

Nos. A05-158 and A05-473

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State of Minnesota  
**In Court of Appeals**

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Lester Wenigar,

*Respondent,*

vs.

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

*Appellant.*

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**RESPONDENT'S BRIEF AND APPENDIX**

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## STATEMENT OF ISSUES

1. Whether the district court was correct in finding Appellant liable under the Federal and State FLSAS.

**Apposite authorities:**

*Maneja v. Waialua*, 349 U.S. 254 (1955)

*Hearnsberger v. Gillespie*, 435 F.2d 926, 929 (8<sup>th</sup> Cir. 1970)

*Walling v. Friend*, 156 F.2d 429, 432 (8th Cir. 1946)

29 C.F.R. § 785.20

2. Whether the district court was correct in finding Appellant liable for a disability hostile work environment claim under the MHRA.

**Apposite authorities.**

42 U.S.C. § 12112(a)

Minn. Stat. § 363 et al.

*Shaver v. Independent Stave Company*,  
350 F.3d 716, 720 (8<sup>th</sup> Cir. 2003).

*St. Hilairie v. Minco Products, Inc.*,  
288 F. Supp. 2d 999 (D. Minn. 2003)

3. Whether the district court was correct in finding Appellate liable for the claim of Intentional Infliction of motional Distress.

**Apposite authorities.**

*Kelly v. City of Minneapolis*,  
598 N.W.2d 657 (Minn. 1999)

*Moysis v. DTG Datanet*,  
278 F.3d 819 (C.A. 8 (S.D.) 2002)

## STATEMENT OF FACTS

### A. Lee Johnson's Businesses.

All of Johnson's businesses (i.e. Stratton Farms, Johnson Sanitation, Johnsons) had the address of 1000 – 261<sup>st</sup> Ave. N.E., Isanti, Minnesota. (12/17/03, T. 37-38). All of the businesses had the same location, the same office, and Johnson ran all of the businesses together. (Id.). Johnson owned all of the businesses. (Id.). All of Johnson's assets and businesses were intermingled on the one tax return. (Id. at 38-39). Johnson testified that Wenigar only worked for Stratton Farms and believed that his checks stated "Stratton Farms," but later, Johnson admitted that the checks stated "Johnsons<sup>1</sup>." (Id.).

### B. Wenigar's Disability.

Wenigar's I.Q. is 54. (12/29/03, T. 87-88). Wenigar has trouble reading and writing. (Id. at 93). He can "a little bit" but described it as his downfall. (Id.). He could not fill out job applications, because he "can't figure out the applications." (Id. at 95-96). Between his jobs, he would try to find other work, but it was difficult because it was hard for him to read the paper (the help wanted ads). (Id. at 98). He has never filled out a job application, and when he would try to find work he would tell the employers that he couldn't read or write. (Id.). On the notes that Wenigar wrote down what he did during the day, he didn't write down everything that he did because he "can't make sense out

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<sup>1</sup> The names of Johnson's businesses were interchanged throughout Wenigar's employment. See, Appellant's Appendix p. 65 ("Stratton"), pp. 95-96 ("Johnson Sanitation"), Respondent's Appendix pp. 2-4 ("Johnsons"), pp. 8-15 ("Johnson Sanitation"), pp. 17-19 ("Stratton Farms").

real good,” and “didn’t write it down because I don’t got ability to write real good.” (1/6/04, T. 22-23). Wenigar can read his own writing, but cannot read anyone else’s. (1/2/04, T. 41). He cannot read the newspaper or books. (Id.). He cannot read his friend Deloris Thomas’ handwriting. (Id.). He has never had a driver’s license. (Id. at 28).

During Wenigar’s employment, Johnson knew Wenigar was “slow” and had a low I.Q. (12/17-03, T. 106). Johnson felt that Wenigar had a handicap. (Id. at 112). A “bunch of young employees” were told not to tease Wenigar, because Johnson was scared that Wenigar would hurt them because of his mental disability. (Id. at 105-106). Johnson told them, “you should thank God that you weren’t born with that handicap.” (Id. at 111). Johnson testified that some employees would tease Wenigar. (Id. at 107). Julie Feiertag (a coworker) testified that Wenigar had a limited mental capability. (1/6/04, T. 106).

**C. The First Years of Employment with Johnson.**

When Wenigar first started working for Johnson he worked Mondays through Saturdays from approximately 7:00 a.m. until 4:30 p.m. and liked those hours. (12/29/03, T. 106). Deloris Thomas, a friend that Wenigar has lived with since 1988, would drive Wenigar to and from work every day. (Id. at 179-180). Thomas did not have a problem driving Wenigar each day and wanted him to come home each night. (Id.).

When Wenigar first started working for Johnson, he told Thomas that it was a really good job and that he was happy to be there. (12/17/03, T. 180). In the beginning, Wenigar and Julie Feiertag (another Johnson employee) did all of the work at Bunker Lake. (12/29/03, T. 107). Feiertag worked about the same number of hours as Wenigar and they both worked hard to get everything done. (Id.). Each night Wenigar went home,

and he liked going home at night. (Id. at 107-108). When he first started working, Johnson treated him like a good worker and Wenigar called him “bud” and “dad.” (1/6/04, T. 24).

**D. Night-watch Duties are Added to Wenigar’s Routine.**

In '94 Johnson told Wenigar that he wanted him to watch the place overnight. (12/29/03, T. 108). Johnson said that he was having trouble with people breaking up the place or -- and stealing stuff. (Id.). Wenigar agreed to stay overnight. (Id. at 107). Johnson “needed him,” and Wenigar’s father had told him, “anybody need you, you stay to the job ‘til it gets done.” (Id.). After he began staying overnight at the Bunker Lake location, Wenigar would go home Saturday nights and come back on Sundays. (12/29/03, T. 109).

When Wenigar started as night watch, Johnson told him that if he heard a noise and went out and found someone, that he should just holler at them and tell them to get off the land, and if they didn’t to call the cops. (12/29/03, T. 113). At Bunker Lake, Wenigar would find young kids on the property having parties. (Id.). At Bunker Lake, Johnson also had fuel barrels, and told Wenigar to watch the barrels (so no one would steal gas). (Id. at 114).

Feiertag testified that Johnson gave Wenigar and herself the instruction that if someone was trying to tamper with or break into anything on the farm that they were instructed to call the sheriff. (1/6/04, T. 111). Feiertag heard Johnson tell Wenigar that “if someone comes at night, don’t do anything yourself, call the sheriff.” (Id. at 112). Johnson had told Feiertag the same thing. (Id.). Johnson testified that he never told

Wenigar or Feiertag what to do at night if someone came onto the property, or that they should go out and see what was happening and then call the police. (12/17/03, T. 149).

Johnson told Wenigar that “when the companies not there anymore,” Wenigar would get paid for night watch. (Id. at 116). Wenigar never put the night watch hours on his timecard, because Johnson told him not to. (Id. at 116-117). In 1994, Wenigar was sleeping 3 to 4 hours at night, and he didn’t “try to catch rest” during the day, because he didn’t have time. (Id. at 118-119).

In the beginning it seemed to Thomas that it was fine with Wenigar to stay overnight. (12/17/03, T. 184). But that changed as he began getting really tired from doing the night watch duties and working all day. (Id.).

Thomas had a telephone conversation with Johnson in which she asked about Wenigar doing the night watch duties, and she told Johnson that they were hard for Wenigar to do. (12/17/03, T. 184-185). Johnson responded that, “Les can handle it.” (Id.). Thomas told Johnson that she wasn’t so sure, that it was really hard for him, and that he needed sleep too. (Id.). Johnson responded that, “I need someone around here to watch the property” and “I need Les to watch the property.”<sup>2</sup> (Id.). In one conversation, Johnson told Thomas that Wenigar would be paid later for the night watchman duties, but did not say how much. (Id. at 186-187).

#### **E. The Way That Wenigar Was Treated Changed During The Business Move.**

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<sup>2</sup> During the time that Wenigar worked for Johnson, Thomas had approximately 15 conversations with Johnson. At first they talked and got along normal, but after Thomas began to voice her opinions about how Wenigar was treated, Johnson became “nasty”

At some point while Wenigar worked at the Bunker Lake location, Feiertag began working up at the Isanti location. (12/29/03, T. 110). When Feiertag began working at Isanti, Wenigar's work changed because he then had to do all of the work at Bunker. (Id.). After Feiertag and Johnson started working at Isanti, Wenigar started getting up at 4:00 a.m. to see that the food by-product trucks were on the route. (Id. at 119).

After Feiertag left Bunker Lake, no one helped Wenigar there. (12/29/03, T. 123). When he wouldn't get the work done, Johnson would get mad and act angry and frustrated. (Id.). Many times while at Bunker Lake, Wenigar would complain that there was too much work for him to do. (Id. at 128).

One time at Bunker Lake, Johnson caught Wenigar sitting down and Johnson acted mad and told him, "Get up there and get down to work." (12/29/03, T. 120). Wenigar was scared because "of his I.Q. when someone yells at him he gets scared." (Id.). When Johnson caught Wenigar sitting down, it was the first time that he yelled at Wenigar. (Id.). After that "he kept yelling lots of times." (Id.). Johnson did not give Wenigar breaks in the morning or the afternoon, and Wenigar didn't normally have any time to eat lunch. (Id. at 121).

