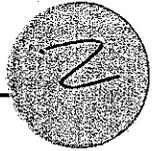


No. A09-1501



State of Minnesota
In Court of Appeals

Trisha Geist-Miller,

Appellant,

v.

Ronald Mitchell and Sun Place Tanning Studios, Inc.,

Respondents.

APPELLANT'S BRIEF WITH APPENDIX

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

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STATEMENT OF THE ISSUES

I. WHETHER APPELLANT HAS ESTABLISHED PRIMA FACIE EVIDENCE TO SUPPORT A HOSTILE WORK ENVIRONMENT CLAIM.

The District Court found that Appellant has failed to meet her prima facie burden as to the second, third and fourth elements of a hostile-work environment claim.

Apposite Authorities

- *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 480 (Minn. Ct. App. 2001)
- *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558 (Minn. 2008)
- *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)
- *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998)

II. WHETHER RESPONDENTS HAVE ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE THAT APPELLANT FAILED TO TAKE ADVANTAGE OF ANY PREVENTATIVE OR CORRECTIVE OPPORTUNITIES TO AVOID HARM.

The District Court found that Respondent has met its burden of establishing the elements of the Faragher/Ellerth defense by a preponderance of evidence.

Apposite Authorities

- *Faragher v. City of Baton Raton*, 524 U.S. 775, 807-08 (1998)
- *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)
- *Henry v. Gehl Corp.*, 867 F. Supp. 960, 969 (D. Kansas 1994)

STATEMENT OF THE CASE

Appellant Geist-Miller filed a summons and complaint against Respondents Ronald Mitchell and Sun Place Tanning Studios, Inc., in Olmsted County District Court on November 14, 2006, alleging sexual harassment under the Minnesota Human Rights Act (MHRA) and sex discrimination under Title VII; reprisal under the MHRA and Title VII; and negligent training, retention and supervision, and intentional infliction of emotional distress. Sun Place Tanning Studios removed the case to U.S. District Court in June 2006 (civ. file no. 05-1177). On October 20, 2006, the U.S. District Court granted Respondents' unopposed motion for summary judgment on Geist-Miller's Title VII claims and common-law claims, found that the MHRA claims were moot as a result, and remanded the case to Olmsted County District Court.

Respondents moved for summary judgment on the state law claims on March 28, 2007. The Honorable Debra A. Jacobson, judge of Olmsted County District Court, granted Respondents' motion on July 26, 2007. Judgment for Respondents was entered on July 31, 2007.

Geist-Miller filed a timely notice of appeal and statement of the case on September 28, 2007. Oral arguments were heard on June 11, 2008. On August 26, 2008, The Minnesota Court of Appeals reversed and remanded the district court's opinion with respect to Appellant's hostile work environment claim. *See*

Geist-Miller v. Mitchell, No. A07-1859, 2008 WL 3898207 (Minn. Ct. App. Aug. 26, 2008).

On February 20, 2009, Mitchell and Sun Place renewed their motion for summary judgment before the Honorable Debra A. Jacobson, Judge of District Court, regarding Appellant's hostile work environment claim. On March 12, 2009, Geist-Miller filed a responsive motion in opposition to the motion for summary judgment. Summary Judgment and Judgment was entered on June 18, 2009 and this appeal follows.

STATEMENT OF THE FACTS

Ronald Mitchell and his wife Sandra Mitchell opened a tanning salon named Sun Place, Inc. in 1990. (RM Dep. 13)(App. 2). Sun Place, Inc. originated in Rochester, Minnesota. *Id.* A year later, they opened additional salons in Edina and Bloomington, Minnesota. (RM Dep. 14-15)(App. 3-4). By the late 1990's, three additional tanning salons were operating in Rochester. *Id.* In 1999, Respondent and Sandra created a second corporation named Sun Place Tanning Studios, Inc. which took over the four Rochester salons. (TGM Dep. 13)(App. 19). Sun Place, Inc. continued to operate the four salons in the Minneapolis/St. Paul area. (RM Dep. 15)(App. 4).

Appellant began her employment with Sun Place, Inc. as a shift manager in 1994. After three to four years, she was promoted to salon/training manager. (TGM Dep. 11)(App. 17). She held this position until April of 2000, when she

was promoted to general manager of both companies. *Id.* As general manager, she was responsible for the day to day management of all salon locations in Rochester and the Minneapolis/St. Paul area. *Id.*; (TGM Aff. Ex. 1)(App. 98). In this capacity, she agreed to do “whatever it takes to run Sun Place any day... any time... 24/7”. (TGM Aff. Ex. 3)(App. 99). In short, Appellant was on call to both Respondent and Sandra Mitchell, 24 hours a day, 7 days a week with Respondent in charge of operating the Rochester locations and Sandra Mitchell operating the Minneapolis/St. Paul locations. (SM Dep. 31)(App. 131). In fact, Appellant was in daily contact with both Ronald Mitchell and Sandra Mitchell during this time. (SM Dep. 24)(App. 127).

Appellant continued in her position as a general manager for both corporations until shortly after the birth of her son on May 5, 2003. (TGM Dep. 14)(App. 20). Upon her return to work from maternity leave in June 2003, Appellant voluntarily discontinued her day to day management duties of the Minneapolis/St. Paul area salons. (TGM Dep. 16; SM Dep. 36-37)(App. 22; 132-133). Appellant did continue in her position as general manager of the Rochester salons and acquired the additional duties of salon manager for a new salon at the Rochester airport location. (TGM Dep. 16)(App. 22). Despite this change, she continued to report primarily to Respondent, but also to Sandra Mitchell. (TGM Dep. 39)(App. 38).

At or about this same time, Respondent filed for dissolution of his marriage to Sandra Mitchell. Thereafter, Respondent’s attitude, conduct and behavior

became increasingly harassing and sexual toward Appellant. During the period of August 2003 through December 2003, Respondent engaged in multiple acts of unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact and other verbal and physical conduct and communication of a sexual nature toward Appellant. (See generally Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment)(App. 137-157).

