App. LEXIS 16 *5,6 (Minn. Ct. App. Jan. 4, 2000) (citing Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 565 (8th Cir. 1992)). Here, Respondent offered no evidence that Ms. Gagliardi invited or solicited Mr. Carlander's behavior. Moreover, Ms. Gagliardi presented significant evidence that the conduct she suffered was unwelcome. Ms. Gagliardi testified that when she was the subject of sexual comments, she did her best to ignore them. When Mr. Carlander brought her bags to his hotel room, she left the hotel. (A. 21.) When Mr. Carlander

⁹ Because the court did not consider the acts of individuals other than Mr. Carlander, it did not make a determination as to whether those acts were unwelcome. It should be noted that Ms. Gagliardi testified that when she was the subject of sexual comments, she did her best to ignore them. When Mr. Strock made his "blow job" comment, Ms. Gagliardi left the table. When Mr. Fife touched her buttock and attempted to kiss her, she pushed him away.

suggested they order in room service and eat in just their bathrobes, Ms. Gagliardi declined. (A. 76.) This is evidence that the harassment was unwelcome.

Moreover, “the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact.” Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986). It is for a jury to determine whether Ms. Gagliardi found the conduct unwelcome.

2. The district court made impermissible credibility determinations.

Essentially, the district court found that Ms. Gagliardi was not credible. As the district court wrote, it was “not persuaded” that Gagliardi found sexual comments and behavior towards her unwelcome. (A. 163.) However, as noted *supra*, it is well established that credibility determinations are not appropriate functions for a court at the summary judgment stage. Anderson, 477 U.S. at 254; Powell, 660 N.W.2d at 122; Williams, 501 N.W.2d at 656. Here, Ms. Gagliardi presented significant evidence that the conduct she suffered was unwelcome. For example, when Mr. Strock made his “blow job” comment, Ms. Gagliardi left the table. (A. 10.) When Mr. Fife touched her buttock and attempted to kiss her, she pushed him away. (Id. at 11.) When Mr. Carlander brought her bags to his hotel room, she left the hotel. (Id. at 21.) When Mr. Carlander suggested they order in room service and eat in just their bathrobes, Ms. Gagliardi declined. (Id. at 76.) Ms. Gagliardi testified that she found the expensive meals and the car service Mr.

Carlander provided her unwelcome. "I feel that he was leading me on trying to seduce me with those things. A stretch limousine at 6:00 in the morning to me is – there has to be a reason for that." (*Id.* at 17.)¹⁰

Rather than find the existence of a factual dispute on the issue of welcomeness, the court simply decided not to believe Ms. Gagliardi. In ignoring Ms. Gagliardi's testimony, the district court ignored both the procedural posture of the motion and the clear prohibition against making determining creditability of the testimony. The district court's decision should be reversed.

B. The District Court Erred In Granting Summary Judgment On Ms. Gagliardi's Reprisal Claim.

The district court found that Ms. Gagliardi's claim of reprisal discrimination failed to survive summary judgment. Specifically, the district court found that there was no causal connection between Ms. Gagliardi's report of sexual harassment and her termination; that reports made on behalf of Ms. Gagliardi by Mr. Vegdahl were not reports for the purposes of the MHRA; and that Ms. Gagliardi was, as a matter of law, terminated for a legitimate non-discriminatory reason. The district court's determination is incorrect on the law and contrary to Minnesota public policy.

¹⁰ It is difficult to imagine what other reason Mr. Carlander had for doing these things other than to seduce Ms. Gagliardi. As a famous Minnesotan once put it, "you don't need a weatherman to know which way the wind blows." (Bob Dylan, "Subterranean Homesick Blues," on Bringing It All Back Home (Columbia Records 1965)).

Minnesota Statute section 363A.15 prohibits employers from engaging in retaliatory conduct because an “individual” opposed discrimination or reported it. “Reprisal” is defined as “any form of intimidation, retaliation or harassment” Id. The Minnesota Legislature has expressly stated the MHRA is to be construed liberally to accomplish the purposes thereof. Minn. Stat. § 363A.04; see also Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 378 (Minn. 1990) (stating that the act “requires us to construe liberally MHRA provisions to effectuate the act’s purposes.”) (citing Continental Can Co., Inc. v. State, 297 N.W.2d 241 (Minn. 1980)); Correll v. Distinctive Dental Servs., P.A., 636 N.W.2d 578, 584 (Minn. Ct. App. 2001). The fundamental purposes of the MHRA include “placing individuals who have suffered discrimination in the same position they would have been in had no discrimination occurred” and “encouraging victims of discrimination to pursue their claims.” Correll v. Distinctive Dental Services, P.A., 636 N.W.2d 578, 584 (Minn. Ct. App. 2001) (citing Guiliani v. Stuart Corp., 512 N.W.2d 589, 596-97 (Minn. Ct. App. 1994).)

