

NO. A06-1318

State of Minnesota
In Court of Appeals

Lisa Gagliardi,

Appellant,

vs.

Ortho-Midwest, Inc.,

Respondent.

RESPONDENT'S BRIEF

Steven Andrew Smith (#260836)
Adam A. Gillette (#328532)
NICHOLS KASTER &
ANDERSON, P.L.L.P.
4600 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 256-3200

Attorneys for Appellant

Stephen G. Andersen (#138691)
Jennifer J. Kruckeberg (#337675)
RATWIK, ROSZAK & MALONEY, P.A.
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

Attorneys for Respondent

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STATEMENT OF ISSUES

1. Did the district court correctly rule that Lisa Gagliardi's allegations against Craig Carlander lack factual support and do not support a prima facie case of sexual harassment?
2. Did the district court correctly rule that Ortho-Midwest cannot be held liable for any alleged sexual harassment by non-employees of which it could not have had any knowledge?
3. Did the district court correctly rule that Ms. Gagliardi failed to provide any material evidence that termination of her employment was an act of reprisal?
4. Did the district court correctly rule that Ortho-Midwest had a legitimate, non-discriminatory reason for terminating Ms. Gagliardi's employment?
5. Did the district court properly exercise its discretion in determining that the evidence presented by Ms. Gagliardi was not probative?

STATEMENT OF THE CASE AND FACTS

Respondent Ortho-Midwest, Inc., (Ortho-Midwest) serves as an independent manufacturer's representative of orthopedic devices and products. Appellant's Appendix ("AA") 45. As a manufacturer's representative, Ortho-Midwest receives commissions on the products it sells to hospitals and clinics within certain geographic territories, including Minnesota, Iowa, North and South Dakota, Nebraska, Wisconsin, Florida and Alabama. AA 46. The majority of Ortho-Midwest's sales involve the Aircast product line. *Id.* To facilitate Aircast sales, Ortho-Midwest receives product samples, literature, and periodic training on Aircast products. *Id.* Ortho-Midwest sales representatives also have access to a phone extension and e-mail address through Aircast. *Id.* Hospitals order Aircast products directly from Aircast. *Id.* Ortho-Midwest also serves as a manufacturer's representative for the Generation II product line. *Id.*

Craig Carlander is the sole owner and President of Ortho-Midwest, Inc. AA 45, 47. Ortho-Midwest has two employees: Mr. Carlander and his wife, Kim. AA 47. Kim Carlander serves as the company's operations manager. *Id.* Bill Bartlett and Barb Gentilli also work as sales representatives for Ortho-Midwest. *Id.* Mr. Bartlett owns Blue Water Sales, Inc., and serves as a sub-representative for Ortho-Midwest in the company's Florida territory. AA 46; Respondent's Appendix ("RA") 1. Ms. Gentilli serves as a sub-representative for Ortho-Midwest in the Wisconsin territory. AA 46; RA 4. Both Mr. Bartlett and Ms. Gentilli are independent contractors, not employees of Ortho-Midwest. AA 47; RA 1, 4.

Appellant Lisa Gagliardi was hired as a personal assistant/sales representative by Mr. Carlander on behalf of Ortho-Midwest on January 15, 2005. AA 9, 51. Her official title was manufacturer's representative. AA 57. In this position, Ms. Gagliardi was responsible for assisting Mr. Carlander with computer work, preparing reports to Aircast, and assisting with sales in the North and South Dakota territories. AA 5, 7, 51. At Mr. Carlander's suggestion, Ms. Gagliardi contacted Joy Frangipane, a former employee of Ortho-Midwest, to get a sense of what the job would entail. AA 92.

Ms. Gagliardi was offered the choice of either working as an Ortho-Midwest employee or as an independent contractor. AA 52. Ms. Gagliardi initially told Mr. Carlander she would rather work as an independent contractor, then two days later changed her mind and told Mr. Carlander she preferred to be an employee of Ortho-Midwest. AA 5, 52; RA 7, 17. Ms. Gagliardi did not have an employment contract. AA 52. Mr. Carlander and Ms. Gagliardi agreed that she would receive a salary of \$50,000 for a .80 position as well as \$400 per month as an auto allowance. AA 5; RA 7-16. As a result, her total compensation package was approximately \$54,800. RA 7-16. On January 14, 2005, Ms. Gagliardi was paid \$2,500 to cover sales related expenses upon beginning her job. AA 5, 52; RA 11. Ms. Gagliardi was paid by Ortho-Midwest, not by Aircast. AA 9; RA 7-16.

On January 22 - January 27, 2005, Ms. Gagliardi attended the Aircast national sales meeting in Del Mar, California, outside of San Diego. AA 9, 59. On at least two occasions during the meeting, Ortho-Midwest sales representatives had dinner together.

RA 2, 4. Mr. Carlander, Barb Gentilli and Bill Bartlett also attended this meeting. AA 9; RA 2, 4.

During dinner one night, John Strock, an employee of Aircast, made an inappropriate sexual comment to Ms. Gagliardi. AA 10. John Strock is a manufacturer's representative for Aircast; he is not an employee of Ortho-Midwest. AA 9, 59-60. According to Ms. Gagliardi, the comment arose when another woman at the table was applying her lipstick. AA 10. Ms. Gagliardi told her, "You [have] very voluptuous lips. I wish I had voluptuous lips like yours." *Id.* Mr. Strock then whispered in Ms. Gagliardi's ear that "women with thin lips give the best blow jobs." *Id.* No one else at the table overheard this comment. *Id.* Ms. Gagliardi did not respond to this comment, nor did she report it to anyone that night. *Id.*

The following evening, Ms. Gagliardi had dinner with other Ortho-Midwest representatives, including Mr. Carlander, Mr. Bartlett, and Ms. Gentilli. *Id.* During this dinner, Ms. Gagliardi shared with those at the table that the previous night, John Strock had told her, "Women with thin lips give the best blow jobs." AA 10, 60; RA 2, 5. Mr. Carlander told Ms. Gagliardi that this comment was inappropriate and should be reported to Mr. Strock's employer, Aircast. AA 10, 60-61. According to Ms. Gagliardi, she agreed that "it probably should be reported." AA 10. Ms. Gagliardi did not report the comment herself, and acknowledges that Mr. Carlander made the decision to report the comment of his own initiative. AA 10, 60-61. Mr. Carlander never witnessed Mr. Strock engage in any sexually harassing behavior toward Ms. Gagliardi. AA 62.

