MINNESOTA STATE LAW LIBRARY

5

NO. A10-543

State of Minnesota
In Supreme Court

Carol J. LaMont,

Petitioner,

vs.

Independent School District #728,

Respondent.

PETITIONER'S BRIEF AND APPENDIX

NICHOLS KASTER, PLLP
James H. Kaster (#53946)
David E. Schlesinger (#387009)
Adam W. Hansen (#391704)
4600 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 256-3200

Attorneys for Petitioner

FOLEY & MANSFIELD, PLLP
Thomas A. Harder (#158987)
Lisa A. Lamm (#264313)
250 Marquette Avenue South
Suite 1200
Minneapolis, MN 55401
(612) 338-8788

Attorneys for Respondent

2011 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE LEGAL ISSUES 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

I. BACKGROUND 3

II. MINER'S CONDUCT 3

A. Spring 2006 3

B. Summer 2006 7

C. Fall 2006 7

D. Winter 2006-2007 9

E. Investigation of Miner's Conduct 10

III. PROBABLE CAUSE FROM THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS 11

IV. PROCEDURAL HISTORY: DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, COURT OF APPEALS AFFIRMS 11

SUMMARY OF THE ARGUMENT 13

ARGUMENT 14

I. STANDARD OF REVIEW 14

II. THE MHRA PROHIBITS A HOSTILE WORK ENVIRONMENT BASED ON SEX EVEN IF THE CONDUCT IS NOT "SEXUAL HARASSMENT" 16

A. Hostile Work Environment Under Title VII 16

1. Title VII Protects Individuals from Hostile Work Environment Based on Every Protected Status 17

2. The Supreme Court Clarifies the Standard for Hostile Work Environment Claims 18

3. Title VII Prohibits a Hostile Work Environment Based on Sex, Even if the Conduct is Not Sexual 20

B. The Minnesota Human Rights Act 22

1. Sexual Harassment Under the MHRA 23

2. The Minnesota Legislature Defines and Later Amends "Sexual Harassment" 24

3. The MHRA Prohibits a Hostile Work Environment Based Upon Any Protected Status 26

C. Other Human Rights Acts of other States Prohibit a Hostile Work Environment Based on Sex, Even if the Conduct is Not Sexual 28

D. The MHRA Prohibits a Hostile Work Environment Based on Sex Separate and Apart from its Prohibition of Sexual Harassment 30

1. The Plain Language of the MHRA's Provisions Outlaw Hostile Work Environment Discrimination Based on Sex 31

2. The Similar Language in Title VII and the MHRA Must Give Rise to a Prohibition of Harassment on the Basis of Sex Under the MHRA 32

3. The Definition of Sexual Harassment Does Not Define the Entire Scope of Claims for Hostile Work Environment 35

4. Those Harassed Based on Sex Should Not Receive Less Protection than those Treated Differently on Another Protected Status 36

5. Given the Broad Remdial Puposes of the MHRA, Harassment Based on Sex Must Be Prohibited, even if it is not Sexual 37

III. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE HARASSMENT LAMONT SUFFERED WAS NOT SUFFICIENTLY SEVERE OR PERVASIVE TO BE ACTIONABLE UNDER THE MHRA 38

A. Harassment Need Not be Directed at LaMont to Contribute to a Hostile Work Environment 39

B. Miner was LaMont's Immediate Supervisor 41

C. Miner's Harassment Should be Viewed in the Aggregate 42

D. Miner's Conduct was Severe 43

CONCLUSION 46

CERTIFICATE OF BRIEF LENGTH 47

TABLE OF AUTHORITIES

FEDERAL CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 15

Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990) 21, 35, 45

Burlington Industries, Inc. v. Ellerth, 542 U.S. 775 (1998) 25

Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559 (8th Cir. 1993) 43

Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959 (8th Cir. 1993) 39

Carter v. Chrysler Corp., 173 F.3d 693 (8th Cir. 1999) 26

Cotrill v. MFA, Inc., 442 F.3d 629 (8th Cir. 2006) 41

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 25, 38, 41

Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) 1, 20, 34, 35, 45

Hare v. Potter, 220 F. App'x 120 (3rd Cir. 2007) 18

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) 1, 18, 19, 38

Hathaway v. Runyon, 132 F.3d 1214 (8th Cir. 1997) 39

Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321 (6th Cir. 2008) 40

Hicks v. Gates Rubber Co., 833 F.2d 1406 (10th Cir. 1987) 21, 39

Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993) 39, 45

Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264 (8th Cir. 1993) 20

Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 22

McKinney v. Dole, 765 F.2d 1129 (D.C. Cir. 1985) 21

Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) 16, 17, 18, 23, 33

Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998) 19

Raniola v. Bratton, 243 F.3d 610 (2nd Cir. 2001) 22

Rodgers v. W.S. Life Ins. Co., 12 F.3d 668 (7th Cir. 1993) 40, 42

Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) 17, 18

Schwapp v. Town of Avon, 118 F.3d 106 (2d Cir. 1997) 39

Sandoval v. Am. Building Maintenance Indus., Inc., 578 F.3d 787 (8th Cir. 2009) 40

Smith v. First Union Nat. Bank, 202 F.3d 234 (4th Cir. 2000) 22

Smith v. Sheahan, 189 F.3d 529 (7th Cir. 1999) 22

Smith v. St. Louis Univ., 109 F.3d 1261 (8th Cir. 1997) 21

Stevens v. Dep't of Treasury, 500 U.S. 1 (1991) 21

Sturm-Sandstrom v. County of Cook, 552 F. Supp. 2d 945 (D. Minn. 2008) 28, 43, 44, 45

Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997) 18

Vinson v. Taylor, 753 F.2d 141 (D.C. Cir. 1985) 40

Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150 (8th Cir. 2003 32

Williams v. Gen. Motors Corp., 187 F.3d 553 (6th Cir. 1999) 18

Williams v. Metro. Waste Control Comm'n, 781 F. Supp. 1424 (D. Minn. 1992) 27

White v. BFI Waste Sevices, LLC, 375 F.3d 288 (4th Cir. 2004) 18

MINNESOTA STATE CASES

Continental Can Company, Inc. v. State, 297 N.W. 2d 241 (Minn. 1980) 1, 23, 24, 25, 33, 35

Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997) 33, 34, 35

Fabio v. Bellomo, 504 N.W.2d 758 (Minn. 1993) 14

Fletcher v. St. Paul Pioneer Press, 1995 WL 379140 (Minn. Ct. App. 2005) 42

Frieler v. Carlson Mktg. Group, Inc., 751 N.W. 2d 558 (Minn. 2008) 24, 26, 27, 28

Gagliardi v. Ortho-Midwest, Inc., 733 N.W.2d 171 (Minn. Ct. App. 2007) 43

Giuliani v. Stuart Corp., 512 N.W.2d 589 (Minn. Ct. App. 1994) 43

Goins v. West Group, 635 N.W.2d 717 (Minn. 2001) 1, 26, 27, 33

Gramling v. Mem'l Blood Ctrs. of Minn., 601 N.W.2d 457 (Minn. Ct. App. 1999) 15

Jones v. Yellow Freight Sys., Inc., 2000 WL 1052167 (Minn. Ct. App. 2000) 40

Kay v. Peter Motor Co., Inc., 483 N.W.2d 481 (Minn. Ct. App. 1992) 40

Mpls. Police Dept. v. Mpls. Comm. Civ. Rights, 402 N.W. 2d 125 (Minn. Ct. App. 1987 24

