

NO. A10-543

State of Minnesota
 In Supreme Court

Carol J. LaMont,

Petitioner,

vs.

Independent School District #728,

Respondent.

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent Independent School District #728's ("Respondent") brief is a response to a series of contentions that Petitioner Carol J. LaMont ("LaMont") did not make.¹ Respondent completely fails to respond to the main argument advanced by LaMont, and the Minnesota Department of Human Rights ("MDHR"), which is that the Minnesota Human Rights Act ("MHRA") prohibits a hostile work environment based on sex, "separate and apart" from a claim for sexual harassment. (LaMont's Br. at 30.) Respondent has no answer to the contention that the MHRA's prohibition of a hostile work environment based on sex is located in Minn. Stat. § 363A.08, Subd. 2, the statute's general provision outlawing discrimination in the terms and conditions of employment. Instead, Respondent attempts to mischaracterize LaMont's argument as a position that the MHRA's definition of "sexual harassment" contains within it a prohibition of non-sexual conduct.

This attempt to ignore or misconstrue LaMont's salient points typifies Respondent's entire submission. Time and again, Respondent erects straw men and attempts to knock them down. Respondent repeatedly mischaracterizes LaMont's claims, argument, the standard of review and the facts.

¹ Respondent's brief exceeds the word limit contained in Minn. R. Civ. App. P. 132.01 by more than two-thousand words.

ANALYSIS

I. RESPONDENT'S STATEMENT OF THE CASE MISCHARACTERIZES LAMONT'S CLAIMS AND ARGUMENT.

Respondent's Statement of the Case states, "only now is it clear [LaMont] is seeking recovery exclusively on the basis of sex harassment that is not sexual in nature[.]" (Rep.'s Br. at 2.) This is a mischaracterization of LaMont's claims and argument. LaMont's complaint for violations of the MHRA included allegations of discrimination, sexual harassment and hostile work environment based on sex. (P.A. 6.) LaMont's argument to this Court – that the MHRA protects individuals from a hostile work environment based on sex, even if the conduct is not sexual harassment – is not new. It is exactly what LaMont argued on summary judgment (Summ. J. Transcript: Respondent's counsel, arguing, "[LaMont's counsel] is claiming this is not a sexual harassment case . . . He is asking Your Honor to create a new cause of action which is gender harassment and it's somehow different than what the legislature has defined to be sexual harassment."), at the court of appeals (LaMont's Br. at 13 ("The district court erred in determining that LaMont could not bring a claim for harassment on the basis of sex unless it fell within the definition of "sexual harassment" under the MHRA.")), and here before this Court. Respondent fails in its attempt to confuse the Court by asserting that LaMont's claims or argument is somehow new.

II. RESPONDENT MISCHARACTERIZES THE STANDARD OF REVIEW.

Respondent argues that the standard of review has changed by virtue of counsel's duty to state the facts with candor pursuant to R. Civ. App. P. 128.02 and the fact that this

Court is faced with a “significant question regarding the scope of the MHRA.” (Resp. Br. at 2.) Because this appeal arises in the context of a grant of summary judgment, review is *de novo*. Zip Sort, Inc. v. Comm’r of Revenue, 567 N.W.2d 34, 37 (Minn. 1997). Furthermore, all evidence must still be viewed in the light most favorable to the nonmoving party, and any doubt as to whether an issue of material fact exists must still be resolved in favor of the nonmoving party. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 112 (Minn. 1992).

