

No. A10-543

STATE OF MINNESOTA
IN SUPREME COURT

Carol J. LaMont,

Appellant,

vs.

Independent School District #728,

Respondent.

**AMICUS CURIAE BRIEF OF
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LEGAL ISSUE

Does the Minnesota Human Rights Act protect employees from non-sexual harassment based on membership in a protected class where the harassment is severe and pervasive and therefore creates a hostile work environment?

The district court and the court of appeals held in the negative.

Most apposite authority:

Minn. Stat. § 363A.08 (2010)

Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980)

STATEMENT OF INTEREST

The State of Minnesota, by its Attorney General, has a compelling interest in ensuring that its anti-discrimination laws are correctly interpreted to protect the public.¹ Through its Department of Human Rights (“Department”), the State investigates charges of discrimination and issues complaints in order to enforce the Minnesota Human Rights Act, Minn. Stat. ch. 363A (“MHRA”).

This case concerns discrimination resulting from non-sexual² harassment directed at an employee due to the employee’s membership in a protected class. Appellant Carol LaMont filed a charge of discrimination with the Department and alleged that her supervisor subjected her to non-sexual harassment on the basis of her status as a woman. The Department found probable cause to believe that Independent School District No. 728 (“the District”) violated the MHRA. *See* Minn. Stat. § 363A.08 (2010).

LaMont later withdrew her charge so that she could commence a private action against the District in district court. *See* Minn. Stat. § 363A.33 (2010). The district court granted the District’s motion for summary judgment regarding LaMont’s harassment claim, holding that the MHRA does not protect an employee from non-sexual harassment directed at her because of her status as a woman. The Minnesota Court of Appeals affirmed.

¹ No portion of this brief was prepared by counsel for a party, and the State received no monetary contributions for this brief. *See* Minn. R. Civ. App. P. 129.03 (requiring certification of authorship and contributors).

² In using the term “non-sexual,” the State refers to conduct or communication that is not motivated by sexual desire, cannot be characterized as a sexual advance or proposition, or is otherwise not sexual in nature.

The opinion of the court of appeals is at odds with the language and purpose of the MHRA, as well as the Department's interpretation of it. A correct analysis of the application of the MHRA to cases involving non-sexual harassment is important to the State, its Attorney General, the Department and to the citizens of the State. The State therefore offers its views to this Court and requests that the Court reverse the holding of the court of appeals.

ARGUMENT

In affirming the dismissal of LaMont's claims, the court of appeals held that the MHRA does not prohibit an employer from subjecting an employee to a hostile work environment resulting from non-sexual gender-based harassment.³ *LaMont v. Indep. Sch. Dist. No. 728*, No. A10-543, 2011 WL 292131 at *2-3 (Minn. Ct. App. Feb. 1, 2011) (unpublished). The court held that, because the definition of "sexual harassment" refers only to harassment of a sexual nature, the MHRA cannot be read to include a claim for non-sexual harassment directed at a woman because she is a woman. *Id.* This interpretation of the MHRA is inconsistent with the Act's plain language and purpose, the Department's interpretation of the Act, federal law interpreting Title VII's substantially

³ The MHRA prohibits discrimination on the basis of sex. Minn. Stat. § 363A.08. The State interprets its Act to protect individuals from harassment based on sex. However, references to sex-based harassment may lead to confusion given that this case involves the difference between sex-based and sexual harassment. To avoid confusion, the State will refer to non-sexual harassment based on sex as "gender-based" harassment. In so doing, the State recognizes that the MHRA does not include gender in the list of protected statuses. The State also recognizes that "gender" is a social construct while "sex" is biological in nature. However, despite these differences, for purposes of this analysis and for ease of discussion, the State will treat "gender" as synonymous with "sex."

similar anti-discrimination provisions, and the protections provided by other states pursuant to their anti-discrimination statutes. The Court should therefore reverse the decision of the court of appeals.

I. THE PLAIN LANGUAGE OF THE MHRA PROTECTS EMPLOYEES FROM NON-SEXUAL HARASSMENT BASED ON MEMBERSHIP IN A PROTECTED CLASS.

