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NO. A10-543

State of Minnesota
In Supreme Court

Carol J. LaMont,

Petitioner,

v.

Independent School District #728,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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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).

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I. Statement of the Legal Issues.

A. Did the Court of Appeals Err?

The court noted that in considering the claim of hostile environment harassment, only the conduct as defined by the statute (i.e., comments or conduct of a sexual nature), should be considered. In reaching this conclusion, the court noted the statutory language of the Minnesota Human Rights Act (MHRA) differs from the language of Title VII.

Apposite Cases:

Cummings v. Koehnen, 568 N.W.2d 418, 423 (Minn. 1997)

Montgomery v. Indep. School Dist. No. 709, 109 F. Supp. 2d 1081, 1088 (D. Minn. 2000).

B. Did the District Court Err in Considering the Petitioner's Claim of Gender Harassment, *Arguendo*, and then Determining the Alleged Harassment was not Sufficiently Severe or Pervasive to be Actionable?

On the motion for summary judgment, the court assumed, *arguendo*, the existence of a claim of non-sexual "sex harassment." The court then applied the well established standards for evaluating a hostile environment, and concluded Petitioner's evidence, viewed in the light most favorable to Petitioner, did not sustain such a claim. On Petition to this Court, the Petitioner stated one legal issue only, i.e., did the court of appeals err in its conclusion of law as to the issue of whether a claim of gender based harassment is actionable. Petitioner did not preserve the issue of the district court's alternative holding.

In any event, the district court did not err in analyzing the gender harassment claim, and determining Petitioner failed to present sufficient evidence to sustain the claim.

II. Statement of the Case.

Petitioner brought a one count complaint alleging "Defendant discriminated against Plaintiff on the basis of sex; Defendant subjected Plaintiff to a hostile work environment; and Defendant subjected Plaintiff to sexual harassment." (PA 000006).

Only now is it clear Petitioner is seeking recovery exclusively on the basis of sex harassment that is not sexual in nature (which she now defines as gender harassment) "a kind of harassment of a different character" (Petitioner's brief, p. 13).

III. Statement of Facts.

The facts are not particularly material as it relates to the one pure legal issue in this case; i.e., does the MHRA extend to claims of non-sexual sex harassment? That is a question of statutory interpretation appropriate for this Court.

However, the facts do matter as it relates to the district court's summary judgment. Due to the standards applicable to Rule 56 motions, Respondent was required to not contest any material fact, and the court was required to evaluate every fact in the light most favorable to Petitioner.

We are now in a different place. This Court is faced with a significant question regarding the scope of the MHRA. It is no longer appropriate for Petitioner to rely upon a skewed, one-sided and exaggerated representation of the record.

Instead, the record should have been stated "with complete candor" as required by R. Civ. App. Pro. 128.02(c). If all of the record is reviewed with candor, Petitioner's claim is seen for what it is; the grievances of a disgruntled worker who, unaccustomed to

close supervision of her work, responded with objection and resistance to the appropriate direction of her supervisor.

Petitioner alleges (Petitioner's brief, pp. 3, 10) a handful of comments she alleged to have overheard head custodian Doug Miner ("Miner") make on the second day of Miner's employment. One of these comments had a mild sexual component to it (i.e., your wife is "not bad," said to a male co-worker and overheard by Petitioner). One or two are suggestions of a sexist attitude (e.g., this is not the time and place for a woman). These will be addressed below. However, the vast majority of Petitioner's complaints simply are her objections as to how Miner supervised her and the rest of the night crew at the Elk River High School.

A. Miner Conduct.

Petitioner began on the night crew in the fall of 2002. Miner began working as the night lead custodian on April 15, 2006. Petitioner makes no allegation of any inappropriate behaviors for the first three and a half years of her employment. Miner was promoted to head custodian on May 31, 2006, as a result of which he now worked days. He was replaced by William Jones. (Petitioner's brief, p. 3). As to the comments Petitioner alleges she overheard, all but one of them occurred in those few weeks Miner and Petitioner actually worked: (1) in the same building; (2) at the same time. The majority of Petitioner's complaints have to do with Miner's activity as head custodian. That behavior is best understood in the context of the reasons for his hiring and his instructions from his supervisors.

Prior to Miner, the head custodian at the school was Paul Bell. Bell worked two jobs, both head custodian and High School Theater Manager. (LaMont depo., p. 17).[1] Bell worked during the days and did not directly supervise the night crew. (Id., p. 18).

The school district administration had concerns due to Bell's double-duty and lack of direct supervision. Prior to the hiring of Miner, there "were definitely problems in the High School." (Baranick depo., p. 11, l. 15-20).[2] The problems "started with the head custodian and worked down from there." The problem was the lack of supervision by Bell. (Id., p. 12). When Miner was hired he was informed the status quo was not acceptable and the District expected improvements in services and conditions. (Id., p. 13). "We told Doug that he needed to set parameters to bring accountability into the workplace, that we expected him to do inspections, punch lists, make sure that breaks were being followed, that people were working on their assigned tasks, essentially that there were standards that were being followed." (Id., p. 13, l. 18-24).

In addition, the night crew was "very dysfunctional." (Id., p. 31). The crew had learned to work without oversight and became resistant to any change. (Id., p. 32).

The Petitioner acknowledged there was tension between the night crew and the day lead. (LaMont depo., p. 61). There had been a lot of turnover both with the night

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[1]Petitioner filed a response brief in opposition to Respondent's motion for summary judgment at the district court, with an affidavit of David Schlesinger, dated October 28, 2009. That affidavit, in turn, attached full transcripts of all of the depositions taken in this case. Unless otherwise noted, all references to depositions will be in reference to those depositions.

[2]Baranick is in reference to Tom Baranick, the district's manager of facilities since January, 2005. (Id., p. 8).

crew generally and the night lead specifically. (LaMont depo., pp. 60-62). The night lead prior to Miner (a male) quit because he thought Bell was giving him too heavy a workload. (Id., p. 61). Miner's charge was to clean up the building and its dysfunctional night crew. Accordingly, in interviewing for Bell's replacement, they were looking for somebody "with experience in the schools, facilities experience, repairs experience, supervisory abilities, abilities to deal with people, conflicts, problems." (Baranick depo., l. 11-15). Even before Miner started, the local union representative called him up to warn him "the place is dirty, there is issues with the night crew, and the day crew don't get along." (Miner depo., p. 44). The building had been "going downhill." Miner's task was to "supervise the night custodians" and "improve the cleanliness of the building..." (Hilyar depo., pp. 25-26).[3]

Consistent with his experience (he had worked in the St. Paul School District since 1991), Miner began by walking through the building to determine how it was being run and to start making changes "where changes are needed." (Miner depo., p. 42, l. 16-23). He also determined the night crew was dysfunctional in that it was "not functionally working to the best of a well managed facility." Miner attributed this to how the crew had been (un)supervised by his predecessor. (Miner depo., p. 99). Shortly after Miner began as night crew lead, Bell quit and Miner was promoted to head custodian. (LaMont depo., p. 63). Almost immediately, the night crew (including Petitioner) began to complain about Miner's close and aggressive supervision.

[3]Hilyar is reference to James Hilyar, who has served as supervisor of buildings and grounds for 15 years. (Id., pp. 6-7).

Petitioner's brief to this Court now distills these issues down to her contention she was subjected to "different work rules..." (Petitioner's brief, p. 3). Specifically, she complains about his work rules as they relate to: (1) where the night crew were to take breaks; (2) the requirement that custodians check in before and after taking breaks; (3) his assignment and distribution of cleaning areas; (4) requirement that the crew had to wear uniforms; (5) his criticism of Petitioner for missing trash and not cleaning adequately; (6) yelling at Petitioner and the rest of the crew; and (7) his criticism of "too much talking and not enough working."

i. <u>Where to Take Breaks.</u>

As noted, facilities manager Baranick instructed Miner to bring accountability to the workplace, and to make sure, as an example, that breaks were being followed. All of the crew had previously taken their breaks in the same room. However, Petitioner (and co-workers Jane Case and Loren Klein (male)) chose to take their breaks in the teachers' lounge in a different building on the other side of the campus. (LaMont depo., pp. 91, 93). Miner, however, wanted all of the custodians to take their breaks in the same room because he "required all of my staff on nights to check in with me at the beginning of and at the end with me. All of them, the whole staff. All the men and women...for accountability purposes." (Miner p. 57, l. 12-20). Petitioner contends she, Case and Klein took their breaks in a different building because they didn't want to be "with him and the other male custodians." (LaMont depo., pp. 93-94). The rest of the crew took their breaks in the same room with Miner.

Petitioner does not contest the fact that Miner had been instructed to monitor breaks and raise the level of supervision as a requirement of his position. Nor does she contend Miner articulated any sexist reason for this requirement. She contends she questioned Miner with the entire crew present as to why he had a requirement as to where they were to take breaks and his answer was "I am a supervisor. This is where you will take your break." By her testimony (LaMont depo., p. 99, l. 2-9), Petitioner considered this sexual harassment. By her brief (Petitioner's brief, p. 4), Petitioner acknowledges this is not sexual harassment, but contends it is harassment based upon sex. 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. This finding is clearly supported and not challenged.

ii. <u>When to Take Breaks.</u>

In what we will see as a familiar pattern, Petitioner immediately complained to Hilyar, who instructed Miner to let Petitioner take her break wherever she wanted. (Petitioner's brief, p. 4). In that Petitioner had now been authorized to take her breaks whenever and wherever she wanted, Miner asked she check in with him so he would know when she was on break. (LaMont depo., pp. 91-93). Petitioner objected to this as well, and took her complaint to Hilyar. In Petitioner's view of the world, her supervisor's request to check in on breaks constituted sexual harassment. (Id., p. 92, l. 3-12). Petitioner was upset because "Doug changed everything." (Id., p. 189, l. 7-9). The court concluded that his requiring of check-ins was "consistent with his superior's mandate to increase accountability." (P.A. 0027).

iii. Area Assignments.