#### **F. The Food By-Product Routes and Wenigar's Involvement.**

When Wenigar first started for Johnson, he did not go out on the routes to pick up food by-products, but at some point after they moved to Isanti, if Johnson had to go out on the route, he took Wenigar with him. (12/17/03 T. 53-54). Also in '96 or '97, a

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towards her and made comments such as "it's none of your business" and "do you want to come down here and run this company." (12/17.03, T. 185-186).

driver named Brad Burk told Johnson that he needed help on the route. (12/29/03, T. 129). After that Les Wenigar started going on the route every day. (Id.). Brad Burk would get to the farm at 3:00 a.m., so Wenigar was up and ready to go by then. (Id.). Burk and Wenigar would return between 12:00 and 2:00 p.m. (Id. at 130). Johnson testified that in 1998, 1999 and 2000, Wenigar would start at 3:00 a.m., if he was going on the route, because the trucks were to leave by 4:00 a.m. to beat the traffic to the Twin Cities. (Id. at 56).

Johnson's son, Steve, showed Wenigar how to get the trucks ready in the morning. (1/2/04, T. 14-15). At 2:30 or 3:00 a.m., Wenigar would check the truck's oil, drain the truck's air tanks, put the cans on the truck, start the truck to warm it up, and build up the air pressure. (Id.). If Wenigar would have waited to do this until the drivers came in, it would have put him behind schedule. (Id.).

In 1999 and 2000, when there were two drivers that went out on the food by-product routes, Wenigar would either go out with Matt Johnson or the other driver. Id. at 105). At the time that Wenigar got hurt (March of 2001), Matt Johnson testified that he was working with him 14 to 16 hours per day. (1/6/04, T. 101). Matt Johnson and Wenigar started each day around 2:00 a.m., and some days started between 1:00 and 2:00 a.m. (Id. at 112-113). Matt Johnson and Wenigar would then stop working together between 3:00 and 4:00 p.m., when Matt Johnson went home. (Id.).

Bill Haluptzok was a driver that drove the route for about two years, first from Bunker Lake and later from Isanti. (12/17/03, T. 125). Sometimes, Wenigar would also

go on the route with Haluptzok. (Id. at 126-127). Haluptzok testified that his hours working on the route were from 3:00 – 4:00 a.m. until 2:00 – 3:00 p.m. (Id.).

When Wenigar went out on the route, he was paid by the can and not by the hour. (Id. at 71, 75). Johnson testified that if an employee got paid by the hour while working on the farm, and then was paid by the can while on the route, he was not paid overtime for the time spent on the route.<sup>3</sup> (Id. 73-74). Johnson never explained to Wenigar that he would not be getting paid overtime for the time he spent on the route. (Id. at 76).

#### **G. Wenigar's Hours and Duties on the Farm.**

After Wenigar would get back to the farm from the food by-product routes, he would bed down the pigs and take care of his chores, which included watering the pigs, cleaning the slab, cleaning the pens out, seeing if there were any dead pigs and checking the fences. (12/29/03, T. 130). The chores that Wenigar did, took the entire afternoon, and then he would start washing cans. (1/2/04, T. 32).

Feiertag testified that if Wenigar was helping to dump the barrels off the food byproduct trucks, it would take him about two hours to feed the pigs. (1/6/04, T. 108). Bedding the pigs would take Wenigar about two hours each day. (Id.). Feiertag testified that washing the cans (barrels from the food byproduct route) would take Wenigar three to five hours each day. (Id.). Besides watering, bedding, feeding the pigs and hauling manure, if Wenigar had extra time he would do other things such as check the fence line. (Id. at 31-32).

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<sup>3</sup> An effect of this practice was further avoidance of overtime pay when working for two of Johnson's entities.

Wenigar would get his chores done around 5:00 or 6:00 p.m. and then would wash cans until 11:00 p.m. (12/29/03, T. 130). The vast majority of the time that Wenigar worked for Johnson, he washed cans every night. (Id. at 122). It would take Johnson himself at least three minutes to wash a can. (Id. at 120).

Sometimes, Wenigar would not get all of the cans done by 10:00 or 11:00 p.m. (Id. at 35-36). On Mondays he wouldn't get them all washed, but would get enough done to go on the route the next day, which was 36 stacks of 7 cans per stack. (Id.). The cans that were left over from Monday nights would be washed on Tuesdays. (Id.).

Johnson testified that on the average they did 130 to 150 cans on the route per day, with Mondays averaging 200 to 230. (1/17/03, T. 64, 70). On one of Wenigar's timecards he wrote down the actual number of cans he washed each day of the week beginning with 322 cans on Monday. Johnson admitted that it was possible that Wenigar washed that many on that day. (12/17/03, T. 140-141). For the remainder of the week, Wenigar washed 147 cans on Tuesday, 200 on Wednesday, 183 on Thursday, 202 on Friday, and 203 on Sunday.

#### **H. Wenigar Experienced a Hostile, Demeaning and Exploitative Workplace.**

Matt Johnson testified that Lee Johnson would yell and swear at Wenigar. (1/6/04, T. 122). Lee Johnson would use "your average swear words" such as "fuck" and "shit" and make comments along the line of "Go do your fucking job." (Id. at 123). Lee Johnson swore at everyone on the farm. (Id. at 132, 146). Lee Johnson would always be yelling. (Id. at 146). At both Bunker Lake and Isanti, Feiertag would hear Lee Johnson swearing, and swearing was common. (Id. at 85-87).

In contrast to his employees testimony, Johnson testified that he never yelled at Wenigar or any other employees for not getting the work done. (12/17/03, T. 93).

Johnson claims he never swore at any employees. (Id. at 102).

A couple of times a month, employees would throw food, tomatoes, at Wenigar. (1/6/04, T. 126-127). Feiertag heard employees, including Matt Johnson, make jokes about Wenigar's I.Q. (1/6/04, T. 112-113). On occasion, Matt Johnson would make fun of how Wenigar talked. Id. at 113). Bill Haluptzok would hear another driver call Wenigar names such as "fucking dumb ass," "brain dead," and "an idiot." (12/17/03, T. 128-129, 133). Wenigar would hear other employees make fun of him and call him names such as "stupid" and "no good shit." (1/2/04, T. 69).

When Wenigar moved to Stratton farms, Johnson was "treating him real bad." (1/2/04, T. 58). Every day Johnson would call him names and hollar at Wenigar. (Id. at 58-59). He would swear at Wenigar and say things like, "You dumb fucker, you get back to work." (Id.). This hurt Wenigar's feelings because, "I ain't dumb. Just because I'm a little slow, I'm not dumb." (Id.). Johnson would call Wenigar "stupid, retard, no good shit, I come from a retarded family, my ma and my dad retarded and stupid, I come from a stupid family." (Id.).

Johnson would be present when other employees were calling Wenigar names. (1/2/04, T. 69-72). On one occasion in '98, Johnson was standing in front of the steps a short distance from Matt Johnson and Tim Kilpatrick who were yelling at Wenigar. (Id.). Wenigar asked Johnson "how come the kids are calling me names" and Johnson responded, "That's good for you." (Id.).

In January of 1999, Wenigar was supposed to have a week vacation, but on that Tuesday, Johnson came to Wenigar and Thomas' trailer to talk to Wenigar. (12/17/03, T. 197). Thomas could hear Johnson yelling at Wenigar and telling him, "goddamit, this goddamn work needs to get done. Nobody is watching the property." (Id.). After the conversation, Wenigar told Thomas that he had to go to work, and left. (Id.).

In '96 and '97, Wenigar would tell Thomas about some of the things that were going on at the farm, like him being blamed for stuff, or Johnson would short him on his hours, or that Johnson would yell at him for breaking something while Wenigar tried to tell Johnson that he wasn't near the thing that broke. (12/17/03, T. 188). Wenigar complained to Thomas that he wasn't getting any breaks, and that Johnson would throw away his food, and that he was swearing and calling Wenigar names all of the time. (12/17/03, T. 189). Wenigar would tell Thomas that Johnson would call him, "you fucking retard" and "you idiot" "you moron" "you're worthless" "you're nothing but an idiot." (Id.). When Wenigar would talk to Thomas about the workplace he seemed very angry, defensive, almost like he was in tears. (Id. at 188-189). Wenigar also told her that the kids at the farm were teasing him and calling him names like "idiot" and "retard." (Id. at 190).

On Fridays, Wenigar would get his checks and then be taken to the bank to cash them. (1/2/04, T. 4). Wenigar would keep some of the money, and give the rest to Johnson because of things that broke and dead livestock. (Id.). Wenigar began giving money back to Johnson in 1998 while at Stratten Farms. (1/2/04, T. 4). The first time that Wenigar paid Johnson money from his check was because of a flat tire on the manure

spreader that occurred after Wenigar had run over a piece of glass and put a hole in the tire. (Id. at 6). Wenigar was asked for the money in Johnson's office when he was told, "You owe me money for the tire." (Id.). After the initial time, Johnson asked for money back for livestock or broken machinery every week. (Id. at 6-7). Most of the time it was \$100.00. (Id.).

Wenigar would sometimes tell Johnson that he needed a break to rest, and Johnson would tell him, "No, you get out there and you get the work done. That's what I'm paying you for to get it done." (1/2/04, T 47-48). On one occasion, when Johnson and Wenigar were out on the route, they stopped by Keys Restaurant, and Johnson told the waitress, "Get the stupid help a cup of coffee." (1/6/04, T. 26-27). This made Wenigar feel real hurt and he went out to the truck and cried a little bit until Johnson came out. (Id.).

The room at Stratton farms, in the garage where Wenigar stayed, is 8' x 10'. (12/17/03, T. 150). The room was supposed to be a storeroom over the garage, not living quarters. (Id.). There was no air conditioning, no electrical outlets, no windows, no heat registers, no carpet, and no paint or wallpaper on the walls. (Id. at 163). Feiertag inexplicably described the room as a "typical bedroom." (1/6/04, T. 92).