Statutory interpretation is a question of law, which this Court reviews de novo. *Frieler v. Carlson Mktg. Group*, 751 N.W.2d 558, 566 (Minn. 2008). The goal of statutory interpretation is to ascertain the legislature’s intent. Minn. Stat. § 645.16 (2010). When the plain meaning of a statute is clear, a court must apply its plain language. *Id.*

The MHRA provides, in part:

It is an unfair employment practice for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation or age to ... discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions facilities, or privileges of employment.

Minn. Stat. § 363A.08, subd. 2 (“Section 363A.08”) (2010). The “conditions” of employment include an employee’s work environment. A continuing pattern of hostile and offensive behavior directed only at female employees creates a different condition of employment for women than it does for men. Thus, harassment directed at an employee because of her gender discriminates against the employee in the conditions of employment in violation of Section 363A.08. Section 363A.08’s prohibition against discrimination in the conditions of employment similarly prohibits harassment based on the other protected statuses enumerated in the statute.

This Court has previously recognized that the plain language of Section 363A.08 (formerly codified at Minn. Stat. § 363.03, subd. 1) creates a cause of action for workplace harassment based on an employee's membership in a protected class. In 1980, this Court held in *Continental Can Company v. State*, 297 N.W.2d 241, 248 (Minn. 1980), that the MHRA's language prohibiting discrimination in the conditions of employment based on an employee's membership in a protected class prohibits an employer from subjecting the employee to harassment that alters the conditions of employment. The case involved a claim of sexual harassment based on sex. *Id.* The Court held that the MHRA's language prohibiting an employer from discriminating based on sex in the conditions of employment included a prohibition against sexual harassment because harassment impacts the conditions of employment experienced by women. *Id.* at 249. As the Court explained: "when sexual harassment is directed at female employees because of their womanhood, female employees are faced with a working environment different from the working environment faced by male employees." *Id.* at 248.

This Court's holding in *Continental Can* applied the language of the employment provisions in the MHRA and, thus, was limited to the employment context. *Id.* At the time of the decision, the MHRA did not include a definition of sexual harassment. *See* Minn. Stat. ch. 363 (1980). Following *Continental Can*, the legislature amended the MHRA to define sexual harassment, *see* 1982 Minn. Laws ch. 619, §§ 2-3 at 1511, which simply codified the holding and concepts set forth in the case. *Compare* Minn. Stat. § 363A.03, subd. 43 ("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”), with *Continental Can*, 297 N.W.2d at 248-49 (referring to sexual harassment as including “sexually motivated physical contacts,” “verbal sexual advances,” and “verbal and physical conduct of a sexual nature”). In addition, the amendment expanded *Continental Can*’s prohibition on sexual harassment beyond the employment context to include sexual harassment in other areas including housing, public accommodations, public services, and education. *Id.* The legislation did not amend, or in any way affect the validity of the Court’s reasoning and analysis in *Continental Can* regarding the plain language of what is now Section 363A.08.⁴ The Legislature did not affirmatively state that harassment based on sex was limited to acts of a sexual nature as it clearly could have done if it actually intended such a result.

Despite the plain language of Section 363A.08 and this Court’s holding in *Continental Can*, the court of appeals determined that the MHRA does not provide a cause of action for non-sexual gender-based harassment. *Lamont*, 2011 WL 292131 at *2. The court reasoned that the MHRA now defines discrimination based on sex to “include” sexual harassment⁵ and the definition of sexual harassment therefore limits sex

⁴ *Cummings v. Koehnen*, 568 N.W.2d 418, 422-23 (Minn. 1997), held that the addition of the MHRA’s provisions regarding sexual harassment invalidates the decision in *Continental Can* to the extent that *Continental Can* required plaintiffs alleging sexual harassment to prove that sexual harassment occurred “because of sex.” This holding does not affect *Continental Can*’s analysis regarding the effect of harassment on conditions of employment for purposes of the MHRA’s prohibition against discrimination based on an employee’s membership in a protected class.