Mr. Carlander promptly reported Mr. Strock's comment to Michelle Romanenko, Vice President of Human Resources for Aircast, the next day, on January 26, 2006. AA 60-61; RA 18, 22. Ms. Gagliardi does not dispute that she did not make this report herself, but rather Mr. Carlander made the report. AA 10, 41-42; RA 18, 22, 24. On January 31, 2005, Ms. Romanenko sent Mr. Carlander an e-mail which stated, "[C]onfidentially and for your information, we have addressed with John Strock, the concern you expressed to me on Wednesday, January 26, 2005, regarding John's dinner conversation with Lisa Gagliardi as she related it to you afterwards." RA 22. Mr. Carlander forwarded this e-mail message to Ms. Gagliardi the same day. *Id.* Ms. Gagliardi did not experience any further comments or conduct by Mr. Strock that she felt were inappropriate. AA 11.

According to Ms. Gagliardi, she was also subjected to sexual harassment by another Aircast employee, Jim Fife, at the same Aircast national sales meeting. AA 11-12; RA 18, 19. Mr. Fife is an Aircast sales representative from Phoenix, and is not an employee of Ortho-Midwest. AA 11, 62. According to Ms. Gagliardi, Mr. Fife came to her hotel room one night during the conference. AA 11. Mr. Fife told Ms. Gagliardi that he "got a hard on" when she whispered a question in his ear during a presentation, told her he was attracted to her and that they made a cute couple, and attempted to kiss her and fondle her breasts and buttocks. AA 11; RA 19. According to Ms. Gagliardi, this incident occurred after the inappropriate comment by Mr. Strock. AA 12.

Ms. Gagliardi did not report the incident with Mr. Fife to Mr. Carlander. AA 11; RA 19. Although Mr. Carlander was aware that Mr. Fife and Ms. Gagliardi were

spending time together during the meeting, Mr. Carlander was never aware that Mr. Fife made an inappropriate comment to Ms. Gagliardi or touched her inappropriately. AA 11-12, 62-63. At most, Mr. Carlander knew that Mr. Fife had moved his binder to sit next to Ms. Gagliardi at a seminar and that Mr. Fife appeared to be “a fan” of Ms. Gagliardi’s. AA 62-63. Ms. Gagliardi first reported the incident involving Mr. Fife to Aircast on February 28, 2005, approximately one month after it occurred. AA 12. This report was made almost five hours *after* she had received notification from Mr. Carlander that her employment with Ortho-Midwest had been terminated. AA 38; RA 18-20, 27, 33.

Finally, Ms. Gagliardi alleged that she was also subjected to sexual harassment by a third Aircast employee, Ron McNeil, during the same Aircast national meeting. RA 20. Ron McNeil is a product manager for Aircast, and is not an employee of Ortho-Midwest. AA 12. According to Ms. Gagliardi, Mr. McNeil made an inappropriate comment to her at the awards banquet on the final night of the meeting, whispering to her that she looked “delicious” in the dress she was wearing. AA 12; RA 20. Ms. Gagliardi also alleged that Mr. McNeil began sending her inappropriate and unwelcome e-mails after this meeting. AA 12-13; RA 20. Ms. Gagliardi voluntarily dismissed her federal court complaint against Aircast after confronted with her own responses to Mr. McNeil’s e-mails, which included an e-mail describing a scenario in which she falls down drunk while accompanied by Mr. McNeil, with her dress up above her head while not wearing any underwear, and he and her other colleagues learn about her preference for “shaving down

there.” AA 24-28; RA 44.¹ Ms. Gagliardi also made the following statements to Mr. McNeil through her own voice mails and e-mail messages to him: “And I absolutely loved the message that you sent me, and I really, really wish that we would have been able to get together at the meetings;” “To me, you are genuine, caring, intriguing, very handsome and intelligent. I enjoyed the encounters we had in San Diego and find myself thinking of how we could see each other again;” “I am listening and waiting for more;” “Anyway, is there anyway you can get me that territory in Salt Lake? You must have all kinds of pull there. You know, give me a base of 100. All kinds of stuff. Be my sugar daddy.” RA 40-43. Ms. Gagliardi did not report Mr. McNeil’s comment or any of this intimate correspondence between herself and Mr. McNeil to Mr. Carlander. AA 13, 63. Mr. Carlander only learned of Ms. Gagliardi’s allegations against Mr. McNeil as a result of this lawsuit. AA 63-64.

On January 27-29, 2005, Ms. Gagliardi attended a Generation II sales meeting in Bothell, Washington, a suburb of Seattle. AA 16, 64. Ortho-Midwest serves as a manufacturer’s representative for the Generation II product line, and hotel and travel arrangements for the meeting were paid for by Generation II. AA 17, 64. Mr. Carlander, Ms. Gentilli and Mr. Bartlett also attended this meeting. AA 16, 64. The meeting ended around noon on January 29, and Mr. Carlander and Ms. Gagliardi were scheduled to return to Minneapolis on a red-eye flight that night. AA 17, 64. Mr. Bartlett had a flight earlier in the evening, and Ms. Gentilli had a flight the next morning. AA 64; RA 3, 6.

¹ This is despite the fact that she testified *under oath* during her deposition that she was not trying to engage in sexual communication with Mr. McNeil nor to encourage or lead

The four discussed having dinner together that evening. AA 64. To save money for Generation II, the conference sponsor, Mr. Carlander suggested to Ms. Gagliardi that she check out of her room and store her bags in his room before dinner. AA 17, 65. Ms. Gagliardi initially agreed, but then told Mr. Carlander at noon that she wanted to rest in her room. AA 17; RA 24. Mr. Carlander asked Ms. Gagliardi if he could hang out in her room. RA 24. She told him that he could, and Mr. Carlander checked out of his room. AA 65; RA 24. In Ms. Gagliardi's room, Mr. Carlander lay on the bed and began watching the movie "The Terminal." AA 17, 65-66; RA 24. Ms. Gagliardi left the room and ran into Bill Bartlett in the hotel lobby, where she helped him work on a spreadsheet for over an hour. AA 17, 65; RA 3, 24-25. As she returned to her room, Mr. Carlander was leaving the room with his bag and asked where she had been. RA 24-25.

Mr. Carlander, Ms. Gagliardi and Mr. Bartlett went to dinner together in Seattle that night. AA 66; RA 3, 6. After dropping Mr. Bartlett at the airport, Mr. Carlander and Ms. Gagliardi asked the driver to drive around Seattle. AA 66. During this drive, Mr. Carlander laid down, face up, with his head on Ms. Gagliardi's lap. AA 40, 66-67. Ms. Gagliardi did not tell Mr. Carlander this made her uncomfortable or complain to Mr. Carlander about this action. AA 40.

Again, Ms. Gagliardi did not complain about Mr. Carlander's actions to anyone until almost a month later, after Mr. Carlander had terminated her employment. RA 18-21. In an e-mail to Michelle Romanenko on February 28, 2005, Ms. Gagliardi complained about Mr. Carlander watching a movie in her hotel room. AA 20. In this

him on through this correspondence. AA 28.

formal complaint, she failed to mention the alleged incident involving Mr. Carlander putting his head on her lap.² RA 18-20. Several days later, on March 2, 2005, Ms. Gagliardi sent a second e-mail to Ms. Romanenko stating that she would like this information added as an “addendum” to her complaint. RA 46.