Wenigar complained to Johnson about the room he stayed in at Stratton Farms and said that it was too cold in the wintertime and too hot in the summertime. (1/2/04, T. 61-62). In the winter it was too cold to sleep, and you could see your breath. (Id.). When it was too cold to sleep in his room, Wenigar went into Johnson's office and slept there.

Id.). Wenigar slept on two chairs that he moved back and forth between the office and his room. (Id.).

After Wenigar moved up to Stratton Farms, he would eat peanut butter sandwiches, because the refrigerator that they had moved from Bunker Lake wasn't cold enough to keep other food. (1/2/04, T. 42). He had tried to bring other food, but it had spoiled in the refrigerator. (Id.). Wenigar did not cook at Stratton Farms. Id. at 43). There was a microwave, but Johnson told Wenigar not to use it, because of the electricity bill. (Id.). Wenigar would get the bread and peanut butter, but would not sit down and eat, he kept working. (1/2/04, T. 63).

Wenigar used to also eat apples and oranges out of the pig barrels, because it was something to eat. (1/2/04, T. 43-44). Matt Johnson would see Wenigar eating out of the garbage nearly every day. (1/6/04, T. 124). Wenigar was hungry during the day, and sometimes would eat an apple while he was unloading trucks or doing bedding. (1/2/04, T. 44). Johnson would take time off from Wenigar's timecards, and would say it's for lunch, but Wenigar never took lunch breaks. (Id. at 46-47).

On one occasion, Wenigar was eating his lunch in Johnson's office. (1/2/04, T. 64-65). When Johnson saw Wenigar he said, "Get out and get the work done. You ain't got time to eat." (Id.). After Johnson said that, he threw Wenigar's food into the garbage barrel. (Id.). Wenigar remembered that it was on a Wednesday that this happened, because that was the slowest day, and he had a chance to eat. (Id. at 68-69). Wenigar ate apples and oranges that he saved from the pig barrels the rest of the week. (Id.). There were quite a few other times that Johnson threw away Wenigar's food. (Id. at 64-65).

Wenigar would sometimes take short lunch breaks when out on the route, but didn't stop and sit down, "we kept moving all of the time." (1/2/04, T. 62). Sometimes the driver on the route would stop at MacDonaldis and buy Wenigar a hamburger and milk. (Id. at 63). Sometimes after Wenigar got off the route, Brad Burk would say, "Let's have a little break" and they sat down for a few minutes and ate and got up and run. (1/2/04, T. 65). They would sometimes sit down for five minutes, "that's it." (Id.). Wenigar would not "sit on my butt and eat lunch like everyone else, because if I sat down, Lee jump on me." (Id.).

Thomas told Wenigar to quit working for Johnson, but his response was, "Where would I find another job?" (12/17/03, T. 193). Wenigar was afraid of Johnson who told him that he would sabotage other jobs and tell people "mean things" about him. (Id. at 225-226). Johnson told Wenigar that if he ever quit, he would never get another job, because Johnson would do something about it so that he wouldn't ever get another job again. (12/29/03, T. 132). If Wenigar quit, and tried to get another job, Johnson told Wenigar that he would tell other people that he was stupid and retarded. (1/2/04, T. 60-61).

#### **I. Wenigar's Emotional and Psychological Injuries.**

In the late 1980's and early 1990's, Deloris Thomas testified that Wenigar was really talkative, really humorous all of the time, joking a lot and really friendly. (12/17/03, T. 177). He was really fun to be around, always joking and kidding. (id.). He is a lot different now. (Id.).

In '94, '95, '96 and '97 Thomas saw Wenigar changing both physically and emotionally. (12/17/03, T. 187). Physically he looked very run down, kind of skinny and sickly looking. (Id.). Emotionally he seemed just not all there anymore, not talkative anymore, not the happy, friendly, outgoing person he always was anymore. (Id.). Into '96, '97 and '98, Wenigar would sleep the whole time that he was at home. (Id. at 187-188). Sometimes when Wenigar called Thomas on the telephone from work and talk to her about situations like Johnson calling him names, he would start crying. (12/17/03, T. 191). Wenigar told Thomas that he was afraid to put up a fuss, because Johnson would fire him if he said anything. (12/17/03, T. 192-193).

Now Wenigar doesn't really want to do things like he used to do. (12/17/03, T. 207). He seems depressed a lot, down on himself. (Id.). He doesn't like to talk to people like he used to. He just seems to want to sit and be by himself. (Id.). He's more of a loner than he used to be and just seems really depressed. (Id.). Now the majority of his time is spent at the trailer. (Id.). Wenigar sits in his back room unless he comes out for a glass of water or something. (Id.). The last time that Thomas saw Wenigar cry was a couple of days prior to her testimony (12/17/03). (Id. at 208). Wenigar was saying, "why would Lee do that to me" and "Why would Lee treat me like that, why did they call me names, why did they be mean to me, why did they call me retard and stuff like that." (Id.). Over the last couple of years, Thomas sees Wenigar cry a couple of times a week. (Id.). The crying on the telephone from work went back to '96 or '97. (12/17/03, T. 225-226). Wenigar had a hiding place in the straw at Stratton Farms where he would go and cry. (1/2/04, T. 72). One time he cried for a whole hour about "why people picking on

me all the time.” (Id.). Wenigar was crying because it hurt his feelings so bad, all of the names that he was being called and the hollering at him. (Id. at 73).

Now Wenigar doesn't like to go places. (12/29/03, T. 101). He thinks people are poking fun at him because of the way he walks “and all that stuff.” (Id.). He feels they are poking fun of him because of “how Lee treated me down there. (Id.). Before Wenigar started working for Johnson, he didn't feel that people made fun of him. (12/29/03, T. 102). He was happy back then and didn't have any trouble sleeping or have any nightmares. (Id.). Wenigar wakes up about three times a night crying. (1/2/04, T. 3). He has nightmares every night. (Id. at 2-3).

After leaving Johnson's employment, Wenigar began receiving therapy for emotional distress from Dr. Rebecca Thomley. (1/2/04, T. 89). At the time of trial, Wenigar had been taking medication for emotional distress for nearly three years. (Id. at 90). Wenigar first saw Thomley on January 20, 2002. (1/2/04, T. 87-89).

#### **J. Testimony of the Psychologists/Psychiatrists.**

Dr. Thomley treated Wenigar and is a licensed clinical psychologist who specializes in working with trauma psychology as well as working with developmental disabilities. (12/18/04, T. 3-5). On January 30, 2002, Dr. Thomley diagnosed Wenigar as suffering from PTSD and dysthymia. (Id. at 16). Dysthymia is depression lasting more than six months, but may have been for a much longer period of time based on what Wenigar was sharing with Dr. Thomley about his employment situation. (Id.).

Dr. Thomley testified that Wenigar met the symptomatology required for a diagnose in the DSM IV manual including problems with dreams, intruding thoughts,

feeling that he was threatened, and having trouble shifting and thinking. (Id. at 17).

Other symptoms included not being able to interact with others, changes in relationships, and isolation. (Id. at 19-20, Exhibit 45). A problem was present with Wenigar's social activities such as not leaving his house. (Id.). Dr. Thomley described him as passive to some extent and vulnerable. (Id.). In a letter written by Dr. Thomley on June 28, 2002, she included:

...A traumatic event that is caused by another individual, as in Les' case. Is far more difficult to recover from as there was deliberate harm intended. It is likely that Les, given his age, the length of the trauma that he experienced, and his perceived limitations cognitively may never fully recover. It could be expected that with intensive therapeutic support as well as legal intervention that he may reach his highest level of recovery in three to five years. (Exhibit 87(b))<sup>4</sup>.

Dr. Susan Phipps-Yonas is a licensed psychologist and was retained by Wenigar to provide an expert opinion in the litigation. (12/18/03, T. 32). It was Dr. Phipps-Yonas opinion that Wenigar had met the criteria for the diagnosis of PTSD with the kind of experiences he had had. (Id. at 40). Dr. Phipps-Yonas found that there was no question that Wenigar had cognitive limitations. (Id.).

Dr. Phipps Yonas testified that the types of conduct or events meeting the criteria for PTSD included really extreme verbal or psychological abuse. (Id. at 44-45). In testifying about the cause of Wenigar's injuries, Dr. Phipps Yonas stated that the experiences that Wenigar had on the farm with Johnson and some of the individuals that worked on the farm, that those abusive experiences are what constituted the traumatic stressor. (Id. at 46). It was the psychological abuse, both verbal statements and

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<sup>4</sup> See, Respondent's App. pp. 2-4. (Exhibit 87(b) was originally marked "Exhibit 23.").

the messages contained in those, that really wore Wenigar down and led him to fear that he had no options but to stay there and take the abuse. (Id. at 47). It was more the whole psychological environment there and his naivete, that made him very vulnerable to the kinds of symptoms that then follow . (Id.).

Dr. Thomas Gratzler is a board certified psychiatrist that was Johnson's expert witness. (1/2/04, T. 4). During the course of Dr. Gratzler's evaluation, he reviewed psychological testing of Wenigar that showed that he had below average intelligence and a score of 50 to 55 on an I.Q. test. (Id. at 11). Dr. Gratzler described Wenigar as borderline intellectual functioning to mild mental retardation. (Id. at 87).

Dr. Gratzler found Wenigar to be very angry about being unfairly treated. (Id. at 63). Dr. Gratzler's impression was that being called "stupid" and "retard" was an ongoing daily event. (Id. at 63-64). Dr. Gratzler was more than satisfied when Wenigar gave his version of the events that it was a negative, antagonistic, persecutory environment, and that he may have developed psychiatric symptoms in that environment. (Id. at 71-72).