⁵ The MHRA provides that, “the term ‘discriminate’ includes segregate or separate and, for purposes of discrimination based on sex, it includes sexual harassment.” Minn. Stat. § 363A.03, subd. 13 (2010).

discrimination claims to conduct or communication of a sexual nature.⁶ *Id.* Accordingly, the court held that LaMont was unable to proceed on a gender-based harassment claim because she could not present sufficient evidence that she experienced sexual-based harassment. *Id.*

The court of appeals erroneously decided that sexual harassment is the only form of gender-based harassment prohibited by the MHRA. The Act defines “discriminate” to include segregate or separate and states that “for purposes of discrimination based on sex, *it includes* sexual harassment.” Minn. Stat. § 363A.03, subd. 13 (2010) (emphasis added). As discussed above, this provision merely identifies one form of sex discrimination prohibited by the MHRA in accordance with the *Continental Can* decision.

⁶ Sexual harassment is defined as follows:

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

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

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

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

Minn. Stat. § 363A.03, subd. 43 (2010).

The *American Heritage Dictionary* defines the word “include” as follows:

1. To take part in as a part, element or member;
2. To contain as a secondary or subordinate element;
3. To consider with or place into a group, class or total.

American Heritage Dictionary 887 (4th ed. 2000). Thus, the word “include” is not exclusive or exhaustive. When something is “included” it is one part, not the whole. That the phrase “it includes sexual harassment” was not meant to be exclusive is further underscored by the legislature’s use of the word “it,” referring to the defined word “discriminate,” and with respect to sex discrimination. The Legislature could not have intended that either sex discrimination only includes “sexual harassment,” or that the term “discriminate” is limited to “sexual harassment.” *See, e.g.*, Minn. Stat. §§ 363A.08-.09, .11-.13, .16-.17 (2010) (identifying numerous other forms of discrimination, including sex discrimination). Such a result would be absurd and unintended by the Legislature. *See, e.g.*, Minn. Stat. § 645.17(1) (2010).

The Legislature in 1982 simply defined “sexual harassment,” and acknowledged, consistent with *Continental Can*, that sexual harassment is a form of sex discrimination. It did not implicitly or otherwise preclude any other form of discrimination actionable under Section 363A.08. If the Legislature had intended such a result, it could have easily so stated and presumably would have done so.

As discussed above, the plain language of Section 363A.08 prohibits discrimination in the terms, conditions, and privileges of employment when the discrimination is based on an employee’s membership in a protected class.

Discriminatory harassment that is severe or pervasive alters the conditions of employment experienced by one class of employees. *Continental Can*, 297 N.W.2d at 249. Thus, Section 363A.08 provides additional protection from non-sexual gender-based harassment independent of the MHRA’s prohibition of sexual harassment.

Finally, if the court of appeals’ reasoning was accepted by this Court, Section 363A.08 would also not prohibit non-sexual harassment based on the other protected classes, including race, religion and national origin. Such a result is not only contrary to the plain language of Section 363A.08, but it would produce yet another unreasonable and unintended construction of the law. *See* section 645.17(1). This Court should reverse the holding of the court of appeals.

II. EVEN IF THE COURT DETERMINES THAT THE STATUTE IS AMBIGUOUS, THE COURT SHOULD STILL HOLD THAT THE MHRA PROHIBITS NON-SEXUAL GENDER-BASED HARASSMENT.

When the language of a statute is ambiguous, the intention of the legislature may be ascertained by considering, among other matters:

- (1) the occasion and necessity for the law;
- (3) the mischief to be remedied;
- (4) the object to be attained;
- (6) the consequences of a particular interpretation;
- (8) legislative and administrative interpretations of the statute.

Id. In addition, when ascertaining the intention of the legislature, courts are guided by the presumption that “the legislature intends to favor the public interest as against any private interest.” Minn. Stat. § 645.17 (5) (2010). When interpreting the MHRA, “the

legislature has directed courts to construe the MHRA liberally to accomplish its purpose.” Minn. Stat. §§ 363A.02, 363A.04 (2010).

If the Court determines that the language of the MHRA is ambiguous, the Court should nonetheless hold that the MHRA prohibits non-sexual gender-based harassment. Indeed the legislature’s purpose, the public interest, the Department’s interpretation, and the interpretations of other jurisdictions all support reversal of the court of appeals’ decision.