During the aforementioned time period, Sun Place Inc. and Sun Place Tanning Studios, Inc. had an employee policy handbook which covered sexual harassment in the work place. (RM Dep. 81-82; TGM Dep. 83-84; TGM Aff. Ex. 4)(App. 6-7; 70-71; 100). Specifically, this policy stated the following:

Harassment will not be tolerated. This includes, but is not limited to slurs, jokes, verbal, graphic, or physical conduct relating to an individuals race, color, sex, religion, national origin, age, or disability. This also includes sexual advances, requests for sexual favors, unwelcome or offensive touching and other verbal, graphic, or physical conduct of a sexual nature. Violation of this policy will result in any disciplinary action needing to take place and/or termination. It is the employee's responsibility to bring any harassment complaint or concern to any management, upper management, corporate office, or our human resources department's attention right as it happens . . . the upper management staff includes the general manager, Trisha Giest-Miller, and our maintenance manager, Jim Arnold. Our corporate office and human resource department include Jo Heeren and Denys Rain. (TGM Dep. Ex. 14)(App. 89-93)

Respondent, Sandra Mitchell, Denys Rain and Appellant were mutually responsible for human resources. (SM Dep. 18)(App. 126). Appellant documented much of the unwelcome sexual conduct committed by Respondent on Sun Place, Inc's. standard employee incident forms. (TGM Dep. 12-20)(App. 18-26). Although she documented, dated and signed these incident reports on the dates of the occurrences, she did not provide them to Respondent or his wife Sandra out of fear that she would be fired if either one of them saw the reports. (TGM Dep. 12)(App. 18). Respondent and Sandra Mitchell were the only persons within both corporations above Appellant in rank. (TGM Dep. 112-113)(App. 84-85). Accordingly, the policy, in effect, required her to report the harassment to either herself, the Respondent, Sandra Mitchell, Jo Heeren or Denys Rain, an employee inferior to her in the chain of command. Moreover, she believed she was in compliance with the employee's handbook policy by documenting the incidents in her personnel file, as she was a part of the upper level management that would handle sexual harassment complaints. (TGM Dep. Ex. 14)(App. 89-93).

Specifically, Appellant has documented and testified to the following seventeen (17) incidents of sexually harassing conduct committed by Respondent during the four months preceding her termination.

1. Appellant would occasionally wear her hair down. Respondent would touch her hair and pull it forward over her face, and tell her to wear her hair that way more often. (TGM Aff. Ex. 5)(App. 106-108).

2. On another occasion, Respondent and Larry Campion came into the Northwest Rochester Salon while Appellant was cleaning a bed in Room 17. Respondent entered the room, grabbed her and forcibly kissed her. Appellant attempted to push Respondent backward and asked what he was doing (TGM Aff. Ex. 5; 15)(App. 106-108; 121-124).
3. On another occasion, Respondent and Appellant were standing in Respondent's home, waiting for Sandra Mitchell to finish getting ready for a trip to a business meeting in the Twin Cities. Appellant was putting on chapstick when Respondent asked her to "give him some of that". He leaned forward and attempted to kiss Appellant on the lips. Appellant backed away and stated "No". Respondent then told her that she had "no guts". (TGM Aff. Ex. 5; 15)(App. 106-108; 121-124)
4. On another occasion, Appellant was asked to accompany the Respondent to an eye appointment in the Twin Cities. While riding in the car, Respondent put his hand on Appellant's leg and suggested that they "run away together". Appellant promptly moved her leg aside and said, "No Ron, it is not going to happen". Respondent again accused her of having "no guts". (TGM Aff. Ex. 5)(App. 106-108). On more than one occasion, Respondent placed his hand on Appellant's knee and attempted to hold her hand while riding in a car to or from business meetings. (TGM Aff. Ex. 5)(App. 106-108).

5. On February 26, 2003, Respondent told Appellant that he was upset that Jo Heeren and Sandra Mitchell had been talking together and he was going to have the locks changed on the Rochester business office. A locksmith company came and changed the locks. Respondent gave Appellant a key and asked her if she would protect him. She responded by saying of course, but she was going to protect Sandra as well. Respondent then became visibly upset and left in haste. (RM Dep. 97-98; TGM Aff. Ex. 5)(App. 8-9; 106-108).
6. On August 26, 2003, Respondent took Appellant from the Crossroads salon for a business meeting with Lanmark Personnel at the Hanger Bar. They arrived early for the meeting and Respondent suggested they have a drink. Respondent consumed two additional alcoholic beverages. After the meeting, Appellant and Respondent took his car to pick up Appellant's son from daycare. While riding in the car together, Respondent made several comments that Appellant was denying him sexually and if her husband ever messed [sic] up, that he would get her. He also asked her to run away with him and told her that he had bought a Lincoln Navigator so that her son and *their* future children could watch DVD's while they traveled. Appellant told Respondent that he was drunk and that she was not interested. (TGM Dep. 28-30, TGM Aff. Ex. 7)(App. 27-29; 109-110).
7. On September 17, 2003, Respondent asked Appellant to accompany him outside of her salon location whereupon he told her that he had a dream that

he and Sandra had gotten divorced and that he and Appellant had gotten married, had a little girl, and opened five new salons. Appellant did not respond in fear of his reaction. (TGM Dep. 31; TGM Aff. Ex. 8)(App. 30; 111).

8. On October 13, 2003, Respondent met Appellant at the new airport salon. He was in an extremely pleasant mood and Appellant inquired as to why he was so happy, which responded, "My one true love, will you run away with me?" Appellant rejected this and said "no", to which Respondent again said, "No guts, Trisha. You have no guts". (TGM Dep. 32-33; TGM Aff. Ex. 9)(App. 31-32; 112).
9. On October 14, 2003, Respondent, Appellant, Brian McCoy, Katie Roch, and Julie Ellinghuysen were outside of the new airport salon location when Roch asked if Respondent and Appellant ever had sex together. Appellant said "God, no". Respondent then asked Roch if she and Andy ever had sex together. The conversation continued with sexual comments and innuendo until Appellant walked away. (TGM Dep. 34-35; TGM Aff. Ex. 10)(App. 33-34; 113-114).
10. On October 15, 2003, Appellant approached Roch and told her that she did not appreciate the comment she had made the previous day regarding her and Respondent. Roch apologized. Later that same day, Respondent entered the salon, put his arm around Appellant, and stated, "seeing that we have had sex, maybe we should run away and continue having sex". In her

signed incident report, Appellant also wrote that she was starting to believe that Respondent was not joking about the increasing sexual comments and innuendos, especially in light with what happened with another employee who had filed sexual harassment charges against Respondent. She also wrote that he was making her uncomfortable and that she did not know what to do. (TGM Dep. 35-36; RM Dep. 106-107; TGM Aff. Ex. 10)(App. 34-35; 10-11; 113-114).