Dr. Gratzler testified that he believed that Wenigar, someone with more limited cognitive abilities, might be more vulnerable to emotional and psychological injury. (Id. at 86-87). A lower I.Q. increases ones vulnerability, and is an important factor because one might not be able to look at alternative options. (Id. ).

Dr. Gratzler expected Wenigar to have developed more emotional problems than what he showed or that he reported. (Id. at 92). Dr. Gratzler assumed Wenigar to be sleep deprived, food deprived, overworked. (Id. at 95-96). He was also being constantly harassed. He was also under the influence of a boss that he assumed the worst motives

towards him and he may not have seen a lot of alternatives to that workplace, so he may have felt trapped there. (Id.).

## **ARGUMENT**

### **I. THE DISTRICT COURT WAS CORRECT IN FINDING JOHNSON LIABLE UNDER THE FEDERAL AND STATE FLSAS.**

Johnson has appealed the Trial Court's lengthy and well reasoned Findings of Fact and Conclusions of Law and Order by first briefly acknowledging their heavy burden to show the findings of fact must be reviewed under the clearly erroneous standard. Then Johnson repeatedly articulated his own version of the facts even though the Trial Court found his version lacking credibility.

Johnson also claims he is exempt from either FLSA arguing he is exempt as an agriculture or farming operation and that his revenues are below \$500,000.<sup>5</sup> Johnson fails to mention that he historically recognized that they are not exempt by paying over time to keep Wenigar pacified and unaware of how much more he was due.

#### **A. Federal Overtime**

Wenigar worked far more than 40 hours per week. Under Federal Law he should have been paid time and a half for every hour over 40, including the hours that were deducted by Johnson and the hours spent as a night watchman. 29 U.S.C. § 207.

##### **1. The Agriculture Exemption is Not Applicable**

Johnson asks this Court to apply the exemption provision of 29 U.S.C. 213 (13) as a *de novo* review of a legal conclusion, but ignores the extensive fact finding relevant to

the legal conclusions of the Trial Court. Further, Johnson makes no attempt to even address the fundamental Eighth Circuit case, Walling v. Friend, 156 F.2d 429, 432 (8th Cir. 1946), that the Trial Court specifically cited in its Findings of Fact under its FLSA analysis. (Appellants' Appendix p.22, ¶ 19 and 20).<sup>6</sup>

Johnson first fails to note that any court reviewing an exemption to the overtime protection employees are provided, such as 29 U.S.C. §213 (13), must give the exemption a strict construction.

[T]he exemptions contained in the Fair Labor Standards Act are subject to strict construction and should be extended only to those plainly within their terms. The Administrator's interpretation appears to be sound as applied to Defendant's employees and the proof as to their activities does not bring them within the exemption of employees employed in agriculture.

Walling v. Friend, 156 F.2d 429, 432 (8th Cir. 1946). "Exemptions are to be narrowly construed against the employers seeking to assert them." Hearnberger v. Gillespie, 435 F.2d 926, 929 (8<sup>th</sup> Cir. 1970).<sup>7</sup> Further, the "burden of proving an exemption from the Act rests upon the [Appellants]. Id. "Exempt status will be limited to those situations that 'plainly and unmistakably' come within the terms and spirit of Section 13 exemption

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<sup>5</sup> In Appellant's Brief they failed to note the \$537,000 received from the sale of the route. (See, Respondent's Appendix. P. 1).

<sup>6</sup> Appellants surprisingly, and unfairly, criticize the Trial Court at page 23 of their Brief arguing "the district court did not cite any supporting authority for its conclusion" in ¶ 21 of the Findings of Fact at Appellants' Appendix p. 23. This absurd claim ignores Walling cited by the Court in ¶s 19 and 20! Ironically, in the two cases cited by Appellants at page 23 of its Brief, Maneja v. Waialua 349 U.S. 254 (1955) and Mitchell v. Budd, 350 U.S.473 (1956), the U.S. Supreme Court agreed with the Trial Court here and in both cases cited by Appellants, employees were found to be non exempt and covered by the protection of the FLSA. In Mitchell, employees who dried tobacco leaves, called the "bulking process," even when done on the tobacco farm, were found to be nonexempt and covered by the FLSA.

provisions.” Id. and quoting from Arnold v. Ben Kanowsky, 361 U.S. 388, 392, 80 S.Ct. 453, 4 L.Ed. 2d 393 (1960).

The U.S. Supreme Court would not consider Johnson’s two garbage operations (the food by-product routes and Johnson Sanitation) to be exempt as agriculture. In an early case, Farmers Reservoir & Irrigation Co. v. McComb, 337 U.S. 755, 760-61, 69 S.Ct. 1274, 93 L.Ed. 1672 (1949) the court found no exemption stating:

Thus, the question as to whether a particular type of activity is agricultural is not determined by the necessity of the activity to agriculture nor by the physical similarity of the activity to that done by farmers in other situations. The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity.

Johnson cites and relies on Reich v. Tiller Helicopter Service, Inc. 8 F. 3d 1018 (5<sup>th</sup> Cir. 1993)<sup>8</sup> and the Reich Court interpreted Farmers Reservoir:

In Farmers Reservoir the Court held that work of employees of a water supply company cooperatively owned by a group of farmers was not exempt as secondary agricultural work even though the work was incidental to agriculture because it was not performed by farmers or on a farm. 337 U.S. at 767, 69 S.Ct. at 1281.

Reich at 1026.

Johnson organized two different garbage operations as independent profitable, productive activities, work that was not performed “by farmers or on a farm.”

Employees working in the two garbage operations are not subject to the agriculture exemption. The U.S. Supreme Court has even found the exemption to not apply to certain employees actually working on a farm. Johnson’s Reich Court observed that the U.S. Supreme Court later continued the analysis of Farmers Reservoir:

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<sup>7</sup> Hearnsberger was cited by Appellants at page 21 of their Brief.

Six years later in Maneja v. Waialua Agricultural Co., 349 U.S. 254, 75 S.Ct. 719, 99 L.Ed 1040 (1955), the Court again addressed the scope of the agricultural exemption. The Court held that certain employees of a corporate sugar plantation were exempt from the FLSA's wage and hour provisions while others were not exempt even though, unlike the Farmers Reservoir employees, all of the Waialua employees worked both for a farmer and on a farm. ... The effect of Waialua was to narrow the second prong of the test for secondary agricultural activity.

Reich at 1027. Waialua is cited by Appellants at page 22 of their brief for the statement that the agricultural exemption "was meant to apply broadly and to embrace the 'whole field of agriculture.'" However, two sentences later, the U.S. Supreme Court noted:

Nevertheless, no matter how broad the exemption, it was meant to apply only to agriculture and we are left with the problem of what is and what is not properly included within that term.

Id. at 260.

Numerous courts have not applied the exemption to employees who transport actual livestock. In a more recent U.S. Supreme Court case, Holly Farms Corp. v. NLRB, 517 U.S. 392, 116 S.Ct. 1396, 134 L.Ed.2d 593 (1996), the Court concluded that independent growers of broiler chickens under contract to Holly Farms were engaged in agriculture but live-haul employees of Holly Farms who caught the chickens at the contract farms and delivered them to Holly Farms' processing plant were not "themselves engaged in raising poultry." (Id. at 400) The Eighth Circuit agrees holding that employees who transport live poultry from an independent farm to their employer's processing plant are not agricultural laborers. NLRB v. Hudson Farms, Inc. 681 F.2d 1105 (8<sup>th</sup> Cir. 1982). Curiously, in a case cited by Appellants at page 20 of their Brief, Bayside Enters, Inc. v. NLRB, 429 U.S. 298, 303 (1977), the U.S. Supreme Court

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<sup>8</sup> Cited at page 19 and 24 of their brief.

concluded that truck drivers hired by a poultry farm to deliver feed to the chickens “is not work performed ‘by a farmer.’”

Although Wenigar undisputedly worked part of the time during the week for Johnson’s farming entity, and was clearly engaged in agriculture, he also worked a substantial amount of the day on non-agriculture work such as the routes, cleaning cans for the routes and standing night watch. In fact, much testimony indicated he only did his farm chores during the afternoon between 2:00 and 6:00 p.m.

The Walling decision also addressed the situation where an employee works for two distinct entities and that Court considered whether or not the employee’s hours should be analyzed separately or combined. The Walling court at page 432 quoted extensively from “Interpretative Bulletin No. 13. The Trial Court also relied on this Bulletin and quoted it verbatim. (See Appellants’ Appendix p. 22, ¶20 of the Findings of Fact.) If the time with one entity is “not completely disassociated” with the time at the other then both “should be considered as a whole for purposes of the statute.” (Id.)

For purpose of the analysis under the FLSA, Wenigar’s hours should be combined. Wenigar’s labor on the food by-product routes and cleaning cans, can not be completely disassociated from the farming operation. But from early morning hours until 12:00 or 2:00 p.m., Wenigar worked on the routes. Between 12:00 or 2:00 and 6:00 p.m., he did his farm chores. Between 6:00 and 11:00 p.m. he cleaned cans for the routes. Between 11:00 and approximately 3:00 a.m. he watched the property that included all of the businesses. Therefore, all the hours over the first 40 hours each week should have been calculated at time and a half.

In Appellants' cited case, Hearnsberger v. Gillespie, 435 F.2d 926, 929 (8<sup>th</sup> Cir. 1970), the Eighth Circuit considered a Arkansas cattle farm with only one employee who also worked for an auction company on Friday afternoons. The farmer, Gillespie, owned both business and paid his employee \$85.00 per week with a pay check from the auction company for purpose of convenience. The Court found Hearnsberger to be a joint employee of both defendants and then cited 29 C.F.R. § 780.110 finding it "to be a reasonable and proper construction of the applicable provisions of the Act":

Where an employee in the same workweek performs work which is exempt under this section 13(a)(6) and also engages in work to which the Act applies, not exempt under this or any other section of the Act, he is not exempt that week, and the wage and hour requirements of the Act are applicable.