A. The Legislature’s Purpose Supports The State’s Interpretation.

Consideration of the occasion and necessity for a law, the mischief to be remedied, and the object to be attained establishes a means of determining the purpose of a statute. The legislature has explicitly stated that the purpose of the MHRA is to “secure for persons in this state, freedom from discrimination.” Minn. Stat. § 363A.02, subd. 1(a) (2010). Thus, the law was passed to address and eliminate discrimination based on an individual’s membership in a protected class. This Court has noted that one of the purposes of the MHRA “is to rid the workplace of disparate treatment of female employees merely because they are female.” *Continental Can Co.*, 297 N.W.2d at 248. Workplace harassment directed at an employee because of her membership in a protected class is a form of discrimination. The State’s interpretation of the MHRA prohibiting such harassment effectuates the purpose of the statute and is consistent with the legislature’s direction that the statute be liberally construed.

B. It Is In The Public Interest To Protect Minnesota Employees From Nonsexual Gender-Based Harassment.

Harassment directed at an employee because of the employee's membership in a protected class interferes with the employee's job performance and also affects the employee's psychological well-being. As the United States Supreme Court has recognized, "a discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993). It is in the public interest to protect Minnesota residents from discriminatory hostile and abusive work environments. Thus, the State's interpretation of the MHRA as prohibiting non-sexual harassment is consistent with the statutory presumption that the legislature intended to favor the public interest over private interests.

C. The Minnesota Department Of Human Rights Interprets The MHRA To Protect Employees From Non-Sexual Harassment Based On Membership In A Protected Class, And Its Interpretation Is Entitled To Deference From This Court.

When interpreting a statute that a state agency enforces, the agency's interpretation "is entitled to deference and should be upheld, absent a finding that it is in conflict with the express purpose of the Act and the intention of the legislature." *Frieler*, 751 N.W.2d at 567 (addressing interpretation of the MHRA); *see also* Minn. Stat. § 645.16(8) (2010) (stating that legislature's intent may be ascertained from administrative interpretations of statute).

The Department interprets the MHRA to protect an employee from non-sexual harassment directed at the employee because of the employee's membership in a protected class. *See, e.g., Rights Stuff Newsletter*, October 2005 (featuring a national origin harassment case);⁷ *Rights Stuff Newsletter*, May-July 2004 (featuring religious harassment case);⁸ *Rights Stuff Newsletter*, Fall 2003 (featuring a disability harassment case);⁹ *By Rights: Ask The Commissioner*, Column 32 (answering question about abusive employer);¹⁰ *By Rights: Ask The Commissioner*, Column 24 (answering questions about hostile work environment based on pregnancy and use of gender slurs).¹¹ The Department's interpretation is consistent with the MHRA's purpose and the legislature's intent and should be given deference.

D. Numerous Courts Have Recognized A Cause Of Action For Discriminatory Non-Sexual Harassment.

A review of federal and state case law also supports the conclusion that the MHRA protects employees from gender-based harassment.

1. The Interpretation Of Title VII Is Relevant To This Court's Analysis Of Section 363A.08.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et. seq.*, provides that it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

⁷ www.humanrights.state.mn.us/education/articles/rs05_3case2sex_norigin.html

⁸ www.humanrights.state.mn.us/education/articles/rs04_2case5_proselytize.html

⁹ www.humanrights.state.mn.us/education/articles/rs03_3case1_harassed_quit.html

¹⁰ www.humanrights.state.mn.us/about/col_32.html

¹¹ www.humanrights.state.mn.us/about/col_24.html

individual’s race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(a)(1). This language is substantially similar to the language in Section 363A.08 of the MHRA. In addition, a federal regulation issued by the Equal Employment Opportunity Commission (“EEOC”) in 1980 prohibits and defines sexual harassment.¹² 29 C.F.R. § 1604.11(a). The language in the MHRA’s definition of sexual harassment is very similar to the EEOC’s regulation in both structure and content. *See* Minn. Stat. § 363A.03, subd. 43 (2010).

a. Federal courts have interpreted Title VII to prohibit non-sexual harassment that creates a hostile work environment.

The United States Supreme Court has interpreted Title VII to create a cause of action for harassment that creates a hostile or abusive work environment.¹³ For instance,

¹² Sexual harassment is defined as follows:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when

(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment,

(2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.