From February 21-25, 2005, Mr. Carlander attended the annual meeting of the American Academy of Orthopedic Surgeons (AAOS) in Washington, D.C. Ms. Gagliardi also attended this meeting from February 21-22. AA 19, 23. They flew to Washington D.C. separately, and stayed in different hotels. AA 70. They agreed to meet at the airport and share a car to their hotels. AA 20, 70.

Upon arriving at Mr. Carlander’s hotel, Mr. Carlander asked Ms. Gagliardi to come upstairs to look at his hotel room. AA 21. Mr. Carlander asked the driver to bring both bags up to his hotel room and to wait. AA 20, 70-71. While he was looking at his room, Mr. Carlander commented that the hotel had very nice robes. AA 22. After looking at the room, Ms. Gagliardi took her bag downstairs and told the driver to take her to her hotel. AA 21, 71. Mr. Carlander never tried to discourage Ms. Gagliardi from staying in her original hotel room during the trip. AA 21.

The next day, Mr. Carlander and Ms. Gagliardi were in his hotel room doing some work on the computer. AA 22. They were discussing going downstairs for dinner. *Id.*

² According to Mr. Carlander, he placed his head in Ms. Gagliardi’s lap because she was massaging his neck and shoulders. AA 66. Mr. Carlander testified that Ms. Gagliardi willingly gave him massages on several occasions, even removing her blouse during one massage. AA 74. Ms. Gagliardi testified that she never massaged Mr. Carlander at any time. AA 35. Acknowledging that the Court must weigh factual inferences in favor of the Appellant, we recite the facts in the light most favorable to the Ms. Gagliardi.

Mr. Carlander stated that he really just likes to have dinner in his room in front of the television in a robe. AA 22, 75-76. He told her there was an extra robe for her if she wanted it. AA 22, 76. Mr. Carlander and Ms. Gagliardi then went downstairs and had dinner in the restaurant. AA 76. Ms. Gagliardi did not tell Mr. Carlander that his conduct was offensive or made her uncomfortable. AA 22. Again, she never filed any complaint about Mr. Carlander's conduct until after he terminated her employment. AA 22-23.

Early on the morning of Wednesday, February 23, while at the AAOS meeting, Ms. Gagliardi told Mr. Carlander that her son was ill and she would need to leave the conference and fly home. AA 23, 76. She informed him that she had changed her flight and would be leaving the conference. AA 76. Ms. Gagliardi later admitted that she left the conference, at least in part, because her boyfriend, Kurt Vegdahl, had discovered provocative e-mail messages from Ron McNeil to Ms. Gagliardi. AA 23.

Ms. Gagliardi returned to Minneapolis at about 1:30 p.m. on February 23. RA 28. Later that night, at about 9:00 p.m., Ms. Gagliardi sent an e-mail message to Mr. Carlander which stated, "Craig: Just wanted to update you-but still don't know the dx. Flight went fine. I'm exhausted. Thx for first class!! You're the best. Tell Dr. Nagle hi if you see him. Talk soon. Sorry again - I'm missing a great meeting and more great meals I'm sure. Take it easy. Lisa" RA 47. Around this time, Ms. Gagliardi's boyfriend, Kurt Vegdahl, had apparently decided to contact Ron McNeil himself. At 9:47 p.m. on the 23rd, Mr. Vegdahl sent an e-mail message to Ron McNeil stating, "You could possibly be the most pathetic excuse for a man that I have ever had the misfortune

to speak to,” calling him a “dirty old man,” and threatening to show the e-mail messages to Mr. McNeil’s wife. RA 48. Mr. Vegdahl copied Ms. Gagliardi on this message. *Id.* On Thursday, February 24 at 10:40 am, Mr. Vegdahl sent an e-mail to Michelle Romanenko complaining that Ms. Gagliardi had been the target of several sexual advances by Aircast employees, including being “trapped up against a door by some thug named Edgar” and having been sent “pornographic” e-mail messages. RA 49-50. Mr. Vegdahl informed Ms. Romanenko that he had faxed her copies of the “disgusting email.” RA 49. Mr. Vegdahl also wrote, “Lisa would be upset if she knew I composed and sent this e-mail.” RA 50. On February 24, at 4:24 p.m., Ms. Romanenko sent an e-mail to Mr. Vegdahl informing him that she had not received any faxes from him, and that no “disgusting emails” had been delivered to her. RA 49. During this time, Ms. Gagliardi wrote in her planner on February 23, “Left D.C.. Moved out of Kurt’s house. Broke up with Kurt. Very upset. Crying all day.” AA 38; RA 28. On February 24, her notes indicate “Sad. Crying. Explaining to Kurt no relationship with Ron.” AA 38; RA 29. On February 26, 2005, Ms. Gagliardi wrote “To Kurt’s birthday party.” RA 31. Finally, on February 27, 2005, she wrote, “Stayed at Kurt’s.” RA 32.

Meanwhile, Mr. Carlander attempted to reach Ms. Gagliardi regarding her business duties several times between February 24 and February 28, 2005, with no response. For example, on Thursday, February 24, he forwarded her an e-mail from Roger Martin, Vice President of Aircast North American Sales regarding information needed by March 4, 2005. RA 51. He received no response to this message. AA 77. On Sunday, February 27, he sent her an e-mail with specific assignments, stating, “I really

need you to be constantly working on these as they need to be into RM/LD by Thursday. Call me in the a.m.” RA 52. Ms. Gagliardi recalls receiving this message, but she never called Mr. Carlander. AA 32, 77. On Monday, February 28, at about 11:30 a.m., Mr. Carlander sent Ms. Gagliardi another e-mail message which stated, “Regarding novation info, Bill will take care of 20-21-22 so 49 is key. Please advise on progress.” RA 52. He also left a voice mail message on her cell phone on Monday morning. AA 78. After failing to receive a response to any of these messages, on February 28, 2005, at 5:23 p.m., Mr. Carlander sent Ms. Gagliardi an e-mail message terminating their employment relationship. AA 78; RA 47. Ms. Gagliardi acknowledges receiving this message on this date. AA 32. Approximately five hours later, at 10:05 p.m., Ms. Gagliardi sent an e-mail message to Michelle Romanenko, Vice President of Aircast Human Resources, alleging, for the first time, that she had been sexually harassed by Mr. Carlander, Mr. McNeil and Mr. Fife. RA 18-20. The notes in her planner for this date indicate, “Craig fired me today. I stayed at Marriott and e-mailed H.R. tonight.” RA 33.