Murnane v. Aitkin Co., 2001 WL 910293 (Minn. Ct. App. 2001) 27

Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981) 15

Schramm v. Village Chevrolet Co., 2003 WL 1874753 (Minn. Ct. App. 2003) 27

State by Beaulieu v. City of Mounds View, 518 N.W.2d 567 (Minn. 1994) 15

Wartnick v. Moss & Barnett, 490 N.W.2d 108 (Minn. 1992) 15

Wenigar v. Johnson, 712 N.W.2d 190 (Minn. Ct. App. 2006) 1, 26, 27, 38, 39

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623 (Minn. 2007) 15

Williams v. Curtis, 501 N.W.2d 653 (Minn. Ct. App. 1993) 15

W.J.L. v. Bugge, 573 N.W.2d 677 (Minn. 1998) 15

Zip Sort, Inc. v. Comm'r of Revenue, 567 N.W.2d 34 (Minn. 1997) 14

OTHER STATE CASES

Alcorn v. Anbro Eng'g, Inc., 2 Cal. 3d 493 (Cal. 1970) 42

A.L.P. Inc. v. Bureau of Labor & Indus., 984 P. 2d 883 (Or. Ct. App. 1999) 28

Contreras v. Crown Zellerbach Corp., 565 P.2d 1173 (Wash. 1977) 42

Ellsworth v. Pot Luck Enterprises, Inc., 624 F. Supp. 2d 868 (M.D. Tenn. 2009) 18

Hampel v. Food Ingredients Specialties, Inc., 729 N.E.2d 726 (Ohio 2000) 28

Haynie v. State, 664 N.W.2d 129 (Mich. 2003) 29, 30

Payne v. Children's Home Soc. of Washington, Inc., 892 P.2d 1102 (Wash. Ct. App. 1995) 28

McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 669 N.Y.S. 2d 122 (N.Y. Sup. Ct. 1997) 28

Muench v. Twp. Of Haddon, 255 N.J. Super. 288 (N.J. Super. Ct. App. Div. 1992) 28

Taylor v. Metzger, 706 A.2d 685 (N.J. 1998) 42

White v. Monsanto Co., 585 So.2d 1205 (La. 1991) 42

FEDERAL STATUTES

42 U.S.C. § 2000e-2(a)(1) 1, 16

FEDERAL REGULATIONS

29 C.F.R. § 1604.11(a) 1, 20, 21, 24, 34, 35

MINNESOTA STATE STATUTES

Minn. Stat. § 363.01 subd. 10 24

Minn. Stat. § 363.01, subd. 10a 25

Minn. Stat. § 363.01, subd. 14 34

Minn. Stat. § 363.03 23

Minn. Stat. § 363.03 (2)(c) 22

Minn. Stat. § 363.03, Sec. 1 22

Minn. Stat. § 363A.01, *et. seq.* 1, 11

Minn. Stat. § 363A.01, subd. 41 34

Minn. Stat. § 363A.03, subd. 13 ..... 25, 31, 32

Minn. Stat. § 363A.03 subd 42 ..... 1, 32, 35, 36

Minn. Stat. § 363A.03, subd. 43 ..... 1, 2, 12, 16, 25, 32, 35, 36

Minn. Stat. § 363A.03, subd. 43(1) 35

Minn. Stat. § 363A.03, subd. 43(3) 36

Minn. Stat. § 363A.04 22

Minn. Stat. § 363A.04, subd. 1 37

Minn. Stat. § 363A.08 23

Minn. Stat. § 363A.08, subd. 1 31

Minn. Stat. § 363A.08, subd. 2 ..... 1, 31, 36

RULES

Minn. R. Civ. P. 56.03 14

STATEMENT OF THE LEGAL ISSUES

I. Did the court of appeals err in concluding that the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.01, *et seq.* does not prohibit a hostile work environment based on "sex" under Minn. Stat. § 363A.03, Subd. 42, unless the offending conduct is "sexual harassment" under Minn. Stat. § 363A.03, Subd. 43?

The court of appeals incorrectly held that Petitioner Carol J. LaMont's ("LaMont") hostile work environment claim failed because the harassment she suffered on the basis of her "sex" was not "sexual harassment." LaMont preserved this issue for appeal by timely petitioning this Court for review of the court of appeals' decision. (Add. 32.)

Apposite Cases:

Continental Can Co., Inc. v. State, 297 N.W. 2d 241 (Minn. 1980)
Goins v. West Group, 635 N.W.2d 717 (Minn. 2001)
Hall v. Gus Const. Co., Inc., 842 F.2d 1010 (8th Cir. 1988)

Apposite Statutory Provisions:

Minn. Stat. § 363A.03, Subds. 42, 43 (2010)
Minn. Stat. § 363A.08, Subd. 2. (2010)
42 U.S.C. § 2000e-2(a)(1) (2011)
29 C.F.R. § 1604.11(a) (2010)

II. Did the district court err in determining that the harassment LaMont suffered was not sufficiently severe or pervasive to be actionable under the MHRA?

Although the court of appeals did not reach this issue, the district court incorrectly concluded that LaMont's hostile work environment claim failed as a matter of law because no reasonable fact-finder could conclude that the conduct was sufficiently severe or pervasive to be protected. LaMont preserved this issue for appeal by timely appealing the district court's grant of summary judgment against her and petitioning this Court for review of the court of appeals' decision. (Add. 32.)

Apposite Cases:

Wenigar v. Johnson, 712 N.W.2d 190 (Minn. Ct. App. 2006)
Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993)

STATEMENT OF THE CASE

Petitioner Carol J. LaMont brought suit against her employer, Independent School District #728 ("Respondent") in the Tenth Judicial District for violations of the Minnesota Human Rights Act ("MHRA") after she was subjected to a hostile work environment simply because she is female. LaMont's Complaint asserted claims for hostile work environment based on sex and for sexual harassment. (P.A. 2.) Respondent brought a motion for summary judgment which was granted by the Honorable Robert B. Varco. (Add. 1.) The district court held that LaMont's hostile work environment claim failed because the harassment she suffered based on her sex was not sexual harassment. (Add. 17.) Furthermore, the district court held that even if LaMont could present a hostile work environment claim based on sex, it would fail because no reasonable fact-finder could conclude that the conduct was sufficiently severe or pervasive. (Add. 1.)

LaMont appealed. (P.A. 53.) The court of appeals affirmed, holding that the MHRA does not protect individuals from a hostile work environment based upon "sex" unless the conduct falls within the definition of "sexual harassment" under Minn. Stat. § 363A.03, Subd. 43. (Add. 18.) LaMont then petitioned the Minnesota Supreme Court for review. The Supreme Court granted LaMont's petition for review on April 19, 2011.

STATEMENT OF FACTS

I. BACKGROUND

LaMont worked as a custodian in the Elk River School District beginning in 1996. (LaMont Dep. 11.) In the fall of 2002, LaMont began working at Elk River High School. Doug Miner ("Miner") was hired by Respondent and began working as the Night Lead Custodian ("Night Lead") at the Elk River High School on April 10, 2006. (Miner Dep. 14.) At the time Miner was hired as the Night Lead, LaMont was a member of the night crew working under Miner. The other custodians on the night crew were Dustan Johnson ("Johnson"), Gary Ebner ("Ebner"), Loren Klein ("Klein") and Holly Case ("Case").[1] On May 31, 2006, Miner was promoted to Head Custodian, which meant that he worked days but was still responsible for overseeing the night crew. (Miner Dep. 14, 23.)

II. MINER'S CONDUCT

A. Spring 2006

From the day he started working as Night Lead, Miner treated the women differently than the men on the crew. (Ex. 1 at No. 7.)[2] Miner segregated them from the male employees. Miner also subjected them to different work rules and frequent degrading comments about their sex. At times, including for an entire summer, Miner ordered them not to speak.