III. RESPONDENT MISCHARACTERIZES THE FACTS.

Respondent repeatedly attempts to confuse and mischaracterize the facts. Respondent also requests that the Court make inappropriate inferences in Respondent’s favor. See Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 630 (Minn. 2007) (stating that on summary judgment all factual inferences are drawn in favor of the nonmoving party). For example, Respondent asks the Court to infer that because Miner was hired to improve conditions at the school, his treatment of LaMont must have been motivated by a good faith desire to improve conditions in the school, rather than animus towards women. Respondent states, that the “district court found (Finding no. 2) that there had been no oversight by Bell, and Miner had been instructed to keep the employees on task and control breaks. The finding is clearly supported and not challenged.” (Resp. Br. at 6.) LaMont challenges the inference that the district court drew from these facts, not the facts themselves. (P.A. 49 (“Miner explained that he would not allow check-ins over the radio for accountability purposes, which is consistent with his supervisors’ mandate to increase accountability.”); P.A. 50 (“The evidence

shows that Plaintiff and Case talked quite a bit during their shifts instead of working, which indicates that Miner's decision to forbid them from taking was work-related.".) At summary judgment, the district court cannot infer that because Miner was hired to improve conditions the school he did not subject LaMont to a hostile work environment because she is a woman.

Similarly, Respondent points out that men working under Miner also objected to his treatment of them, and asks the Court to infer that this means Miner did not treat LaMont and as he did because of her sex. (Resp.'s Br. at 13.) The fact that men also objected to the way Miner treated them does not mean that Miner did not also treat LaMont way he did because she was a woman. Respondent fails in its attempt to have the Court draw these inappropriate inferences against LaMont.

Respondent's statement of facts also contains many mischaracterizations of the factual record. LaMont responds to these mischaracterizations in the order in which they appear in Respondent's brief.

A. Breaks

Respondent states that male custodian Loren Klein ("Klein") took breaks with LaMont and Case after they stopped breaking with Miner. (Resp.'s Br. at 6.) This is an attempt to muddle LaMont's point. Although Miner required female employees LaMont and Case to check in with him before and after every break, he did not require the same of Klein. (LaMont Dep. 94.) LaMont's point is that this is an example of how Miner treated the women differently than the men, time and time again.

B. Work Assignments

Respondent also mischaracterizes LaMont's contention with respect to area work assignments. Respondent points out that a third party was hired to evaluate work areas and make sure they were of the same size. (Resp.'s Br. at 9.) Again, this misses the point. LaMont's claim is not that the work areas themselves were unfair; rather, LaMont contends that one of the ways Miner would harass her was by routinely singling her out and demanding more work in addition to her assigned area. (LaMont Dep. 224 ("He would add stuff to mine. Stuff that was in his, his area, he'd say, 'Carol, you can – you can now clean those bathrooms.' Okay. 'Carol, you're going to sweep the gym tonight. Carol, you're going to . . .")

C. Clothing

Respondent also attempts to minimize the record with respect to the issue of Miner allowing the men to wear street clothes while requiring the women to wear uniforms. Respondent states, "Petitioner's only evidence of this issue is that Case recalled seeing one employee, Dusty Johnson, in street clothes, and everybody else was required to wear a uniform." (Resp.'s Br. at 11.) Here is the testimony from Case's deposition:

Q. Any other conduct that you can recall that made you feel Doug treated men differently than women?

A. He let them wear what they want and we had to wear uniforms.

Q. He let them wear what they want?

A. Yes.

Q. So he let them wear like street clothes?

A. Yes.

(Case Dep. 23-24.) Contrary to Respondent's characterization, Case's testimony shows that this issue involved different treatment as a result of gender.

Furthermore, Respondent's makes much of the fact that this testimony comes from Case rather than LaMont. Nevertheless, it is further evidence of Miner's differential treatment of individuals related to sex.

D. Chastisement

Respondent attempts to minimize an incident in which, "Miner picked on" LaMont by "requiring her to mop the floor." (Resp.'s Br. at 11.) What Respondent leaves out is that at the time, LaMont had a broken leg and therefore had work restrictions that prohibited her from mopping the floor. (Petitioner's Add. 25, ¶ 7.) From Robideau's perspective, this was an example of Miner constantly picking on LaMont because of her sex. (Id.)