11. On October 20, 2003, Respondent walked behind Appellant and intentionally brushed his hand against her buttocks. He then took Appellant into the hallway and told her that he was going to get immunity for the salons and take back control of the company. He then put his arm around Appellant and told her that everything would work out. Appellant told him that she wanted to be left alone to do her job. (TGM Dep. 36-40; TGM Aff. Ex. 11)(App. 35-39; 115).

12. On November 25, 2003, another salon manager, Jamie Brewington, called Appellant to inform her that Respondent had told her that she needed to be careful about who he talked to because everyone was talking to Sandra (TGM Dep. 56-57; TGM Aff. Ex. 12)(App. 46-47; 116).

13. On another occasion, an employee of Sun Place Tanning Studios, Inc. approached Appellant, told her that she was at a party at Deer Creek Speedway, and observed Respondent making sexual innuendos and comments towards other young women. She also indicated that he had

soiled himself. (TGM Dep. 59-62; TGM Aff. Ex. 13)(App. 48-51; 117-118).

14. On another occasion, Appellant and Respondent attended a business meeting with employees of Lanmark and JVC Builders regarding the airport location. They had looked at several blueprints of the new location and were discussing problems that needed attention. After the meeting, they went to the Hanger Bar for an alcoholic beverage. The employees of Lanmark and JVC Builders were talking to another female about her breasts when Respondent began comparing the women's breasts. Specifically he pointed at the other female's breasts and stated that hers were nice and then looked at Appellant's breasts and said, "yours are so-so". Appellant was embarrassed and upset by the comment and told him not to look at her like that. Appellant got up and walked away to which Respondent should, "Bye honey. We will talk to you tomorrow". (TGM Dep. 63-65; TGM Aff. Ex. 14)(App. 52-54; 119-120).
15. On another occasion, Respondent made a statement in the presence of several employees that "he did not care if Appellant was in the back pleasuring herself so long as she was getting her vacuuming done". (TGM Dep. 68-69; 113)(App. 57-58; 85).
16. On another occasion, Appellant, Respondent and several other employees were outside having a cigarette break when Respondent told a female

employee that she shouldn't wear that particular shirt because it made her nipples show. (TGM Dep. 110)(App. 83).

17. On another occasion, Respondent stated, "he could be out to lunch with two hairdressers one minute and the next minuet he could be in bed with them". (TGM Dep. 113-114; RM Dep. 150)(App. 85-86; 15).

Appellant repeatedly indicated to Respondent that his comments were unwelcome and offensive. She also reported some of the incidents to Denys Rain in her role as office manager. (TGM Dep. 83)(App. 70). Appellant also informed Sandra of her husband's sexually harassing conduct. (TGM Dep. 108; SM Dep. 30; TGM Aff. Ex. 15)(App. 81; 130; 121-124). She also told Jo Heeren that she did not like being left alone with Respondent. (TGM Aff. Ex. 15)(App. 121-124).

On December 3, 2003, Appellant was fired for refusing to sign a policy change agreement presented to her by Respondent. (TGM Dep. 94-96)(App. 75-77). The policy change agreement required that Appellant agree to no contact, either in person, by phone, or electronic mail with Sandra Mitchell and in the event that Sandra attempted to contact Appellant, she must immediately notify Respondent of the attempted contact. (TGM Dep. Ex. 16)(App. 94). Respondent drafted the policy change agreement based upon a hearing in the Olmsted County District Court on December 2, 2003 wherein the court issued a temporary order in the marital dissolution proceeding between Respondent and his wife Sandra. (RM Dep. 124)(App. 14). The temporary order signed by the Honorable Kevin A. Lind and filed on December 17, 2003, however, did not order that Sandra have no

contact with the employees of Sun Place Tanning Studios, Inc. (RDB Aff. Ex. F)(App. 160-162).

Moreover, Appellant remained an employee of Sun Place, Inc., which was the company that Sandra Mitchell had exclusive control. (SM Depo. 39)(App. 134). Appellant continued in her general manager position even after the reduction in her day to day management duties. She continued working for both corporations and still had a duty to report to both Sandra and Respondent. (SM Dep. 39)(App. 134).

Appellant refused to sign the policy change agreement and asked to see the court order. (TGM Dep. 88)(App. 74). Respondent refused and informed her that he was the owner and that he could do anything he wanted in the salon. (RM Dep. 112; 114)(App. 12; 13). Thereafter she was terminated with instructions to turn in her keys. (TGM Dep. 94-96; 98)(App. 75-77; 78). Appellant believes and a jury could reasonable infer that Respondent terminated her in order to prevent Sandra from learning about his sexually harassing conduct towards her which could affect his desire to control the salons in his marital dissolution action. (TGM Dep. 117)(App. 87).

At the time of her termination, Appellant was Sun Place, Inc.'s most senior employee. (SM Dep. 42)(App. 135). Sandra called her their "prodigy" and "best employee" over the nine years of employment. (SM Dep. 29; 42)(App. 129-135). Sandra even told Appellant that she would get her job back. (SM Dep. 59)(App. 136). Appellant was never disciplined nor given a pink slip or other written

warning at anytime during the course of her employment from December 5, 1994 through December 3, 2003, both of which were a pre-requisite for termination. (RM Dep. 44; SM Dep. 26; TGM Dep. Ex. 14)(App. 5; 128; 89-93).

SUMMARY OF THE ARGUMENT

This case arises out of a four-month period wherein Appellant was sexually harassed by Mitchell, co-owner of Respondent, Sun Place, Inc. and Sun Place Tanning Studios, Inc. Mitchell sexually harassed her verbally and physically. He made several inappropriate sexual comments towards Appellant and tried to forcibly kiss her, place his hand on her leg and inappropriately touch her and brushed up against her. And although Appellant rejected his sexual behavior, Mitchell was in a position of authority over Appellant and he used that authority to his advantage. His harassment, taken together as a whole, demonstrates a course of conduct that creates a hostile work environment. The multiple instances of sexual harassment create an issue of material fact that must be resolved by a fact finder.