It did not take long for Miner to make it clear that he would not treat women and men equally. In May 2006, soon after Miner started, while he and Klein were in the

[1] LaMont and Case were the only women on the night crew at the time.
[2] The Exhibits cited herein are attached to the Affidavit of David E. Schlesinger that was submitted with Petitioner's Response to Respondent's Motion for Summary Judgment.

commons of the school, Miner openly told Klein that he didn't want any women on his crew.[3] (Add. 27 at ¶ 4.)

On another occasion, Miner and custodians Ebner, Case, Klein and LaMont were gathered in the break room. (LaMont Dep. 87.) In front of the rest of the custodians, Miner stared at LaMont and humiliated her by stating roughly, "I have no intention of ever asking you anything." (LaMont Dep. 198.) Then Miner said he had seen Ebner's wife. (Id.) Miner said, "not bad!" (LaMont Dep. 87-88; Case Dep. 14.) Miner went on to ask Ebner if his wife had spent a lot of money on a recent shopping trip. (LaMont Dep. 87-88.) When Ebner stated that she had, Miner said, "Oh, ho, ho. Wait a minute here. Well, you've got to -- no. Women have their place. You've got to keep them in their place . . ." (Id.) Later that same night, LaMont heard Miner expound further on his comment about women having their place. (Id.) He said, "The only place women should be is in the kitchen and the bedroom." (Id. at 89.) Klein also heard Miner make this comment. (Add. 27 at ¶ 5.)

As the result of Miner's differential, humiliating treatment of them, LaMont and Case decided to take their breaks in a separate room from Miner. (LaMont Dep. 91-92.) LaMont told Miner that she did not want to take breaks in the same room with him. (Id. at 91.) At first, Miner refused to allow LaMont and Case to break in another room. Then, after LaMont and Case complained to Jim Hilyar ("Hilyar"), Supervisor of Buildings and Grounds, Miner relented, but insisted that Case and LaMont report to him

[3] LaMont's coworkers Klein, Robideau and Layne submitted affidavits which LaMont cited in opposing summary judgment. They are included in Petitioner's Addendum.

in person before and after their breaks despite the fact that the entire staff carried radios that they could have used to report to him. (LaMont Dep. 91-2; Miner Dep. 54-5, 57-8.) When LaMont asked if she and Case could report to him on their radios, Miner said, "You will report directly to me." (LaMont Dep. 92.)

Male custodians Klein, Johnson and Ebner sometimes took breaks in rooms separate from Miner. (LaMont Dep. 91-3.) When they did, Miner did not require them to check in with him in person before and after his breaks. (Id.) Unlike the male custodians, LaMont and Case were required to check in with Miner in person before and after each break. (Id. at 95.)

Miner also allowed the men, but not the women, to take breaks at times of their choosing. (Case Dep. 44.) Additionally, although Miner allowed the men to wear street clothes, he required LaMont and Case to wear uniforms. (Case Dep. 23-4.) Miner also harassed Case and LaMont in other ways. For example, Miner required Case and LaMont to put their lunches in the break room before clocking in, while he would allow the men to do so after they clocked in. (LaMont Dep. 171-72.)

LaMont's co-worker, Donald Robideau ("Robideau"), stated in his affidavit that Miner constantly picked on Case and LaMont. (Add. 25 at ¶ 7.) For example, on at least one occasion, Miner chastised LaMont for unclean spots in her work area even though LaMont was on vacation during that time. (LaMont Dep. 156-58.) Miner also falsely accused Case of not doing her work so frequently that she took photographs of her work area after she had cleaned it. (Case Dep. 27-28: "I had been written up so much by Doug

Miner that I finally had taken pictures. After the area was cleaned we went around and took pictures.")

Miner frequently became agitated if simply asked job related questions by LaMont or Case. (Case Dep. 62-63.) He would clench and shake his fist in anger. (Id.; Add. 25 at ¶ 8.) George Layne, one of LaMont's co-workers, stated that Miner was "scary" when he got mad and that he would "clench his fists" and his "face would get all red." (Add. 31 at ¶10.) This conduct was directed in particular at Case and LaMont, rather than the male custodians. (Case Dep. 63.)

Miner also disproportionately added additional tasks to LaMont's work area, often having her clean his work area. (LaMont Dep. 223-24.) LaMont testified:

> Doug would change [my work area] anytime he wanted to. He would add stuff to mine. Stuff that was his, his area, he'd say, "Carol, you can -- you can now clean those bathrooms." Okay. "Carol, you're going to sweep the gym tonight. Carol, you're going to" – he added stuff to my area.

Id. at 224.

LaMont and Case reported Miner's conduct to Jim Voight ("Voight"), who at that time was Principal of Elk River High School, on two occasions. (LaMont Dep. 90, 103-05, 107-09; Case Dep. 30-32.) The first report LaMont and Case made to Voight was a few weeks after Miner started working for Respondent. (LaMont Dep. 90.) Voight said he was going to observe Miner's conduct. (Id.) When Miner's conduct continued, a second report occurred in September, 2006. (Id. at 109.)

B. Summer 2006

In the summer of 2006, the entire custodial crew worked during the days. (Miner Dep. 32-33.) Miner directly supervised them all. (Id.) Miner literally segregated the women from the men, further isolating and humiliating them. (LaMont Dep. 111: Q. "So we're talking about physical separation of work areas during the summer when everybody is working together?" A. "Correct.") Miner also literally prohibited the women from speaking at all. LaMont testified:

> They would work in one area; we would work in another area. We were not allowed -- we had no contact with the guys at all. We were not allowed to talk to them. We were not allowed to talk to each other, at all.

(Id. at 111.)

Klein was also well aware that Miner had segregated the women from the men that summer. (Add. 28 at ¶ 7.) In fact, Klein was present on one occasion when Miner told LaMont and Case not to speak. (Id. at ¶ 6.) Miner told them "not to talk at all during work hours." (Id.) Klein found this to be harsh and unreasonable and also testified that Miner did not restrict speaking amongst the men. (Id.)

C. Fall 2006

In the fall of 2006, Miner instructed Day Lead Custodian Will Jones ("Jones") continued to keep Case and LaMont segregated from the male custodians. (LaMont Dep. 127-28; Case Dep. 23.) Jones also prohibited Case and LaMont from speaking. (LaMont Dep. 136; Case Dep. 22.) Miner admitted telling Jones not to allow Case and LaMont to talk to each other. (Miner Dep. 121-22.)

Klein averred that in September, 2006, Jones told him that Miner had instructed him not to speak to the women on the crew. Jones said to Klein, "Doug didn't want me [Klein] to have anything to do with the women, because they will bring you down." (Add. 28 at ¶ 8.) Jones also continued Miner's practice of forcing Case and LaMont to check in with him very time they took a break. (Case Dep. 55.)

In the fall of 2006, Miner ordered Jones to instruct LaMont to clean the bleachers at the high school, even though it was well known that LaMont was afraid of heights. (LaMont Dep. 129; Case Dep. 38; Add. 28 at ¶ 9.) LaMont told Jones that she was afraid of heights and asked why he was requiring her to clean the bleachers. (LaMont Dep. 130.) Case also told Jones that LaMont was afraid of heights. (Case Dep. 40.) Klein even volunteered to clean the bleachers for LaMont. (Add. 28 at ¶ 9.) Nevertheless, Jones persisted, despite the fact that there was no reason LaMont had to be the one to clean the bleachers. (LaMont Dep. 130.)

> I had to go to the top of the bleachers. He followed me up there, told me I wasn't doing a good job. Jayne told him, "You know she doesn't like heights." And he laughed, made some remark about I think the stairs in her house are higher. She said, "No." And she turned to him and said, "Do you realize what would happen if she falls?" And he just laughed. And I turned to him and said, "Why are you doing this to me?" And he said, "Doug told me to have you clean the bleachers, and you will."