To establish a *prima facie* case of reprisal and thus withstand a defendant’s motion for summary judgment, a plaintiff must show (1) that she engaged in statutorily protected conduct, (2) that she suffered an adverse employment action, and (3) that there is a causal connection between the two. See Hoover v. Norwest Private Mortgage Banking, 632 N.W.2d 534, 548 (Minn. 2001). In analyzing MHRA reprisal claims, Minnesota courts apply federal caselaw discussing retaliation claims brought under Title VII of the Civil Rights Act of 1964, 42

U.S.C. §§ 2000e-2000e-17. See Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999).

1. Ms. Gagliardi's report and Mr. Vegdahl's report protect Ms. Gagliardi.

The district court correctly found that Ms. Gagliardi engaged in protected conduct when she reported Mr. Strock's comments to Mr. Carlander. (A. 165.) However, the district court also held that Mr. Vegdahl's report did not protect Ms. Gagliardi. (Id. at 19.) In so holding, the district court did not construe the MHRA liberally to effectuate its purposes as is required by Minn. Stat. § 363A.04. Instead the district court construed the statute narrowly and against Ms. Gagliardi.

As noted above, in analyzing MHRA reprisal claims, Minnesota courts apply federal caselaw discussing retaliation claims brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17. See Fletcher, 589 N.W.2d at 101. Federal courts addressing this issue have uniformly concluded that an employer violates Title VII's anti-retaliation provision by taking adverse employment action against an employee because of the protected activity of a family member or friend. In McKenzie v. Atlantic Richfield Co., 906 F. Supp. 572, 575 (D.Colo. 1995), the court concluded that the plaintiff-husband had a cause of action for his employer's adverse action against him in retaliation for his wife's protected activity, observing that "as other courts have held ... the antireprisal provision of Title VII precludes an employer from discriminating against an individual because that person's spouse has engaged in protected

activity." Id. (citing Wu v. Thomas, 863 F.2d 1543 (11th Cir.1989); De Medina v. Reinhardt, 444 F. Supp. 573 (D.D.C. 1978).) See also Thurman v. Robertshaw Control Co., 869 F. Supp. 934, 941 (N.D. Ga. 1994) (recognizing that "in a case of an alleged retaliation for participation in a protected activity by a close relative who is a co-employee, the first element of the prima facie case is modified to require the plaintiff to show that the relative was engaged in statutorily protected expression."); Clark v. R.J. Reynolds Tobacco Co., Civ. No. 79-7, 27 Fair Empl. Prac. Cas. (BNA) 1628, 1982 U.S. Dist. LEXIS 11679, 1982 WL 2277, at * 7 (E.D. La. Feb. 2, 1982) (finding *prima facie* case where plaintiff received reprimand allegedly in retaliation for his son's EEOC filing); De Medina v. Reinhardt, 444 F. Supp. 573, 580 (D.D.C. 1978) (acknowledging that Title VII does not expressly consider the possibility of third-party reprisals, but concluding that "since third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude, as has the only other court to consider the issue, Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 312 (N.D. Ohio 1976), that section 2000e-3 proscribes the alleged retaliation of which plaintiff complains."). Cf. McDonnell v. Cisneros, 84 F.3d 256, 262 (7th Cir. 1996) (construing Title VII to permit suit by one complaining of retaliation either for being suspected of engaging in or for failing to prevent another from engaging in protected conduct); EEOC v. Ohio Edison Co., 7 F.3d 541, 545-46 (6th Cir. 1993) (broadly construing statutory language that "he has opposed any practice" to mean the plaintiff or his agent);

Wu v. Thomas, 863 F.2d 1543, 1547 (11th Cir.1989) (permitting husband's claim of retaliation against him for wife's EEOC filing to "piggy back" on wife's charge of retaliation); Murphy v. Cadillac Rubber & Plastics, Inc., 946 F. Supp. 1108, 1117-18 (W.D.N.Y. 1996); EEOC v. Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1210-11 (E.D. Cal. 1998); Kennard v. Louis Zimmer Comm., Inc., 632 F. Supp. 635, 638-39 (E.D. Penn. 1986).