Respondent further attempts to mischaracterize the record and trivialize Miner's harassment by raising an issue regarding LaMont forgetting to take out the trash in a particular classroom. Respondent states that LaMont raised this issue "in further purported support of her chastisement claim." (Resp.'s Br. at 11.) In fact, although LaMont was questioned about this issue in deposition, she did not raise it in support of her hostile work environment claim. LaMont raised a separate incident involving Miner falsely accusing her of not cleaning her work area as an example of his constant mistreatment of her. (LaMont's Br. 5, LaMont Dep. 156-58.)

Respondent also attempts to make LaMont appear unreasonable because she characterized Miner's treatment of her as "sexual harassment" in her deposition. The fact that LaMont (who is not a lawyer) did not draw a fine line between sexual harassment

and hostile work environment based on sex in her deposition is both understandable and irrelevant to the substance of her claims.

E. Segregation

Respondent claims there is “precious little evidence” to support LaMont’s claim that that women and men were separated during the summer of 2006. (Resp.’s Br. at 14.) First of all, Respondent incorrectly suggests that LaMont’s testimony is not enough to establish this fact for purposes of summary judgment. Moreover, Respondent ignores that Klein – a third party witness – also averred that this physical separation took place that summer. (LaMont’s Add. 28 at ¶ 7.)

F. Instruction not to Speak

Respondent attempts to minimize the fact that Miner instructed LaMont and Case not to speak *at all* during work hours. Respondent titles this section of its brief, “Talk Less, Work More.” (Resp.’s Br. at 15.) First, Respondent denies that Miner himself told LaMont and Case not to speak. (*Id.*) That is not accurate. (LaMont’s Add. 27, ¶ 6 (Klein Aff. (“Doug told Carol and Jayne not to talk to anyone. He told them not to talk at all during work hours.”).) Further, Miner instructed Jones not to allow LaMont or Case to speak. (Miner Dep. 121-22.) Second, Respondent attempts to characterize Miner’s instruction as one to talk less when the facts show that the instruction was not to speak at all. (LaMont Dep. 111; LaMont’s Add. 27 ¶ 6, 29 at ¶ 4.) Third, Respondent attempts to characterize this instruction not to speak as having something to do with the “bleachers incident.” In fact, it was unrelated to the bleachers incident.

G. Miner's Comments

Respondent attempts to minimize several statements made by Miner because they were either not said directly to LaMont or reported by individuals other than LaMont. As pointed out in LaMont's opening memorandum, comments overheard by LaMont must be taken into account when considering whether a reasonable fact finder could conclude that a hostile work environment exists. (LaMont's Br. at 39-41.) Secondly, the importance of many of the comments made to the male custodians is that they show what Miner's motivation was regarding his treatment of LaMont and Case. (LaMont's Add. 25 at ¶ 6 (Miner's statement that Robideau will be fired in thirty days if he so much as takes a break with "them women"); (LaMont's Add. 27 at ¶ 4 (Miner telling Klein that he did not want any women on his crew).)

H. LaMont's Complaints of Discrimination

In discussing LaMont's "complaint" of discrimination, Respondent discusses only LaMont's complaint to Baranick, subsequent report to human resources and discussions with O'Keefe. (Resp.'s Br. at 19-22.) Respondent fails to mention that LaMont and Case reported Miner's conduct to Elk River High School Principal Jim Voight ("Voight") on two occasions, in the spring and fall of 2006. (LaMont's Br. at 6.)

IV. RESPONDENT MISCHARACTERIZES AND FAILS TO RESPOND TO LAMONT'S LEGAL ARGUMENTS.

A. Respondent Fails to Respond to LaMont's Argument that the MHRA Prohibits a Hostile Work Environment based on Sex.

LaMont's brief is crystal clear that her argument is not that the conduct she suffered constitutes "sexual harassment" as defined under the MHRA. (LaMont's Br. at

16.). Instead, LaMont devoted twenty-one pages of her brief to a discussion of the development of the MHRA and Title VII of the Civil Rights Act of 1964 (“Title VII”) and a demonstration of why the MHRA’s general prohibition of discrimination in the terms and conditions of employment gives rise to a ban on a hostile work environment based on sex. (LaMont’s Br. 16-37.) Amazingly, Respondent’s brief utterly fails to engage this argument.