29 C.F.R. § 1604.11(a).

¹³ Title VII does not contain a prohibition regarding “hostile work environment.” Rather, like the MHRA, it prohibits discrimination in the terms and conditions of employment based on sex. Courts use the term “hostile work environment” as short-hand for harassment based on a protected status that is severe or pervasive enough to discriminate in the terms, privileges, and conditions of employment.

in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986), the United States Supreme Court held that a plaintiff may prove a violation of Title VII by showing that discrimination based on sex has created a hostile or abusive work environment. The Court noted that the phrase “ ‘terms, conditions or privileges of employment’ evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment” and held that sexual harassment is actionable under Title VII if it is sufficiently severe or pervasive “to alter the conditions of the victim’s employment and create an abusive working environment.” *Id.* at 64, 67. In reaching its decision, the Court relied on case law from federal circuit courts holding that Title VII prohibits harassment based on race.¹⁴ *Id.* at 65-66.

The Court clarified the scope of hostile work environment harassment claims in *Harris v. Forklift Systems*. 510 U.S. at 21. The Court explained that Title VII is violated “when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Id.* *Harris* involved mixed allegations of gender-based and sexual harassment. *Id.* at 19. In analyzing the contours of a hostile work environment claim, the Court looked beyond sexual harassment claims and referenced harassment claims based on other protected statuses noting “the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment

¹⁴ This Court also acknowledged the history of federal racial harassment cases in *Continental Can.* 297 N.W.2d at 247.

abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality." *Id.* at 22.

Similarly, in *Oncale v. Sundowner Offshore Services*, a case examining the viability of a Title VII claim based on same-sex sexual harassment, the Court stated that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." 523 U.S. 75, 80 (1998). The Court stated that, as an example, a trier of fact might reasonably find discrimination "if a female victim is harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace." *Id.*

In keeping with the United States Supreme Court's analysis, federal circuit courts have long held that Title VII prohibits gender-based harassment.¹⁵ *See, e.g., Haugerud v. Amery Sch. Dist.*, 259 F.3d 678, 692-96 (7th Cir. 2001) (fact issues precluded summary judgment on female custodian's hostile work environment claim alleging that she was subjected to sexist comments, attempts by male employees to prevent her from completing job tasks, and differential treatment with regard to job duties); *see also Rosario v. Dep't Of The Army*, 607 F.3d 241, 247 (1st Cir. 2010); *Scruggs v. Garst Seed Co.*, 587 F.3d 832, 840 (7th Cir. 2009); *Equal Employment Opportunity Comm'n v. Nat'l*

¹⁵ Courts appear to struggle with what to call gender-based harassment. Some courts call it "gender harassment." Some call it "harassment based on sex" or "sex harassment." Others, confusingly, call it "sexual harassment" even when the conduct is not what is traditionally considered sexual in nature. Because of the confusing terminology, it is important to look to the underlying allegations in cited authorities to determine whether the claim is related to gender-based harassment.

Educ. Ass'n, 422 F.3d 840, 844-45 (9th Cir. 2005); *Elizabeth Smith v. First Union Nat'l Bank*, 202 F.3d 234, 241-43 (4th Cir. 2000); *Pollard v. E.I. DuPont de Nemours Co.*, 213 F.3d 933, 941-42 (6th Cir. 2000), *rev'd on other grounds*, 532 U.S. 843 (2001); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999); *Valeria Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999); *Victorija Smith v. St. Louis Univ.*, 109 F.3d 1261, 1265 (8th Cir. 1997); *Cross v. State of Alabama, State Dep't of Mental Health & Mental Retardation*, 49 F.3d 1490, 1507 (11th Cir. 1995); *Cornwell v. Robinson*, 23 F.3d 694, 706-07 (2d Cir. 1994); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 903-05 (11th Cir. 1988).

Federal circuit courts have also interpreted Title VII to prohibit harassment based on other protected statuses. *See e.g. Fuller v. Fiber Glass Sys., LP*, 618 F.3d 858, 863 (8th Cir. 2010) (stating that Title VII prohibits an employer from subjecting its employees to a hostile work environment because of the employees' race, color, religion, sex, or national origin); *Feingold v. New York*, 366 F.3d 138, 149 (2d Cir. 2004) (religious harassment); *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (race harassment); *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87, 88 (8th Cir. 1977) (national origin harassment).