Hearnsberger at 930. The "auction operations were clearly, under the evidence, not 'an adjunct' to the raising of livestock." Id. at 930. Hearnsberger was not exempt under the agriculture exemption.

The Minnesota Supreme Court in Otis v. Mattila 281 Minn. 187, 160 N.W.2d 691 (1968) held that the burden of proof was on Appellants to show that in any given week its employee was not subject to the FLSA.

The general rule applicable to segregation of qualifying from nonqualifying weeks is that once the employee has demonstrated regular or recurrent qualifying work for the time in question, the burden shifts to the employer to prove the segregation of weeks if he seeks such a segregation. 29 C.F.R. (Rev. 1968) §776.4(b). See, also, Anderson v. Mt. Clemens Pottery Co. 328 U.S. 680, 66 S.Ct. 1187, 90 L. ed. 1515; Wirtz v. First State Abstract & Ins. Co. (8 Cir.) 362 F.2d 83.

(Id. 193).<sup>9</sup> Here, based on the inadequate, incomplete and often, abject failure, to keep records of hours Wenigar worked for each entity during the week, Johnson has not met his burden. Johnson's historical payment of nominal overtime to Wenigar, indicates an admission that Wenigar was not an exempt employee.

Johnson argues for the first time here at the Court of Appeals that Wenigar is subject to a slightly different exemption under the Minnesota FLSA, 177.23(Subd. 7)(2) relating to the computations for a minimum "salary" amount based on the minimum wage for 48 hours plus 17 hours for "any individual employed in agriculture on a farming unit who is paid a salary." (Emphasis added) Appellants misapprehend the purpose of this section. The legislature has anticipated "Belo" type contracts discussed below. These are contracts that attempt to pay a fixed dollar amount or salary for employees who would otherwise receive overtime compensation. Section 177.23 (Subd. 7)(2) simply sets the minimum dollar amount for these fixed salaries. Here, Wenigar was always paid by the hour, and never by a salary. He was always paid overtime. This statute section is not applicable to this lawsuit.

## **2. Integrated Enterprise**

Johnson's argument that his various business operations should be considered separately fails. Even if these business operations were incorporated, for purpose of the FLSA, the group of business operations should be considered an "integrated enterprise." The term enterprise is defined by statute at 29 U.S.C. §203 (r) (1):

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<sup>9</sup> See also *29 C.F.R. § 780.10* "the burden of effecting segregation between exempt and nonexempt work as between particular workweeks is upon the employer."

"Enterprise" means the related activities performed either through unified operation or common control by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor.

The integrated enterprise test has been applied to the same FLSA argument since 1973,

Baker v. Arnheim & Neely, Inc., 410 U.S.512 (1973).

The Court should look at four standards: (1) common ownership of financial control; (2) centralized control of labor relations; (3) interrelation of operations; and, (4) common management. Fahey v. Avnet, Inc., 525 N.W.2d 568 (Minn. App. 1994) citing Baker v. Stuart Broadcasting Co., 560 F.2d 389 (8th Cir. 1977).

the most important requirement is that there be sufficient indicia of an interrelationship between the immediate corporate employer and the affiliated corporation to justify the belief on the part of an aggrieved employee that the affiliated corporation is jointly responsible for the acts of the immediate employer.

Fahey v. Avnet, Inc., 525 N.W.2d 568, 572 (Minn. App. 1994) quoting from Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983) (Emphasis added). Appellants cite Brennan v. Arnheim & Neely, Inc. 410 U.S. 512 (1973) at page 28 of their Brief. There the U.S. Supreme court reversed the Third Circuit Court of Appeals and found that a real-estate management company with contracts with nine different building owners to manage their buildings was an "enterprise" under the meaning of the FLSA for the purpose of the \$500,000 minimum gross revenue calculation.

It is the respondent management company, not the individual building owners, that has been held in this case to be the an "employer" of all the effected "employees."

Furthermore, the proper measure of the respondent's size has been held to be the gross rentals produced by properties under its management.

Id. at 513. Even though the gross rentals of each building owner was the income and property of the owner, the U.S. Supreme Court looked at the combined nine separate dollar amounts to determine that the management company met the \$500,000 gross revenue test.

Johnson cites to 29 C.F.R. §779.209(b) in arguing that their operations are not an integrated enterprise. (See Appellants' Brief at page 29.) The actual title of that Regulation and the full text prior to the quoted section in Appellants' Brief supports Wenigar, 29 C.F.R. § 779.209 Vertical activities which are "related activities."

- (a) ...activities are "related" when they are "part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products." Where such activities are performed through unified operation or common control for a common business purpose they will be regarded as a part of the enterprise.
- (b) Whether activities are vertically "related" ... depends upon the facts in each case.

Johnson's activities are related and vertical, therefore an integrated enterprise.

### **3. Appellants satisfy each element to meet the Gross Volume Sales**

If the court finds a sufficient degree of interrelatedness, the revenues of all of Johnson's various business operations are considered together.

When such a degree of interrelatedness is present, we consider the departure from the "normal" separate existence between entities an adequate reason to view the subsidiary's conduct as that of both.

Armbruster v. Quinn, 711 F.2d 1332, 1337 (6th Cir. 1983).

In his testimony, Johnson identified numerous entitled business entities under his control including "Stratton Farms, Johnson Sanitation, and Johnson." Johnson owned all of these businesses and they all had the same address. All of these businesses were intermingled on Johnson's single, personal tax return each year. It is undisputed that Johnson individually controlled the centralized day to day operations performed at the farm and on the routes. There is no other decision makers other than Johnson. He assigned the various employees to work for the various entities, some times on the very same day.

Johnson is the only manager/decision maker for all of these operations. He dictates financial planning and labor and personnel policies. Employees such as Wenigar, Matt Johnson, Julie Feirtag, Steve Johnson, and Lee Johnson, himself, routinely worked for more than one operation. All of Johnson's enterprises should be considered an integrated operation. The gross sales as the Trial Court determined (without including any deductions, especially for some questionable expenses) when totaled each year exceeds the FLSA threshold of \$500,000. Under the FLSA, Wenigar should have been paid time and a half for every hour over forty-hours he worked each week.

#### **B. Sleep Time-Federal Law**

Under certain conditions an employee is considered to be working even though some of his time is spent in sleeping or in certain other activities. (29 C.F.R. § 785.20) An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy. A telephone operator, for example, who is required to be on duty for specified hours is working even though she is permitted to sleep when not busy answering calls. Her time is given to her

employer. She is required to be on duty and the time is work-time. (29 C.F.R. § 785.21 and Central Mo. Telephone Co. v. Conwell, 170 F.2d 641 (8<sup>th</sup> Cir., 1948); Strand v. Garden Valley Telephone Co., 51 F. Supp. 898 (D. Minn. 1943).

The Trial Court found that Mr. Wenigar was required to be on duty 24 hours. But, even under Appellants' theory that Mr. Wenigar "chose" to stay overnights, absent a reasonable and specific agreement, the sleep time hours should be paid. 29 C.F.R. § 785.23. Skelly Oil Co. v. Jackson, 194 Okla. 183, 148 P.2d 182 (Okla. Sup. Ct. 1944; Thompson v. Loring Oil Co., 50 F. Supp. 213 (W.D. La. 1943).

It is undisputed that Wenigar and Johnson had no specific agreement regarding the sleep time much less a "reasonable agreement." The testimony of all the witnesses, including Johnson, makes it clear that Wenigar did not have adequate time for "eating, sleeping, entertaining and other periods of complete freedom." Wenigar was expected to be up at as early as 1:00 or 2:00 a.m. and his regular, assigned duties required him to work past 11:00 p.m. As the Trial Court found, Johnson required Wenigar to remain on the premises for the entire 24 hours and 29 C.F.R. § 785.22 applies.

In the situation, as with Wenigar, where the sleep time is less than five hours, the sleep time must be paid.

...if the employee cannot get at least 5 hours' sleep during the scheduled period the entire time is working time. (See Eustice v. Federal Cartridge Corp., 66 F. Supp. 55 (D. Minn. 1946).)

29 C.F.R. § 785.22(b). Johnson should have paid Wenigar for all twenty-four hours of each day he worked and stayed overnight, six days a week. Further, as the Trial Court

found, after the first forty-hours each week, all of these hours should have been paid at time and a half.

### **C. Sleep Time-State Law**

The Minnesota Department of Labor has promulgated rules pertaining to sleep time that are very similar to the Federal rules. *5200.0121* "SLEEPING TIME"

**Subp. 2. Duty of 24 hours or more.** If an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than eight hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted sleeping period. ... Where no expressed or implied agreement to the contrary is present, the lunch periods and up to eight hours of sleeping time constitute hours worked. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted so that the employee cannot get a minimum of five hours of sleep, the entire period must be counted as hours worked.

As under federal law, sleep time must be paid if the employee "cannot get a minimum of five hours of sleep." (Id. Subp. 2) Additionally, there was no "express or implied agreement" about Wenigar's sleep time and therefore "up to eight hours of sleeping time constitute hours worked" (had Wenigar been allowed eight hours to sleep).

### **D. Liquidated Damages**

The Trial Court found that Johnson did not show good faith for his failure to pay Wenigar for 144 hours a week plus overtime. Based on 29 U.S.C. § 260, the Court ordered liquidated damages.