Id. LaMont was so afraid she was shaking, and Jones knew it. (Case Dep. 39: Q" "How do you know [Jones knew LaMont was afraid]? A: "Because he was standing over her shoulder yelling at her.").

D. Winter 2006-2007

Miner's differential and harassing treatment of the women continued in the winter of 2006-2007. Jones resigned his position and in December 2006, and Layne became the Night Lead Custodian. (LaMont Dep. 138.) On Layne's first day on the job, Miner said that Layne needed to watch his back with "these women." (Add. 29 at ¶ 4.) Miner also reiterated that the women were not allowed to speak. Miner told Layne not to let Case or LaMont speak and not to ask LaMont any questions. (Id.) Layne also told LaMont that Miner had instructed him to keep Case and LaMont physically separated from the male custodians. (LaMont Dep. 128.) Layne testified that the first time he saw LaMont and Case, "they looked scared to death." (Add. 30 at ¶ 5.) He testified, "I could see that they had been mistreated." (Id.)

Based upon his communications with Miner, Layne believed LaMont and Case were "lazy." (Add. 29 at ¶ 4.) However, soon after he started, an incident occurred in which it became clear to him that LaMont was being "treated unfairly." (Add. 30 at ¶ 6.) In the first few days after he started, the lights went out in the gym. (Id.) Layne did not ask LaMont about it because Miner told him not to speak to her. (Id.) Layne walked around for about an hour looking for the circuit breaker box to turn the lights on. (Id.) Finally, LaMont called Layne on his walkie-talkie and told him where the circuit breaker box was. (Id.) Layne stated that he realized then that LaMont was being "treated unfairly" and "knew what she was doing." (Id.)

On December 18, 2006, custodian Robideau's first day on day on the job, Miner continued to make it clear he did not want the men and women speaking or interacting

with each other. Miner said to him "I don't want you to talk to either of them women at all," referring to LaMont and Case. (Add. 24 at ¶ 4.) Then, approximately a week after Robideau was hired, Miner stopped him in the hallway and stated that he would be disciplined if he so much as spoke to the women. He stated, "You are to have nothing to do with them women. Don't take a break or anything with them. If you do, I will have you fired within 30 days." (Add. 25 at ¶ 6.)

On December 19, 2006, Case and LaMont were at the time clock preparing to clock in for work. They encountered Miner, who said, "There is a time and a place for women and Elk River High School is not the time or the place." (LaMont Dep. 141; Case Dep. 18.) Robideau witnessed this statement and told Miner he could not say that. (Add. 25 at ¶ 5.) Miner just gave him a look and walked away. (Id.)

Miner also continued adding additional work LaMont's area. Layne averred that Miner gave LaMont the biggest area in the school to clean from January 2007 until the end of the school year. (Add. 30 at ¶ 8; Ex. 1 at 7.) Layne remembered Miner "smirking" when he handed out the assignments. (Id.)

E. Investigation of Miner's Conduct

On March 12, 2007, a male custodian made a complaint regarding Miner directly to Respondent's superintendent. (Ex. 2.) Respondent had William O'Keefe ("O'Keefe"), a private investigator, conduct an investigation into what was occurring amongst the custodial staff at the high school. (O'Keefe Dep. 9-10.) O'Keefe interviewed LaMont and she told him about Miner's discrimination. (O'Keefe Dep. 50-53.) O'Keefe testified that he told Ivars Krafts ("Krafts"), Respondent's attorney, that he thought that LaMont

was "full of crap about [her complaints about Miner]." (Id. at 54.) O'Keefe also made the credibility determination that when LaMont told him about "discrimination," she was actually talking about "changes being made and being made to work too hard." (Id. at 96.) Miner testified that O'Keefe never asked him about LaMont's allegations of harassment. (Miner Dep. 128-29.)

III. PROBABLE CAUSE FROM THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

On or around May 15, 2007, LaMont filled out a questionnaire with the Minnesota Department of Human Rights ("MDHR"). (Ex. 5.) On June 26, 2007, LaMont filed a charge of discrimination with the MDHR. (Ex. 6.) Following an investigation, the MDHR found probable cause to believe that LaMont had been harassed based upon her gender. The MDHR stated the following:

> The Department . . . concludes that the charging party was subjected to unlawful harassment based upon her gender and that the respondent employer is liable for the conduct of its supervisor.

(Ex. 7 at ¶ 16.) LaMont subsequently requested a right to sue and filed this action.

IV. PROCEDURAL HISTORY: DISTRICT COURT GRANTS SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, COURT OF APPEALS AFFIRMS

LaMont filed suit against Respondent, alleging violations of the Minnesota Human Rights Act, Minn. Stat. § 363A.01, *et. seq.* (2010). Specifically, LaMont articulated two theories of liability in her complaint: first, that "Defendant subjected Plaintiff to a hostile work environment." (P.A. 6.) And second, that "Defendant subjected Plaintiff to sexual harassment." (P.A. 6.).

Respondent brought a motion for summary judgment, which the district court granted. First, the district court concluded LaMont had proffered insufficient evidence to create a triable issue on her sexual harassment claim. (Add. 14.) Next, and most relevant to this appeal, the court concluded that LaMont could not maintain a cause of action for sex discrimination based on a hostile work environment unless the conduct was actionable under the MHRA's sexual harassment statute. (P.A. 16.) According to the court, "a hostile work environment claim under the MHRA requires a showing that the alleged behaviors or communications were sexual in nature, and none of the allegations met that criterion." (Add. 17.).

LaMont appealed, and the court of appeals affirmed. (Add. 23.). The court of appeals began its analysis by concluding, as did the district court, that LaMont failed to create a fact question issue of whether she suffered sexual harassment. (Add. 23.). Tracking the language of the MHRA's sexual harassment statute, Minn. Stat. § 363A.03, subd. 43 (2010), the court of appeals concluded that "[n]othing in the record demonstrates that appellant's supervisor made unwelcome sexual advances, requested sexual favors, or engaged in sexually motivated physical contact." ((Add. 21.)[4] The court of appeals wrote, "Wholly excluded from [the] definition [of sexual harassment] is sexist, misanthropic, or otherwise gender-based communication or conduct." (Add. 22.) Next, and relevant to this appeal, the court of appeals concluded that the MHRA does not prohibit "harassment based on gender." (Add. 22.) The court cited the "plain language"

[4] LaMont did not seek review of the portion of the court of appeals' opinion affirming summary judgment on her sexual harassment claim.

of the MHRA's sexual harassment statute but never considered the section of the MHRA outlawing discrimination because of sex. (Add. 22.)

SUMMARY OF THE ARGUMENT

The historical development of sexual harassment and hostile work environment jurisprudence under Title VII of the Civil Rights Act of 1964 ("Title VII") and the MHRA illustrates why the court of appeals critically misinterpreted the MHRA by finding that the MHRA does not prohibit a hostile work environment based on sex unless the offending conduct is sexual—essentially legalizing even severe workplace harassment if the harassment is based on hostility towards women in the workplace.

Like Title VII, the MHRA is a broad, remedial statute designed to eradicate discrimination in the workplace. Both Title VII and the MHRA prohibit discrimination in the terms and conditions of employment, out of which stems a ban on the creation of a hostile work environment based on any protected status, including sex.

LaMont was subject to a hostile work environment based upon her "sex" which arguably did not constitute "sexual harassment," as defined by the MHRA. Rather, Miner's conduct constituted a kind of harassment of a different character: harassment and disparate treatment based on hostility to the presence of women in the work environment. The court of appeals erred by narrowly holding that because the conduct was not "sexual harassment," it is not prohibited by the MHRA.