Several federal circuit court cases have involved gender-based harassment of women that was particularly egregious. For example, in *Pollard v. E.I. DuPont de Nemours Company*, the Sixth Circuit determined that the plaintiff established a case of hostile work environment sexual harassment under Title VII. 213 F.3d at 942. Despite

the court's characterization of the claim as a "sexual harassment" claim, the majority of the conduct alleged was non-sexual in nature. *Id.* at 938-41. The plaintiff, an employee in the hydrogen peroxide unit of a DuPont plant, alleged that her co-workers refused to take direction from her because she was a woman, placed a bible on her desk open to the passage "I do not permit a woman to teach or have authority over man. She must be silent," put a highlighted copy of the bible verse in her locker, ignored her, made derogatory gender-based remarks at least five times per week, set false alarms in her work area, failed to tell her when actual alarms sounded in her area, slashed the tires on her bicycle, burned her food, and interfered with her work supplies to make it look as if she were incompetent. *Id.* After the plaintiff moved to a different shift, her male co-workers threw a party with balloons and had a fish fry to celebrate her departure. *Id.* The Sixth Circuit noted that "there was overwhelming testimony as to the anti-female animus which the men in peroxide consistently demonstrated, specifically toward women working in the peroxide area." *Id.* The court held that the plaintiff demonstrated severe and pervasive harassment sufficient to support a hostile work environment claim. *Id.* at 942.

Similarly, in *Andrews v. City of Philadelphia*, the Third Circuit reversed judgment entered for the employer on the plaintiffs' gender-based hostile work environment claims. 895 F.2d at 1488. The allegations involved a mixture of sexual and non-sexual gender-based conduct. *Id.* at 1472-75. However, the most egregious conduct was non-sexual. *Id.* The plaintiffs, female police officers, alleged that male co-workers regularly referred to women in an offensive and obscene manner, that co-workers stole or

hid their case files, scribbled on their paperwork, poured soda on one plaintiff's typewriter and ripped the covers off her books, vandalized the plaintiffs' cars by slashing the tires, scratching the paint, and removing the windshield wipers, vandalized one plaintiff's coat and hat, and put lime in one plaintiff's shirt causing her to suffer severe chemical burns. *Id.* Co-workers also made some sexual comments and displayed pornography in the workplace. *Id.* In overturning the district court's judgment in favor of the employer, the Third Circuit held that "to constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones in every instance." *Id.* at 1485. The court noted that "intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." *Id.*

Federal courts have determined that non-sexual gender-based harassment can also include physical conduct that is not sexual in nature. In *Valeria Smith v. Sheahan*, the Seventh Circuit determined that the plaintiff's hostile work environment claim based on a physical assault survived summary judgment. 189 F.3d at 535. The plaintiff, a guard at a county jail, alleged that her male co-worker called her derogatory names, threatened her, and pinned her against a wall, twisting her wrist hard enough to severely damage the ligaments, requiring surgical correction. *Id.* at 531. The male co-worker had a history of threatening and hostile behavior towards only female employees. *Id.* The Seventh Circuit rejected the defendant's argument that the plaintiff's harassment claim was foreclosed because the assault she suffered was not sexual in nature. *Id.* at 534. The court noted that harassment resulting from sex-based animus is actionable under Title VII

and stated that “breaking the arm of a fellow employee because she is a woman or, as here, damaging her wrist to the point that surgery was required, because she was a woman, easily qualifies as a severe enough isolated occurrence to alter the conditions of her employment.” *Id.* at 533-34.

The Fourth Circuit reached a similar conclusion in a case in which a male supervisor was physically threatening and aggressive toward women and commented to a female employee that “he could see why a man would slit a woman’s throat.” *Elizabeth Smith*, 202 F.3d at 239-43. The court stated that “a work environment consumed by remarks that intimidate, ridicule, and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances.” *Id.* The court held that the plaintiff established a violation of Title VII.