An award of liquidated damages is "a finding of fact not to be set aside unless found to be 'clearly erroneous.' [Citations omitted]" Reich v. Tiller Helicopter Service, Inc., 8 F. 3d 1018, 1023 (5<sup>th</sup> Cir. 1993). Upon finding a violation of the FLSA, "the

Court in its discretion may decline to award liquidated damages if the failure to pay overtime was in good faith ...” Lane v. M’s Pub, Inc., 435 F. Supp. 917, 920 (D. Neb. 1977).

As the Trial Court found, Wenigar should have been paid 144 hours per week (24 hours per day for 6 days per week). The first 40 hours should have been paid at the regular rate. The next 104 hours should have been paid time and a half. Johnson now argues that he “thought he was paying Wenigar appropriately in reliance on his accountant’s advice.” (Appellants’ Brief at page 31). To argue that Johnson relied upon his accountant’s advice is preposterous, because the accountant was not told that Wenigar was working 144 hours a week. Johnson’s self-serving claim that he relied on his accountant ignores reality.

In Martin v. David T. Saunders Construction Co., 813 F. Supp 893 (D. Mass. 1992) the employer and his accountant attempted to set up a “Belo contract” that would pay a fixed amount for 50 hours a week, including overtime. The Court found the contract did not meet the test under the law and awarded additional overtime compensation but reserved the issue of awarding liquidated damages at the summary judgment stage saying: “I am unable to resolve this factual dispute by summary judgment. .... Based on the evidence described above, reasonable factfinders could reach differing conclusions on defendant's claimed good faith.” Id. 903.

The factfinder here certainly reached a different conclusion on Johnson’s ridiculous claim of good faith. In fact, the Court found and concluded that Johnson arbitrarily deducted hours from Wenigar’s time cards. (Conclusion of Law ¶ 11,

Appellants' Appendix p. 32). The Court concluded that Johnson "exploited" Wenigar. (Id. ¶s 7 and 8) Johnson's exploitation of Wenigar can not be done in good faith.

## **II. THE DISTRICT COURT WAS CORRECT IN FINDING JOHNSON LIABLE UNDER THE MHRA FOR DISABILITY DISCRIMINATION AND HARASSMENT.**

The District Court found that Wenigar suffered from disability discrimination and harassment and a hostile workplace environment. In its Conclusions of Law, the Court included:

2. The Court concludes that Plaintiff is a disabled person as defined under Minn. Stat. § 363A.03, subd. 12) because he has an undisputed low IQ of only 55 or less and suffers from significant mental limitations that affect several major life activities including reading, speaking and working. In addition, Defendant regarded Plaintiff as disabled.
3. The Court concludes Plaintiff suffered disability discrimination and a hostile work place environment due to his disability as defined in violation of Minn. Stat. § 363A.01, subd, (now renumbered as Minn. Stat. 363A.01 subd. 43) from at least the year 1996 until his separation from employment on April 5, 2001.

Appellant's Appendix pp. 31-32.

### **A. A Claim for Disability Discrimination Under a Hostile Work Environment Analysis has been Recognized in Federal Court.**

This analysis may be one of first impression in our State. In applying the MHRA, State courts get guidance from the interpretation of analogous federal anti-discrimination statutes by federal courts. Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn, 1986). Minnesota courts use principles arising from federal discrimination cases as a guide for interpreting MHRA.

Using federal principles, the 8<sup>th</sup> Circuit recognizes a claim for disability harassment. A similar long-standing analysis of human rights has been in existence for hostile environment sexual and racial harassment claims. The primary issue becomes whether, based on a disability, an abusive or hostile environment existed, concerning the terms and conditions of employment.

The law continues in Minnesota to be that it is an unfair employment practice for an employer to discriminate because of an employee's disability with respect to that employee's terms, conditions and privileges of employment. Minn. Stat. § 363.04 Subd. 1(2)(c). Similarly the ADA states that "no covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to ... terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

Much evidence at trial proves that Defendant Lee Johnson was able to exploit Les Wenigar because of his low I.Q. Les Wenigar was manipulated into working "around the clock" (while not being paid for much of the work), and misled into believing that he would be paid for the night watch hours. He was continually being berated, sworn at, and ridiculed. There were few terms, conditions and privileges of employment which were left untouched by Johnson's self-serving manipulations.

The drafters of the ADA borrowed the phrase "terms, conditions, and privileges of employment" directly from Title VII of the Civil Rights Act of 1964. Shaver v. Independent Stave Company, 350 F.3d 716, 720 (8<sup>th</sup> Cir. 2003). As early as 1971, the courts had construed the phrase in Title VII to create an action based on a hostile work environment, see, e.g. Rogers v. EEOC, 454 F.2d 234, 238-39 (5<sup>th</sup> Cir. 1971), and by the

time the ADA was passed in 1991, this interpretation was clearly established as the controlling federal law on the subject. Shaver at 720, *citing* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65-66) (1986).

In Shaver in 2003, the court held for the first time in the Eight Circuit that a claim for a hostile work environment under the ADA is actionable. Prior to Shaver, this Circuit had never ruled directly on the matter of whether a hostile work environment claim may be brought under the ADA, but had indicated it was possible:

We have suggested in dicta that it might be possible to bring a claim for a hostile work environment under the ADA, see, e.g. Jeseritz v. Potter, 282 F.3d 542, 547 (8<sup>th</sup> Cir. 2002), but we have never ruled directly on the matter. Today, for the reasons that follow, we join the other circuits that have decided the issue by holding that such claims are in fact actionable. Cf. Flowers v. Southern Reg'l Physician Servs., 247 F.3d 229, 232-35 (5<sup>th</sup> Cir. 2001), Fox v. General Motors Corp., 247 F.3d 169, 175-77 (4<sup>th</sup> Cir. 2001).

Shaver at 719.

In the years immediately preceding Shaver, the Eight Circuit had assumed the existence of a disability harassment claim. Hiller v. Runyon, 95 F.Supp.2d 1016, 1022-23 (S.D.Iowa 2000), *citing* Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723 (8<sup>th</sup> Cir. 1999) (assuming existence but not reaching issue as plaintiff failed to present evidence that harassment occurred because of disability) (Cody v. CIGNA Healthcare, 139 F.3d 595, 598 (8<sup>th</sup> Cir. 1998) (affirming summary judgment for employer but implicitly recognizing ADA hostile work environment claim.)

With respect to recognition of a hostile work environment claim under the ADA, the Third Circuit had previously held :

The ADA states that “no covered entity shall discriminate against a qualified

individual with a disability because of the disability of such individual in regard to ... the terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a) ... The Supreme Court has held that language in Title VII that is almost identical to the above language in the ADA creates a cause of action for a hostile work environment.

Walton v. Mental Health Ass’n of Southeastern Pa., 168 F.3d 661, 666-67 (3<sup>rd</sup> Cir. 1999).

### **B. Wenigar Satisfied the Elements of a Hostile Work Environment Disability Claim.**

In determining the existence of a harassment or hostile work environment claim under the ADA, the Shaver court held:

“...we think it proper to turn to the standards developed elsewhere in our anti-discrimination law, adapting them to the unique requirements of the ADA. To be entitled to relief, it seems to us that Mr. Shaver must show that he is a member of the class of people protected by the statute, that he was subjected to unwelcome harassment, that the harassment resulted from his membership in the protected class, and that the harassment was severe enough to affect the terms, conditions, or privileges of his employment.

Shaver at 720, citing, Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 906, 907-08 (8<sup>th</sup> Cir. 2003).

On pages 35-40 of Appellant’s Brief, they challenge the first, third and fourth elements of the claim. As argued below, their analysis of the elements is ineffective.

#### **1. Wenigar is a Member of a Protected Class.**

In order to sustain a disability discrimination claim, Mr. Wenigar must prove that he suffers from a disability within the meaning of Minn. Stat. § 363.01 (13) and/or the ADA. 42 U.S.C. § 12102 (2) (2000). The ADA defines a disability as “(a) a physical or mental impairment that substantially limits one or more of the major activities of such individual; (b) having a record of such impairment; or (c) being regarded as having such

an impairment.” Id. “An ‘impairment’ is any physiological disorder, cosmetic disfigurement, or anatomical loss affecting one of the body’s systems, or any mental disorder.” Crock v. Sears, Roebuck & Co., 261 F.Supp.2d 1101, 1116-17 (S.D.Iowa 2003), *citing* Weber v. Strippit, Inc., 186 F.3d 907, 915 (8<sup>th</sup> Cir. 1999).

Minn. Stat. § 363.01, subd. 13 (1998), states a person is disabled for the purposes of the MHRA if he or she “has a physical, sensory, or mental impairment which materially limits one or more major life activities.” A major life activity is a basic activity that the average person in the general population can perform with little or no difficulty.” Hoover v. Norwest Private Mortg. Banking, a Div. of Norwest Funding Inc., 605 N.W.2d 757, 762 (Minn. App. 2000), *citing*, Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10<sup>th</sup> Cir. 1999). In determining whether an individual is substantially limited in a major life activity, the court will consider “(1) the nature and severity of the impairment; (2) its duration or anticipated duration; and (3) its long-term impact.” Id. at 949 (*citing* 29 C.F.R. 1630.2(j)(a)(i)(ii)).

Work is a major life activity within the meaning of MHRA. Sigurdson v. Carl Bolander, 532 N.W.2d 225, 228 (Minn 1995). In Hoover, the court held, “to show that her ability to work is materially limited by her impairments, Hoover must show that she is “restricted in her ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities.” Hoover at 762, *citing*, 29 C.F.R. § 1630.2(j)(3)(I) (1998); DePaoli v. Abbott Lab., 140 F.3d 668, 672 (7<sup>th</sup> Cir. 1998); Webb v. Garelick Mfg., 94 F.3d 484, 487 (8<sup>th</sup> Cir. 1996).