Ms. Gagliardi filed a charge of discrimination with the Equal Employment Opportunity Commission on April 8, 2005, and a sexual harassment lawsuit in federal court on May 4, 2005. Ms. Gagliardi agreed to voluntarily dismiss the federal suit against Aircast after being confronted with her own voice-mails and e-mail responses to Mr. McNeil. Subsequently, Ms. Gagliardi initiated this lawsuit against Ortho-Midwest on June 28, 2005. Ortho-Midwest moved for summary judgment on the basis that Ms. Gagliardi had failed to present any evidence to support her claims as a matter of law. On May 17, 2006, the Hennepin County District Court, Judge William R. Howard, granted

Ortho Midwest's motion for summary judgment in its entirety, dismissing Ms.

Gagliardi's claims as lacking factual support to create any genuine issue of material fact.

Ms. Gagliardi filed this appeal.

ARGUMENT

I. STANDARD OF REVIEW

On an appeal from a district court's grant of summary judgment, appellate courts ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). A "material fact" is one which will affect the outcome of the case. *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 531 (Minn. Ct. App. 1993). Appellate courts afford great deference to the district court's findings of fact and will affirm those findings unless they are clearly erroneous. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). When reviewing a district court's application of facts to the law, appellate courts review the court's ultimate conclusions under the abuse of discretion standard. *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

A district court shall grant a motion for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, demonstrate that there is no genuine issue of material fact that entitles a party to judgment as a matter of law. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). No genuine issue of material fact exists "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH, Inc. v. Russ*, 566 N.W.2d 60,

69 (Minn. 1997). A genuine issue of material fact must be established by substantial evidence; mere averments do not suffice. *Id.* at 69-71. Metaphysical doubt as to a factual issue presented by the nonmoving party which is not sufficiently probative with respect to an essential element of the nonmoving party's case is also insufficient to demonstrate a genuine fact issue. *Id.* at 71. The district court's function on a motion for summary judgment is to determine whether genuine factual issues exist. *Zander v. State*, 703 N.W.2d 845, 856 (Minn. Ct. App. 2005). While this examination of the evidence on a motion for summary judgment does not involve weighing evidence to resolve the factual issues, the district court is not required to ignore its conclusion that the evidence presented does not have probative value and that reasonable persons could not reach different conclusions on the evidence presented. *Id.* The district court is given the discretion to determine whether or not evidence presented is sufficient to survive summary judgment. *DLH, Inc.*, 566 N.W.2d at 70.

II. THE DISTRICT COURT CORRECTLY RULED THAT LISA GAGLIARDI'S ALLEGATIONS AGAINST CRAIG CARLANDER LACK FACTUAL SUPPORT AND DO NOT CONSTITUTE SEXUAL HARASSMENT AS A MATTER OF LAW.

The district court properly dismissed Appellant Lisa Gagliardi's sexual harassment claim against Respondent Ortho-Midwest because she has failed to produce any genuine issues of material fact over whether any actions by Craig Carlander would constitute sexual harassment as a matter of law. The Minnesota Human Rights Act (MHRA) provides that it is an "unfair employment practice for an employer, because of . . . sex . . . to discriminate against a person with respect to hiring, tenure, compensation, terms,

upgrading, conditions, facilities, or privileges of employment.” Minn. Stat. § 363A.08. Minnesota courts use the *McDonnell Douglas* framework to determine whether a violation of the MHRA has occurred. *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983); see *McDonnell Douglas, Corp. v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, the employee has the initial burden of establishing a prima facie case of discrimination. *Id.* at 442. The burden then shifts to the employer to articulate a legitimate and nondiscriminatory reason for the adverse employment action. *Id.* at 441-442, n.12. If the employer does so, the burden shifts back to the employee to show that the employer’s proffered reason was a pretext for discrimination. *Id.* Under *McDonnell Douglas*, summary judgment is appropriate if an employee fails to present a prima facie case of employment discrimination. *Albertson v. FMC Corp.*, 437 N.W.2d 113, 116 (Minn. Ct. App. 1989). Summary judgment is also appropriate if an employee, having established a prima facie case of discrimination, fails to provide evidence that the employer’s proffered reasons for its employment decision were a pretext for discrimination. *Id.*

Under the Minnesota Human Rights Act, sexual discrimination includes sexual harassment. Minn. Stat. § 363A.03, subd. 13. To establish a prima facie case of sexual harassment, a plaintiff must show that (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based membership in a protected group; (4) the harassment affected a term, condition or privilege of her employment; and (5) the employer knew of or should have known of the harassment and

failed to take appropriate remedial action. *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001).

An employee alleging sexual harassment must prove that the conduct in question satisfies the factors detailed in Minnesota Statutes § 363A.03, subd. 43. *See Klink v. Ramsey County by Zacharias*, 397 N.W.2d 894, 900 (Minn. Ct. App. 1986) (*abrogated on other grounds by Cummings v. Koehnen*, 568 N.W.2d 418, 420 n. 2 (Minn. 1997)). The factors are as follows: the “conduct must be unwelcome, 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, or offensive work environment.” *Beach v. Yellow Freight System*, 312 F.3d 391, 396 (8th Cir. 2002); *Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997). To evaluate the effect of the harasser’s language and conduct, a court may evaluate the nature, frequency, intensity, location, context, duration and object or target of the harassment. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (in ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at the totality of the circumstances, including 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). Application of the factors of a sexual harassment claim under the MHRA to these facts showcases that Ms. Gagliardi has failed to establish a prima facie case.

A. The Alleged Harrasing Conduct Was Simply Not Pervasive or Severe.

Even assuming each of the allegations against Mr. Carlander occurred exactly as Ms. Gagliardi alleges, the behavior complained about simply does not rise to the level of severe and pervasive harassment necessary to establish a hostile work environment sexual harassment claim. The sum of Ms. Gagliardi's claims against Mr. Carlander is the following: (1) he alluded she was "too hot" in a conversation about her e-mail address, lisag_2_5@hotmail.com; (2) he rested his head on her lap unsolicited while riding in a car during a business trip; (3) he watched a movie in her room while she was out of the room when she would rather have rested by herself during the same business trip; (4) he asked a driver to bring both of their bags up to his hotel room so that they could look at it together; (5) he told her he would rather eat dinner in the hotel room in a bathrobe and that there was an extra robe for her; and (6) he showed her a calendar of his wife that she found inappropriate.³

Even if Ms. Gagliardi's version of the facts surrounding each of these incidents is true, these actions do not, as a matter of law, rise to the level of sexual harassment. Compare *Pierce v. Rainbow Foods, Inc.*, 158 F.Supp.2d 969, 973 (D. Minn. 2001) (finding sexual harassment when defendant found plaintiff alone, limited her ability to leave the area, and forcibly kissed and touched her in an intimate manner) with *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1249 (11th Cir. 1999) (supervisor's constant following and staring not sufficiently severe and pervasive); *Gonzales v. Sea-Mar Inc.*, 99