Petitioner also contends Miner "disproportionately added additional tasks to LaMont's work area, often having her clean his work area." (Petitioner's brief, p. 6). Again, Petitioner's complaint is not that Miner made any stereotypical comments, used any inappropriate sexual or sexist language, or treated her any differently than anyone else. He would simply say "'Carol, you can – you can now clean those bathrooms.' Ok. 'Carol, you are going to sweep the gym tonight. Carol, you are going to' he added stuff to my area. That's why that back media center wasn't even originally mine. I didn't have that." (LaMont depo., p. 224, l. 3-9). Changes began in the fall when school started and Miner was now head custodian (Id., pp. 224-25); i.e., "when he became day lead, his job is to – is to issue the – that's what his job is, to issue where the – where the areas were." (Id., p. 224, l. 10-13). While she is claiming her area got changed, she does not claim that "nobody's area ever got changed at all except for you." (Id., p. 226, l. 16-18).

Petitioner also contends the area zone she was charged with cleaning was larger than anybody else's. However, and omitted from the Petitioner's brief is an explanation about (1) how the cleaning zones came to be identified; and (2) how those zones were then rotated.

The High School is a large building and generally there was a night crew lead and three or four other custodians working the night shift. As head custodian, Bell would assign the areas that each of the night crew was required to work. (LaMont depo., p. 19). Although Petitioner would complain later when Miner was in charge, Petitioner had a good relationship with Bell (Id., p. 18) and she had made no complaint when Bell

regularly added and subtracted areas from job assignments and generally "moved people around." (Id., pp. 20-21).

In the Bell years, Respondent had hired an outside consulting firm, Hillyard, Inc., to evaluate the building and prepare time studies for the various cleaning areas. (LaMont, p. 25). These time studies were then used to balance the work assignments. All of the custodial staff, including Petitioner, received a copy of this study. Petitioner then met with Bell and the Hillyard employees and provided her own input. (Id., pp. 36-37).

In February, 2007, Hillyard, Inc.[4] was called in again to perform additional time studies. The first draft was completed and delivered to Petitioner on February 19, 2007. (LaMont depo., p. 27). As in the previous years with Bell, Petitioner and the crew met with Miner and the Hillyard, Inc. staff, reviewing the time studies, discussing the area assignments, and offering their input. (Id., pp. 41-42).

Hillyard, Inc. made the first measurements, which were then distributed to custodians. The custodians were then asked to work them for a couple of weeks so they could come back "let us know if this works, doesn't work, why, when, where, you know, whatever." (Hilyar depo., p. 46, l. 11-24).

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[4]This is a private management firm that was retained by Respondent to provide consulting as to its custodial management. There is no connection between this Missouri corporation and Jim Hilyar. The time study was part of a Cleaning Cost Analysis Program (CCAP) that the School District "is going through throughout the District as far as cleaning program, dividing up areas so that they are equal." (Hilyar depo., pp. 45-46). Hillyard describes itself as an industry-leading resource for custodial management. Hillyard has developed programs, including industry-specific software that allows it to develop a CCAP. See www.hillyard.com .

The goal of the process was to "make sure that all areas were equal, that everybody had an equal area to work – that their area was equal to everybody else's. We got tired of people saying well, this is Carol's area, or this is Tom's area, this is Bill's area, so we went with colors, yellow, blue, green, whatever. It was divided up, everything's equal. That way, you know, "Joe, you go to yellow area tonight and clean that for the next two nights. Everything's equal. It shouldn't make any difference where you were working, the area should have been equal." (Hilyar depo., p. 47, l. 10-21). An example of a Hillyard map is attached to Respondent's Appendix at R-App 0024.

The work zones would be "interchangeable in work volume, work effort." (Id., p. 49, l. 1-14). Petitioner complained to Hillyard she did not believe all of the areas were completely equal.

The Hillyard representatives told her "they had done a study on square footage of the building but that "some changes could be made." (LaMont depo., p. 44, l. 24 through p. 45, l. 19). (Id., p. 48, l. 20 through p. 49, l. 8). While she complains areas were added and subtracted from her area, Petitioner acknowledges this occurred with other employees also. (Id., p. 55). While she complains about changes to her area, there is insufficient evidence of differential treatment in light of the fact she acknowledges she "does not know" whether her area was any more time consuming or difficult than other areas because "I wasn't present." (Id., pp. 112-13).

To the extent Hilyard, Inc.'s evaluation could have, theoretically, resulted in one area taking slightly longer to clean than another, this is rendered moot by the fact Miner required the various color coded assignments be swapped periodically. The night crew

immediately began swapping areas so that "what's now defined as Carol's area is being done by somebody else and Carol is doing somebody else's area." (LaMont depo., p. 56, l. 17-21). Twice a year, the areas were swapped because "Doug [Miner] wanted rotations." (LaMont depo, p. 57, l. 1, p. 59, l. 20).

iv. Street Clothes v. Uniforms.

Petitioner alleges (p. 5) she was harassed because the men were allowed to wear street clothes while the women were required to wear a uniform. Petitioner in fact made no such allegation. 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. (Case depo., p. 64).

v. Chastisement.

Petitioner contends further she was "chastised" regarding unclean spots in her work area. (Petitioner's brief, p. 5). As proof of this, she refers to the affidavit of co-worker Donald Robideau.

In his affidavit (he was not deposed), Robideau alleges Miner "picked" on Petitioner by requiring she mop the floor despite certain work restrictions. This direction was not conveyed by Miner, but by a female supervisor, Patty. (P-Add 25 at paragraph 7). Not wanting to mop the floor, Petitioner then called "someone else to prevent Patty from making her mop the floor." (Id.)

In further purported support of her chastisement claim, Petitioner refers to an incident when a teacher (not Miner, Jones, or any other supervisor), but a female teacher, placed a note on her classroom door: "I'm sorry to bother you again, but the garbage cans

in the back lab of the media center in my office area and by the teacher's desk were not emptied again last night." (LaMont, pp. 151-52). Miner's response was nothing but professional and polite; he advised the teacher he would speak with Petitioner; "I'm sure its just an oversight on her part. She is learning a new cleaning assignment." (Id., p. 152). Another teacher (female) left a note on the door asking if her room "could be swept tonight, its starting to look really bad. I even have dust bunnies." (LaMont, p. 156). Jones simply handed this note to Petitioner (156). Petitioner apologized to the teacher because she did "in fact miss the trash in the room the night before." (Id., p. 149, l. 8-19).

Despite the fact Jones simply handed to Petitioner a note from a teacher complaining about her trash being missed (for which Petitioner apologized), Petitioner nonetheless contends all of this constitutes sexual (or now sex) harassment of the Petitioner.

vi. Yelling.

Petitioner contends (p. 6) Miner's behavior was sometimes "scary" and he would clench his fists. As proof of this allegation, Petitioner relies upon Case, who testified (Case depo., p. 62), that he would do this "in talking to us as a group, or talking to her, or talking to me – all of the above." Case had no idea what Miner would get angry about. (Id.)

The reference to Miner's yelling refers primarily to the "key" incident. Miner had come into the gym looking for his lost keys. "We were in the gym. He was yelling and hollering at all of us from the other side of the gym." (LaMont depo., p. 100, l. 3-12). He yelled at Chuck, then he yelled at Don, then he yelled at "a sub to go back to work."

He was upset because he had lost his keys. (Id.) Petitioner contends Miner then came over to her and Case, screaming at them "where are my keys?" He then looked at Case and asked "which one of you has got my keys?" "He kept going on and on." Having apparently exhausted himself, Case them pulled the keys out of her pocket and handed them to Miner. (Id., p. 100, l. 14 though p. 101, l. 1).

Petitioner was hardly alone in her resistance to Miner's aggressive supervision. Johnson was upset about Miner yelling at him and filed a complaint. (LaMont depo., p. 99). As a further example of his perceived harassment by Miner, Johnson gave an example where Miner had been talking to three members of the crew, slammed his fist on the table, and said "let's get this show on the road." (R-App 0081). For another example, George Layne sent a letter to the district superintendent in which he criticized Miner's treatment of Petitioner and himself. He complained that Miner's conduct constituted harassment of "my whole crew." (R-App 0074). It was Petitioner's opinion all three male co-workers, Johnson, Layne and Robideau, were unhappy with Miner's firm style. (LaMont depo., pp. 99-100, 125). The men complained because they didn't like Miner telling them how to do their job. (Id., p. 168).[5]

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[5]In the past, the lights in the common areas would be turned down at a certain time in the evening. Initially Miner did not follow that practice and Klein (male) complained to Miner. Miner did not respond, which upset Klein. (LaMont depo., p. 106). After this, Petitioner again told Miner that she thought he ought to turn the lights down earlier. He said nothing in response to her, which she considers sexual harassment. (Id., pp. 106-07). Unhappy with Miner's refusal to take her instructions as to when to dim the lights, Petitioner took her complaint to the high school principal, Jim Voight. (LaMont depo., pp. 89-91, 104-05, 109-10).

Petitioner complained to everyone that everything was unfair. (Hilyar depo., p. 20-21). Her complaint was primarily that Miner was changing things. They did not have to do certain things under Bell. Petitioner complained they now had to do things under Miner's supervision. (Id., p. 22-23). (Baranick depo., p. 32). According to Hilyar, Petitioner complained "this isn't fair. It's unfair. We didn't have to do this before. Why do we have to do it now?" (Hilyar, p. 23, l. 7-9).

vii. Segregation.

Petitioner alleges, as an element of harassment, that Miner "segregated the women from the men..." (Petitioner's brief, p. 7). There is precious little evidence to support this. Miner testified it did not happen; i.e., he did make work assignments and put individuals in specific areas, but the assignments were not based on gender. (Miner depo., pp. 122-23). For her part, Case testified she and the Petitioner were separated from working together, not separated jointly from the men. (Case depo., p. 22).

Petitioner alleges this occurred in the summer of 2006, and she knows this because another employee, Zerwas, told her that Miner would separate "the guys from us girls." (LaMont depo., p. 111, l. 1-6). While Petitioner's brief now alleges this occurred again the following summer, Petitioner's testimony was that in the summer of 2007, this had "absolutely not" occurred. (Id., p. 113, l. 11-15). The difference had been in the summer of 2006, both the day crew and the night crew worked at the same time, but were physically separated, whereas in the summer of 2007, the night shift worked the night shift and the day shift worked the day shift. (Id., p. 114).

viii. Talk Less, Work More.

Finally, Petitioner contends Miner "prohibited the women from speaking at all." (Petitioner's brief, p. 7). This in fact relates to Jones, not Miner, and this relates in large part to "the bleacher incident."