Instead of reporting Mitchell's conduct to him directly, she reported his conduct on employee incident forms in compliance with the company's anti-sexual harassment policy. Appellant believed that this self-reporting was in compliance with the company policy and that if she reported it to Mitchell or Sandra, she would be immediately fired. It would be unreasonable to expect Appellant to complain to Mitchell when Mitchell was the harasser. Likewise, it would be unreasonable for Appellant to approach Sandra, Mitchell's wife, who

was in the middle of a hostile divorce proceeding with Mitchell. Appellant did what she was required to do. She self-reported the incidences on the employee incident forms.

Lastly, many of the incidents at issue were discovered during depositions. However, during the deposition, Appellant indicated that she was confused and had stated what she remembered as of that day, but that she may have additional information regarding incident's that she could search for following the deposition. In her correction sheet, within the 30 days required by Minn. R. Civ. Pro. 30.05, the Appellant documented additional incidents when Mitchell harassed her. Furthermore, she provided the incident reports and also an affidavit that supplemented her deposition testimony. None of her additional statements contradict her deposition testimony, but instead supplement her recollection of the events that took place while she was employed by Respondent.

ARGUMENT

I. STANDARD OF REVIEW

There are two questions before a reviewing court on appeal: (1) whether there are any genuine issues of material facts and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990); *see* Minn. R. Civ. P. 56.03 (1994). Since summary judgment involves only questions of law, the Appellate court reviews the lower court's decision de novo. *Lefto v. Hoggsbreath Enters, Inc.*, 581 N.W.2d 855, 856 (Minn. 1998). (*citing Walling v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995)).

A court deciding a summary-judgment motion, either in the first instance or on appeal, may not weigh the evidence or determine credibility. *Prior Lake Am. v. Mader*, 642 N.W.2d 729, 735 (Minn. 2002). Instead, the court must view the evidence in the light most favorable to the nonmoving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citations omitted). No genuine issue of material fact exists when “ ‘the record taken as a whole could not lead a rational trier of fact to find for the non-moving party.’ ” *DHL, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). Summary Judgment is inappropriate if the nonmoving party has the burden of proof on an issue and presents *sufficient evidence* to permit reasonable persons to draw different conclusions. *Schroeder v. St. Louis County*, 708 N.W.2d 497, 507 (Minn. 2006). Appellant must show a prima facie case of sexual harassment by proving the “bare essentials of discrimination or harassment, merely sufficient evidence to create the inference of unequal treatment.” *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 479 (Minn. App. 2001).

In this case, genuine issues of material fact exist, and Respondents did not meet their burden on summary judgment before the district court.

II. APPELLANT HAS ESTABLISHED PRIMA FACIE EVIDENCE TO SUPPORT A HOSTILE WORK ENVIRONMENT CLAIM.

At the summary-judgment stage of proceedings, Minnesota courts use the *McDonnell Douglas* framework for analyzing claims under the Minnesota Human Rights Act (MHRA). *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475,

480 (Minn. Ct. App. 2001); *See McDonnell Douglas Corp. v. Green*, 411 U.S. 972, 93 S. Ct. 1817 (1973).

Sexual Harassment is recognized as a form of discrimination under the MHRA. *See* Minn. Stat. § 363A.09, subd. 13 (2006). When interpreting cases under the MHRA, this court gives weight to federal interpretations of the Title VII claims because of the substantial similarities between the two statutes. *Wayne v. MasterShield, Inc.*, 597 N.W.2d 917, 921 (Minn. App. 1999). The MHRA defines sexual harassment to include “unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when (3) that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment...or creating an intimidating, hostile, or offensive employment...environment.” *See* Minn. Stat. §363A.09, subd. 43 (2006). This clause is referred to as a “hostile work environment”. *Benassi*, 629 N.W.2d 475, 480.

The prima facie burden varies depending on the category of sexual harassment alleged. *Id.* For claims of hostile work environment, a plaintiff must show that, (1) she is a member of a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; and (4) the harassment affected a term, condition or privilege of her employment.” *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558 (Minn. 2008).

It is undisputed that Appellant, as a female is a member of a protected class. The parties do not dispute that Mitchell’s conduct was unwelcome, based on sex,

or work related. The main dispute between the parties is whether Mitchell's conduct was so severe and pervasive as to affect a term, condition or privilege of employment. However, the district court appears to suggest that, in its opinion, Appellant does not make a prima facie showing of elements 2 and 3 as well, in that Appellant does not demonstrate that the conduct was unwelcome or that it was based on sex or work-related. In reaching this conclusion, the district court failed to apply the appropriate standard of review by not viewing the facts from the pleadings, depositions, interrogatories, and affidavits in favor of the non-moving party. Instead, the district court makes credibility determinations, disregards deposition testimony and affidavits, and cherry picks which facts will ultimately favor a grant of summary judgment. Appellant does establish a prima facie case of sexual harassment based on a hostile work environment; Mitchell's conduct, including his forcible attempts to kiss appellant, intentionally brush up against her buttocks and numerous sexual advances and innuendos are severe and pervasive so as to alter the conditions of her employment and create an abusive environment.

A. The District Court Erred By Granting Summary Judgment On The Grounds That Appellant's Conduct Does Not Demonstrate That Mitchell's Advances Were Uninvited.

To establish sexual harassment based on hostile work-environment requires that the harassment be unwelcome. *Frieler*, 751 N.W.2d at 571. The district court erroneously changed this standard and required that Appellant prove that all of the alleged conduct was uninvited. In *Gagliardi*, discussed below, the employee testified that Carlander's conduct was "inappropriate and offensive" and it was not

something “that a boss should do”. *Id.* The court stated that the test of whether the conduct is welcome is not whether it was declared, but instead is a “question of whether the conduct was *uninvited* and offensive”. *Gagliardi*, 733 N.W.2d at 182. They reasoned that an employee does not carry the burden to announce discomfort with objectively abnormal conduct, such as a supervisor putting his head onto her lap and presenting her with sexually provocative photographs of his wife. *Id.* Furthermore, the court stated “whether particular conduct was unwelcome will turn largely on credibility determinations by the trier of fact” and found that summary judgment was improper. *Id.* Thus, the question of whether the conduct is invited requires resolution of disputed facts and therefore summary judgment was improper. *Id.*

Notwithstanding the courts’ acknowledgment that the parties do not dispute the conduct was unwelcome; the Court suggests that appellant failed to meet the second element because “[Appellant] does not demonstrate through her conduct that all the incidents were uninvited. (Order, Memorandum, And Order for Judgment 4)(App. 166). It is unclear whether the court definitively concludes that appellant failed to meet this second element. Nonetheless, the court erroneously applied the incorrect standard of law and also failed to take into consideration the entire course of Appellant’s conduct which subjectively and objectively shows that appellant did not welcome Mitchell’s sexual behavior.