Even though Miner's conduct may not be sexual harassment as specifically defined by the MHRA, the conduct nevertheless qualifies as a form of sex discrimination under the MHRA's general provisions. When seen from a historical prospective, the

result reached by the court of appeals is stunning. Thirty years ago, federal and state courts held that sexual harassment was a subset of differential treatment of women. Under the court of appeals' opinion, only the subset of sexual harassment exists, while the prohibition on differential treatment based on the protected status of sex is deprived of meaning. This court should follow the ample authority from federal and state appellate courts and hold that the MHRA's prohibition on discrimination "because of sex" outlaws harassing conduct based on sex, even if the conduct is not sexual harassment.

Second, the district court erred in concluding that no reasonable fact-finder could conclude that the harassment LaMont suffered was sufficiently severe or pervasive to be actionable under the MHRA. In making this determination, the court disregarded several factors which are considered as a matter of law in making this determination. Because the district court erred in concluding that the harassment LaMont suffered was not severe or pervasive as a matter of law, its judgment must be revered.

ARGUMENT

I. STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment *de novo*. Zip Sort, Inc. v. Comm'r of Revenue, 567 N.W.2d 34, 37 (Minn. 1997). A moving party is entitled to summary judgment only upon showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. See Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993); Minn. R. Civ. P. 56.03. An appellate court should affirm the grant of summary judgment only where there is no genuine dispute of material

fact and the district court did not err in its application of the law. Id. No deference is given to the district court's application of the law. Gramling v. Mem'l Blood Ctrs. of Minn., 601 N.W.2d 457, 459 (Minn. Ct. App. 1999).

The burden is on the party moving for summary judgment to show that there are no issues of material fact. W.J.L. v. Bugge, 573 N.W.2d 677, 680 (Minn. 1998). Any doubt as to the existence of a material fact is resolved in favor of finding the existence of a fact issue. State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 571 (Minn. 1994). All evidence must be viewed in the light most favorable to the nonmoving party, and any doubt as to whether an issue of material fact exists is resolved in favor of the nonmoving party. Wartnick v. Moss & Barnett, 490 N.W.2d 108, 112 (Minn. 1992); Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 630 (Minn. 2007) (stating that on summary judgment all factual inferences are drawn in favor of the nonmoving party). Further, the court is not authorized to make credibility determinations in deciding whether to grant summary judgment. Indeed, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions." Williams v. Curtis, 501 N.W.2d 653, 656 (Minn. Ct. App. 1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986)); see also Nord v. Herreid, 305 N.W.2d 337, 339 (Minn. 1981) (holding factual inferences, credibility, and the weight of the evidence are all questions for the finder of fact).

II. THE MHRA PROHIBITS A HOSTILE WORK ENVIRONMENT BASED ON "SEX" EVEN IF THE CONDUCT IS NOT "SEXUAL HARASSMENT."

The development of sexual harassment and hostile work environment law under Title VII and the MHRA shows why the MHRA prohibits a hostile work environment based on sex even if the offending conduct is not sexual. Both statutes share the same broad, remedial goal of eradicating discrimination in the workplace. To effectuate that goal, both statutes contain similar language prohibiting discrimination in the terms and conditions of employment. That language provides the basis for the ban on a hostile work environment based on any protected status. With this history in mind, it is evident that the MHRA, like Title VII, protects individuals from a hostile work environment based on "sex" even if that conduct does not fall within the definition of "sexual harassment" contained within Minnesota Statute § 363A.03, Subd. 43.

To properly understand the governing legal framework, it is useful to examine the historical development of Title VII and the MHRA prior to analyzing the application of the MHRA to the facts of this case.

A. Hostile Work Environment Under Title VII

Title VII outlawed discrimination on the basis of race, color, religion, national origin and sex. 42 U.S.C. § 2000e-2(a)(1). Title VII made it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment[.]" Id. In 1986, the U.S. Supreme Court held that Title VII prohibited sexual harassment. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986). The Supreme Court rooted its analysis in Title VII's prohibition of

discrimination in the "terms and conditions of employment." Id. ("The phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women" in employment.) (citations omitted). The Court noted that the U.S. Equal Employment Opportunity Commission's ("EEOC") 1980 guidelines stated that sexual harassment was a form of sex discrimination. Id. The Court then observed that a "substantial body" of federal judicial decisions had concluded that that "Title VII affords employees the right to work in an environment free from 'discriminatory intimidation, ridicule, and insult.'" Id.

The Meritor Court singled out a quotation from Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), a racial harassment case which the Court stated may have been the first case to recognize a cause of action for a discriminatory work environment:

> [T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . .

Id. at 64 (quoting Rogers, 454 F.2d at 238). The Court observed that nothing in Title VII suggested that an individual harassed based upon their sex should not be protected equally as those of other protected status. Id. The Court then concluded that sexual harassment is prohibited by Title VII. Id.

1. Title VII Protects Individuals from Hostile Work Environment Based on Every Protected Status.

Before and after Meritor, courts have taken for granted that Title VII shields individuals from a hostile work environment when that conduct is based upon any status

protected by Title VII. See Venters v. City of Delphi, 123 F.3d 956, 975 (7th Cir. 1997) ("But as Meritor itself reveals, the federal courts have been applying hostile environment principles to harassment based on race, religion, and national origin as well as sex in the twenty-five years since the Fifth Circuit's ground breaking decision in [Rogers]"). See, e.g. Hare v. Potter, 220 F. App'x. 120, 133 (3d Cir. 2007) (reversing summary judgment on a hostile work environment claim based on retaliation); White v. BFI Waste Servs., LLC, 375 F.3d 288, 297 (4th Cir. 2004) (reversing summary judgment on hostile work environment claims based on race); Williams v. Gen. Motors Corp., 187 F.3d 553, 562 (6th Cir. 1999) (reversing summary judgment on a hostile work environment claim based on sexual harassment); Ellsworth v. Pot Luck Enterprises, Inc., 624 F. Supp. 2d 868, 875 (M.D. Tenn. 2009) (denying summary judgment on a hostile work environment claim for same sex-harassment).

2. The Supreme Court Clarifies the Standard for Hostile Work Environment Claims.

In Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993), the Supreme Court clarified the standard for hostile work environment claims under Title VII. The Court reversed summary judgment on Harris' hostile work environment claim, finding that a fact question existed on the severity or pervasiveness of the harassment in a situation in which she was told, "You're a woman, what do you know," "We need a man as a rental manager," and was called "a dumb ass woman." Id. at 20. Like this case, Harris involved an allegation of a hostile work environment based on hostility and animus towards the presence of women in the workplace.

The Court held that an employee alleging hostile work environment does not need to show psychological harm to prove that the conduct was severe or pervasive. Id. at 22 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown."). The Court stated that whether an environment was severe or pervasive "can be determined only by looking at all of the circumstances." Id. at 23. Factors that may be considered in making this determination 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." Id.

In Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998), the Supreme Court reaffirmed the standard articulated in Harris while holding that Title VII prohibited same-sex sexual harassment. In so doing, the Court quoted Justice Ginsburg's concurrence in Harris to reject the argument that prohibiting same-sex harassment would turn Title VII into a general civility code for the workplace. Id. at 80 ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.") (citing Harris, 510 U.S. at 25 (Ginsburg, J., concurring)). Federal courts considering Title VII claims have been true to Justice Ginsburg's view of Title VII, finding that it prohibits a hostile work environment when the harassing conduct is based on sex, even if the conduct is not sexual.