The crew, male and female, was cleaning out the gym. Jones was night lead. Miner was not there. Traditionally this involves cleaning the bleachers that had just been used for a basketball game. However, just as Petitioner has a problem with mopping, she has a problem with cleaning bleachers. Specifically, "I don't go on the bleachers because I don't like heights." (LaMont depo., p. 129, l. 4-5). While "the men are required to clean the bleachers," Petitioner does not because "I don't do heights. I do not climb ladders, and I don't do bleachers, ever since I have been a sub-custodian all the way to when I was hired." (Id., p. 131, l. 1-7). Case soon joined Petitioner in her refusal to clean the bleachers.

Jones called Case on the radio asking her to come to the gym and "bring a broom." (R-App 0078). She asked what kind, and he told her again just to bring a broom. She radioed back asking him to "say please." (Id.) Miner pointed out it was not his obligation to say please when he asked her to do her job.

Case arrived and began talking to Petitioner. Jones asked them to stop talking so much and get to work. (Case depo., p. 77). Case recalls no other occasion where Jones told her and Petitioner to stop talking to each other so much. (Id.)

Petitioner makes no claim Miner criticized her for spending so much time talking, but acknowledged Jones told her to stop "spending too much time talking and not enough

time working." (LaMont depo., p. 128, l. 9-18). Specifically, she recalls Jones saying this in the context of the bleacher incident. (Id.)

Case also didn't like her boss telling her to get to work. She responded with "we will see about that." She got mad and upset and then dropped or threw her broom, and went off to complain to the principal. (Id.) Case received a suspension for her improper conduct and she then filed a grievance. (Case depo., p. 86). She complained that Jones had been "rude" to her over the radio. The suspension was overturned.[6]

While Petitioner contends there were unidentified times in which Miner suggested she was talking too much and not working enough, she contends it was not always the case that Miner was simply telling her to get back to work. (LaMont depo., p. 136).[7] On this occasion, Jones had simply said "I don't want you two talking to each other, I want you to get your work done." (Id., p. 135).

B. Miner Comments.

As noted, in addition to her complaints about Miner's conduct, she also alleges that he made inappropriate comments. Petitioner alleges exactly 5.

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[6]In response to this, Jones quit. He noted that he had asked Case to do her job, she demanded that he say "please," she then threatened him with "I'm going to take care of you" then slammed her dust mop down and walked away. He was frustrated that Case and Petitioner were allowed to "do and say whatever they want." (R-App 0073).

[7]For his part, Miner acknowledged that he had suggested to the night lead that the employees "focus on their work and not talk to each other" because "when its time to work, they are supposed to be in the area working and not talking." (Miner depo., pp. 121-22). Petitioner's response to this was to deny that she had been talking to Case and that she simply had more work than they could possibly get done in a day. In response, he pointed out he knew this was not true because he had been watching them on the security cameras and observed them out of their work area and talking. (Id.)

i. May, 2006.

First, Petitioner contends that in May, 2006, in a conversation between Miner and Loren Klein, Miner told Klein he didn't want any women on his crew. (Petitioner's brief, pp. 3-4). Petitioner makes no claim she heard this conversation, nor even that Klein told her about the conversation. Her only source for this is an affidavit of Klein (Petitioner's ADD 27). According to Klein, he and Miner were having a conversation as to whether or not it was appropriate for male custodians to work in a woman's locker room or bathroom and Miner stated his opinion he could work wherever he wished.

ii. Second Night on the Job.

Second, Petitioner contends that, "a few nights after he started as night lead, Miner entered the break room and Ebner, Case, Klein and Petitioner were present." (LaMont depo., p. 87, l. 17). Petitioner alleges that in front of that group, Miner stated "I have no intention of ever asking you anything." While Petitioner now contends (p. 4), that Miner humiliated her, that he stated these words "roughly," and that he "stared at LaMont" when he said this (Id.), Petitioner's testimony on this, as cited by the Petitioner, is merely that the night crew was all in the break room and Miner made this statement. (LaMont depo., p. 98, l. 2-13). There was no testimony to support the current allegation this was directed at Petitioner, nor that Miner stared at her when he made this alleged comment.

According to Petitioner, Miner then engaged in a conversation with night custodian Gary Ebner. (LaMont depo., pp. 87-88). Petitioner contends she overheard the two of them discussing a garage sale and Miner state he had run into Ebner's wife at this garage sale. Petitioner contends Miner said to Ebner that his wife was "not bad." The

"target" of the comment was not offended, in fact Ebner stated he was flattered. (Miner depo., p. 124, l. 19-20). (Petitioner's brief, p. 4). They continued to talk about the garage sale. When Ebner disclosed the amount of money she spent. Miner said "wait a minute here, well you've got to – know. Women have their place. You've got to keep them in their place. That's a lot of money." (Id., citing LaMont depo. at 88).

Next, Petitioner alleges she also heard Miner say "the only place women should be is in the kitchen and the bedroom." (Petitioner's brief, p. 4, citing LaMont depo., p. 89). Petitioner testified this was simply a continuation of the conversation between Miner and Ebner. They were having a general conversation, "just kind of small talk." (LaMont depo., p. 89, l. 2-8). Although Ebner, Case, Klein and Petitioner all allegedly overheard this, no one said anything to Miner. (LaMont depo., p. 89). Petitioner contends she reported this to Jim Voight and also told him about other things, such as Miner's insistence she check in on breaks in person rather than by the radio. Voight told her that he would observe. (Id., pp. 90-91).

iii. December 19, 2006.

Finally, Petitioner contends that on December 19, 2006, Case and Petitioner were at the time clock where they encountered Miner, who said "there is a time and a place for women and Elk River High School is not the time or the place." (Petitioner's brief, p. 10, citing LaMont depo., p. 141, Case depo., p. 18). Petitioner overheard this while Miner was talking to Case. (LaMont depo., p. 141, l. 2-10).

Accordingly, Petitioner presents no evidence any of these comments were directed to her; they were all overheard and three of them were overheard in a single conversation between Miner and Ebner on Miner's second day on the job.

C. **Petitioner's Complaint of Discrimination and Respondent's Response.**

The vast majority of Petitioner's complaints about Miner were his implementation of work rules. As she herself states, on many occasions, Miner's instructions were overridden when Petitioner complained about them to his supervisors or, as she now puts it, Miner "relented." (Petitioner's brief, p. 4). Baranick and Hilyar both met with Miner on many occasions in response to a variety of complaints. Baranick understood that Miner was "pretty demanding in what his expectations were ." (Baranick depo., p. 15, l. 22-24). He felt that Miner's expectations were appropriate. (Id., pp. 15-16). "There was a feeling that he was too particular..." (Id., p. 17). However, he and Hilyar also met to assure he was appropriate in how he was delivering these expectations. They met to determine "is Doug acting appropriately in his approach? Is Doug going beyond having high expectations? Is Doug being fair and respectful in his delivery and tone? Is he being fair in his expectations of the staff? Those are certainly things we talked about." (Id., p. 20).

Baranick realized "a number of employees weren't happy..." (Baranick depo., p. 18, l. 22-25). "Why were they unhappy? You know, in most cases, it would seem that people weren't happy that there was basically supervision now at night. And then, you know, moving into the days as you know things changed." (Id., p. 19).

While many of the crew felt they were being "harassed" by Miner (Id., pp. 19-20), only on one occasion, in a 45 minute phone call, did Petitioner suggest to Baranick she thought Miner was "treating me in a particular way because I am a woman." (Id., pp. 23-24). In all of the meetings prior to this phone call, Baranick had concurred Miner's actions were absolutely correct in that he was implementing the expectations assigned to him. Baranick acknowledged, however, that his way of dealing with people was generating complaints and concerns. (Baranick depo., p. 37). Similarly, Hilyar acknowledged "if there was a white piece of fuzz on the floor, he would call me up and say 'hey this room's dirty,' and I would say 'hey, Doug, this isn't the military. Y'know, settle down.'" (Hilyar depo., p. 34, l. 9-16).

Baranick understood the fundamental difference between the reports he had been receiving (i.e., "I don't like my job assignment and I am being harassed") versus what he now heard ("somebody's treating me wrong because I'm a woman.") (Baranick depo., pp. 25-26). The latter was suggested only in this one phone call to Baranick. In response to this phone call Baranick immediately advised Petitioner to contact the district HR; "if you feel like you are being harassed, absolutely go to HR." (Id., p. 24). Petitioner then went to HR either that day or the next. Baranick immediately called Hilyar (Hilyar depo., p. 42), who confirmed that Petitioner had never suggested to him she was being harassed by Miner. (Id., p. 36, l. 21-25).

As noted in Petitioner's brief (p. 10), Respondent then retained an outside private investigator (O'Keefe) to conduct an investigation. Petitioner met with O'Keefe and confirmed to him that in the past, the night and day crews had worked well together, but

currently the night and day leads "didn't get along." (Id., pp. 186-87). She told him Miner's predecessor had "tension with Bell." (Id., p. 188). She advised O'Keefe that when Miner began, the "night crew was a big happy family," that from the time Miner started, he "changed everything." (Id., p. 189). Petitioner confirmed with O'Keefe the building was now cleaner than it had been under Bell. (LaMont depo., p. 192). She complained about the fact Miner had instructed Petitioner as to where boxes should be unloaded and placed from the dock. She complained this was not how Bell did it and that Miner's response to her complaint again was "not any more." (Id., p. 190). Petitioner complained that other male employees were not working as hard as she was and were not pulling their weight. (Id., p. 188). As to Miner's comments, she advised O'Keefe of Miner's "not bad" comment and the "keep them in their place" comment "in reference to his wife's spending patterns." She reported to O'Keefe Miner asked her if she had children. (Id., p. 191, l. 13-15). She told O'Keefe words to the effect that she had "no complaint with Doug at this time," but testified that was only to confirm that at that time in the investigation, she was having no contact with him. (Id., p. 194). She testified she also advised O'Keefe of the "time and place for women" comment, and told him "everything that had been said by Doug." (Id., p. 195, l. 10-14). She acknowledged, however, that currently the crew was working well together, there was "no tension on staff, there was good communication." (Id., p. 193).

After her meeting with O'Keefe, she met with the Union steward and then with the district's HR director. (Id., pp. 198-99). They discussed the status of O'Keefe's investigation. However, before the meeting was over, the Union steward advised the HR

director Petitioner had already filed her charge of discrimination with the Minnesota Department of Human Rights.