The women in the above cases were subjected to demeaning, insulting, frustrating, and sometimes frightening conduct because of their gender. Although not sexual in nature, the conduct created a poisonous working environment that interfered with their abilities to perform their jobs and altered the conditions of their employment. If this Court adopts the Minnesota Court of Appeals’ analysis of Section 363A.08, it would prohibit Minnesota women subjected to this same conduct from bringing claims against their employers under Minnesota law and Minnesota employers would have less incentive to take steps to prevent workplace harassment.

b. This Court should adopt the federal courts' reasoning when analyzing Section 363A.08.

As discussed above, the plain language of Section 363A.08 clearly prohibits non-sexual gender-based harassment. Thus, this Court does not need to consider federal interpretations of Title VII. However, the federal courts' analysis of Title VII further supports reversal of the court of appeals decision in this case.

In analyzing cases brought under the MHRA, Minnesota courts frequently apply principles developed in the adjudication of claims arising under Title VII because of the substantial similarity in the language of the two statutes. *Renja Sigurdson v. Isanti County*, 386 N.W.2d 715, 719 (Minn. 1986). Historically, this Court has only departed from federal discrimination principles when holding that the MHRA provides more protection than federal law. *See Cummings v. Koehnen*, 568 N.W.2d 418, 423 (Minn. 1997) (holding that, unlike Title VII, the MHRA does not require plaintiffs to prove that sexual harassment occurred because of sex); *Stuart Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225, 228 (Minn. 1995) (holding that the standard for proving that a plaintiff suffers from a disability under the MHRA is less stringent than the standard provided by the federal Americans With Disabilities Act).

In the present case, the court of appeals declined to consider federal interpretations of Title VII in deciding whether the MHRA prohibits gender-based harassment. *LaMont*, 2011 WL 292131 at *2. The court relied on a footnote from this Court's decision in *Cummings v. Koehnen* in which this Court declined to consider federal cases interpreting Title VII sexual harassment claims in the context of a same-sex sexual harassment case

because of differences in the statutory language regarding sexual harassment. *Id.*; see *Cummings*, 568 N.W.2d at 423.

The court of appeals' reliance on *Cummings* is misplaced. LaMont's claim was for gender-based harassment, not for sexual harassment.¹⁶ *Cummings* did not involve gender-based harassment claims and, because its holding derives from language in Section 363A.03 that is specific to sexual harassment, the opinion is necessarily limited to sexual harassment claims. As explained above, gender-based harassment claims and harassment claims based on other protected statuses derive from the plain language of Section 363A.08 prohibiting discrimination in the conditions of employment and not from Section 363A.03's sexual harassment provisions.

The holding in *Cummings* does not preclude review of Title VII case law when analyzing a claim for gender-based harassment or harassment based on any of the other protected statuses. Because of the substantial similarity between Section 363A.08 and Title VII, this Court should consider the long history of federal case law recognizing that harassment based on a protected class is a prohibited form of discrimination. If this Court declines to follow the reasoning of the federal cases, it will be the first time that the MHRA has been interpreted to provide less protection from discriminatory conduct than Title VII.

¹⁶ LaMont did have a separate sexual harassment claim which she is no longer pursuing. It appears the court of appeals combined her sexual harassment and gender harassment claims in its analysis.

2. Other States Have Recognized A Cause Of Action For Non-Sexual Harassment.

Many states have determined that their state civil rights acts prohibit gender-based harassment. *See Russell v. KSL Hotel Corp.*, 887 So.2d 372, 378 (Fla. Dist. Ct. App. 2004) (“any harassment or other disparate treatment of an employee that would not occur but for the gender of the employee may, if there is a pattern or pervasiveness in the conduct, constitute ‘hostile work environment’ sexual harassment”); *Strongman v. Idaho Potato Comm’n*, 932 P.2d 889, 893 (Idaho 1997) (“sexual conduct is not a necessary element of a hostile environment claim based on gender-specific discrimination”); *Nelson v. Univ. of Hawaii*, 38 P.3d 95, 111 (Haw. 2001) (holding that jury instruction requiring plaintiff to prove that sex was a motivating factor for harassment was erroneous); *Lehmann v. Toys ‘R’ Us, Inc.*, 626 A.2d 445, 602-05 (N.J. 1993) (stating that when a plaintiff has proved that she has been “subjected to harassing comments about the lesser abilities, capacities, or the ‘proper role’ of members of her sex, she has established that the harassment occurred because of her sex”); *Hampel v. Food Ingredients Specialties, Inc.*, 729 N.E.2d 726, 734 (Ohio 2000) (“actions that are simply abusive, with no sexual element, can support a claim for sexual harassment if they are directed at an employee because of his or her sex”); *DeCamp v. Dollar Tree Stores, Inc.*, 875 A.2d 13, 23-24 (R.I. 2005) (holding that genuine issues of material fact precluded summary judgment on plaintiff’s gender-based hostile work environment claim); *Huck v. McCain Foods*, 479 N.W.2d 167, 170 (S.D. 1991) (stating that the conduct underlying a harassment claim does not need to be clearly sexual in nature or consist of explicit sexual overtones);