3. Title VII Prohibits a Hostile Work Environment Based on Sex, Even if the Conduct is Not Sexual.

The Eighth Circuit Court of Appeals has been clear that harassment which is based upon sex but which is not sexual is still unequivocally prohibited by Title VII. The Eighth Circuit has been unwavering about its position despite the fact that the Code of Federal Regulations contains a specific definition of sexual harassment, just as the MHRA does. The Code of Federal Regulations defines sexual harassment as follows:

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (2010) (footnote omitted).

Consistently rejecting the same argument the court of appeals accepted in this case, the Eighth Circuit has refused to read the federal regulation banning sexual harassment as impliedly extinguishing all other forms of hostile work environment discrimination based on sex. See Hall v. Gus Const. Co., Inc., 842 F.2d 1010, 1014 (8th Cir. 1988) (rejecting the argument that under 29 C.F.R. § 1604.11 only conduct of a sexual nature is prohibited by Title VII and noting instead that "[i]ntimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances."); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269 (8th Cir. 1993) (reversing summary judgment where there was evidence that supervisor

treated women more harshly than men, even though conduct was not sexual in nature); Smith v. St. Louis Univ., 109 F.3d 1261, 1265 (8th Cir. 1997) (reversing summary judgment where the district court "discounted the severity of the harassment because it was not sexually explicit.")

Other federal circuit courts have been unequivocal that harassment based on sex need not be sexual in nature to be prohibited by Title VII. For example, in Andrews v. City of Philadelphia, the Third Circuit reversed a trial court verdict for a defendant on the hostile work environment claims of several female police officers. 895 F.2d 1469 (3rd Cir. 1990). That court noted that the district court had too narrowly construed the contours of sexual harassment because it was misled by 29 C.F.R. § 1604.11. Id. at 1488 n.6. The court stated:

> We read the first sentence, that harassment based on sex is a violation of Title VII, to be the general concept, and the second sentence as merely an illustration of how explicit sexual conduct could rise to this level. But, if the second sentence were read to modify the first, it would seem to imply that only explicit sexual harassment would be actionable. This reading does not appear to be consistent with either the wording of the EEOC guideline or the prevailing case law.

Id. Other federal circuit courts agree. See McKinney v. Dole, 765 F.2d 1129, 1138 (D.C. Cir. 1985) *abrogated on other grounds by* Stevens v. Dep't of Treasury, 500 U.S. 1 (1991) ("We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now."); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (acts of physical violence would be considered in

support of a sexual harassment claim); Raniola v. Bratton, 243 F.3d 610, 617 (2d Cir. 2001) (hostile work environment claim does not require that sexual desire is the reason for the conduct); Smith v. First Union Nat'l. Bank, 202 F.3d 234, 242 (4th Cir. 2000) ("The district court failed to recognize that a woman's work environment can be hostile even if she is not subjected to sexual advances or propositions."); Smith v. Sheahan, 189 F.3d 529, 533 (7th Cir. 1999) ("It makes no difference that the assaults and the epithets sounded more like expressions of sex-based animus rather than misdirected sexual desire . . ."); Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988) (actions which were not explicitly sexual may contribute to a hostile work environment).

B. The Minnesota Human Rights Act

When the MHRA was enacted in 1955 it contained a declaration of policy, which provided:

> As a guide to interpretation and application of this act, be it enacted that the public policy of this state is to foster the employment of all individuals in this state in accordance with their fullest capacities . . . and to safeguard their rights to obtain and hold employment without discrimination.

Minn. Stat. § 363.03, Sec. 1 (1955).[5] The MHRA states expressly that it is to be construed liberally to accomplish the purposes of eradicating discrimination in the workplace. Minn. Stat. § 363A.04 (2010).

The original MHRA prohibited discrimination on the basis of race, religion or national origin. Minn. Stat. § 363.03 (1955). Using similar language as Title VII, the law made it illegal for an employer "to discriminate against an employee with respect to

[5] The MHRA was originally titled the Minnesota State Act for Fair Employment Practices. It is referred to throughout as the MHRA for simplicity.

his hire, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment[.]" Minn. Stat. § 363.03 (2)(c) (1955). In 1969, the Minnesota legislature followed the lead of the Civil Rights Act of 1964 and added "sex" as a suspect classification under the MHRA. Act of June 6, 1969, ch. 975, 1969 Minn. Laws 1937, 1938-39 (codified at Minn. Stat. § 363A.08).

1. Sexual Harassment Under the MHRA

In 1980, the Minnesota Supreme Court considered for the first time whether the MHRA's language outlawing discrimination in the terms and conditions of employment contained a prohibition of sexual harassment. Cont'l Can Co., Inc. v. State, 297 N.W. 2d 241, 246 (Minn. 1980). The Continental Can Court began its analysis by noting that the principals articulated in Title VII cases had been used by the Minnesota Supreme Court in construing the MHRA. Id. The Court then surveyed federal decisions and found that a majority had held that Title VII's prohibition of discrimination in the conditions of employment prohibited sexual harassment. Id. (citations omitted). Then, the Court noted that the "provisions of the [MHRA] are to be liberally construed to accomplish their purposes" and "[o]ne of the purposes of the [MHRA] is to rid the workplace of disparate treatment of female employees merely because they are female." Id. at 248 (citations omitted). Like the U.S. Supreme Court in Meritor, the Court concluded "that the prohibition against sex discrimination . . . includes sexual harassment which impacts the conditions of employment . . ." Id. at 249.[6]

---

[6] Without any analysis regarding whether the Continental Can analysis applied to race as well as sex, the court of appeals relied on Continental Can in 1987 to analyze a hostile

Having held that the MHRA's language prohibiting sex discrimination in the conditions of employment also prohibited sexual harassment, the Court looked to the EEOC's interim guidelines, which contained a characterization of sexual harassment as including:

> (u)nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature as sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Cont'l Can Co., 297 N.W.2d at 248.[7] Borrowing language from the guidelines, the Court then observed, "[I]n our view, verbal and physical sexual harassment includes sexually motivated physical contacts, sexually derogatory statements and verbal sexual advances." Id. at 249.

2. The Minnesota Legislature Defines and Later Amends "Sexual Harassment"

Two years after Continental Can, "the legislature amended the MHRA to state that sexual harassment was a form of sex discrimination." Frieler v. Carlson Mktg. Group, Inc., 751 N.W.2d 558, 565 (Minn. 2008) (describing the 1982 amendments to the MHRA); Act of Mar. 23, 1982, ch. 619, §§ 2-3, 1982 Minn. Laws 1508, 1511 (codified at § Minn. Stat. § 363.01, subd. 10 (1982)). The statute provides, "The term 'discriminate' includes segregate or separate and, for purposes of discrimination based on sex, it

---

work environment based on race. See Mpls. Police Dep't. v. Mpls. Comm. Civ. Rights, 402 N.W. 2d 125, 131 (Minn. Ct. App. 1987).

[7] These interim guidelines were subsequently codified at 29 C.F.R. § 1604.11 (2010).

includes sexual harassment." Minn. Stat. § 363A.03, Subd. 13 (2010). At that time, the legislature also codified a definition of "sexual harassment," which mirrored the characterization contained in the EEOC guidelines and Continental Can:

> "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or
>
> (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; and, in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Minn. Stat. § 363.01, subd. 10a (1982)).

After the U.S. Supreme Court's decisions in Burlington Industries, Inc. v. Ellerth, 542 U.S. 775 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), the legislature amended the MHRA by eliminating the phrase "the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." Act of May 24, 2001, ch. 194, § 1, 2001 Minn. Laws 723, 724 (codified at Minn. Stat. § 363A.03, subd. 43 (2010)).