To this day, Petitioner continues as a custodian in the night crew at the highschool and Miner continues as the head custodian. Petitioner has made no further complaints regarding Miner's behavior.

ARGUMENT

I. The MHRA Prohibits Only Sexual Harassment and it is for the Legislature to Expand the Scope of the Act.

A. Standard of Review.

Petitioner asks this Court to recognize a cause of action of "gender harassment." That is a prerequisite to her claim, and if this Court does not recognize such a cause of action, the court of appeals must be affirmed. As to this Court's standard of review of the court of appeals, this is purely a question of law; one of statutory construction.

Petitioner fails to provide any analysis whatsoever. This Court has stated:

> The touchstone for statutory interpretation is the plain meaning of a statute's language. When the words of a statute are clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words. When a statute's meaning is plain from its language as applied to the facts of the particular case, a judicial construction is not necessary. The courts apply the rules of grammar and consider all words and phrases in the statutory language when possible so that none is deemed superfluous.

Krueger v. Zeman Constr. Co., 758 N.W.2d 881, 885 (Minn. Ct. App. 2008), *aff'd*, 781 N.W.2d 858 (Minn. 2010) (internal citations and punctuations omitted).

The MHRA utilizes the word "harassment" in one, and only one, context; i.e., to define sexual harassment. Petitioner would now have this Court also find within the MHRA a prohibition of gender harassment. We contend the statute is clear, explicit, unambiguous and free from obscurity obviating the need (or indeed the right) to engage in statutory construction.

B. A Cause of Action of Non-Sexual "Gender Harassment" is not Found the Plain and Unambiguous Language of the MHRA.

Petitioner contends the prohibition of gender harassment is found in the "plain language" of the MHRA. We disagree. The only harassment that is referenced in the statute is "sexual" harassment. Petitioner wishes to take the "ual" off of that word. Those letters, however, are plainly there, and it is the only type of harassment defined in the MHRA.

Petitioner argues (and amicus NELA argues with more vigor) that because the statutory definition of sexual harassment (M.S. § 363A.03, subd. 43) states it includes various types of behavior "of a sexual nature," this is a non-exclusive list. They contend that because the legislature defined what it includes, the legislature did not mean to exclude anything. This is not a logical reading. The statute "includes" various types of comments and various types of conduct of "a sexual nature," which may constitute sexual harassment. The list may not be all-inclusive as to the types of comment or conduct, but clearly, if it is not sexual conduct, it does not fit the definition of sexual harassment. Under the doctrine of *ejusdem generis*, the general wording of a statute must be interpreted to include only matters of the same kind or class as those specifically

enumerated. Goplen v. Olmstead City Support & Recovery Unit, 610 N.W.2d 686, 689 (Minn. Ct. App. 2000). The concept of gender harassment cannot be found within the plain language of the definition of sexual harassment.

Nor is "gender harassment" found plainly articulated in any other aspect of the MHRA. When the plain language of a statute is unambiguous, the court need "not look elsewhere for guidance." Minn. Ass'n of Prof'l Emps. v. Anderson, 736 N.W.2d 699, 702 (Minn. Ct. App. 2007). What is and is not protected is a matter of public policy and "courts, as compared to the legislature, are ill-equipped to determine what constitutes 'public policy.'" Nelson v. Productive Alts., 715 N.W.2d 452, 457 n.5 (Minn. 2006) (citing Anderson-Johanningmeier v. Mid-Minn. Women's Ctr., 637 N.W.2d 270, 277-78 (Minn. 2002) (Blatz, C.J., concurring)). The definition of sexual harassment is found in the definitional section of the MHRA, Minn. Stat. § 363A.03. Since its enactment, that section has been modified 21 times.[8] In all those opportunities, the legislature has not modified the definition of discrimination to include hostile environment harassment on any category other than sex. "Where failure of expression rather than ambiguity of

[8]Act of April 17, 1961, ch. 428, §1-4; Act of May 25, 1967, ch. 897, §§1-9; Act of June 6, 1969, ch. 975, §§1-2; Act of May 24, 1973, ch. 729, §1; Act of February 2, 1976, ch. 2, §130; Act of June 2, 1977, ch. 351, §1; Act of June 2, 1977, ch. 408, §1; Act of April 11, 1980, ch. 531, §§1-2; Act of March 19, 1982 ch. 492, §1; Act of March 23, 1982, ch. 619, §§2-3; Act of June 6, 1983, ch. 276, §§1-4; Act of June 27, 1985, ch. 13, §§320-24; Act of April 9, 1987, ch. 23, §1; Act of May 28, 1987, ch. 282, §2; Act of April 26, 1988, ch. 660, §1; Act of May 16, 1989, ch. 144, Art. 2, §8; Act of May 25, 1989, ch. 280, §1-3; Act of June 1, 1989, ch. 329, Art. 9, §26, 2548; Act of June 3, 1989, ch. 335, Art. 1; Act of June 3, 1989, ch. 356, §18; Act of May 3, 1990, ch. 567, §1; Act of April 29, 1992, ch. 527, §§1-10; Act of April 2, 1993, ch. 22, §1-2; Act of May 19, 1993, ch. 277, §§1-4; Act of April 21, 1994, ch. 465, Art. 3, §20; Act of May 24, 2001, ch. 194, §1.

expression concerning the element of the statutory standard is the vice of the enactment, courts are not free to substitute amendment for construction and thereby supply the omissions of the legislature." State v. Moseng, 254 Minn. 263, 95 N.W.2d 6, 11-12 (Minn. 1959). "Gender harassment" is not found in the plain language of the MHRA.

C. The MHRA and Title VII are not Similar on this Issue.

Petitioner bases much of her argument on her review of Federal Title VII law. While this Court has often followed Title VII cases, it has done so where the statutory language is substantially similar. Hubbard v. UPI, Inc., 330 N.W.2d 428, 441 (Minn. 1983). "Minnesota courts have an obligation to apply this state's statutes as they are written, not to apply a statute as if it uses the language of counterpart federal law." Swanson v. State, No. A08-0553, 2009 WL 671039, at *3 (Minn. Ct. App. Mar. 17, 2009). The MDHR definition of sexual harassment is not similar to Title VII; Title VII does not define the phrase at all. Accordingly, this Court is not at liberty to jettison the state legislative definition of sexual harassment, in favor of a federally judicially created concept of a legislatively undefined term.

> [R]eliance on Federal Title VII decisions as a guide at times does not necessarily mean that adherence to positions advanced in those decisions constrain this court as binding precedent in the interpretation of our state statute. Moreover, notwithstanding that our legislature has displayed no aversion to directing us to follow federal social or economic statutes in the interpretation of our state statutes (see e.g., Minn. Stat. § 80A.31 (1984)), it has not done so with respect to our State Human Rights Act.

Carlson v. ISD #623, 392 N.W.2d 216, 220-21 (Minn. 1986).

This Court, in Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997), set out the elements of the hostile environment claim in what has come to be known as the "Cummings factors," i.e., (1) the conduct must be unwelcome; (2) it must consist of "sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature, and it must be sufficiently pervasive as to substantially interfere with the plaintiff's employment or to create a hostile, intimidating work environment." Cummings, supra, 568 N.W.2d at 424.

The lower appellate court has routinely analyzed cases in reference to the establishment (or non-establishment) of the Cummings factors. See, e.g., Jones v. Yellow Freight Systems, Inc., 2000 WL 1052167, *3 (Minn. Ct. App. 2000); Monson v. Northern Habilitative Services, 2006 WL 771919, *6 (Minn. Ct. App. 2006). In this way, "the MHRA is not similar to Title VII in its treatment of sexual harassment." Cummings, 568 N.W.2d at 423 n.5. While Title VII's statutory prohibition "turns on discrimination...Minnesota's statutory language includes the specific definition of sexual harassment." Id. It is "error" to apply the Title VII standard, and "we decline to follow the federal rule here because the MHRA is not similar to Title VII in its treatment of sexual harassment." Id. at 423 n.5.

The federal courts of Minnesota have expressly recognized the distinction. That is, despite the fact the same broad public policy principles underlie both the federal and state enactments, the federal courts have never suggested a hostile environment claim based upon the MHRA can be based upon anything other than comments or conduct of a sexual nature.

For example, in Bailey v. Seagate Tech., LLC, No. Civ.04-1399, 2005 WL 1869108, at *6 (D. Minn. Aug. 5, 2005), the court concluded the plaintiff had failed to establish a violation of the MHRA "as interpreted by Cummings and its progeny." The court distinguished the Title VII cases on which plaintiff sought to rely because such "involved a Title VII claim, which 'is not similar to' the MHRA 'in its treatment of sexual harassment.'" Id (quoting Cummins, 568 N.W.2d at 422 n.5). The claim was dismissed because the allegations made no "reference to sex." Id.

Further, in Johnson v. Burlington Northern & Santa Fe R.R., No. Civ.04-2638, 2005 WL 1868311 (D. Minn. Aug. 8, 2005), the court considered a whole array of workplace comments, mostly contained in graffiti in the restroom. All of them referred to the plaintiff. Some were of a sexual nature and some were not. The court noted that under the MHRA, the conduct must be "unwelcome," must consist of "sexual advances, request for sexual favors...or other...conduct...of a sexual nature." Id. at *7. The court determined that references to the plaintiff as a "fuckhead" and an "asshole" are not of a sexual nature and cannot constitute sexual harassment under the MHRA. Id; see also Montgomery, 109 F. Supp. 2d at 1088 n.6 ("The Cummings court expressly distinguished the MHRA from federal discrimination statutes on the ground that it contains this definition.").

Rather than discuss those federal cases that distinguish Title VII from the MHRA, Petitioner relies upon federal cases that don't bother to make the distinction (for the simple reason they do not involve a claim brought under the MHRA). Nor do any of

them allow a claim to proceed that does not include some (although perhaps not exclusively) sexual behavior.

For example, Petitioner relies on Hall v. Gus Constr. Co., Inc., 842 F.2d 1010, 1014 (8th Cir. 1988). The case was chock full of sexual behavior.[9] Again, the court was not confronted with a dissimilar statutory framework. While the plaintiff had also brought a claim under the Iowa Civil Rights Act, the court simply assumed "the elements of a sexual harassment claim under the Iowa Civil Rights Act are the same as under Title VII." Id. at 1013 n.3. Indeed, the court expressly held that under Title VII, the behavior need not be sexual in nature because "Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities." Id. at 1014.