First, under *Gagliardi*, it is not the Appellant’s burden to announce the discomfort of objectively abnormal conduct, such as when Mitchell brushed up

against her buttocks, asked her to “try some of that [lip gloss]”, grabbed her and attempted to kiss her, placed his hand on her knee and suggested they “run away together”, and when he told her about his dream of having children together. Rather, the threshold for determining whether the conduct was unwelcome is whether it was uninvited and offensive. Certainly, there is no evidence that Appellant invited this conduct or that it was not offensive to her. To the contrary, on one occasion she specifically wrote that she was “starting to believe that Respondent was not joking about the increasing sexual comments and innuendos” and that “he was making her uncomfortable and that she did not know what to do.”

Second, Appellant went beyond the standard in *Gagliardi*, and outwardly rejected Mitchell’s sexual advances, innuendos and derogatory remarks on multiple occasions. In fact, Mitchell would even comment that Appellant had “no guts” when she rejected him. One could easily conclude that the conduct was uninvited and offensive.

Third, the district court’s finding that appellant’s testimony wherein she “said ‘whatever’ and changed the subject”, and other out of context remarks, such as “he must be mad” or that “she did not really comment because he was in a good mood and she did not want to get him upset,” was not enough to demonstrate that the incidents were uninvited is misplaced and involves a credibility determination by the court. Such credibility determinations should be made by a trier of fact and not by the court on summary judgment.

B The District Court Erred By Granting Summary Judgment On The Grounds That Some Of The 17 Alleged Incidents' Were Not Based on Sex or Work Related.

Sexual behavior directed at women raises the inference that the harassment was based on sex. *Burns v. McGregor Elec. Industries*, 955 F.2d 559, 564 (8th Cir. 1992). In *Rorie v. United Parcel Service, Inc.*, the court declared that although the “facts are on the borderline of those sufficient to support a claim of sexual harassment, it cannot be said that a supervisor who pats a female employee on the back, brushes up against her, and tells her she smells good does not constitute sexual harassment as a matter of law.” *Rorie v. United Parcel Service, Inc.*, 151 F.3d 757, 762 (8th Cir. 1998). It presents a jury question as to hostile environment. *Id.*

In *Gagliardi v. Ortho-Midwest, Inc.*, summary judgment was inappropriate because the evidence suggested that Gagliardi’s supervisor, Carlander, required her to join him on business trips during which he attempted to manipulate the circumstances for his own romantic or sexual interests. *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 180 (Minn. Ct. App. 2007). When they arrived at their hotel, Carlander placed his bags in her room without invitation and immediately laid down on her bed. *Id.* That evening, Carlander directed their limousine driver to take them on an *unrelated-work* drive and during that drive, he placed his head on Gagliardi’s lap and made her feel extremely uncomfortable. *Id.* After the business trip, Gagliardi was present at the supervisor’s home when he handed her a calendar which contained sexually suggestive photographic images

of his wife. *Id.* Carlander displayed this same inappropriate conduct on their next business trip, including a request for Gagliardi to put on a bathrobe and order room service. *Id.* The Court of Appeals reversed the district court's denial for summary judgment because they found that the events, *taken together as a whole*, depicted a course of arguably sexual conduct that a fact finder may find to have created a hostile work environment. *Id.* at 182. They reasoned that although isolated instances of sexual harassment may seem inconsequential, taken together they might demonstrate a course of conduct that creates a hostile environment. *Id.* at 176.

The district court erroneously concludes as a matter of law that Mitchell's conduct was not based on sex. This is legally incorrect because if sexual behavior is directed at a female, then it raises the inference that the harassment is based on sex. It is obvious that Appellant is a female and is a member of a protected class. Her gender and Mitchell's sexual behavior alone suggest that the harassment is based on sex. Furthermore, Mitchell's conduct is similar to the conduct in *Rorie*. Even if the facts or incidents are borderline, it cannot be said that intentional brushing up against Appellant; telling her to wear her hair in a certain way; forcibly trying to kiss her on more than one occasion; placing his hand on her leg; telling her "they should just run away and have kids"; telling her that she should "stop denying him" and that "he would get her"; and telling her that she was "his one true love" and that they should "run away and continue having sex"; does not constitute sexual harassment as a matter of law.

The district courts assertion that some of the incidents occurred outside of the work place and did not involve Appellant's employment is also an incorrect application of law and facts. First, the district court attempts to "cherry pick" certain facts to support its' decision and fails to take into consideration all of the incidents' reported, documented and cited by Appellant. There is no requirement that *all* incidents have to be work related. At the summary judgment stage and viewing the facts in favor of appellant, there only needs to be a showing that the sexual conduct was based on sex and work related. The district court cites four incidents to support the conclusion that the conduct occurred outside of the workplace. However, the district court fails to note that two of these incidents were work-related. Both of these incidents occurred while meeting with business associates from Lanmark and/or JVC Builders regarding the opening of a new salon location. Whether the conduct occurred before, during or after the actual meeting is irrelevant. The conduct arose from a work-related event. Moreover, the court fails to take into consideration the incidents when Mitchell brushed up against appellant's buttocks; forcibly tried to kiss her while cleaning a tanning bed; pulled her hair forward; placed his hand on her leg and suggested they "run away together" and the other incidents Appellant reported. These incidents, taken together as a whole, create an issue of fact that Mitchell's conduct was sexual and work-related.

Second, even if some of the conduct occurred outside of the traditional work setting, Mitchell's conduct still constitutes sexual harassment that is work

related. Like the supervisor in *Gagliardi*, Mitchell attempted to manipulate the circumstances in many occasions to be alone with Appellant, both at the work place and after work house. Although it was not a private limousine ride, he did place his hand on her leg as they were driving up to St. Paul for an eye appointment for which he demanded the appellant accompany him. He also commented on her breasts in front of Lanmark personnel at a bar during a meeting to discuss plans for a new tanning salon. Although it was at a bar, the content of the meeting and the participants already indicate that the meeting was work related. Similarly, Mitchell's attempt to kiss Appellant while she was in his home rivals the supervisor's attempt in *Gagliardi* to give his employee sexually provocative pictures of his wife. Even if some of the instances seem inconsequential, it arguably depicts a course of sexual conduct that could allow a fact finder to find that a hostile work environment exists. Summary judgment is inappropriate because reasonable minds could differ as to whether Mitchell's harassment was based on sex and work related.