As with the MHRA, the primary purpose of Title VII's anti-retaliation provision is to ensure unfettered access to statutory remedial mechanisms. See Robinson v. Shell Oil Co., 519 U.S. 337, 117 S. Ct. 843, 846, 136 L. Ed. 2d 808 (1997). A construction that finds a violation of the MHRA only where the employee himself has participated in activity giving rise to unlawful retaliation leaves employees who have third parties complain on their behalf without a remedy. The employer would be free to engage in indirect retaliatory conduct, accomplishing indirectly what it is prohibited from doing directly. Such an interpretation would chill employees from exercising their MHRA rights against unlawful employment practices out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative. See Clark 1982 U.S. Dist. LEXIS 11679, Civil Action No. 79-7 Section F, 1982 WL 2277, at *7 ("Plaintiff's son would certainly be deterred from exercising his rights under Title VII if there was a threat that his former employer could fire his father if he were to file a charge of discrimination against it. This is exactly the type of retaliation Congress meant to make unlawful..."); cf. Ohio Edison Co., 7 F.3d at 545. This

would in turn frustrate the state's efforts to ferret out and prevent impermissible employment practices. It seems unlikely that the Minnesota Legislature intended the broad remedial purposes of the statute to be thwarted in such a way.

In Ohio Edison Co., the Sixth Circuit stated:

We believe that under this line of thought the words in the statute [Title VII] at issue in the present case – “because he has opposed any practice made unlawful employment practice under this subchapter” should be broadly construed to include a claim in which an employee, *or his representative*, has opposed any practice made unlawful employment practice. In the present case, a former employee alleged he was discriminated against because a co-employee engaged in protected activity and protested his discriminatory discharge on his behalf and threatened that a claim would be filed for the discriminatory discharge. The causal link in the present case between the person engaging in the protected activity and the person retaliated against is clear, because the person, allegedly engaging in protected activity, was protesting the allegedly unlawful discharge of Whitfield and was allegedly acting on his behalf.

7 F.3d at 545-46 (emphasis in original.)

Similarly, the legitimate concerns of protecting employees from reprisal where a third party complains of discrimination were underscored in De Medina, 444 F. Supp. At 580:

While the language of [section 704 of the Civil Rights Act] indicates that Congress did not expressly consider the possibility of third-party reprisals, i.e., discrimination against one person because of a friend's or relative's protected activities, the very clear intent of Congress would be undermined by the construction defendant suggests. In enacting section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation. Since tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude . . . that section 2000e-3

proscribes the alleged retaliation of which plaintiff complains.

In finding Ms. Gagliardi's reprisal claims are actionable under MHRA, this court would be properly exercising its authority to broadly interpret remedial legislation in order to effectuate the statute's overarching purposes. Indeed, protecting employees in similar situations effectuates the underlying purpose of MHRA's anti-reprisal provision and the statute's broad remedial purposes. To hold otherwise, as the district court did, would thwart the intent of the Minnesota Legislature and produce an absurd result. The decision of the district court must be reversed.

2. Ms. Gagliardi can establish a causal connection.

Because the district court improperly disregarded the report made by Mr. Vegdahl and found it not sufficient to protect Ms. Gagliardi, the district court found that Ms. Gagliardi failed to establish a causal connection between her report and her termination. (A. 165.)¹¹ The Minnesota Supreme Court has noted that discriminatory intent or retaliatory motive are difficult to prove by direct evidence. Thus, an employee may demonstrate a causal connection "by evidence of circumstances that justify an inference of retaliatory motive." Dietrich v. Canadian Pac. Ltd., 536 N.W.2d 319, 327 (Minn. 1995) (quotation omitted). In

¹¹ While not clear from the district court's order, Mr. Vegdahl's complaint is clearly close enough in time to create a causal connection. Ms. Gagliardi was fired within four days of Mr. Vegdahl's report. The United States Court of Appeals for the Eighth Circuit has held that timing of 15 days between a plaintiff's report and termination "*strongly supports* an inference of causation." Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1122 (8th Cir. 2006)(emphasis added).