Petitioner relies on Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993). Again, the case involved some sexual behavior,[10] and the court considered only a Title VII claim, not a state act claim. In Smith v. St. Louis University, 109 F.3d 1261 (8th Cir. 1997), the plaintiff brought a claim both under Title VII and the Missouri Human Rights Act. The Missouri Human Rights Act does not define sexual harassment. (Mo.

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[9]Propriety suggests that we provide only the more innocuous comments; plaintiffs were repeatedly asked if they "wanted to fuck," were asked to engage in oral sex, were trapped between two vehicles where the male crew rubbed their hands up and down the woman's thigh, the female employees were "mooned," and shown obscene pictures of naked couples engaged in oral intercourse. Id. at 1012.

[10]Plaintiff was referred to as a stupid bitch, her supervisor grabbed her by the bra straps, pulled her close to him, thumped her on the chest calling her a "little lady," and physically shocked her with defibrillator paddles. Id. at 266-67.

Rev. Stat. § 213.010), and the court expressly noted that in light of the fact Title VII "guides" the Missouri Human Rights Act, the state claim is "subsumed under our consideration of Smith's federal claims." 109 F.3d at 1264, n.2.

Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir. 1990) was a claim based solely on Title VII (and contained allegations of extreme obscenities and pornography in the workplace). Similarly, McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) abrogated on other grounds by Stevens v. Department of Treasury, 500 U.S. 1 (1991) included only a federal claim (and also included allegations the supervisor exposed himself, rubbed up against the plaintiff and asked her for sexual favors).

Finally, Petitioner refers to Sturm-Sandstrom v. County of Koch, 552 F.Supp.2d 945 (D. Minn. 2008). In that case, the district court, in its opening comments, made mention of the fact the plaintiff's claim was brought both under Title VII and the MHRA. That was the last time the court mentioned the MHRA. The court did not discuss the distinctions or the Cummings factors. In analyzing the claim, the court cited only federal cases and no state cases. While we do not contest the notion some federal courts have recognized gender harassment under Title VII, no federal court has recognized the claim under the MHRA. Neither has this Court.

D. This Court has Never Recognized a Hostile Work Environment Based Upon Anything Other than Sexual Harassment.

Petitioner relies heavily on the court of appeals' decision in Wenigar v. Johnson, 712 N.W.2d 190 (Minn. Ct. App. 2006). However, as Petitioner previously

acknowledged, the Court in Wenigar looked to federal law because the language of the statutes at play "are similar." (Petitioner's Court of Appeals brief, p. 18).

We assume the court of appeals would not have been so free to come up with its own definition of disability harassment if the legislature had already defined it.

Beyond that, Petitioner relies primarily on Goins v. West Group. In that case, petitioner alleged she had been discriminated against on the basis of sexual orientation (a protected class legislatively added to the MHRA). 635 N.W.2d 717, 720 (Minn. 2001). She alleged she was physically separated in the workplace, confined to use only one bathroom, and was stared at and gossiped about. She alleged this discrimination created a hostile work environment. Id. at 721. This Court expressly did not determine whether or not plaintiff had a cognizable claim of sexual orientation harassment. This Court noted "we have not recognized sexual harassment as a form of sexual orientation discrimination." Id. at 726 n.6. This Court then considered the allegations of misconduct in the context of a sexual orientation claim by merely "[a]ssuming that the MHRA contemplates a hostile work environment claim based on sexual orientation." Id. at 725. Assuming without deciding, this Court determined plaintiff Goins had not, in any event, sustained her burden of establishing severe and pervasive conduct so as to create a hostile environment. Id. at 725-26.

E. Cases From Other States are Inapposite and do not Support the Petitioner's Claim.

Petitioner cites decisions from Ohio, New York, Oregon, Washington, and New Jersey in support of her contention other states recognize a claim of "hostile work

environment based on sex, even if the conduct is not sexual." While a number of states have a statutory definition of sexual harassment, Petitioner chooses to discuss none of them. Instead, Petitioner chooses to address only states that, as with Title VII, prohibit sex discrimination but have no statutory definition of sexual harassment, and accordingly do not address the issue before this Court. One of these cases specifically discussed the effect of this distinction. The Washington Court of Appeals, in Payne v. Children's Home Soc'y of Wash., Inc., noted the Washington statute "does not suggest any requirement that discriminatory conduct involve sexual advances, innuendo, or physical contact to be actionable." 892 P.2d 1102, 1105 (Wash. Ct. App 1995). While noting some federal cases have held, under Title VII, that actual conduct must in fact be sexual, the Washington court concluded it need not "given the language of" the Washington statute. Id. at 1106.

The Petitioner also suggests Oregon recognizes a gender harassment claim, even if the conduct is not sexual "despite the fact the Oregon rules define sexual harassment." A.L.P. Inc. v. Bureau of Labor & Indus., 984 P.2d 883, 885 (Or. Ct. App. 1999). (Petitioner's brief, p. 28). This is misleading. In that case, the defendant argued the behavior must be sexual. To support that, the defendant relied upon an administrative rule of the State Bureau of Labor, which defined sexual harassment, essentially identical to Minnesota's. Id. The Oregon court, however, concluded it was not bound by that administrative rule, but instead followed Title VII, which contains no statutory definition of sexual harassment. Id. The court chose to follow the federal rule because the Oregon

statute "is patterned after Title VII and that we therefore consider federal cases 'instructive.'" Id.

Further, two consistent themes run strongly through all the cases relied upon by Petitioner; (1) all of them involve some behavior that was clearly either sexual or physically abusive (they merely contained some additional behaviors that were neither); and (2) all involve conduct far more egregious than that alleged by Petitioner here.

In Hampel v. Food Ingredients Specialties, Inc., the court considered behavior that was "severe and shocking in the extreme." 729 N.E.2d 726, 737 (Ohio 2000). It continued for 9 months. The supervisor repeatedly asked the Plaintiff to "blow me," asked him to "suck my dick," told the plaintiff he wanted the plaintiff to "taste my cum and go umm umm umm," and stated he wanted to the plaintiff to "wear my pearl necklace." Id. at 729. Plaintiff asked to be transferred to a different department and the request was denied. Id.

In McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., the plaintiff was constantly intimidated, abused, humiliated and ridiculed by three individuals; the "three musketeers." 69 N.Y.S.2d 122, 124-25 (N.Y. Sup. Ct. 1997). The behavior was "often of a sexually explicit nature." Id. at 125. The evidence was every sentence uttered by her supervisor included the word "fuck." Id. Her supervisor commented on the size of her breasts on more than one occasion and asked her if she had gotten "on her knees" to please a customer. Id. She was constantly referred to as a bitch, and a bitch on a broom. Id. A broom was left by her desk on a daily basis. Id. She was asked if she had ever "done a black man." Id. Somebody carved the words "blow me" on her desk and she

was required to scrub them out. Id. at 125-26. She was then physically assaulted by her supervisor, who grabbed her around the neck and throat. Id. at 126. She reported this behavior and was fired for insubordination. Id. at 125. The court noted some of the behavior was not sexual (i.e., laughing at the plaintiff and making fun of her due to her miscarriage), but commented that in the context of the sexually explicit behaviors, this last comment was simply the "most egregious" which "exemplifies the malevolent nature of plaintiff's harassers." Id. at 129.

In A.L.P., Inc., the plaintiff's supervisor frequently commented on the "tits and ass" of customers and referred to the plaintiff as a dumb fucking blond bitch. 984 P.2d at 884. The supervisor then placed an artificial penis on the plaintiff's counter and told her "her husband had been replaced." Id. Her supervisor suggested she "needed to start getting laid every morning" and when the plaintiff went to a different area of the store to purchase diet pills, her supervisor told her she didn't need diet pills, she needed to "have more sex." Id. The supervisor then threatened to "bitch slap" the plaintiff, and then carried this through and slapped the plaintiff on the top of her head and across the face. Id. When plaintiff complained about the "bitch slapping," the supervisor responded with the non sexual abuse of calling her "a real stupid fucking dweeb." Id.

In Muench v. Twp. of Haddon, some of the behavior was clearly non-sexual. In addition, however, supervisor would smear the dispatch window with his hands where the plaintiff worked (she was very fastidious), he would kiss the window area and smear that around as well. Id. He also discussed with the plaintiff his "big guns," which the plaintiff took as a reference to his genitalia. Id. at 294. When the plaintiff complained

about this, the supervisor suggested "the next nice looking girl that comes in that day, they are mine," and went on to brag about having "laid two women in one night last night." Id. at 293-94.

More akin to the case at hand is the Washington case of Payne v. Children's Home Society of Washington. As noted, the court there concluded the behavior did not have to be sexual to be actionable, and came to this conclusion specifically because the Washington statute does not define sexual harassment. Payne, 892 P.2d at 1105. Instead, the plaintiff complained her supervisor had "communications problems," that he often had outbursts and got angry. Id. at 1104. However, the court made note of the fact the supervisor also on occasion got angry at the male employees. Id. at 1107. As a result, the court concluded plaintiff had not established the behavior was "because of sex," nor had she established the behavior was "sufficiently severe and persistent" as to constitute a hostile environment. Id. As a consequence, the Oregon Court of Appeals affirmed the district court's summary dismissal of the hostile environment claim. Id.

In another of Petitioner's cases, the court dismissed based upon the fact the conduct was not severe or pervasive, even where the behavior was clearly sexual. Plaintiff was called into the supervisor's office, was asked to take his clothes off, was asked to lift up his shirt, was told he could be a model, and was asked if he had ever received or given a lap dance. Id. In the one case where the behavior was neither physically threatening or sexual in nature, the court allowed the claim to proceed only where the evidence showed the supervisor did not engage in the same behavior with male employees. City of San Antonio v. Cancel, 261 S.W.2d 3d. 778 (Tex. App. 2006).

The cases cited by NELA are similar.

In Speedway SuperAmerica, 933 So.2d 75, 81 (Fla Dist. Ct. App. 2006), the supervisor screamed at plaintiff, threw things at her, talked about her butt, told her she looked hot. Other male employees physically harassed the plaintiff, touching her buttocks and her arm and pulling her against them. In Willis v. Wal-Mart Stores, Inc., the supervisor grabbed his crotch in front of the plaintiff, told her to "come here," and began to unzip his pants in front of the plaintiff. 504 S.E.2d 648 (W. Va. 1998). In Lehman v. Toys R Us, Inc., the supervisor told the plaintiff to lean over his desk and show him her tits and commented on the plaintiff's "ass." Her supervisor lifted up the plaintiff's shirt in the office asking her to "give them a show." 626 A.2d 445, 450 (N.J. 1993).