Campbell v. Florida Steel Corp., 919 S.W.2d 26, 28-33 (Tenn. 1996) (“any disadvantageous treatment of an employee which would not occur but for the employee’s race or gender may, if sufficiently pervasive constitute unlawful harassment”); *Soto v. El Paso Natural Gas Co.*, 942 S.W.2d 671, 679 (Tex. Ct. App. 1997) (“offensive behavior not involving sexual activity but nevertheless based on the gender of an employee, when sufficiently severe or pervasive may create a hostile work environment”); *Payne v. Children’s Home Soc’y of Washington, Inc.*, 892 P.2d 1102, 1104-06 (Wash. Ct. App. 1995) (“gender-based harassment need not be of a sexual nature to be actionable as sex discrimination”); *see also Byra-Grzegorzczk v. Bristol-Myers Squibb Co.*, 572 F. Supp. 2d 233, 247 (D. Conn. 2008).¹⁷ While there is variation in the language of other state statutes, other states consistently determine that gender-based harassment is prohibited.

E. If The MHRA Is Not Interpreted To Include Non-Sexual Harassment, Then Many Minnesota Employees Will Have No Legal Recourse To Remedy Such Discrimination.

When attempting to ascertain legislative intent, courts may consider the consequences of a particular statutory interpretation. Minn. Stat. § 645.16 (6) (2010). If this Court adopts the court of appeals’ interpretation of the MHRA, many individuals in Minnesota will be left without protection from non-sexual harassment based on a protected status.

¹⁷ Many of the state cases cited address the standards for gender-based harassment even though the underlying facts do not involve gender-based harassment.

In the employment context, Title VII provides some protection to Minnesota employees from non-sexual harassment, but does not protect all Minnesota employees. The MHRA's anti-discrimination provisions apply to all employers regardless of size. *See* Minn. Stat. § 363A.03, subd. 16 (defining "employer" as "a person who has one or more employees"). Title VII only protects employees who work for employers with fifteen or more employees. 42 U.S.C. § 2000e(b). Thus, if this Court interprets the MHRA to preclude non-sexual harassment claims, Minnesota residents who work for small employers will have no recourse when subjected to non-sexual harassment that results in a hostile work environment.

Employees experiencing harassment in a small employer environment often face additional challenges due to the intimate setting and the tendency to have fewer employees present at the workplace during a shift to act as a buffer between the employee and a harasser. In addition, small employers often have fewer individuals employed in supervising or human resources positions to address complaints. Accordingly, if a supervisor or owner is the harasser, employees experiencing harassment often have no one in a position of authority to turn to for help or support. The court of appeals' interpretation of the MHRA leaves many Minnesotans without protection from severe and pervasive workplace harassment based on gender, race, religion, disability, national origin, and other protected classes. This Court should decline to adopt that interpretation.

CONCLUSION

For the reasons discussed above, the Court should reverse the decision of the court of appeals.

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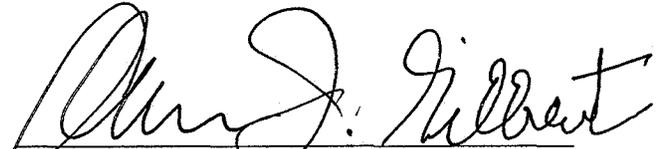
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CERTIFICATE OF COMPLIANCE

WITH MINN. R. APP. P 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 6,185 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2003, the word processing system used to prepare this Brief.


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