C. The District Court Erred By Granting Summary Judgment On The Grounds That Appellant Has Failed to Present Evidence That Mitchell's Conduct Made the Workplace Offensive and Interfered With Her Job.

Appellant does state a prima facie case for sexual harassment based on a hostile work environment. As stated in the district court's memorandum, the main dispute between the parties is whether the harassment affected a term, condition or privilege of Appellant's employment.

1. All seventeen incidents of sexual harassment must be examined to determine whether a hostile environment exists.

The district court attempts to disregard certain incidents by finding that Appellant's correction sheet and affidavit are self-serving and contradict earlier deposition testimony. First, this is an incorrect standard of review. Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact". Minn. R. Civ. P. 56.03. The court must view the evidence in the light most favorable to the nonmoving party. *Fabio*, 504 N.W.2d at 761.

Second, case law articulates that a subsequent affidavit may raise a factual issue where the deposition itself reveals confusion or mistake, as such an affidavit is not inherently inconsistent with the deposition, but rather seeks to explain it. *Banbury v. Omnirition Intern., Inc.*, 533 N.W.2d 876, 888. In *Dooner v. Impressions Incorpo.*, the appellant was asked about a certain incident of 'sexual harassment' during her deposition. *Dooner v. Impressions Incorpo.*, NO. C2-95-1140, 1995 WL 634933, at *5 (Minn. Ct. App. Oct. 31, 1995). She replied that the incident did happen, but she was unsure when it happened. *Id.* She detailed the information in a subsequent affidavit. *Id.* The court declared that the subsequent affidavit did not contradict the deposition, but merely added some facts which she later remembered. *Id.* at *6. Furthermore, the court said that even if the statements contradict her deposition testimony, the original deposition was enough

in itself to raise an issue of fact as to whether such conduct created a sexually hostile environment. *Id.*

The court fails to apply the correct standard of review for a summary judgment proceeding. At this stage, the court must look at the evidence in a light most favorable to Appellant. This evidence comes from *deposition testimony, a timely executed correction sheet, and affidavits*. Instead, the court uses this argument to “cherry pick” which evidence will support summary judgment and does not look at the evidence as a whole. Furthermore, this is the first time that the subsequent correction sheet or affidavit has been made an issue. In the original district court order, dated July 26, 2007, the court properly took into consideration all seventeen incidents currently at issue when granting summary judgment. In fact, the same seventeen incidents were presented to this Court in the first appeal. However, in the most recent order dated June 18, 2009, the court changes which facts should be considered for determining a hostile-work environment. Instead, the court concludes that many of the incidents previously relied upon are now additional allegations that seek to change her deposition testimony. Again, the district court incorrectly attempts to pick and choose the evidence that will support its conclusion and fails to apply the appropriate summary judgment standard.

Even if the deposition testimony, correction sheets and affidavits are an issue, case law maintains that they are still admissible. During the deposition, it was evident that the Appellant was confused. She requested that the questions be

rephrased or repeated multiple times. She repeatedly answered that she “did not remember” or “could not recall” *as she sat there*, but that she may have additional information that she could look for and provide. (TGM depo pg. 29-32; 35-36; 39; 41-42; 45; 51-52; 55; 57; 59-60; 63; 65-67; 69-72; 74; 76-81; 83; 85-86; 98-99; 101; 109-110)(App. 28-31; 34-35; 38; 40-41; 42; 43-44; 45; 47; 48-49; 52; 54-56; 58-61; 63; 64-69; 70; 72-73; 78-79; 80; 82-83). She agreed to search her files for any additional documents related to her claim. (TGM depo pg. 114)(App. 86). Several times she stated that she was confused. (TGM depo pg. 73; 120)(App. 62; 88). Opposing counsel repeatedly attempted to ask the same question and after rephrasing the question multiple times, she finally said she did not remember any other instances. Like *Dooner*, Appellant was confused and her deposition reveals that confusion. Her affidavit is not inconsistent with the deposition, but rather seeks to explain and add to her testimony. Furthermore, less than 30 days after the deposition, as required by Minn. R. Civ. Pro 30.05, Appellant submitted her correction sheets to opposing counsel which provided additional incidents which she subsequently recalled. The correction sheet properly supplemented the deposition testimony and the same information was contained in the subsequent affidavit.

Appellant does state a prima facie case for sexual harassment based on a hostile work environment. These seventeen incidents documented, testified and cited to by Appellant are relevant in determining whether Mitchell’s conduct was

severe and pervasive to alter the conditions of Appellant's employment and create an abusive environment.

2. The Severe and Pervasive Conduct Altered the Conditions of Appellant's Employment.

In order to demonstrate that the harassment affected a term, condition, or privilege of employment, Appellant will have to show that the harassment was so severe or pervasive as to alter the conditions of [Appellant's] employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).¹ The conduct must be sufficient to create a hostile environment, both as it would be viewed objectively by a reasonable person and as it was actually viewed subjectively by the victim. *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998). Relevant factors for determining whether the conduct rises to a level of sufficient hostility or abuse so as to create a claim include "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." *Gagliardi*, 733 N.W.2d 171. Although isolated instances of harassment may seem inconsequential, taken together they may demonstrate a course of conduct that creates a hostile environment. *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 594 (Minn. App. 1994).

¹ The District Court's memorandum incorrectly cites to an unpublished case regarding deposition testimony *Dooner v. Impressions Inc.*, support this proposition. *Dooner v. Impressions, Inc.*, NO. C2-95-1140, 1995 WL 634933, at *5 (Minn. Ct. App. Oct. 31, 1995). However, the correct citation for this proposition is from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993).