While Petitioner and her supporters (the brief of the attorney general presents a horror story of slashed tires, vandalized property, burned food, broken arms and slit throats) discuss many cases that do not have a statutory definition of sexual harassment, ironically they discuss none of the cases that do.

The Supreme Court of Massachusetts has considered the issue of the construction of its statutory definition of sexual harassment in Lowery v. Klemm, 845 N.E.2d 1124, 1125 (Mass. 2006). The court dealt with the construction of its statutory definition of sex harassment, found at MGLA 15B, Sec. 1. Id. (i.e., did it apply to volunteers where the statute referred only to employer?)

The court engaged in statutory interpretation and noted plaintiff's interpretation "would require us to ignore much of the definition of 'sexual harassment' provided in"

the Massachusetts statute. Id. at 1128. The court noted "the legislature could have provided a broader definition for sexual harassment in [the statute] or it could have enacted provisions that would have explicitly protected [volunteers] from sexual harassment." Id. The court noted, however, that the legislature had limited its definition of sexual harassment to sexual conduct in the workplace, and "we accordingly construe [the statute] to incorporate the complete definitions of "sexual harassment" found in [the statutes]. Id.

Connecticut General Statute § 46A-60(a)(8) defines sexual harassment as "any unwelcome sexual advances or request for sexual favor or any conduct of a sexual nature." The Connecticut Superior Court has noted that based upon this definition, a hostile environment claim "must be predicated on sexual conduct directed to" plaintiff. Ledan v. City of Dansbury, No. X01CV044001301S, 2006 W.L. 2349017, at *3 (Conn. Sup. 2006) (emphasis added). The Ledan court noted the claim involved only one comment of a sexual nature. The court noted this one comment of a sexual nature did not constitute sexual harassment in the absence of any offensive touching, as a matter of law. Id.

Similarly, the Wisconsin legislature has enacted Wis. Stat. § 111.32(13) which defines sexual harassment nearly identical to Minnesota's. The Wisconsin courts have determined that in analyzing an allegation of sexual harassment "we must turn to the statutory definition of sexual harassment..." See Jim Walter Color Separations v. Labor & Indus. Review Comm'n, 226 Wis.2d 334, 595 N.W.2d 68, 73 (Wis. Ct. App. 1999). The court noted it often looked to Title VII cases for guidance. However, "Title VII is

not automatically incorporated into the WFEA." Id. "Title VII, unlike WFEA, does not expressly refer to sexual harassment at all..." Id. Accordingly, the Federal Title VII cases in the arena of sexual harassment "do not provide guidance for the issue presented on this appeal. Id. at 74.

In Haynie v. State, 468 Mich. 302, 664 N.W.2d 129, 130 (Mich. 2003), the Michigan Supreme Court granted leave to appeal "to consider whether gender based harassment that is not at all sexual in nature sufficient to establish a claim was sexual harassment under the Civil Rights Act. (CRA), MCL § 37.2101 et seq." The court determined gender based harassment that is not sexual in nature cannot, as a matter of law, constitute a claim of sexual harassment, based expressly upon the fact the state legislature has defined the term; (i.e., "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature.") MCL § 37.2103(i). The court determined that "conduct or communication that is gender-based but is not sexual in nature does not constitute sexual harassment as that term is clearly defined in the CRA." Haynie, 664 N.W.2d at 130.

Federal courts of Michigan have recognized this distinction between state and federal law. For example, in Henderson v. Walled Lake Consol. Sch., 469 F.3d 479 (10th Cir. 2006), the federal court considered a claim of sexual harassment brought under the above-referenced Michigan Civil Rights Act. The court there noted the Michigan State Courts had "interpreted strictly" the requirement that sexual harassment requires comments of a "sexual nature." Id. at 487. The federal court expressly rejected any notion it should look to Federal Title VII law to analyze the Michigan state claim,

because the Michigan state legislative scheme is "directly at odds with" Title VII. Id. at 488.

Ultimately, Petitioner's claim comes down to an argument of public policy. The MHRA is to be liberally construed and accordingly, this Court should aid the legislature and enhance the statute by adding to the statutory definitions. What behaviors and conduct are, and are not protected is a matter of public policy and "courts, as compared to the legislature, are ill equipped to determine what constitutes 'public policy.'" Nelson, 715 N.W.2d at 457 n.5. While the MHRA is to be liberally construed, "a liberal construction cannot enlarge the MHRA beyond its clear and definite scope." Monson v. Rochester Athletic Club, 759 N.W.2d 60, 65 (Minn. Ct. App. 2009). A claim of gender harassment is not found in the plain language of the statute. Whether it is found within the penumbra of public policy, is for the legislature to decide.

II. If This Court Recognizes a Claim of Gender Harassment, the District Court Dismissal Must Nonetheless be Affirmed.

A. Standard of Review.

Should this Court determine gender harassment is a cognizable claim, that will then likely lead this Court to consider the district court's summary dismissal. First, we contend Petitioner did not preserve the issue of the district court summary dismissal. If this Court concludes the issue is properly before the Court, this Court would then have to analyze the proper basis for the review of that summary judgment dismissal. The court considered, *arguendo,* the cause of gender harassment. The district court made certain findings of fact. The court applied the findings to the law as the court viewed it, and

concluded Petitioner did not establish a claim of hostile environment based upon the facts taken in the light most favorable to Petitioner. (PA 00025).

Thus, the standard of review for the grant of summary judgment is also (potentially) relevant. Unlike the first issue, Petitioner provides her version of such a standard as to this issue. (Petitioner's brief, pp. 14-15). Petitioner's statement of the standard is not incorrect, but it is incomplete.

An appellate court should affirm a district court's summary dismissal if there is no genuine issue of material fact and the district court did not err in its application of the law. See, e.g., Zip Sort, Inc. v. Comm'r of Revenue, 567 N.W.2d 34, 37 (Minn. 1997). If Petitioner contends there was a genuine issue of material fact at the district court, she must establish what that is and "there is no genuine issue of material fact for trial when the non-moving party presents evidence which merely creates a metaphysical doubt as to a factual issue and which is not sufficiently probative with respect to an essential element of the non-moving party's case to permit reasonable persons to draw different conclusions." DLH, Inc. v. Russ, 556 N.W.2d 60, 71 (Minn. 1997); Frieler, 751 N.W.2d at 564.

Petitioner's brief does not contend there were any genuine issues of material fact. Instead, Petitioner contends the district court misapplied the law in concluding Petitioner did not allege sufficiently severe and pervasive conduct as to create a hostile environment. That is an essential element of her claim and "the nonmoving party bears the burden of proof on an element essential to the nonmoving party's case, the

nonmoving party must make a showing sufficient to establish that essential element." DLH, Inc., 556 N.W.2d at 71.

B. The Standard for Hostile Environment.

Should this Court consider a claim of gender harassment, the Court will have to articulate its elements. We could start with the statutory definition of sexual harassment and take out all the references to sexual (which is apparently what Petitioner desires). Thus, the definition would be:

> [C]onduct or communication [of whatever nature that] has the purpose or effect of substantially interfering with an individual's employment... or creating an intimidating, hostile, or offensive employment... environment, [because of the individual's gender].

Minn. Stat. § 363A.03, subd. 43(3) (as theoretically amended).

It does not appear Petitioner contends Respondent's conduct had the purpose or effect of substantially interfering with her employment. That is to say, its hard to see that telling an employee to talk less and work more is designed to interfere with her employment. Asking an employee to take breaks with the rest of the crew or at least check in with the boss if you refuse to, does not "interfere" with the employment.

We will admit that Miner's supervision of the Petitioner interfered with the Petitioner's ability to do her job the way she wanted to do it. The problem is the way she wanted to do it was without supervision.

We are therefore left with one remaining avenue, i.e., the notion Respondent's actions created an intimidating, hostile or offensive employment environment.

That standard is fairly well established by this Court commencing with Continental Can, through Cummings, and most recently in Freiler. The threshold for establishing a hostile environment "presents a high threshold." Cummings, 568 N.W.2d at 422. Sexual harassment standards "are demanding." LeGrand v. Area Res. for Cmty. & Human Services, 394 F.3d 1098, 1101-02 (8th Cir. 2005) (internal citations omitted). The act does not establish a "general civility code for the American workplace." Anda v. Wickes Furniture Co., Inc., 517 F.3d 526, 532 (8th Cir. 2008).

We have analyzed the five comments Petitioner alleges. One was said outside of her presence. None of them were directed at her solely, and three of them were comments she overheard on Miner's second day on the job, and they did not recur. Her primary complaint is her allegation of the implementation of work rules (i.e., when and where to take breaks, and when and where to talk v. work). The court made findings on all of them. The court made 38 findings of fact, none of which are contested on this appeal. The court then applied well settled hostile environment law (albeit in the sexual harassment context), applied it to those facts, and determined Petitioner did not establish a prima facie case to establish a hostile work environment. (PA 00051).

In that Petitioner does not contend there were any genuine issues of material fact, her claim on appeal therefore is limited to the allegation the court erred in its application of law. But what is the alleged error? Generally, Petitioner contends the court must consider the environment both objectively and subjectively, cannot be based upon any single factor, but must be based upon the totality of all of the circumstances, including "the frequency of the discriminatory conduct; its severity; whether it is physically

threatening or humiliating, or a mere offensive utterance..." (Petitioner's brief, pp. 38-39). As to that, the court hardly erred. The court expressly concluded as follows:

> For a hostile environment claim, the sexual harassment must be so severe or pervasive that it altered the conditions of employment, creating an abusive work environment. The court must look at the totality of the circumstances and whether a string of isolated instances demonstrates a hostile work environment. Factors to consider are "the frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

(Court's Conclusions, PA 00025-26). Petitioner contends the environment must be "both objectively and subjectively offensive," citing Faragher, 524 U.S. at 787 (Petitioner's brief, p. 38). As to that, the district court concluded "the environment must be 'both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so.'" (citing Faragher, 524 U.S. at 787, and Goins, 635 N.W.2d at 725) (PA 000026). In that the district court quoted and relied upon precisely the same cases Petitioner promotes here, the court obviously stated the law correctly as a general principle. Where then did the court err in applying the law? On pp. 39-45, Petitioner sets out her contentions as to the four ways in which the court erred.