F.Supp.2d 753, 755 (E.D. La. 2000) (coworker's offensive and boorish comments together with glaring insufficient); *Bishop v. Nat'l R.R. Passenger Corp.*, 66 F.Supp.2d 650, 663-66 (W.D. Pa. 1999) (staring, leering, and offensive comments insufficient). See also *Woodford v. Federal Express Corp.*, No. Civ. 02-1116, 2004 WL 234396 (D. Minn. Jan. 21, 2004) (giving plaintiff a penis shaped sucker with an offensive birthday card and parking delivery truck outside plaintiff's home insufficient); *Duncan v GMC*, 300 F.3d 928, 933 (8th Cir. 2002) (reversing jury award for plaintiff when alleged conduct included supervisor sexually propositioning plaintiff and keeping a penis shaped planter in his office); *Cummings v. Koehen*, 568 N.W.2d 418, 424 (Minn. 1997) (recognizing that every sexual comment in the workplace does become actionable sexual harassment); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (finding no sexual harassment when plaintiff's supervisor asked her for dates, asked about her personal life, called her a dumb blond, put his hand on her shoulder several times, placed "I love you" signs at her work station, and attempted to kiss her once at work and once in a bar); *Peterson v. One Call Concepts*, No. Civ. 04-4235, 2005 WL 2406033 (D. Minn. Sept. 29, 2005) (finding no sexual harassment when an employee's supervisor touched her breasts, called her a lesbian, grabbed her, and prevented her from leaving the office). If taken as true, the sum of Ms. Gagliardi's allegations against Mr. Carlander simply do not rise to the level of pervasive verbal or physical sexual conduct necessary to constitute sexual harassment under the MHRA.

³ Although Ms. Gagliardi denied that she ever asked to see the calendar of Mr. Carlander's wife, at least two witnesses overheard her make just such a request. AA 15-

In her brief, Ms. Gagliardi attempts to attribute error to the district court's finding of a lack of evidence of harassment by stating that hypothetically, a single action could constitute sexual harassment. Yet, she again fails to cite any single act by Mr. Carlander that would be factually sufficient. The district court properly exercised its discretion in determining that the factual evidence lacks any weight sufficient to demonstrate a material issue of fact to survive summary judgment.

B. Ms. Gagliardi's Never Complained About Mr. Carlander's Behavior Until After She Was Fired.

Furthermore, although Ms. Gagliardi claims she found Mr. Carlander's conduct inappropriate and offensive *after* he fired her, there is no evidence that his behavior was unwelcome and offensive to her before the termination of her employment. She has simply failed to present any contemporaneous evidence to demonstrate that she recorded or made *any* complaint to *anyone* about Mr. Carlander's behavior before she was fired. Ms. Gagliardi alleges that she was offended and uncomfortable when, on a trip to Seattle on January 27-29, Mr. Carlander checked out of his hotel room and watched a movie in her room. She alleges she was offended when Mr. Carlander put his head on her lap while they were driving around Seattle before going to the airport. She stated that she felt that Mr. Carlander was trying to seduce her with limousines and nice dinners. AA 17. She testified that she thought it was inappropriate for Mr. Carlander to have a white stretch limousine pick them up from the airport after the Seattle trip. AA 14. Shortly after this trip, however, on February 1, 2005, Ms. Gagliardi sent Mr. Carlander an e-mail

stating, "Hope your trip to Wisconsin went well and I will see you in the morning – I anticipate a call from you to set up a time and place. I can't believe I had to eat cereal for dinner last night! And where was my driver today?? I actually had to put gas in my car myself! :) See you soon.....Lisa" RA 53. Ms. Gagliardi's own contemporaneous words contradict her alleged objection to receiving luxurious accommodations as part of the business travel required for her job. If Ms. Gagliardi had been as uncomfortable with Mr. Carlander's alleged seduction of her as she claims, there would have been no reason to bring up the limousine rides and meals again in an e-mail to her alleged harasser. Similarly, after allegedly being offended by Mr. Carlander's conduct during the AAOS meeting in Washington, D.C. on February 21 and 22, Ms. Gagliardi sent Mr. Carlander an e-mail message on February 23 which stated, "Craig: Just wanted to update you-but still don't know the dx. Flight went fine. I'm exhausted. Thx for first class!! You're the best. Tell Dr. Nagle hi if you see him. Talk soon. Sorry again – I'm missing a great meeting and more great meals I'm sure. Take it easy. Lisa" RA 47.

There is absolutely no evidence in the record that Ms. Gagliardi felt uncomfortable with Mr. Carlander's behavior during the time they were working together. It was only after Ms. Gagliardi had lost her job due to her failure to fulfill her assigned tasks that she lodged complaints about Mr. Carlander. The lack of contemporaneous evidence is fatal to Ms. Gagliardi's newfound objections to Mr. Carlander's behavior now that her employment has been terminated. AA 16. Viewing the evidence in the light most favorable to Ms. Gagliardi (for example, completely disregarding Mr. Carlander's testimony that Ms. Gagliardi volunteered to give him massages several times during their

trips together), she has failed to create a genuine issue of material fact on her sexual harassment claim against Mr. Carlander.⁴

C. Ms. Gagliardi Has Failed to Produce Any Evidence That Her Work Environment at Ortho-Midwest Was Hostile.

Furthermore, as the district court expressly stated, “Ms. Gagliardi has completely failed to produce any evidence that the actions taken by Mr. Carlander interfered with her employment or created a hostile work environment.” AA 164. She does not claim she was adversely impacted by Mr. Carlander’s alleged comment about her e-mail address; she simply ignored it. AA 15. In fact, Ms. Gagliardi never even changed her e-mail address after Mr. Carlander asked her to. Ms. Gagliardi took a copy of the calendar of Mr. Carlander’s wife “just to not make him feel bad,” shared it with her boyfriend, and then threw it away. AA 16; RA 55. Ms. Gagliardi does not allege Mr. Carlander made any inappropriate comments or engaged in any inappropriate behavior while watching a movie in her hotel room, and she was, by her own account, in the hotel lobby for over an hour during that time helping Bill Bartlett work on a spreadsheet. AA 14, 17; RA 3. Mr. Carlander never attempted to prevent her from leaving the hotel room and simply watched the movie alone in the room while she was gone.

⁴ Although it is not the role of the district court to weigh credibility during summary judgment, Ms. Gagliardi’s veracity in this case deserves careful scrutiny. Ms. Gagliardi willingly signed both a discrimination charge with the EEOC, as well as a sexual harassment complaint in federal court, knowing full well she had encouraged and welcomed the very correspondence from Ron McNeil she alleged was harassing. Once her own responsive e-mails and voice mails to Mr. McNeil were exposed, Ms. Gagliardi dropped the federal lawsuit.