circumstances where the employer had knowledge and the adverse action followed closely in time, a causal connection may be established by inference. Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 445 (Minn. 1983). Put another way, the close proximity between appellant's discrimination complaint and the termination decision supports the inference of reprisal. Potter v. Ernst & Young, 622 N.W.2d 141, 146 (Minn. Ct. App. 2001) (finding causal connection where decision to terminate was made within three months of complaint); Thompson v. Campbell, 845 F. Supp. 665, 675 (D. Minn. 1994) (explaining that the plaintiff's termination four months after filing her complaint, together with other circumstantial evidence in the record, raised an issue of material fact concerning the causal connection between her protected conduct and her termination); Dietrich, 536 N.W.2d at 327 (stating that a causal connection may be established by the proximity in time between the statutorily protected act and the adverse action). Other courts are in accord. See Smith v. Riceland Foods, 151 F.3d 813, 819-20 (8th Cir. 1998); Hossaini v. Western Missouri Medical Center, 97 F.3d 1085, 1089 (8th Cir. 1996) ("reasonable person could infer a discriminatory motive from the timing" between complaint and adverse action of three months); EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998) ("short interlude" between protected conduct and termination sufficient evidence of causation); O'Bryan v. KTIV Television, 64 F.3d 1188, 1193-94 (8th Cir. 1995) (three months between filing administrative complaints and firing established causal connection); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999) (assuming that temporal proximity of two

months and one week is sufficient to support a *prima facie* case of retaliation); Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994) (one and one half month period between protected activity and adverse action may, by itself, establish causation); see also Budenz v. Sprint Spectrum, L.P., 230 F. Supp. 2d 1261, 1276-77 (D. Kan. 2002) (warning two months after plaintiff's protected activity established a causal connection sufficient to support *prima facie* case of reprisal discrimination); Alexander v. Gerhardt Enterprises, Inc., 40 F.3d 187, 196-97 (7th Cir. 1994) (adverse action close in time to protected activity is sufficient to establish causal connection).

Here, even assuming the district court is correct in excluding Mr. Vegdahl's report, Ms. Gagliardi's termination one month after her report sufficiently establishes causation for the purposes of surviving summary judgment. Alexander, 40 F.3d at 196-97 (7th Cir. 1994) (adverse action close in time to protected activity is sufficient to establish causal connection). The district court erred in granting summary judgment because of a lack of causation. The decision of the district court should be reversed.

3. Respondent's legitimate non-discriminatory reason for Ms. Gagliardi's termination is pretext.

The district court found that Ms. Gagliardi did not rebut the legitimate non-discriminatory reason for her termination. Once a plaintiff establishes a *prima facie* case of employment discrimination, a rebuttable presumption that the defendant unlawfully discriminated against the plaintiff is created, and the inquiry

proceeds to the second step of the McDonnell Douglas analysis. Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 711 (Minn.1992). At the second step, the court considers any evidence, as presented by the defendant, that the defendant's actions were related to a legitimate business purpose. Sigurdson v. Isanti County, 386 N.W.2d 718, 720 (Minn. 1986). The legitimacy rationale “must be offered by admissible evidence, be of a character to justify a judgment for the defendant, and must be clear and reasonably specific enough to enable the plaintiff to rebut the proffered reasons as pretextual.” Feges, 483 N.W.2d at 711; see also, Sigurdson, 386 N.W.2d at 720.

Importantly, an employer does not escape liability merely because it offers a legitimate reason for the discharge, if an illegitimate reason also played a role in the discharge. See McGrath v. TCF Bank Savings, fsb, 509 N.W.2d 365, 366 (Minn. 1993). Even if the employer has a legitimate reason for the discharge, a plaintiff may nevertheless prevail if an illegitimate reason more likely than not motivated the discharge decision. Id. (citing Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 627 (Minn. 1988)).

Here, the district court determined that Ms. Gagliardi's failure to be in contact with Mr. Carlander was a legitimate non-discriminatory reason for her termination. (A. 167.) In making this determination the district court overlooked that Ms. Gagliardi disputes that she had no contact with Mr. Carlander. (A. 31.) Thus a fact question exists as to whether Ms. Gagliardi was in contact with Mr. Carlander. For the district court to find, as a matter of law, that Ms. Gagliardi was

not in contact with Mr. Carlander disregards the standard of review at summary judgment.