First, Petitioner contends the court erred by concluding "without citing to any legal authority" that the harassing remarks made in her presence, but not directed to her, "cannot be considered." Petitioner does not cite to where or how the court refused to

consider those comments, and there are two problems with Petitioner's argument. The first is that it was not raised to the district court.

That is, while Petitioner now contends it was error for the court to not consider remarks not directed at her, Petitioner did not make that argument to the district court. (R-App ___). Petitioner cannot allege now, as legal error, a theory that was not presented to the district court. Petitioner argues for the first time on the appeal to this Court that the district court should have considered the evidence differently on how the alleged harassment impacted the plaintiff. The Petitioner argues the district court should have considered matters and cases which Petitioner never presented to the district court or did not argue in her court of appeals brief. This Court held in Gruenhagen v. Larson, 310 Minn. 454, 246 N.W.2d 565,568 (Minn. 1976) that assignments of error which have not been presented to the trial court would not be reviewed on appeal. This principle of appellate review has existed since this Court stated: "It is also elementary that on appeal a case must be determined on the theory upon which it was tried. State v. Adams, 251 Minn. 521, 89 N.W.2d 661, 679 (Minn. 1958). Thiele v. Stich, 425 N.W.2d 580, 582 (Minn.1988) (holding that issue raised below but argued under new theory on appeal is generally not reviewable). "We may, however, review any matter 'as the interest of justice may require.'"

The second problem with Petitioner's contention is that it is not true.

If the court had considered only those remarks directed at the Petitioner, the discussion would have been very, very brief, because no sexist or sexual remarks were directed at the Petitioner. Even those that were uttered in her presence were simply

overheard in a conversation between others. The court did in fact consider them. The court expressly made findings regarding the reference to Ebner's wife (FOF 10, PA 000013 and 000016). The court made specific findings regarding the "women should be in the kitchen and bedroom" comment. (FOF 15). The court made specific comments regarding the "time and place for women" comment on December 19, 2006. (FOF 25).

If the district court had made findings of fact that none of these events had occurred (because Miner did in fact testify none of them had occurred, other than the comment about Ebner's wife, taken as a compliment), the district court would have been making an improper determination of credibility and fact finding in a summary judgment setting. The court did not do so. Nowhere does the court find or conclude that those comments could not be considered, and the court in fact did consider them.

The court did not "ignore" all comments not directed at Petitioner. Instead, the court noted the well established principle that the "totality of the circumstances must be acknowledged." Certainly the "circumstance" of being told about a comment made out of your presence is different from the "circumstance" of overhearing the comment yourself, which in turn is different from the circumstance of being the direct recipient and target of the comment.

The court did make note of the fact the comments were not directed at Petitioner. However, Petitioner is wrong when she contends the court cited no authority for its proposition.

The court cited Thompson v. Campbell, 845 F.Supp. 665, 673 (D. Minn. 1994) as a case granting summary judgment on a hostile environment claim. There the court noted

the supervisor often discussed the anatomy of other women, commented on their breasts and buttocks, opined on the clothing of women, discussed sexual fantasies he had with his cousin and on several occasions attempted to place his arm around the shoulders of the plaintiff. Id. at 673. The court considered all of this conduct, and "taking the conduct at its worst," concluded the plaintiff had "failed to raise a question of material fact as to whether a reasonable person would consider the offensive conduct sufficiently pervasive to create an abusive work environment." Id. at 674. The court noted "the severity of Campbell's offensive conduct was minor. None of the alleged sexual remarks were directed at Thompson. Campbell's conduct did not physically threaten or personally humiliate Thompson." Id. (emphasis added). The same is true here, and the court was correct in relying upon that decision.

The court expressly compared and contrasted that case against a case in which there were constant and pervasive references to women as sexual objects, even to the plaintiff themselves, or subjected to graphic harassing comments "about the plaintiff." (PA 000026) (citing Jensen v. Eveleth Taconite Co., 824 F.Supp. 847, 886 (D. Minn. 1993), and Beach v. Yellow Freight System, 312 F.3d 391, 396-97 (8th Cir. 2002)).

The court simply recognized the fact that in evaluating the circumstances, one circumstance is whether the behavior was directed at the plaintiff or simply overheard. That is not in any way a deviation from established legal principles. The Minnesota Court of Appeals, in interpreting this Court's decision in Continental Can, has noted the behavior is more egregious where the statements are "directed specifically at or to a particular female employee." Klink v. Ramsey Cnty. by Zacharias, 397 N.W.2d 894, 901

(Minn. Ct. App. 1986), abrogated on other grounds by, Cummings, 568 N.W.2d 418. The fact that comments are not directed at the Petitioner, but simply overheard, while "not dispositive" is an appropriate consideration. Reid-Lamm v. Time Warner Entm't Co., Ltd. P'ship, No. 3:10-cv-00077-W, 2011 WL 1883113 (W.D. N.C. 2011); Moseby-Grant v. City of Hegerstown, 830 F.3d 326, 336 (4th Cir. 2010) (same).

All the circumstances must be considered, and whether or not the comment is directed at the Petitioner is a relevant circumstance. Smith v. Ashland, Inc., 179 F.Supp.2d 1065 (D. Minn. 2000) (plaintiff has not asserted the comments were directed at her, they were merely uttered in her presence. Plaintiff has not alleged comments sufficiently severe or pervasive to constitute actionable harassment).

The second alleged error was the court's alleged failure to consider the testimony of co-workers. (Petitioner's brief, p. 40). However, Petitioner does not make any specific reference to the court's summary judgment order to support the contention that the court disregarded the co-worker's comments. The court made express findings[11] as to the testimony of co-workers.

Petitioner contends, with citation to nothing, that the court failed to consider the comment that Miner made about Ebner's wife. (Petitioner's brief, p. 41). However, in Finding 13, the court specifically found Miner had made this comment. The court acknowledged (Finding 14) that Petitioner felt Miner's comment about Ebner's wife was

[11]See Findings nos. 5, 8, 9, 10, 11, 12, 15, 16, 20, 23, 24, 25, 26, 28, 31, 33, 35.

inappropriate. The court specifically found (¶ 34) Miner had acknowledged making the "not bad" comment.

Petitioner further contends the court failed to take into account the "women have their place" comment. (Petitioner's brief, p. 41). However, the court specifically found (Finding 25) Miner, Case and Robideau were present when Miner made this comment, that the Petitioner subsequently reported this comment to the union steward and the principal, that a meeting thereafter was held with all custodians and Petitioner did not at that meeting mention this comment. All of these findings were well supported by the evidence.

Finally, Petitioner contends the court failed to consider the alleged "the only place women should be is in the bedroom and the kitchen" comment. (Petitioner's brief, p. 41). However, the court also made specific findings regarding this comment (Finding no. 15).

For a third alleged error, Petitioner contends the court failed to consider that the harassment is intensified because it was perpetrated by a supervisor. (Petitioner's brief, pp. 41-42). Petitioner contends it is "well established that a supervisor's remarks, when directed to a subordinate, impact the severity" than a co-worker comment. (Petitioner's brief, p. 42). Again, while Petitioner now contends this principle is "well established," Petitioner did not, at the district court level, cite any cases for that proposition or even raise the proposition. Again, Petitioner cannot raise, as an error of law, an issue that Petitioner did not present to the district court.

In a further irony, Petitioner contends the court erred (Id.), by not intensifying the conduct because it was directed to the Petitioner by a supervisor, but then erred in

determining the conduct was less intense because it was not directed at the Petitioner by her supervisor.

Fourth, Petitioner contends the court failed to consider Miner's conduct as a whole. Again, however, Petitioner fails to cite to any place in the court's order where it might appear the court did not consider all of the circumstances. The court specifically concluded it must look at the "totality of the circumstances." (PA 00025). It must consider "whether a string of isolated instances demonstrates a hostile work environment." (Id.) It must consider "the frequency of the discriminatory conduct." The court applied the correct standard. All the findings are supported by the evidence and all the conclusions are supported by the findings. The court considered all of the comments and conduct alleged, that reported by co-workers and that simply overheard by the Petitioner. The court considered comments Miner had made when Petitioner was not present, and considered comments made when Petitioner was present. The court assumed, *arguendo*, that even if "the court found all of these comments to be inappropriate, they are not severe or pervasive enough to constitute a hostile work environment."[12] The court considered the federal case of Thompson, and noted the court there determined there was no hostile environment as a matter of law.

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[12]Petitioner contends that the conduct extended from May, 2006 until "at least" the spring of 2007. (Petitioner's brief, p. 43). As seen, fully 60% of the comments (3 out of 5) occurred in a conversation overheard on Miner's second day on the job. The only comment that occurred subsequent was Miner's alleged comment to Case on December 19, 2006.

The district court relied (P-Add 000012-15), on Hervey v. Cnty. of Koochiching, 527 F.3d 711 (8th Cir. 2008). The court again did not err in relying upon that case, as the facts of that case are as close to ours as any of the many dozens cited to this court in the various briefs. Plaintiff Hervey worked as a jail administrator for Koochiching County, and reported to the sheriff and under sheriff. A new organizational chart changed her reporting structure and Hervey (much like Petitioner), immediately "objected to the new reporting structure." Id. at 716. She emailed her supervisor to voice her objections, which caused the supervisor to become upset and made him "so damn mad." Id. A series of disputes continued between Hervey and her supervisors. She questioned the sheriff's instructions to the county attorney, which caused her supervisors to storm into her office to complain about her going outside of departmental channels. Id. Unlike Petitioner, Hervey's duties were then reduced and her responsibilities reassigned. Unlike Petitioner, Hervey received "mixed reviews." Id. at 716. Similar to Petitioner, however, Hervey also disagreed with her evaluation and took time off of work "to prepare a formal complaint against" her supervisors. Id., pp. 716-17. Her supervisor became upset and called her a liar. Similar to Petitioner, Hervey's supervisor required her to wear a uniform. Unlike Petitioner, this was a demotion, as she was required to go from a white shirt to a brown shirt to suggest she was "no longer a supervisor." Id.

Because the conduct was not sexual, Hervey was required to establish the action taken was taken "because she was a woman." Id. at 718. The district court determined she did not present such evidence and granted summary judgment. The 8th Circuit affirmed.