The silence is deafening. In her opening brief, LaMont explained that the plain language of the MHRA’s provisions outlaw hostile work environment discrimination based on “sex.” (LaMont’s Br. at 31-32.) Respondent ignores this argument, confining its argument to the definition of “sexual harassment” under the MHRA.² Respondent fails to address LaMont’s argument that the lower courts in this case ignored salient sections of the MHRA which clearly prohibit the conduct at issue in this case. Furthermore, Respondent misleadingly characterizes LaMont’s argument as one for “gender harassment” when LaMont has used the phrase “hostile work environment based on sex” throughout her submission.

² In its amicus filing to this Court, Minnesota’s Chapter of the National Employment Lawyers Association (“NELA”) confronts Respondent’s argument head on, arguing that the definition of sexual harassment itself prohibits creating a hostile work environment based on sex. Petitioner acknowledges NELA’s argument as a plausible alternative route to the same conclusion, and encourages the Court to consider the argument. Nevertheless, given the text, structure, an history of the MHRA, Petitioner (along with the amicus brief filed by the MDHR) continues to press her primary point: that the general provisions of the MHRA (as opposed to the MHRA’s definition of sexual harassment) supply the basis for concluding that conduct amounting to a hostile work environment based on sex is unlawful in Minnesota.

In her brief, LaMont also explained that the similar language in Title VII and the MHRA, which outlaws discrimination in the terms and conditions of employment, gives rise to a prohibition of harassment on the basis of sex under the MHRA. (LaMont's Br. at 32-35.) Respondent ignores this argument, again confining its argument to the definition of "sexual harassment" under the MHRA. While LaMont pointed out that the Code of Federal Regulations contains a similar definition of sexual harassment to the definition under the MHRA, and nevertheless numerous circuit courts have recognized that non-sexual conduct can create a hostile work environment based on sex, Respondent ignores this point as well.

Respondent does attempt to distinguish several of the cases cited by LaMont in support of her showing that Title VII prohibits a hostile work environment even if the conduct is not sexual. Respondent argues that LaMont did not cite any cases which "allow a claim to proceed that does not include some . . . sexual behavior." (Resp.'s Br. at 28.) This is inaccurate. See, e.g. Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (reversing summary judgment where a doctor's disciplinary treatment of women was more severe his treatment of men); Sturm-Sandstrom v. County of Koch, 552 F.Supp.2d 945, 950 (D. Minn. 2008) (denying summary judgment where a female sheriff's deputy was treated differently because of her sex).

LaMont also pointed out that the definition of sexual harassment under the MHRA does not define the entire scope of claims for hostile work environment and that, in fact, sexual harassment is just one form of hostile work environment recognized by this court in the seminal case of Continental Can Company, Inc. v. State., 297 N.W.2d 241 (1980).

Respondent ignores this argument. Respondent's never even meaningfully discusses Continental Can in its submission.

LaMont also made the public policy argument that under the court of appeals' opinion, individuals harassed on the basis of their sex would receive no protection under the MHRA if the conduct to which they are subjected is not sexual. (LaMont's Br. at 36-37.) LaMont pointed out that this is contrary to the broad remedial purposes of the MHRA. Respondent ignores these points as well.

Rather, Respondent argues that Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997), controls the result in this case. (Resp.'s Br. at 26.) However, Respondent ignores the argument in LaMont's opening brief that because her claim is not for sexual harassment, Cummings is not controlling. (LaMont's Br. at 33-34.)