Even if no fact question exists as to whether Ortho-Midwest has proffered a legitimate non-discriminatory reason, summary judgment is still inappropriate because Ms. Gagliardi can demonstrate pretext. If the defendant produces evidence of such a legitimate purpose, the presumption of unlawful discrimination disappears, the inquiry shifts to the third step of the McDonnell Douglas analysis, and the plaintiff must persuade the court, by a preponderance of the evidence, that the defendant intentionally retaliated against him. Feges, 483 N.W.2d at 711; see also, Sigurdson, 386 N.W.2d at 720. The plaintiff sustains this burden "either directly by persuading the court that a discriminatory reason likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Sigurdson v. Isanti County, 386 N.W.2d at 720 (quotation omitted); see also, McGrath, 509 N.W.2d at 366.

Although, the district court focused solely on Ms. Gagliardi's purported failure to contact Mr. Carlander, Ortho-Midwest offered multiple reasons for terminating Ms. Gagliardi. These reasons include the one found persuasive by the district court, as well as a purported failure to make sales calls, or work sufficient hours.¹² The company's multiple and shifting explanations are sufficient to

¹² Ms. Gagliardi called several of her contacts in attempts to make sales calls. (A. 6.) Moreover, Mr. Carlander never spoke negatively about her performance at any time during her employment. (A. 18.)

support an inference of discrimination. See Young v. Warner-Jenkinson Co., Inc., 152 F.3d 1018, 1022 (8th Cir. 1998); Randle v. City of Aurora, 69 F.3d 441, 455 (10th Cir. 1995) (holding a defendant's shifting explanations regarding the reason for discharge strengthens a plaintiff's pretext argument); Washington v. Garrett, 10 F.3d 1421 (9th Cir. 1993) (same); Cole v. Ruidoso Mun. Sch., 43 F.3d 1373, 1380-81 (10th Cir. 1994); Fuentes v. Perskie, 32 F.3d 759, 765 (3rd Cir. 1994) (inconsistencies and contradictions are proper basis to prove decision was the product of discriminatory animus); National Labor Relations Board v. Henry Colder Co., Inc., 907 F.2d 765, 769 (7th Cir. 1990) ("shifting explanations for discharge may, in and of themselves, provide evidence of unlawful motivation").

The timing of Ms. Gagliardi's termination, both with respect to her reports and those of Mr. Vegdahl; Mr. Carlander's knowledge of his own conduct and the fact that "human resource" issues regarding Ms. Gagliardi had been raised to Ortho-Midwest clients; and Ortho-Midwest's multiple explanations for Ms. Gagliardi's termination create, at a minimum, a fact question as to Ms. Gagliardi's reprisal claims. Summary judgment was not appropriate. The district court's order granting summary judgment should be reversed.

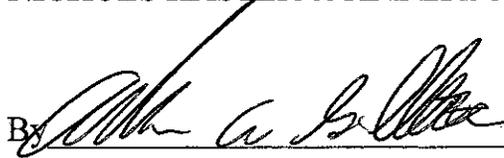
CONCLUSION

The district court made numerous errors in granting Respondent's summary judgment motion. Ms. Gagliardi has demonstrated issues of material fact on the issues of welcomeness, whether Respondent should have known of the behavior by individuals other than Mr. Carlander, and whether she was terminated in

response to the report of sexual harassment. Because of these issues of fact, summary judgment was and is inappropriate. The district court's decision should be reversed.

DATED: August 14, 2006

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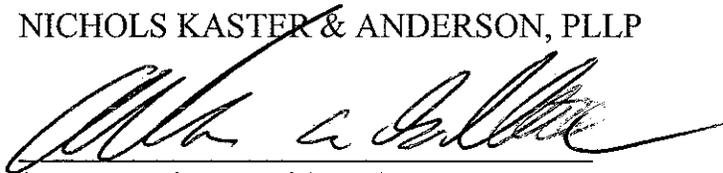
CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellant Lisa Gagliardi certifies that this brief complies with the following requirements:

1. This brief was drafted using Microsoft Word 2000 word processing software;
2. The brief was drafted using Times New Roman, 13-point font, compliant with the typeface requirements; and
3. There are 11,237 words in this brief.

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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).