> Hervey claims that [supervisors] created a hostile environment by, among other things, constantly criticizing her, requiring her to report to [her supervisor], and yelling at her on several occasions...Even if we assume that [supervisor's] actions were abusive, Hervey must "prove that she was the target of harassment because of her sex and that the offensive behavior was not merely non-actionable, vulgar behavior. This distinction is important because "Title VII does not prohibit all verbal or physical harassment in the workplace and is not a general civility code for the American workplace." Hervey has failed to produce such evidence. She simply recites a list of actions that [supervisors] took against her, and claims that they were taken because she is a woman. This is insufficient evidence to support an inference of discrimination.

(Id. at 722) (internal citations omitted).

The district court relied upon this Court's decision in Goins, in which the plaintiff alleged she had been the subject of scrutiny, gossip, stares and glares, and she was subject to "restrictions on the use of the restroom near her work station..." 65 N.W.2d at 725-26. The district court also granted summary judgment. The court of appeals reversed, but this Court reversed the lower appellate court and reinstated the summary dismissal concluding the behavior alleged "was not of the type of severe or pervasive harassment required to sustain an actionable hostile work environment claim." Id.

The court made many findings, none of which are challenged. The court then made various legal conclusions and did not in any way depart from proper analysis of the (theoretical) claim as articulated in the sexual harassment context by this Court. Petitioner contends the court committed error by not considering all of the evidence in precisely the language she would have preferred, based upon legal principles and theories not articulated to the district court.

The fact of the matter is that Petitioner simply does not like the result, but the court did not err in reaching that result. Indeed, we have cited to this Court a great many cases where behavior was far more egregious than that alleged here, yet summary judgment was granted and affirmed. Even considering Petitioner's cases, courts have affirmed a summary dismissal even where the behavior was sexual and more egregious (Nava v. City of Santa Fe), or where the behavior was not sexual, but aggressive and hostile behavior by a supervisor, because the behavior was no different than that toward men, the summary dismissal was affirmed. (Payne). The court was well within well established jurisprudence in reaching the conclusion it did. A handful of comments, overheard and not repeated, in a nine year employment history, is insufficient as a matter of law.

As to Miner's conduct in enforcing work rules, not only was the behavior not physically threatening, severe, pervasive or hostile, but Petitioner wholly fails to establish that it was "but for" her gender. That is, Where the conduct alleged is sexual harassment, the "because of" requirement of the statute is satisfied expressly because the statutory requirement of sexual behavior. If the conduct meets the definition of sexual harassment, it is sexual harassment regardless of sexual orientation, sexual desire, or "because of" the sex of the victim. Cummings, 568 N.W.2d at 422. If (as Petitioner suggests), sexual conduct is no longer required, Petitioner must then otherwise establish Respondent's behavior was "because of" Petitioner's gender. She does not. Everyone was required to wear their uniforms. Obviously everybody was required to clean, and was subject to scrutiny, in that everybody lodged complaints about Miner's direct supervision.

Everyone was required to break at the same time in the same room. Petitioner objected and got special dispensation. There was, of course, no need for the men, breaking with Miner, to check in with him at break, in light of the fact they were sitting next to each other. Petitioner chose to break separately, and was asked to check in. She objected and received special treatment.

As the district court noted, Miner had received very specific instructions to assure the building was cleaner and was told to accomplish this by closely monitoring work performance and breaks to assure people stayed on task and got their job done. Petitioner does no so much as put forth an argument in her brief as to how she can establish the "because of" element. Admittedly, Miner, initially, was harsh. It appears he may have yelled in the gym, and got frustrated when he couldn't find his keys. The fact he did not yell because Petitioner is female is proven by the fact the two males present also filed grievances regarding his yelling and it is not hard to understand his frustration when, having exhausted his search, Jane Case calmly pulls the keys out of her pocket and hands them to him. Perhaps a more patient purpose could have managed to keep their frustration internal, but as this Court has said repeatedly, [13] employers are not obligated to maintain a pristine working environment.

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[13]This Court has repeatedly confirmed that the MHRA does not mandate the maintenance of a "pristine work environment." Continental Can, 297 N.W.2d at 249; Cummings, 556 N.W.2d at 589; Frieler, 751 N.W.2d at 582.

Petitioner closes with an attempt to discuss four cases which she contends support a denial of a summary judgment motion. With one exception, those involve behaviors of either sexual conduct or physical abuse, and the behaviors were far more egregious.

The one exception is Sturm-Sandstrom v. County of Cook, the case did not involve any sexual behavior, nor any physical abuse. The behaviors were not extreme, yet the district court did deny the motion for summary judgment. All of the analysis, however, of the decision went to the constructive discharge claim, and the court's discussion of the hostile environment claim was nothing much more than a brief "see above." 552 F.Supp.2d at 945, 951 (D. Minn. 2008). Nor, as set out previously, did the court in any way discuss or consider the MHRA. That case should be contrasted to Hershey, an 8th Circuit case. Hershey's allegations alleged essentially all of the same conduct alleged by Petitioner here, and quite a bit more. In that case, the district court granted summary judgment, and that was upheld on the 8th Circuit. Other than that, the cases Petitioner relies upon are not reasonably comparable to this one.

In Jenson, supra, the non-sexual behavior was extreme. For the first ten years, women were not allowed to work for the employer at all. Even after women were allowed to become employed, men continued to operate every supervisory and managerial position. Jensen, 824 F.Supp. at 879. The fact men held every position of management resulted in a sexualized workplace. The court noted that almost every reference to sex and to women was to refer to women as sexual objects. Id. Here, Petitioner alleges no reference to women as sexual objects other than referring to a male co-worker's wife as "not bad." In Jensen, visual references to sex and to women as

sexual objects was found throughout the workplace. These objects were found in every location where the women worked, where they ate and where they "attended to their personal needs while at work." Id. at 879-80. All of the evidence showed that all of the men felt free to and did exhibit sexually focused material "anywhere they chose." Id. The women attempted to remove the pornographic pictures, erase and obliterate the graffiti, and complain about the verbal comments, to no avail. Id. at 883.

Petitioner relies upon Andrew v. City of Philadelphia, 895 F.2d 1465 (3d Cir. 1990). The appellate court did disagree with the trial court for focusing too heavily on simply the sexual aspects. That is, the court was correct to consider the "pornography" and displaying of "sexual objects" on the desk. Id. at 1486. In addition, the court should have considered the fact the plaintiff's work files disappeared from her desk, her work files on her desk would be scribbled on (she was a police officer), her case files on her desk were ripped apart. Her personal property was vandalized. Her tires were slashed and her car was scratched and the windshield broken. Someone poured soda into typewriter, and ripped the cover off her motor vehicle code book. All of this was complained about and none of this was investigated. Id. at 1473-74. An anonymous caller told her her mother was sleeping with a female co-worker. She and a female co-worker were referred to as bitches. Id. Lime was then placed on the inside of her shirt causing her severe burns.

Finally, in Hall v. Gus Constr., the plaintiffs were referred to as "fucking flag girls." Carol LaMont was referred to as Carol LaMont. Darla Hall was asked if she "wanted to fuck." Carol LaMont was asked if she was willing to clean the bleachers.

Darla Hall was asked to engage in oral sex with her supervisor. Carol LaMont was asked to check in with her supervisor so he knew whether she was on break or not. Darla Hall was cornered between two vehicles so that one crew member could pick her up and hold her against the cab window so the other men could fondle her. Carol LaMont was told to stop talking so much and get to work. Darla Hall's supervisor pulled down his pants and mooned her. Doug Miner asked Carol LaMont if she knew where his keys were.

Indeed, it could be said Petitioner received preferential treatment. Petitioner didn't want to take breaks with the rest of the crew. She complained and the rule was overturned. She didn't want to check in in person with her supervisor. She complained and the rule was overturned. She got irritated when Miner wouldn't turn the lights off when she told him to. She complained and the lights were off the next day. Case was suspended for throwing down her broom and storming off to see the principal to see if she could get Jones fired. Her suspension was overturned, and Jones quit. The district court did not err in its application of law, and should be affirmed.

III. Conclusion.

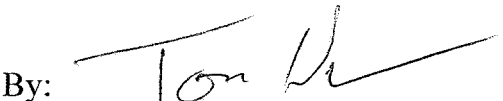
The court of appeals correctly analyzed the MHRA. The statute does not provide for a cause of action of gender harassment. Any such modification is for the legislature. The court of appeals should be affirmed.

In the alternative, should the Court disagree with the court of appeals on that legal issue, it then must reach the underlying issue that the court of appeals did not. The district court considered the claim, analyzed it and dismissed it. There were no genuine

issues of material fact and the court did not err in its application of law. Should the court reach it, the district court's order granting summary judgment should be affirmed. [14]

Respectfully submitted,
FOLEY & MANSFIELD, PLLP

Dated: 6/17/11

By: 

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[14]Because the district court held that Petitioner did not establish a hostile environment, the court was not required to consider the Faragher/Ellerth defenses. This is similar to Thompson, in which the court noted that because it was determined the plaintiff had not established a hostile environment, it "need not decide whether Thompson established the final factor of her prima facie case, namely knowledge and lack of remedial action on the part of the employer." 845 F.Supp. 665, 674, n.7. Should this Court evaluate the district court's summary dismissal, we suggest it should be affirmed for the reasons articulated above. If it is not fully affirmed, a remand would be necessary to determine whether Respondent had practices in place to eliminate harassment, and Petitioner failed to take steps to limit the harassment. See generally, Frieler, 751 N.W.2d at 568-69. We do note briefly that most of Petitioner's complaints were either never reported, or were addressed and eliminated immediately. When for the first time Petitioner suggested discriminatory treatment, she met with HR within hours. HR retained a private investigator. Unfortunately, before an investigation was complete, Petitioner had already filed her charge of discrimination with the Human Rights Department.

STATE OF MINNESOTA
IN SUPREME COURT

Carol J. LaMont,

Appellant,

v.

Independent School District #728

Respondent.

CERTIFICATION OF BRIEF LENGTH

Appellate Court File No.: A10-543
Trial Court File No.: 71-CV-09-602

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subdivisions 1 and 3, for a brief produced with a proportional font, using a 13-point font. The length of the brief is 16,155 words. This brief was prepared using Word 2007.

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