Although Mr. Carlander asked the driver to bring both bags to his room during the trip to Washington, D.C. and asked Ms. Gagliardi to look at his room with him, again her own testimony acknowledges that he did not try to discourage her from staying in her own hotel room during the trip. AA 21. Despite the alleged activity with which Ms. Gagliardi was uncomfortable, she maintained a friendly working relationship with Mr. Carlander, traveling and dining with him frequently. Moreover, Ms. Gagliardi produced no evidence that her failure to respond to Mr. Carlander's e-mails for several days which ultimately led to the termination of her employment was due to any apprehension over a hostile work environment. In fact, Ms. Gagliardi admitted that she left the business trip which preceded her failure to respond to Mr. Carlander's e-mails and voice mails for several days after her boyfriend discovered e-mails from Ron McNeil. AA 23. The evidence shows that Ms. Gagliardi's personal life was interfering with her work, not the work environment itself. There is no evidence that any allegedly unwelcome verbal or physical sexual conduct by Mr. Carlander interfered with Ms. Gagliardi's employment in any way.

Alternatively, because Ms. Gagliardi cannot establish a case against Mr. Carlander, she argues that Ortho-Midwest should be punished merely because the company does not have a sexual harassment policy. This argument, however, has been explicitly rejected by this Court. *See Fore v. Health Dimensions, Inc.*, 509 N.W.2d 557 (Minn. App. 1993) (rejecting plaintiff's claim that an employer without a sexual harassment policy in place should be strictly liable for a supervisor's acts of harassment). Ms. Gagliardi's allegations of sexual harassment against Mr. Carlander and Ortho-

Midwest simply lack any evidence necessary to support a prima facie case and were properly dismissed.

D. Ms. Gagliardi Was Fired Because She Failed to Perform Her Assigned Job Duties.

Mr. Carlander also had a legitimate, non-discriminatory reason for ending Ms. Gagliardi's employment with Ortho-Midwest. Ms. Gagliardi admits she did not complete reports or communications with Aircast, which was something she was hired to do. AA 7, 51. When Mr. Carlander asked about the status of report he had requested, she replied with an e-mail asking, "Are you mad at me?" AA 57; RA 56. She also admits she did not make any sales calls during her six-week employment, but only left phone messages for three doctors. AA 6. Most importantly, Ms. Gagliardi unexpectedly left one of the most important sales meetings of the year. AA 19, 76, 77. The evidence establishes that she did so, in large part, because her boyfriend had discovered the provocative e-mails from Mr. McNeil that Ms. Gagliardi had printed off her computer. AA 23. During the five days following her departure from the sales meeting, the evidence shows that Mr. Carlander tried to contact Ms. Gagliardi regarding specific tasks that needed to be completed and received no response from her. AA 77, 78; RA 51-52. Nothing in the record establishes that these are not the true reasons for Ms. Gagliardi's termination. *See Wilking v. County of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998) (stating, "When an employer articulates reasons for its actions not forbidden by law, it is not the Court's province to decide whether those reasons were wise, fair or even correct, so long as they truly were the reasons for its actions."). Ms. Gagliardi has not produced any evidence to

show that she did respond to her assigned tasks, and even if she had, the lack of sales calls and follow-through with tasks constitute legitimate, non-discriminatory reasons for termination of her employment. Ms. Gagliardi cannot show that these reasons for firing her were pretext for sex discrimination. The district court correctly determined that even when viewed in the light most favorable to Ms. Gagliardi, her claims of sexual harassment against Mr. Carlander fail as a matter of law.

III. THE DISTRICT COURT PROPERLY RULED THAT ORTHO-MIDWEST CANNOT BE HELD LIABLE FOR ANY ALLEGED SEXUAL HARASSMENT BY THIRD PARTIES WHICH MS. GAGLIARDI KEPT SECRET UNTIL AFTER SHE WAS FIRED.

Ms. Gagliardi continues to transfer blame to Ortho-Midwest for alleged sexual harassment perpetrated by employees of Aircast after she dropped her lawsuit against Aircast pertaining to those allegations. As the district court ruled, however, the law is clear that Ortho-Midwest cannot be held liable for any inappropriate actions by Aircast employees of which Ortho-Midwest had no knowledge. AA 161.

The MHRA may impose liability upon an employer when the employer *is aware* that its employee is subject to sexual harassment by a non-employee, yet fails to take timely and appropriate action to protect its employee. *Costilla v. State of Minnesota*, 571 N.W.2d 587, 592 (Minn. Ct. App. 1997). In this situation, however, Ms. Gagliardi's supervisor, Mr. Carlander, did not fail to take timely and appropriate action in response to her sexual harassment allegations. By contrast, Mr. Carlander took swift and appropriate action to respond to the single incident that Ms. Gagliardi reported to him. It is undisputed that John Strock, Jim Fife, and Ron McNeil, Ms. Gagliardi's alleged

harassers, are employees of Aircast, not Ortho-Midwest. Ms. Gagliardi admits that the *only* time she even mentioned a potential incident of sexual harassment to Mr. Carlander was when she relayed the inappropriate comment made to her by Aircast employee John Strock. AA 14. She also admits, and the evidence establishes, that Mr. Carlander promptly reported this comment to Aircast Human Resources Vice President Michelle Romanenko. AA 10, 41-42; RA 22. When Mr. Carlander and Ms. Gagliardi saw Ms. Romanenko in the elevator the morning after the dinner, Ms. Romanenko stated that she would be taking appropriate action to respond to the comment by Mr. Strock. AA 10. Mr. Carlander did not have any authority to either investigate the complaint himself or to terminate Aircast employees, but appropriately reported the comment to those who did. Reporting the alleged harassment to the non-employee's employer has been deemed prompt and remedial action. *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 812 (7th Cir. 2001). Thus, after contacting Aircast management, it was clear that Mr. Carlander had fulfilled any obligation he may have had as Ms. Gagliardi's employer to respond to the incident. According to Ms. Gagliardi, she was not subjected to any further harassment by Mr. Strock. AA 11.

Ms. Gagliardi admits she never informed Mr. Carlander of the alleged sexual harassment by Jim Fife. AA 11. Mr. Carlander never knew about this harassment, and there is no way he should have known. AA 62-63. Assuming, for the sake of argument, that Ms. Gagliardi's testimony is completely credible, the most Mr. Carlander knew was that others at dinner discussed the fact that Mr. Fife seemed interested in Ms. Gagliardi and that Mr. Fife moved Mr. Carlander's binder to sit next to Ms. Gagliardi during a

seminar. AA 39, 62, 63. Mr. Carlander was not aware that Mr. Fife engaged in sexually harassing behavior prior to the initiation of Ms. Gagliardi's lawsuit, and never witnessed Mr. Fife engage in any sexually harassing behavior. AA 62. Again, Ms. Gagliardi only reported the alleged harassment by Mr. Fife to Aircast *after* Mr. Carlander terminated her employment. Similarly, Ms. Gagliardi never reported any alleged inappropriate comments or provocative e-mails by Ron McNeil until after she was fired. AA 13, 63-64. Mr. Carlander was powerless to change the fact that Ms. Gagliardi declined to report any alleged incidents of sexual harassment by Mr. Fife or Mr. McNeil, and thus did not have the opportunity to report those incidents to Aircast management.