In *Howard*, the court declared that once there is evidence of improper conduct and a *subjective* offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury. *Howard*, 149 F.3d at 840. The aggravating factors in that case were unwanted physical contact when the Defendant allegedly brushed against the Plaintiff, and the frequency of the conduct, which were chronic sexual innuendos. *Id.* The court referred to Justice Scalia's concurring opinion in *Harris*, which stated, "since Congress set no clear standard defining a hostile environment, it must be left to virtually unguided juries to decide whether particular conduct is egregious enough to merit an award of damages." *Id.*

The U.S. District Court for the 8th circuit has found that even a single alleged incident is enough to create a genuine issue of material fact for a fact finder to determine whether it was severe and pervasive. *Moring v. Arkansas Department of Correction*, 243 F.3d 452, 456 (8th Cir. 2001). The defendant was the plaintiff's supervisor and while on a business trip, but after the business day, he appeared barely clothed at her door, sat on her bed, touched her thigh and attempted to kiss her. *Id.* at 456-57. The court found that it was sufficient evidence to support a reasonable jury's finding that the incident at the hotel was severe enough to alter the terms and conditions of her employment. *Id.* See also *Howard*, 149 F.3d at 840 ("once there is evidence of improper conduct and subjective offense, the determination whether the conduct rose to the level of abuse is largely in the hands of the jury").

The Eight Circuit Court of Appeals also affirmed a jury verdict where the plaintiff was subjected to hostile treatment when she was physically touched in a sexually suggestive and intimate manner on two occasions by a coworker who had expressed a sexual interest in her. *Hathway v. Runyon*, 132 F.3d 1214, 122 (8th Cir. 1997). *See also Hirase-Doi v. U.S. West Communications, Inc.*, 61 F.3d 777, 780-83 (10th Cir. 1995) (a few incidents of unwelcome physical touching combined with winks and intimidating stares with possible sexual overtones is sufficient to establish a hostile environment).

Cases in which summary judgment was appropriate are quite distinguishable from the case at bar. In *Algana v. Smithville R-II Sch. Dist.*, the court did not find that the conduct was severe or pervasive to satisfy the high threshold for actionable harm. *Algana v. Smithville R-II Sch. Dist.*, 324 F.2d 975, 977-979 (8th Cir. 2003). However, the court relied on the fact that there were no allegations of inappropriate touching or sexual propositions. The Plaintiff was guidance counselor at the high school where defendant worked. The defendant repeatedly went to Plaintiff's office to discuss personal issues and repeatedly told her he loved her. However, the court felt his conduct was more indicative of someone in search of friendship than of a sexual relationship. *Id.* He was simply looking to Plaintiff for therapy, even though it may have been inappropriate. *Id.*

In *Smith v. Ashland*, the court rejected a hostile work environment claim because the Plaintiff failed to assert that any sexual comments were directed at her, but rather, they were merely uttered in her presence. *Smith v. Ashland*, 179 F.

Supp. 2d 1065, 1068 (D. Minn. 2000). The court stated that tasteless banter does not amount to sexual harassment. Similarly, in *Ferguson v. Michael Foods*, the comments were not directed at Plaintiff and they were only isolated and offhanded in nature. *Ferguson v. Michael Foods*, 74 F. Supp. 2d 862, 869 (D. Minn. 1999). Lastly, in *Henthorn v. Capitol Communications Inc.*, the court rejected a hostile work environment claim at summary judgment because, despite the requests, the co-worker never inappropriately touched the Plaintiff, nor did he make sexual comments about her in her presence or sexually proposition her. *Henthorn v. Capitol Communications Inc.*, 359 F.3d 1021, 1027-28 (8th Cir. 2003). They reasoned that continuous requests by a co-worker to go out with him were repetitive and annoying, but not physically threatening. *Id.*

There are many similarities between the case at bar and *Gagliardi v. Ortho-Midwest, Inc.* The inappropriate conduct in *Gagliardi*, including the private limousine ride, the conduct in the supervisor's home and the victim's uncomfortable feeling is similar to Respondent's conduct. Respondent attempted to manipulate the circumstances on many occasions to be alone with Appellant. While cleaning a tanning bed, Respondent approached Appellant and tried to kiss her. He placed his hands on her leg multiple times and attempted to kiss her while she was in his home. He insisted that she travel with him to an eye appointment in St. Paul during which he placed his hand on her thigh and suggested they run away together. Appellant never invited the conduct and often outwardly rejected his sexual advances toward her. Again, the district court failed to take all the

instances of sexual harassment into consideration. Even though an instance may seem inconsequential, it arguably depicts a course of sexual conduct that a fact finder could find that a hostile work environment exists. Summary judgment is inappropriate because reasonable minds could differ as to whether Respondent created a hostile environment.

There is no standard defining a hostile environment. It is up to the fact finder to decide whether Respondent's conduct was egregious enough to establish a hostile environment. Like *Howard*, there is ample evidence of improper conduct. There are seventeen instances where Respondent acted inappropriately. Even though the district court disagreed that all of the incidents constituted sexual harassment, there certainly is evidence that reasonable minds could differ as to whether some of those incidents constitute sexual harassment. Those incidents include when the Respondent intimately stroked Appellant's hair, forcibly tried to kiss her, made inappropriate sexual comments, including comments about her breasts and having sex, repetitively asked her to "run away" with him and intentionally brushed up against her buttocks. This type of behavior, taken as a whole, is evidence of improper conduct and the disputed facts should be resolved by an unguided jury.

Even if the court isolates each incident to determine whether Respondent's conduct created a hostile environment, the evidence in this case sufficiently creates an issue of material fact that should go to a jury like *Moring*. Appellant recorded multiple instances of improper conduct, including Respondent's attempt

to kiss her, the repeated attempts to touch her leg, inappropriate comments and suggestions regarding her breasts and sexual relations. Although *Moring* was an appeal of a jury verdict, it supports the proposition that the supervisor's conduct could not be considered sexual harassment as a matter of law, but instead needed to be decided by a jury. Like *Moring*, Respondent's conduct is similar and should be presented to a jury because reasonable minds can differ as to whether Respondent's conduct established a hostile environment that was severe and pervasive. Here, there is improper conduct and a subjective offense, and therefore the determination whether the conduct rose to the level of abuse should be left to the hands of the jury.

Lastly, like *Hathway*, Respondent expressed a sexual interest in Appellant on many occasions. He asked her to "run away" with him and made several sexual comments to her regarding her breasts and sexual relations. He physically touched her in a sexually suggestive and intimate manner on several occasions. It is evident that this conduct was unwelcome and that Appellant was subjected to this conduct because of her sex.