In 2008, this Court held that due to the elimination of that language, an employee alleging sexual harassment under the MHRA was no longer required to

prove that their employer knew or should have known of the harassment and failed to take action. Frieler, 751 N.W.2d at 567. The Court concluded that the amendment was designed to bring sexual harassment jurisprudence into line with federal law. Id. Therefore, the Court held that in cases with no adverse employment action, an employer has a defense to sexual harassment if the employer can show "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Id. at 571.

3. The MHRA Prohibits a Hostile Work Environment Based Upon Any Protected Status.

In 2001, this Court considered whether the MHRA contains a claim for hostile work environment based upon sexual orientation. Goins v. West Group, 635 N.W.2d 717, 725-26 (Minn. 2001). The analysis that the Court used to determine that such a claim existed was simple, does not change with respect to which protected status is at issue, and should have been applied in this case.

In Goins, the Court noted that the MHRA is to be construed liberally and with reference to Title VII. Id. at 726 n.6. Then, it observed that Title VII contains a claim for "discriminatory harassment so severe or pervasive as to alter the conditions of employment and create a hostile work environment." Id. (citing Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999)); See also Wenigar v. Johnson, 712 N.W.2d 190, 206

(Minn. Ct. App. 2006) (using the same reasoning to recognize a claim for disability harassment).

The Court stated that the elements of a hostile work environment claim under the MHRA are:

> (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on 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 at 725.

Following Goins this same analysis has been used to analyze hostile work environment claims under the MHRA, regardless of which protected status was at issue.[8] See Wenigar, 712 N.W.2d at 206 (analyzing a claim for hostile work environment based on disability); Murnane v. Aitkin Co., No. C2-01-354, 2001 WL 910293, at * 1 (Minn. Ct. App. Aug. 14, 2001) (using this analysis to reverse summary judgment on a hostile work environment claim based on age);[9] Schramm v. Village Chevrolet Co., No. C9-02-1107, 2003 WL 1874753, at *4 (Minn. Ct. App. 2003) (analyzing a claim for hostile work environment based on pregnancy);[10] Frieler, 751 N.W. 2d at 571, n.11 (analyzing a claim for sexual harassment). Moreover, in a case similar to LaMont's, the Federal District of Minnesota used this analysis to deny summary judgment on an MHRA hostile

---

[8] Even prior to Goins, the District of Minnesota recognized the existence of a claim for hostile work environment based on race under the MHRA. See Williams v. Metro. Waste Control Comm'n, 781 F. Supp. 1424, 1426 (D. Minn. 1992).

[9] P.A. 68

[10] P.A. 70

work environment case involving conduct that was based on sex, but not sexual. See Sturm-Sandstrom v. County of Cook, 552 F. Supp. 2d 945, 951 (D. Minn. 2008).[11]

C. Other Human Rights Acts of other States Prohibit a Hostile Work Environment Based on Sex, Even if the Conduct is Not Sexual.

State appellate courts which have considered the question of whether their state's human rights acts prohibit sex-based harassment which is not sexual in nature have answered the question in the affirmative. See Hampel v. Food Ingredients Specialties, Inc., 729 N.E.2d 726, 735 (Ohio 2000) ("[W]e hold that harassing conduct that is simply abusive, with no sexual element, can support a claim for hostile-environment sexual harassment if it is directed at the plaintiff because of his or her sex."); McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 669 N.Y.S. 2d 122, 130 (N.Y. Sup. Ct. 1997) ("[T]he conduct or words upon which plaintiff's claim of discrimination is predicated need not be of a sexual nature in order to create a hostile work environment as long as the conduct or words are prompted because of the employee's gender."); A.L.P. Inc. v. Bureau of Labor & Indus., 984 P. 2d 883, 886 (Or. Ct. App. 1999) (Oregon law prohibits harassment on the basis of sex, even if the conduct is not sexual, despite the fact that the Oregon rules define sexual harassment); Payne v. Children's Home Soc. of Washington, Inc., 892 P.2d 1102, 1106 (Wash. Ct. App. 1995) ("[G]ender-based harassment need not be of a sexual nature to be actionable as sex discrimination . . .); Muench v. Twp. of

[11] Importantly, for the reasons articulated in Frieler, since Minnesota's hostile work environment jurisprudence follows federal law, employees are no longer required to prove the fifth element of this hostile work environment claim. Frieler, 751 N.W. 2d at 566 n.5. Rather, the burden is on the defendant to prove its affirmative defense. Id.

Haddon, 255 N.J. Super. 288, 298 (N.J. Super. Ct. App. Div. 1992) ("In our view, whether the offending conduct is in the form of sexual advances or intimidation and hostility toward a woman solely because she is a woman, the result is the same.")

Respondent may cite Haynie v. State, in support of its position. 664 N.W.2d 129 (Mich. 2003). In Haynie, the Michigan Supreme Court addressed whether sex-based harassment which is not sexual may give rise to a claim of "sexual harassment" under the Michigan Civil Rights Act. Id. at 130. In reversing the court of appeals and reinstating the circuit court's order granting summary judgment in favor of the defendant, the court held that conduct or communication that is gender-based, but non-sexual, does not constitute "sexual harassment" because it does not fall within the definition of "sexual harassment" as defined in the Michigan Civil Rights Act. Id. at 304. Significantly, however, the opinion did not conclude that hostile work environment claims are limited to claims of a sexual nature. Id. at 317. Rather, the only conclusion the court reached was that because the Michigan Civil Rights specifically defines "sexual harassment" as "conduct or communication of a sexual nature", a plaintiff would have to show that the conduct complained of was sexual in nature in order to have a claim for sexual harassment. Id. at 318.

Like the plaintiff in Haynie, the harassment LaMont suffered was largely non-sexual in nature. Unlike the plaintiff in Haynie, however, LaMont brought a hostile work environment claim based upon her sex in addition to her sexual harassment claim. As stated in Haynie, this is the proper recourse for sex-based communication that is non-sexual in nature. Id. at 304 n.2. Regardless, the Haynie opinion makes clear that its

holding does not mean that hostile work environment claims are limited to claims of a sexual nature. Id. at 317 ("[T]he dissent repeatedly mischaracterizes our opinion as concluding that hostile-work-environment actions are limited to claims of a sexual nature. At no point in this opinion do we draw such a conclusion."). The court of appeals reached the same conclusion in this case, and LaMont does not appeal that portion of the court of appeals' opinion.

D. The MHRA Prohibits a Hostile Work Environment Based on Sex Separate and Apart from its Prohibition of Sexual Harassment.

In light of the MHRA's text, structure, history, and purpose, it is evident why the court of appeals held that the statute prohibits hostile work environment discrimination because of sex even if the same conduct does not qualify as sexual harassment. First, the plain language of the statute compels this result. Second, since the MHRA is construed with reference to Title VII when their language is similar, this Court should recognize this claim under the MHRA. Third, there is no reason to believe that the legislature intended its definition of sexual harassment to occupy the entire field of claims that may be brought for hostile work environment under the MHRA. Fourth, MHRA hostile work environment jurisprudence does not reveal any reason to hold that the protected status of sex should be treated any differently than any other protected status under the MHRA. Fifth, it would be contrary to the broad remedial purposes of the MHRA for this Court to narrowly construe it to provide no protection to individuals harassed on the basis of sex – no matter how severe the conduct is – unless that conduct is sexual.

1. The Plain Language of the MHRA's Provisions Outlaw Hostile Work Environment Discrimination Based on Sex.

The MHRA states that:

> [I]t is an unfair employment practice for an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age to:
>
> (1) refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
>
> (2) discharge an employee; or
>
> (3) discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

Minn. Stat. § 363A.08, subds. 1, 2 (2010). Thus, by its plain terms, the MHRA bars not only sex discrimination based on concrete employment decisions (for example, hiring, firing, and compensation), but also bars disparate treatment based on smaller, subtler "terms, conditions, facilities, or privileges of employment." Id. If these words—" terms, conditions, facilities, or privileges of employment"—are to have any meaning, they must refer to the smaller, more mundane conditions of employment more often implicated in hostile work environment claims.