Despite her bold proclamations of the alleged failure of the district court to understand the law, Ms. Gagliardi fails to cite one case that stands for the proposition that Ortho-Midwest should be held liable for actions of Mr. Fife and Mr. McNeil when she failed to report those actions to her employer, Mr. Carlander. Instead, Ms. Gagliardi argues that apparently Mr. Carlander needed to have psychic powers because he *should have known* about the actions of Mr. Fife and Mr. McNeil even though Ms. Gagliardi did not tell him. She also states that Mr. Carlander should have anticipated that Ms. Gagliardi would be sexually harassed at the Aircast National Sales meeting because Ms. Frangipane told him that sexual conduct had occurred there. But, in truth, Ms. Frangipone's own testimony only indicates that she overheard one woman talking about sex at the meeting and that she "probably" told Mr. Carlander that the woman "was a flirt." AA 95. Any such offhand comment by Ms. Frangipone to Mr. Carlander hardly

constituted a basis by which Mr. Carlander should have known that sexual harassment would occur at a subsequent meeting.

In any event, imputing the burden on Mr. Carlander to anticipate the alleged sexual harassment by Aircast employees is ludicrous. As the district court stated, “[a]n employer simply cannot be expected to take action to protect its employees from action that it has not been made aware of nor should have any reason to know of.” AA 161. Indeed, it would have been none of Mr. Carlander’s business to interfere with Ms. Gagliardi’s relationships with her colleagues unless and until she told him that something inappropriate had happened.

To excuse her own failure to report these incidents, Ms. Gagliardi argues that she thought that Mr. Carlander would not have done anything about the Aircast employees’ actions even if she had reported them. To the contrary, if past history was any indicator, Ms. Gagliardi should have had every reason to believe Mr. Carlander would have swiftly reported the Aircast employees’ actions to Aircast management. Shortly after Ms. Gagliardi reported Mr. Strock’s inappropriate comment at dinner where Mr. Carlander was present, Mr. Carlander reported it to Aircast management. In fact, it was Mr. Carlander who told Ms. Gagliardi that the incident should be reported, and it was Mr. Carlander who followed through with the report. AA 10. The next day, Ms. Romanenko told both Mr. Carlander and Ms. Gagliardi that the situation would be remedied. After that, Ms. Gagliardi admitted that the harassment by Mr. Strock stopped. AA 11. Likewise, common sense would have indicated that Mr. Carlander would have followed

the same procedures if he received any more reports of inappropriate conduct and those situations would have been similarly remedied.

Ms. Gagliardi also claims that she thought Mr. Carlander would not do anything about Mr. McNeil's actions because Mr. McNeil told her he and Mr. Carlander were "friends." AA 30. First of all, Mr. Carlander had no control over what Mr. McNeil may have said about their relationship. Also, the evidence of the prior incident with Mr. Strock indicated that Mr. Carlander would report an inappropriate incident, regardless of whether it was a complaint against one of his colleagues at Aircast. Moreover, Ms. Gagliardi was in no way limited to reporting conduct with which she was allegedly uncomfortable to Mr. Carlander. She could have made a complaint to *anyone* else at all. No evidence of any such complaint exists because she never made one until after the termination of her employment. In fact, the evidence that does exist shows Ms. Gagliardi's warm responses to Mr. McNeil included messages such as "I absolutely loved the message that you sent me," and "Be my sugar daddy." RA 40, 43. These are hardly statements that one would want to send to a sexual harasser. Ms. Gagliardi's excuses about her failures to report the alleged harassment fall apart.

If accurate, any alleged inappropriate and unprofessional comments or conduct by Aircast employees are regrettable. Ortho-Midwest, however, simply cannot be held responsible for those actions of which it had no knowledge because for whatever reason Ms. Gagliardi withheld the information until long after the fact. If any legal responsibility exists for those actions, it is not with Ortho-Midwest. The law is clear that the only time an employer may be held liable for sexual harassment by a non-employee

against an employee is when the employer was aware of the harassment and failed to take timely and appropriate action. *See Costilla*, 571 N.W.2d at 592. Here, Mr. Carlander took both timely and appropriate action once he was made aware of an allegedly inappropriate comment by a non-employee against Ms. Gagliardi, and Ms. Gagliardi failed to make him aware of the other alleged incidents of harassment. Therefore, the district court correctly ruled that Ortho-Midwest cannot be held liable for alleged sexual harassment by Aircast employees.

IV. THE DISTRICT COURT CORRECTLY RULED THAT THE TERMINATION OF MS. GAGLIARDI'S EMPLOYMENT WAS NOT REPRISAL.

The district court also appropriately concluded that Ms. Gagliardi has failed to present any factual evidence to establish that termination of her employment was due to reprisal rather than her failure to perform the required duties of her job. Under the MHRA, an employer may not intentionally engage in reprisal against an employee because the employee “[o]pposed a practice forbidden under this chapter or has filed a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this chapter.” Minn. Stat. § 363A.15. Reprisal includes, “any form of intimidation, retaliation, or harassment.” *Id.* To establish a prima facie case of reprisal or retaliation, the employee must show that she engaged in some statutorily protected conduct, that some adverse action was taken against her, and that the two are causally linked. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 327 (Minn. 1995); *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 444 (Minn. 1983). Minnesota courts analyze MHRA reprisal claims under the same burden shifting formula used in Title VII actions.

Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999). Thus, once an employee has established a prima facie case of retaliation, the employer must articulate a legitimate, non-discriminatory reason for its action. *Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1028 (8th Cir. 2004). The employee then has the burden to show that the articulated reason was pretext; in other words, she must raise a genuine issue of material fact regarding whether the employer in fact took an adverse employment action because of her protected activity. *Id.*

Appellant's reprisal claim depends upon her ability to tie her discharge to the alleged protected activity in which she engaged. In this case, the only conceivable protected activity in which Ms. Gagliardi engaged was telling Mr. Carlander, along with several others during dinner, that an Aircast employee had made a sexually inappropriate comment to her. Viewing the evidence in the light most favorable to Ms. Gagliardi, and assuming that she did in fact want Mr. Carlander to report this comment on her behalf, Ms. Gagliardi cannot offer any evidence of a causal connection between her complaint and her discharge. Mr. Carlander told her that the comment should be reported to Aircast and reported the comment himself even though she had failed to do so. Indeed, after her complaint, Mr. Carlander continued to arrange training opportunities for Ms. Gagliardi, sending her to Seattle for the Generation II training on January 27-29, and to Houston for an Aircast training meeting from February 15-February 17. AA 16, 18. Moreover, Ms. Gagliardi was not fired until more than one month after she made the report, when the total length of her employment was about six weeks. There is no evidence, other than Ms. Gagliardi's contention, to tie her discharge to her complaint about an inappropriate

comment made by Mr. Strock. Evidence, not contention, avoids summary judgment. *Mayer v. Nextel*, 318 F.3d 803, 809 (8th Cir. 2003).