It is undisputed that Wenigar has an I.Q. of 54 and had a mental impairment, Johnson regarded him as “slow” and impaired, and that Wenigar has a record of being disabled. Wenigar has trouble reading and writing. Between his jobs, he would try to find other work, but had difficulty because it was hard for Wenigar to read the paper. He has never filled out an application anywhere. When he would try to find work, he would tell the owners that he couldn’t read and write. Les Wenigar can barely read his own writing, but not anyone else’s. He can’t read books. As a result of his low I.Q., when anyone yells at Wenigar, he gets scared. He has never had a driver’s license. Johnson observed Wenigar as being slow and having a low I.Q. Johnson would tell employees, “you should thank God you weren’t born with that handicap.” Johnson felt that Wenigar had a handicap. During the course of Dr. Gratzer’s evaluation, he reviewed psychological testing of Wenigar that showed that he had below average intelligence and a score of between 50 to 55 on an I.Q. test. Dr. Gratzer described Wenigar as a borderline intellectual functioning to mild mental retardation.

From the testimony of several witnesses it is essentially undisputed that Wenigar has an impairment that would meet the definition of disability under the MHRA or ADA. No evidence was presented to the contrary. There is no logical dispute that Wenigar’s ability to work was materially/substantially affected by his inability to perform a broad range of jobs because of his mental limitations. He has great difficulty even finding and applying for jobs. The same thing is true for reading, writing and learning. His disability substantially affects his ability to participate in these major life activities.

2. **The Harassment Resulted from his Membership in the Protected Class.**

Wenigar's mental disability was used by Johnson to treat Wenigar very differently in all terms, conditions and privileges of employment, as compared to other employees. In this day and age, it is difficult to imagine more heartless and severe treatment than inflicted upon Wenigar as he tried to maintain his employment and do the best job he could do.

Wenigar worked in an abusive working environment. Except for his mental disability, he could not have been manipulated into accepting the conditions he was subjected to. In order to get his work done, Wenigar worked around the clock, catching sleep during the few hours a night when he was also night watch. The derogatory and discriminatory conduct was severe and constant. Often Wenigar was ridiculed and humiliated because of his disability. He was berated, challenged, threatened and intimidated on a daily basis. The living conditions, including the room he was provided to sleep in, the food he ate, the lack of sleep and rest, were horrendous.

As a result of his mental limitations, Wenigar was someone Johnson could exploit. After beginning as a good and fair working relationship, Johnson found Wenigar to be an individual capable of providing an extraordinary amount of labor, for low, and often no pay. Johnson had an employee that he could manipulate and deceive, and he used Wenigar's limitations against him, until he could no longer work after his fall and injuries in 2001. By 1994, as Wenigar worked alone at Bunker Lake, and was given added duties of watching the property at night and going on the routes, the work environment for

Wenigar was beginning to spin out of control. Johnson quickly learned what he had in a huge, strong man with limited thinking and reasoning skills, and for the next seven years used up everything that Wenigar's body, mind and spirit had to offer. For his personal gain and benefit, Johnson treated Wenigar in an inhumane manner for several years.

The harassment was based on membership in a protected group. The disability was the mode and vehicle for which Johnson was able to discriminate and treat Wenigar differently than other human beings. In many cases, a person's disability may to some extent limit or inhibit the use of the employee by the employer as compared to non-disabled individuals. But here, Wenigar's disability provided the actual opportunity for this employer for unlimited exploitation. No average person would have accepted the working conditions inflicted upon Wenigar, and few could have survived.

**3. The discrimination and harassment must be severe and pervasive enough to affect the terms, conditions, or privileges of employment.**

A fundamental issue in a disability hostile work environment analysis is the question of the effect of the harassment on the "terms, conditions and privileges" of employment. In order to be actionable, harassment must be both subjectively hostile or abusive to the victim and "severe and pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive. Shaver at 721, citing, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993). Under the facts in evidence, there is a plethora of evidence supporting the conclusion that the work environment was unduly hostile, the abuse uncivilized, and the terms and conditions severely affected.

In Shaver, while the court found that a harassment claim is viable under disability laws, the court there did not find that the harassment was severe enough to support a claim under the circumstances there. In Shaver, the plaintiff suffered from nocturnal epilepsy. The harassment consisted of co-workers referring to him as “platehead” over a period of two years, but some coworkers stopped using the nickname when Mr. Shaver asked them to stop. *Id.* Several coworkers suggested that Mr. Shaver was stupid. *Id.* On one occasion, a coworker said that Mr. Shaver “pissed in his pants when the microwave was on,” but the statement occurred outside the presence of Shaver. *Id.*

Two months prior to the Eighth Circuit decision in Shaver recognizing the potential viability of a disability harassment claim, the federal district court in Minnesota in St. Hilaire v. Minco Products, Inc., 288 F.Supp.2d 999 (D. Minn. 2003), ruled, without deciding whether a hostile environment claim under the ADA exists, that it “would be modeled after the similar claim under Title VII.

In St. Hilaire, the plaintiff argued that there were incidents of friction between himself and coworkers. *Id.* at 6. Co-workers were skeptical of his Tourette’s Syndrome, accused him of lying, and called him “strange,” “weird,” “retarded,” “a baby,” “immature,” “a whiner,” “a thorn in (a co-workers) thigh,” and “a pain in the ass.” *Id.* The court determined that the conduct did not rise to a level of such severe and pervasive harassment to create a hostile work environment. *Id.* The court went on to hold:

Furthermore, the Court cannot find that his co-workers conduct “unreasonably interfered with his work performance,” Harris, 510 U.S. at 23, given his admission that “despite my disabilities and the negative treatment I received, I was promoted four times from Technician 2 to Technician 5 Supervisor from 1984 to 1999. I

routinely received above average to excellent job performance evaluations.” (St. Hilaire Aff. ¶ 6.).

Id.

In Hiller v. Runyon 95 F.Supp.2d 1016 (S.D. Iowa 2000), the plaintiff brought a disability hostile work environment claim. Hiller was a mail carrier who had surgery for testicular cancer. Id. After determining that Hill had a disability the court went on to analyze whether the harassment directed toward Hiller was severe and pervasive as to alter the conditions of his employment and create an abusive working environment. Id. at 1026. In Hiller, the court found the conduct to be the requisite severe and pervasive.

The language Thompson used to harass Hiller, including that Hiller was “unproductive” and “could not perform,” can also have a particularly cruel and offensive double-meaning to an employee who is infertile, unable to engage in sexual relations and recovering from testicular cancer.

*Hiller* at 1026.

If one analyzes the terms, conditions and privileges of employment, *only* as it related to Wenigar’s work schedule, one would have to come to the conclusion that the exploitative actions severely affected the terms and conditions of employment. Wenigar was manipulated into getting up to work on the routes between 1:00 and 3:00 a.m. He returned to the farm from the routes between 12:00 and 2:00 p.m. and then did his afternoon chores. He washed cans for the routes from 6:00 until 10:00 or 11:00 p.m. This left two to five hours to sleep and eat....while watching over the property. This unbelievable schedule was confirmed through various testimony by Johnson himself, Matt Johnson, Bill Haluptzok, and Julie Feiertag, in addition to Wenigar. Included with this twenty-four hour a day schedule, six days per week, Johnson would harass, chastise

and berate Wenigar if he took breaks to rest and eat. This schedule, and how Wenigar was treated in relation to the schedule, fully meets the element of harassment affecting a term or condition of employment. But as it has been argued throughout, there was so much more to the harassment. The terms and conditions of employment in this case were absolutely inhumane.

**C. There Is Strong Justification for the District Court to Award Wenigar MHRA Damages.**

On pages 40-44 of Appellant's Brief, they argue that there was no basis for the award of \$119,909.50 as MHRA damages. In reality, this was an appropriate multiplying of the damages pursuant to the MHRA, and should not be set aside unless clearly erroneous.

The District Court included in its Findings of Fact:

83. The Court finds it appropriate to award Plaintiff \$119,909.50 pursuant to the Minnesota Human Rights Act as damages in addition to the amounts already awarded. (\$150,000 emotional distress + \$50,000 future distress + \$39,819 = \$239,819 x 50%).

Appellant's Appendix p. 31.

When a court finds a respondent has engaged in an unfair discriminatory practice, it may award compensatory damages "in an amount up to three times the actual damages sustained" to the aggrieved party. Minn. Stat. § 363.071, subd. 2 (1996); *see* Minn. Stat. § 363.14, subs. 2 (providing section 363.071, subdivision 2, applies to actions in district court). Kohn v. City of Minneapolis Fire Dept., 583 N.W. 2d 7, 14 (Minn. App. 1998). Findings as to an award for damages under the MHRA by the district court sitting

without a jury will not be set aside unless clearly erroneous, giving due regard to the district court's opportunity to judge the credibility of the witnesses. Kohn at 14, *quoting Melsha v. Wickes Cos.*, 459 N.W. 2d 707 (Minn. App. 1990), *pet. for rev. denied*, (Minn. Oct. 25, 1990).

Minnesota Statutes § 363.071, subd. 2 provides in relevant part:

In all cases where the administrative law judge<sup>10</sup> finds that the respondent has engaged in an unfair discriminatory practice, the administrative law judge shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained.

In Melsha, the court of appeals interpreted subdivision 2 and concluded:

In addition, the Minnesota federal district court, quoting Melsha, has held:

Multiplied damages are permitted so as to provide victims of discrimination with "full and adequate compensation" in cases when the amount of actual damages proved do not alone achieve that result.

Baufield v. Safelite Glass Corp., 831 F. Supp. 713, 721 (D. Minn. 1993) (*quoting Melsha*, 459 N.W.2d at 709).