In support of its contention that Cummings controls, Respondent also cites two unreported District of Minnesota cases in which claims for "sexual harassment" under the MHRA are dismissed because the allegations in those cases do not include sexual conduct. Bailey v. Seagate Tech. LLC, CIV.04-1399, 2005 WL 1869108 (D. Minn. Aug. 5, 2005); Johnson v. Burlington N. & Santa Fe R. Co., CIV.04-2638, 2005 WL 1868311 (D. Minn. Aug. 8, 2005),

Both of these cases are distinguishable because, unlike the case at issue here, there is absolutely no evidence in these cases that the conduct is directed at the plaintiffs because of their sex. Furthermore, neither of the plaintiffs in these cases made the argument LaMont is making here, that the MHRA contains a claim for hostile work environment based on sex, separate and apart from a claim for sexual harassment. In fact, in the one

unreported case in which the court of appeals considered the argument LaMont is making here, it recognized that such a claim *could exist* under the MHRA. Zapata v. Metro. Council, A09-1112, 2010 WL 2160909, at * 11 (Minn. Ct. App. June 1, 2010) (“We agree that caselaw interpreting Title VII to prohibit the creation of a hostile work environment through harassment based on sex, distinct from sexual harassment, could potentially support the recognition of a similar claim under the MHRA . . .”)

B. Respondent Mischaracterizes LaMont’s Argument that the Conduct She Suffered was Sufficiently Severe or Pervasive to be Actionable.

In response to LaMont’s argument that Miner’s conduct was sufficiently severe or pervasive to be actionable, Respondent first incorrectly argues that LaMont failed to preserve this issue for review. Second, Respondent continues its strategy of attempting to misconstrue LaMont’s arguments.

1. LaMont Preserved the Issue of “Severe or Pervasive” for this Court’s Review.

Without citing to any authority, Respondent argues that LaMont failed to preserve the issue of whether the conduct she suffered was sufficiently severe or pervasive to be actionable.³ (Resp.’s Br. at 38.) Respondent makes this argument even though whether the issue of whether the conduct is sufficiently severe or pervasive is absolutely integral to the issue of whether the claim exists under the MHRA. Respondent would have this

³ The Court should not consider this argument because, for obvious reasons, Respondent has failed to properly support it with any legal authority. See Minn. R. Civ. App. P. 128.02, subd. 1(d) (argument must include citations to authorities); Stephens v. Bd. of Regents of Univ. of Minnesota, 614 N.W.2d 764, 770-71 (Minn. Ct. App. 2000) ([B]ecause Stephens presents no argument in her brief alleging any deprivation of due process, she has waived that claim.)

Court issue an advisory opinion, declaring whether non-sexual hostile work environments based on sex are unlawful, but declining to apply the governing law to the facts of this case.

The application of the law to the facts was set forth by the district court as a basis for dismissal. LaMont appealed this basis for dismissal to the court of appeals. The issue was raised in the Statement of the Case section of LaMont's Petition for Review (p. 3) and the Argument section of Respondent's Response (p.4.).

In George v. Estate of Baker, 724 N.W.2d 1, 7-8 (Minn. 2006), this Court discussed what is required to sufficiently raise an issue in a Petition for Review to the Minnesota Supreme Court.

We have never made clear precisely what is required to raise a particular legal issue in a petition for review . . . A strict reading of a petition would require us to consider only those issues specified in the statement of issues. A liberal reading would allow us to consider any issues, whether mentioned in the petition or not. We decline to adopt either of these extremes and conclude that this question must be considered on a case-by-case basis and includes consideration of several factors, such as the relationship of the questioned issue to those specifically highlighted in the statement of issues, the procedural history concerning that issue, and any potential prejudice to the respondent by not specifically including it in the statement of issues.