Again, Ms. Gagliardi did not communicate her remaining allegations, both about other Aircast employees and about Mr. Carlander, until after Mr. Carlander had terminated her employment. For example, in her planner on February 28, Ms. Gagliardi wrote, "Craig fired me today. I stayed at Marriott and emailed HR tonight." RA 33. Her e-mail to Michelle Romanenko, Vice President of Human Resources for Aircast, is dated February 28, 2005 at 10:05 p.m. RA 18-20. Ms. Gagliardi cannot establish that she was fired at approximately 5:30 in the afternoon for an activity which did not take place until almost five hours later.

Ms. Gagliardi claims that she engaged in protected activity when her boyfriend at the time, Kurt Vegdahl, contacted Michelle Romanenko on February 24, 2006 regarding Mr. McNeil's "disgusting emails" to Ms. Gagliardi. However, Minn. Stat. § 363A.15 clearly states, an employer may not "intentionally engage in reprisal against any person because *that* person: (1) [o]pposed a practice forbidden under this chapter or has filed a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this chapter." Minn. Stat. § 363A.15 (emphasis added). There is no evidence Ms. Gagliardi made this report herself, or even that Mr. Vegdahl made it on her behalf. Indeed, Mr. Vegdahl's February 23 e-mail to Ms. Romanenko states, "Lisa would be upset if she knew I composed and sent this e-mail." RA 49-50. Even Mr. Vegdahl's affidavit, made after Ms. Gagliardi initiated this lawsuit, does not allege Mr. Vegdahl

contacted Ms. Romanenko with Ms. Gagliardi's permission or even her knowledge. RA 54-55.

Most importantly, there is simply no evidence that Mr. Carlander even knew Mr. Vegdahl had contacted Ms. Romanenko prior to terminating Ms. Gagliardi's employment. The termination could not have possibly been in retaliation for an act of which Mr. Carlander was unaware. Ms. Gagliardi did not engage in protected activity for purposes of Minn. Stat. § 363A.15 when her boyfriend, upset over finding provocative e-mails from Aircast employee Ron McNeil, contacted Aircast Human Resources Vice President Michelle Romanenko to complain about the e-mails. Accordingly, Ms. Gagliardi's reprisal claim lacks any support in the record and was properly dismissed.

V. THE DISTRICT COURT PROPERLY RULED THAT ORTHO-MIDWEST HAD LEGITIMATE, NON-DISCRIMINATORY REASONS FOR TERMINATING MS. GAGLIARDI'S EMPLOYMENT.

Even if Ms. Gagliardi could demonstrate a prima facie case of reprisal, which the district court ruled she could not, Ortho-Midwest has offered a legitimate, non-discriminatory reason for terminating her employment. Ms. Gagliardi simply failed to perform the required duties of her job and to respond to Mr. Carlander's urgent requests to follow-through with her duties for five days in a row. RA 146. As with her sexual harassment complaint, Ms. Gagliardi cannot show that this reason is pretext for illegal discrimination.

VI. THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THAT THE LACK OF EVIDENCE PRESENTED BY MS. GAGLIARDI DID NOT DEMONSTRATE ANY MATERIAL FACTUAL ISSUES.

Finally, Ms. Gagliardi attempts to drum up alleged error by the district court to cover up her inability to present a prima facie case by arguing that the district court made impermissible credibility determinations. While Ms. Gagliardi is correct that credibility determinations are not warranted at the summary judgment stage in that a district court should not *resolve* factual issues, a district court is not expected to ignore its duty to judge the evidence to the extent necessary to determine whether or not genuine factual issues exist for trial. *See Zander v. State*, 703 N.W.2d 845, 856 (Minn. Ct. App. 2005). The district court should not ignore its conclusion that reasonable persons could not differ on their interpretation of the evidence presented and that the evidence lacks probative value. *Id.*

Here, the district court properly ascertained that Ms. Gagliardi's simply lacked probative value. The district court could not disregard the fact that there is no evidence that Ms. Gagliardi ever objected to Mr. Carlander's behavior until after she fired. Because there simply was no evidence, there was no decision whether or not to believe the evidence. Furthermore, the district court noted that even if Ms. Gagliardi's objections to a few instances of Mr. Carlander's behavior were true, the sum of those actions simply does not constitute sexual harassment under the law. And because Ortho-Midwest cannot be held liable for acts of non-employees of which it had no knowledge, Ms. Gagliardi's objections to the district court's alleged credibility determinations regarding sexual

harassment by Aircast employees of which it was unaware are irrelevant. Ms. Gagliardi's case failed due to lack of evidence, not error by the district court.

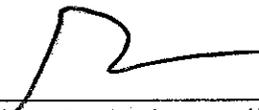
CONCLUSION

For the foregoing reasons, Respondent Ortho-Midwest respectfully requests that this Court uphold the district court's conclusions in their entirety. The district court properly exercised its discretion to determine the weight of the facts, or lack thereof, presented by Appellant, and determined that all of her claims were without merit to proceed to trial. Ortho-Midwest is not liable for the alleged harassment of Lisa Gagliardi by non-employees of which it had no knowledge. Ms. Gagliardi's allegations against Ortho-Midwest do not rise to the level of sexual harassment, and she cannot establish that she engaged in any protected activity prior to her termination. Ortho-Midwest also had legitimate, non-discriminatory reasons for terminating her employment. Accordingly, the district court's grant of Ortho-Midwest's summary judgment motion should be affirmed.

Respectfully submitted,

RATWIK, ROSZAK & MALONEY, P.A.

Dated: 9-11-06

By: 

Stephen G. Andersen (#138691)
Jennifer J. Kruckeberg (#337675)
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

ATTORNEYS FOR ORTHO-MIDWEST

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Lisa Gagliardi,

Appellant,

**CERTIFICATE OF
BRIEF LENGTH**

v.

Ortho-Midwest, Inc.,

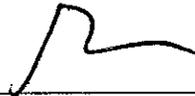
Respondent.

**COURT OF APPEALS
CASE NO.: A06-1318**

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a monospaced font. The length of this Brief is 726 lines, 9,204 words. This Brief was prepared using Microsoft Word.

RATWIK, ROSZAK & MALONEY, P.A.

Dated: 9-11-06

By: 

Stephen G. Andersen
Attorney Reg. No. 138691
Jennifer J. Kruckeberg
Attorney Reg. No. 337675
300 U.S. Trust Building
730 Second Avenue South
Minneapolis, MN 55402
(612) 339-0060

ATTORNEYS FOR RESPONDENT

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).