The statute reflects the strong legislative purpose for full and adequate compensation of victims, and the realization that this may exceed the actual damage sustained. Melsha at 709. It is within the discretion of the trial court to determine whether, in the interest of justice, the actual damages must be multiplied in order for a victim to be fully compensated. (*Id.*). The general purpose of Minn. Stat. § 363.01 - .15,

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<sup>10</sup> Minn. Stat. § 363.14, subd. 2 (1994) provides that a court presiding in an MHRA civil action may award the same damages available under section 363.071. subd. 2.

is to redress the wrongs suffered by victims of discrimination. Convent of the Visitation School v. Continental Casualty Co., 707 F. Supp. 412, 416 (D. Minn. 1989).

Here, the multiplier used by the Court was “one half times.” Pursuant to the MHRA the Court had the authority to triple the damages. After judging the credibility of the witness, and listening to the testimony, the Court found it proper to multiply the damages by one-sixth of the allowable amount. The multiplier is appropriate where, as here, the wage rate was so low, and the damages so great. The loss of earnings, and the conduct leading to the severe emotional distress, covered years. The award of \$119,909.50 was within the District Court’s discretion and proper under the circumstances of this litigation.

### **III. THE DISTRICT COURT WAS CORRECT IN FINDING JOHNSON LIABLE ON THE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.**

A successful claim for intentional infliction of emotional distress is more rare than many torts, because of the high degree of severity of the conduct needed to meet the threshold of culpability. As discussed below, the conduct must cry “outrageous.” Here, Johnson’s manipulation and abuse of Wenigar passes the threshold and would leave the average member of the community speechless.

Among the Findings of Fact that the Trial Court made concerning this claim, the

40. The Court finds Defendant was in a position of power over Plaintiff. He used the power, and Plaintiff’s vulnerability, to coerce him to stay, no matter how intolerable the circumstances were. Plaintiff worked while being harassed and ridiculed, until the only safe haven he could find would be to hide in straw in the barn. Outrageous, uncivilized, insidious are words that describe the necessary conduct to bring this claim, and it is the conduct that was inflicted upon Plaintiff for years as shown by the evidence presented by Plaintiff.

Appellant's Appendix p. 25.

**A. Extreme and Outrageous Conduct.**

Liability for intentional infliction of emotional distress does not extend to "insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Restatement (Second) of Torts § 46 cmt. D (1965). To qualify as extreme and outrageous, the conduct must lead an average member of the community to exclaim "Outrageous!" Id.

This case is very different from merely claims of insults and annoyances. It is based on a long series of incidents, manipulations and exploitation. The impact from years of abuse is cumulative and thus more egregious. None of the incidents can be properly viewed by viewing them in isolation. Lucas v. Root, 736 F.2d 1202 (8th Cir. 1984). The conduct by Johnson that extended from days into weeks, and then months into years, was extreme and inhumane.

The type of actionable conduct referred to in the Restatement is "extreme and outrageous" must be "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community." Hubbard at 439, *citing* Haagenson v. National Farmers Union Property and Casualty Co., 277 N.W.2d 648, 652 n. 3 (Minn. 1979), *citing* Restatement (Second) of Torts § 46 comment d (1965). The phrase "so atrocious that it passes the boundaries of decency and is utterly intolerable to the civilized community" directly summarizes the evidence in this litigation and is "on point" in describing the workplace environment that was inflicted upon Wenigar.

In Venes v. Professional Service Bureau, Inc., 353 N.W.2d 671(Minn.Ct.App. 1984), the plaintiff brought a claim of intentional infliction of emotional distress against defendant bill collectors who made several telephone calls in attempt to collect payment of medical bills, were sometimes abusive, and who called Venes a “deadbeat” and threatened, “If you know what’s good for you and your family, you’ll stay out of the state of Minnesota. Venes at 673. The stress of the calls and litigation aggravated preexisting medical problems, such as migraines, ulcers and spastic bowel syndrome. *Id.* While the question was close, the court of appeals found the evidence sufficient to support the jury award for damages for Venes claim for intentional infliction of emotional distress. *Id.*

The Venes court also held that the Minnesota Supreme Court in Hubbard, based its definition of the elements of the claim for intentional infliction of emotional distress on the Restatement (Second) of Torts § 46 (1965). Venes at 674. Included in the Restatement is comment “e” to the Restatement Notes:

The extreme and outrageous character (of conduct) may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other or power to affect his interests. In particular, ... collecting creditors have been held liable for extreme abuse of their position.

Venes at 674 citing Restatement (Second) of Torts.

In Kelly v. City of Minneapolis, 598 N.W. 2d 657 (Minn. 1999), the Supreme Court upheld the district court verdict that found that two City of Minneapolis police officers had committed intentional infliction of emotional distress, but were protected by official immunity.

The extreme and outrageous conduct may be either intentional or reckless. To establish reckless conduct, a plaintiff must show that a defendant “recklessly acted in a manner which would create an unreasonable risk of harm to him, and that (defendant) knew or had reason to know of facts which would lead a reasonable man to realize that such actions would create the harm that occurred. Moysis v. DTG Datanet, 278 F.3d 819 (C.A. 8 (S.D.) 2002), *citing* Wangen v. Knudson, 428 N.W.2d 242, 248 (S.D. 1988).

Johnson was in a position of power over Wenigar. He used the power, and Wenigar’s vulnerability, to coerce him to stay, no matter how intolerable the circumstances were. Wenigar worked while being harassed and ridiculed, until the only safe haven he could find would be to hide in straw in the barn. Outrageous, uncivilized, insidious are words that describe the necessary conduct to bring this claim, and it is the conduct that was inflicted upon Wenigar for years.

**B. Severe Emotional Distress.**

After establishing the requisite extreme and outrageous conduct, Wenigar also had to provide evidence of severe emotional distress. To fulfill this element of the claim, evidence was provided by Wenigar, Deloris Thomas, Wenigar’s treating psychologist Dr. Rebecca Thomley, expert psychologist Dr. Susan Phipps-Yonas, and even Johnson’s own expert, Dr. Gratzer.

Among the Findings of Fact that the Trial Court made concerning the issue of emotional distress, the Court found:

51. The Court finds the injuries that have been inflicted upon Plaintiff, as a result

of the extreme and outrageous conduct by Defendant are severe, extensive and have affected Plaintiff's entire life. Evidence indicates that Plaintiff is a dramatically different person, because of his experience with Defendant.

Appellant's Appendix, p. 8.

A plaintiff has a heavy burden of production regarding the severity of the mental distress. The claim should not be submitted to a jury if the distress is of the sort people commonly endure in life. Lee v. Metropolitan Airport Comm'n, 428 N.W.2d 815, 823 (Minn. App. 1988).

In claims for intentional infliction of emotional distress, the court may look to the intensity and duration of the distress. *Id.*, citing Cafferty v. Garcia's of Scottsdale, Inc., 375 N.W.2d 850, 853 (Minn.Ct.App. 1985). In Cafferty, the court held, "If the claimed distress is of the type people commonly encounter and endure in their lives, then the claim should not even be submitted to the jury," *Id.* at 853. Even if severe emotional distress exists, the defendant may escape liability if the distress is exaggerated in comparison to what a reasonable person would experience under the circumstances, unless it results from a peculiar susceptibility to such distress of which the defendant had knowledge. *Id.* at 854.

There was substantial evidence produced at trial concerning the severity of Wenigar's injuries, and his experience working for Johnson being the cause. As included throughout this Brief, the testimony concerning the emotional injuries was extensive.

The only testimony that was produced at trial as to the cause of the severe emotional problems was Wenigar's employment with Johnson. This is what Wenigar related when he testified about his nightmares, and crying spells, and feelings of hurt.

There was no testimony that Wenigar's emotional distress has anything to do with anything other than Johnson and the mistreatment Wenigar encountered.

As Dr. Thomley wrote in her 2002 letter:

A traumatic event that is *caused by another individual, as in Les' case*, is far more difficult to recover from as there was deliberate harm intended. It is likely that Les, given his age, the length of trauma that he experienced, and his perceived limitations cognitively may never fully recover.

Exhibit 87(b). (emphasis added).

Wenigar has mental limitations. The limitations allowed Johnson's manipulations and abuse. The emotional injuries are all the more regretful and insidious because of Wenigar's limitations. Testimony indicated that he has continued to dwell on what happened to him, and why Johnson did what he did. He may never fully recover. The evidence overwhelmingly proved that the conduct was truly outrageous, and the injuries severe and long-lasting.

### CONCLUSION

For all of the above stated reasons, the Judgment of the District Court should be affirmed.

Respectfully submitted,

Dated: June 27, 2005

CONNOR, SATRE & SCHAFF, L.L.P.

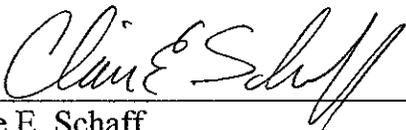
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**CERTIFICATE OF COMPLIANCE**

I, Claire E. Schaff, certify that the Respondent's Brief and Appendix attached hereto is submitted under Minn. R. Civ. App. P. 132.01, subd. 3(a) as exceeding the page limits set by Minn. R. Civ. App. P. 132.01, subd. 3 because I have used 13-point font in preparing the same. The Respondent's Brief complies with the word count limitation set forth in subpart (1) thereof, said brief consisting of 13,987 words, exclusive of pages containing the table of contents, tables of citations, and the appendix, according to, MicroSoft Word version 1998, which was used to prepare the Respondent's Brief. The Respondent's Brief complies with the typeface requirements of the above-referenced rule.

Dated: June 27, 2005

  
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Claire E. Schaff

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).