III. RESPONDENTS HAVE FAILED TO ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT APPELLANT FAILED TO TAKE ADVANTAGE OF ANY PREVENTATIVE OR CORRECTIVE OPPORTUNITIES TO AVOID HARM.

The Court in *Frieler* held that, in cases not involving a tangible employment action, the employer may raise an affirmative defense (referred to as the Faragher/Ellerth defense) to limit liability or damages if it proves by a

preponderance of evidence: (1) that the employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the employee reasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.” *Frieler*, 751 N.W.2d at 568 (adopting the standard set forth by the Supreme Court in *Ellerth* and *Faragher* as the proper one to be applied for claims of workplace supervisor sexual harassment; *Faragher v. City of Baton Raton*, 524 U.S. 775, 807-08 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)). However, it is important to emphasize that an employee who failed to complain does not carry the burden of proving the reasonableness of that decision. Rather, the burden lies with the employer to prove that the employee’s failure to complain was unreasonable. *Faragher*, 524 U.S. at 807; *Burlington Indus., Inc.*, 524 U.S. at 764. Proof that the employee unreasonably failed to use any complaint procedure provided by the employer will normally satisfy the employer’s burden. *Id.*

Moreover, it is critical to note that the court in *Faragher* declared that an employer is liable for unlawful harassment whenever the harasser is of sufficient high rank to fall “within that class...who may be treated as the organization’s proxy”. *Faragher*, 524 U.S. at 789. In such circumstances, the official’s unlawful harassment is imputed automatically to the employer. *Id.* Therefore, the employer cannot raise the affirmative defense, *even if* the harassment did not result in a tangible employment action. The court cited to specific examples of officials’ whose harassment could be imputed automatically to the employer: president,

owner, partner, and corporate officer. *Id.* They cite to *Harris*, in which the “individual charged with creating the abusive atmosphere was the president of or corporate employer and is indisputably within that class of an employer organization’s proxy”. *Id., Harris*, 510 U.S. at 19. See *Burns v. McGregor Electric Industries, Inc.*, 955 F.2d 559, 564 (8th Cir. 1992) (employer-company liable where harassment was perpetrated by its owner); see *Torres v. Pisano*, 116 F.3d 625, 634-35 (2nd Cir. 1997) (noting that a supervisor may hold a sufficiently high position “in the management hierarchy of the company for his actions to be imputed automatically to the employer”).

Notably, in a case decided prior to the establishment of the Faragher/ Ellerth defense, the employer attempted to argue that it was not liable for its’ manager’s harassment of an employee because the alleged conduct was unreported. *Henry v. Gehl Corp.*, 867 F. Supp. 960, 969 (D. Kansas 1994). In denying the employer’s motion for summary judgment, the court found that the employee handbook required the employee to take her complaints first to her supervisor, and the handbook provided no other alternative methods for reporting complaints when the manager was the alleged harasser. *Id.* It would be unreasonable to require an employee to utilize an anti-harassment policy when that policy proscribes that the complaint be submitted to the harasser.

Respondent did not establish by a preponderance of the evidence that Appellant’s failure to complain was unreasonable. To the contrary, Appellant *did* avail herself to the company policy against sexual harassment by reporting the

conduct on company employee incident forms. It would be illogical to argue that it would be reasonable for the appellant to report to Mitchell when Mitchell was the problem. Moreover, it would not have been reasonable for Appellant to report to Sandra Mitchell in the alternative because she was the harasser's wife. In fact, Appellant was instructed by Mitchell to not to talk to Sandra. Instead, Appellant did what she thought was reasonably appropriate. She wrote incident reports to herself, described Mitchell's behavior, and dated and signed each report. She did this in accordance with the company's anti-sexual harassment policy. She reasonably believed that if she presented these to either owner, she would immediately lose her employment with the company. Moreover, she repeatedly rejected Mitchell's advances and innuendos directly to him, making it clear that his actions were inappropriate, unwelcome and offensive. An issue of material fact exists as to whether Appellant's attempt to report the harassment by her rejections and on employee incident forms instead of directly to Mitchell was reasonable in light of the circumstances.

Furthermore, Respondent should not be entitled to the Ellerth/Faragher defense because it goes against precedent and public policy. As the court noted in *Harris* and subsequently referred to in *Faragher*, if the individual creating the harassment is a president or corporate employer, then they are treated as the organization's proxy. Mitchell is the owner, president and corporate official of the company and he indeed was the individual creating the abusive environment. Like the employee in *Henry*, the appellant was required to report any sexual misconduct

to Mitchell, her direct supervisor, however, the handbook did not provide a viable alternative option when her supervisor was the harasser. To allow Respondent to assert an affirmative defense because Appellant self-reported instead of reporting to Mitchell is illogical and contrary to public policy.

CONCLUSION

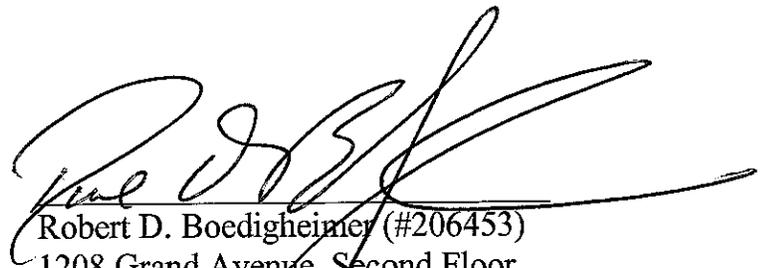
Mitchell's sexual harassment creates an issue of fact as to whether Appellant was subjected to a hostile work environment. Reasonable minds can differ on whether the conduct was severe and pervasive. Respondent cannot demonstrate by a preponderance of the evidence that Appellant's failure to report the sexual harassment to the harasser was unreasonable. Moreover, Mitchell is the owner of Respondent company, and therefore the Ellerth/Faragher defense should not apply because he was the harasser who created the hostile environment. It would be against precedent and public policy to allow Respondent to escape liability under such a defense. Appellant has established that there are disputed issues of material facts and summary judgment should be reversed and remanded for trial.

CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitations of Minnesota Rules of Civil Appellate Procedure 132.01, subdivision 3(a). This brief was prepared using Word, which reports that the brief contains 992 lines/9,899 words.

Respectfully submitted,

Dated: October 15, 2009

A large, stylized handwritten signature in black ink, appearing to read 'R. D. Boedigheimer', is written over the typed name and address.

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