Id. Here, all of these factors militate completely in favor of finding that LaMont raised this issue in her Petition for Review. First, the question of whether the MHRA recognizes a claim for hostile work environment based on sex is interrelated with the question of what conduct is sufficiently severe or pervasive to be prohibited by that cause of action. A statement from this Court regarding the law of hostile work environment cannot be separated from an application of the correct legal standard to the facts of the

case. Secondly, this issue of the application of the law to the facts has been briefed by both parties both at the district court and the court of appeals. Third, Respondent claims no prejudice and in fact this issue has been fully briefed three times by both parties. See Id. (finding that a party had preserved an issue for review because it was interrelated with an issue raised in the petition, the issue had been considered by the courts below, and counsel for the respondent was on notice of the issue.). Respondent has raised this issue as a straw man. Respondent has cited no legal authority in support of this argument because it is an application of Miner's conduct to the facts of this case is squarely before this court.

2. Standard for Hostile Work Environment.

Respondent continues its strategy of attempting to misconstrue LaMont's argument by inserting the definition of sexual harassment "as theoretically amended" into the standard for hostile work environment. (Resp.'s Br. at 40.) This definition is not applicable to LaMont's claim. Rather, the standard for whether conduct is sufficiently severe or pervasive to constitute a hostile work environment under the MHRA is set forth in Wenigar v. Johnson, 712 N.W.2d 190, 207 (Minn. Ct. App. 2006). (LaMont's Br. at 38-39.)

Respondent then addresses LaMont's four arguments for why the district court erred in applying the law to find that the conduct she suffered was not sufficiently severe or pervasive to be actionable.

3. Harassment Need Not be Directed Exclusively at LaMont to Contribute to a Hostile Work Environment.

Respondent raises two issues with LaMont's argument that the district court erred by failing to consider conduct that was not directed exclusively at her. First, Respondent argues that this argument was not made to the district court. All of the facts at issue in this appeal were directed to the district court with supporting argument regarding the severity or pervasiveness of the hostile work environment to which LaMont was subjected. (R-App. 15-19.) See Jacobson v. \$55,900, 728 N.W.2d 510, 523 (Minn.2007) (holding that a party may refine an argument made to the district court as long as the argument can be evaluated on the facts already in the record). In other words, LaMont clearly raised the facts and supporting argument regarding the severity of the hostile work environment to the district court and the court of appeals. The fact that she has refined that argument on appeal does not mean that it was not raised below. See W. Nat. Mut. Ins. Co. v. Structural Restoration, Inc., A09-1598, 2010 WL 1753336 (Minn. Ct. App. May 4, 2010), review denied (July 20, 2010) (“[W]hen an appellate court can evaluate a refined version of the same argument made to the district court on facts already present in the record, the argument is properly before the appellate court.”)⁴

⁴ Respondent argues LaMont did not raise this issue with the district court. (Resp.'s Br. at 43.) Later on the same page of its brief, Respondent argues LaMont never raised this issue with the district court or the court of appeals. (Id.) In fact, LaMont identified the exact same issues with respect to the severity or pervasiveness of the hostile work environment at the court of appeals as she did before this Court. However, in the court of appeals, Respondent did not allege that the arguments had been waived. (Resp.'s Court of Appeal's Br. at 33-34.)

Moreover, the authority on which Respondent relies in arguing LaMont has not sufficiently raised this issue for review is completely inapposite. (Resp.'s Br. at 43.) Respondent relies on Gruenhagen v. Larson, 246 N.W.2d 565, 568 (1976), but in that case the appellant sought to review a legal issue for the first time on appeal. Id. Here, on the other hand, LaMont has consistently argued that Miner's conduct was sufficiently severe or pervasive to be actionable at every level of this litigation. Respondent also relies on Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988), in which the appellant did not present essential facts to its argument to the district court. Here, LaMont has relied on the same facts at every step of the litigation.

Second, Respondent denies that the district court failed to take into account remarks that were not directed at petitioner. (Resp.'s Br. at 43.) That is simply factually inaccurate. In fact, the district court reviewed three comments made by Miner and discounted them in its conclusions of law because they were not directed at LaMont. (P.A. 51-52.)

4. Miner was LaMont's Immediate Supervisor.

In her opening memorandum, LaMont argues that the district court erred by failing to take into account the fact that Miner was her immediate supervisor when considering what impact his conduct would have on her. Respondent's only response to this point is to argue that it was not raised at the district court level. (Resp.'s Br. at 47.) Again, as pointed out above, the argument that the work environment was severe or pervasive was made, with all the facts at issue here, at the district court level. The fact that this argument has been developed on appeal does not mean that it was not raised below.

5. Miner's Harassment Should be Viewed in the Aggregate.

Respondent argues that the district court did not fail to consider Miner's conduct in the aggregate. This is incorrect. In considering LaMont's claim for harassment based upon her sex, the court only considered the *comments* Miner made without considering his actions. (P. Add. 16-17.) The Court failed to consider the fact that Miner did not allow LaMont or Case to speak for an entire summer, that he told the men they would be terminated if they associated with the women, that he had different work rules for men and women, that he constantly picked on LaMont, that his anger was directed at LaMont and Case, that he forced LaMont to clean the bleaches knowing she was afraid of heights or that he harassed LaMont by constantly adding additional tasks to her work area, etc. Had the district court considered this conduct as a whole, surely the court would have concluded that a reasonable fact finder could conclude that the conduct was sufficiently severe or pervasive to be actionable.

Respondent also cites Hervey v. County of Koochiching, 527 F.3d 711, 723 (8th Cir. 2008), in which the Eighth Circuit affirmed summary judgment on hostile work environment claims under Title VII and the MHRA. (Resp.'s Br. at 49-50.) Respondent attempts to use Hervey in support of its argument that the conduct at issue here is not sufficiently severe or pervasive. However, Hervey was dismissed because the plaintiff could not establish that the conduct she suffered was related to her sex, not because the conduct was not sufficiently severe or pervasive. Here, on the other hand, where there is ample evidence of Miner's animus towards women (due to his numerous unambiguous statements), there are sufficient facts for a reasonable jury to conclude that there is a

connection between LaMont's sex and the harassment she suffered.⁵ Additionally, Hervey offers no support to Respondent's position that the conduct at issue here is not sufficiently severe or pervasive to be actionable.

6. Miner's Conduct was Severe.

Respondent concludes its submission by attempting to distinguish cases LaMont cited which show that similar conduct is sufficiently severe or pervasive to be actionable under the MHRA. LaMont will not reiterate her arguments here other than to point out that what constitutes conduct sufficiently severe or pervasive to establish a hostile work environment "is is not, and by its nature cannot be, a mathematically precise test." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993); See also Wenigar, 712 N.W.2d 190, 207 (Minn. Ct. App. 2006).

In this case, there is sufficient evidence for a reasonable fact finder to conclude that the conduct LaMont suffered was sufficiently severe or pervasive to be actionable. LaMont's contentions were supported by the averments of three nonparty witnesses who were never even deposed. (P. Add. 24-31.) On this record, LaMont has submitted sufficient evidence for a reasonable fact finder to conclude that she was subjected to a hostile work environment based upon her sex, and she should be permitted to finally try her case.

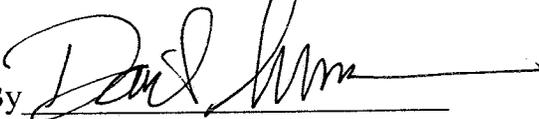
⁵ Neither the district court nor the court of appeals reached the issue of whether the conduct LaMont suffered was "based on membership in a protected group." See Goins v. West Group, 635 N.W.2d 717, 725-26.

CONCLUSION

For the foregoing reasons, Petitioner Carol J. LaMont respectfully requests that the opinion of the court of appeals be reversed and remanded to the district court for trial.

Dated: June 27, 2011

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IN SUPREME COURT

Carol J. LaMont,

Petitioner,

CERTIFICATE OF BRIEF LENGTH

Independent School District #728,

Court of Appeals Case No. A10-543

Respondent.

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 for a brief produced with proportional 13-point font. The length of the brief is 4,968 words. The brief was prepared using Microsoft Word 2007.

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