In addition, the text of the MHRA defining sexual harassment evinces an intent to add to—not subtract from—the MHRA's baseline protections. Minn Stat. § 363A.03, subd. 13 states that "[t]he term 'discriminate' includes segregate or separate and, for purposes of discrimination based on sex, it includes sexual harassment." (emphasis added.) Thus, far from providing the exclusive definition of sex-based hostile work

environment discrimination, the definition of sexual harassment is "include[d]" in the definition of discrimination. Had the legislature wished to make the definition of sexual harassment the exclusive definition of sex discrimination, it could have easily done so.[12]

Moreover, the MHRA defines sex as follows: "'Sex' includes, but is not limited to, pregnancy, childbirth, and disabilities related to pregnancy or childbirth." Id. at subd. 42. Sexual harassment is defined separately. Id. at subd. 43. Under the court of appeals' reasoning, "sex" has no meaning, and the MHRA no longer protects individuals from a hostile work environment based not only based on sex in general, but based on pregnancy, which is a subset of sex under the MHRA. See, e.g. Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150, 1159 (8th Cir. 2003) (upholding an MHRA hostile work environment claim based on pregnancy.) In sum, the bare text of the MHRA demonstrates that a hostile work environment based on sex is unlawful in Minnesota, even if the conduct is not sexual harassment.

2. The Similar Language in Title VII and the MHRA Must Give Rise to a Prohibition of Harassment on the Basis of Sex Under the MHRA.

It is well established that MHRA is construed with reference to Title VII where the language of both statutes is similar. In the context of claims for hostile work environment, this Court's reliance on Title VII authority goes back to the first case to

[12] In addition, the court of appeals' singular focus on sexual harassment as the exclusive test for sex discrimination ignored Minn Stat. § 363A.03, subd. 13 itself. According the plain language of the MHRA, discrimination also includes segregation and separation, both of which LaMont alleges occurred in this case when Miner required the female and male janitors to work separately. It would be an absurd result indeed if the lack of sexual harassment in this case was fatal to LaMont's claim despite the MHRA's unequivocal ban on segregation and separation as an unlawful form of discrimination.

recognize a claim for sexual harassment under the MHRA. Cont'l Can Co., Inc. v. State, 297 N.W. 2d 241, 246 (Minn. 1980).

For the purposes of hostile work environment claims, the operative language in Title VII and the MHRA is similar. Both statutes prohibit discrimination in the terms and conditions of employment, which is the textual root of the prohibition of a hostile work environment based on protected status. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986); Cont'l Can Co., 297 N.W. 2d at 246; Goins v. West Group, 635 N.W.2d 717, 725-26 (Minn. 2001). Under this analysis, because the Title VII prohibits a hostile work environment on the basis of any protected status, including sex, this court must hold that the MHRA does as well.

Respondent may argue, consistent with the court of appeals' opinion, that the statutory language of the MHRA and Title VII are different because the MHRA, unlike Title VII, contains a statutory definition of sexual harassment. (Add. 22 (citing Cummings v. Koehnen, 568 N.W. 2d 418, 421 (Minn. 1997) for the proposition that the treatment of sexual harassment in the MHRA and Title VII are different because their statutory language is different). Respondent may argue that because the harassment LaMont suffered did not fall within the MHRA's statutory definition of sexual harassment, her claim fails.

However, because LaMont's claim is for a hostile work environment based on her protected status of sex, it does not require her to prove the elements of "sexual harassment" under the MHRA. Therefore, to the extent that Respondent attempts to rely on Cummings, that argument would fail. In Cummings, this Court considered the

question of whether same-sex sexual harassment was actionable under the MHRA. The conduct at issue included such things as simulating anal sex and derogatory sexual name calling. Id. at 421. The harasser argued that Cummings' claim failed because he could not prove that the harassment he suffered was "because of sex." Id. at 421-22. In other words, the harasser contended that because he was not homosexual, and not sexually attracted to Cummings, Cummings' claim failed. Id. The Cummings Court concluded that Cummings was not required to show as a factual matter that the conduct he suffered was "because of sex" to prevail on his sexual harassment claim. Id. at 421. Rather, the Court referred to the MHRA's definition of discriminate: "The term 'discriminate' includes segregate or separate *and, for purposes of discrimination based on sex, it includes sexual harassment.*" Id. (citing Minn. Stat. § 363.01, Subd. 14.) (emphasis added in original). The Court concluded that this statutory language meant that "sexual harassment *is* discrimination based on sex" and that therefore, in a sexual harassment case, "it is not necessary for a sexual harassment plaintiff to prove that the harassment occurred 'because of sex,' in addition to proving the elements of sexual harassment as set forth in [Minn. Stat. 363A.01, subd. 41]." Id. Cummings does not answer the question presented here. This case involves a hostile work environment case based on sex, apart from a claim for sexual harassment.

Additionally, Respondent's argument and the court of appeals' opinion fail to take into account that the Code of Federal Regulations, at 29 C.F.R. § 1604.11, contains a definition of sexual harassment that is virtually identical to the definition of sexual harassment contained in the MHRA. As the Eighth Circuit noted in Hall, the definition

of sexual harassment in the federal regulations was obviously not intended to mean that Title VII only protects harassment that is sexual. See Hall v. Gus Const. Co., Inc., 842 F.2d 1010, 1014 (8th Cir. 1988) (rejecting the argument that due to 29 C.F.R. § 1604.11 only conduct of a sexual nature is prohibited by Title VII); See also Andrews v. City of Philadelphia, 895 F.2d 1469, 1488 n.6 (3rd Cir. 1990) (29 C.F.R. § 1604.11 does not define the outer limits of actionable harassment based on sex).

3. The Definition of Sexual Harassment Does Not Define the Entire Scope of Claims for Hostile Work Environment.

Third, there is absolutely no reason to believe that the MHRA's definition of sexual harassment preempts the MHRA's separate definition of sex or otherwise prohibits a claim for harassment based on sex that is not "sexual." See Cummings, 568 N.W. 2d at 421 (Originally the MHRA only prohibited discrimination; the prohibition of sexual harassment was later placed "within" the prohibition based on sex); Minn. Stat. § 363A.03, Subds. 42, 43. Particularly given the broad remedial purposes of the MHRA, it is nonsensical to believe that by defining sexual harassment the legislature intended to permit harassment based on the protected status of sex unless the conduct is sexual. Such a reading ignores the issue this Court confronted in Continental Can and the legislature addressed in specifically outlawing sexual harassment. The crux of the dispute in Continental Can was whether sexual harassment was a form of discrimination at all. This court concluded (and the legislature agreed) that sexual harassment was a form of sex discrimination. Importantly, the legislature recognized that sexual harassment was sex discrimination in both traditional, quid-pro-quo cases, see Minn. Stat. § 363A.03, Subd.

43(1) (sexual harassment exists where "submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment"), as well as hostile work environment cases, see Minn. Stat. § 363A.03, Subd. 43(3) (sexual harassment exists where the "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.). Thus, far from creating from whole cloth the theory of liability for sex-based hostile work environment discrimination, the legislature merely clarified that creating a hostile work environment through sexual harassment was one particular form of discrimination.

4. Those Harassed Based on Sex Should Not Receive Less Protection than those Treated Differently Based on Another Protected Status.

If this Court were to affirm the court of appeals, the result would be that women or men who are harassed on the basis of their sex have less protection than those harassed on the basis of any other protected status. If an individual is subject to a hostile work environment based on their race, age. disability or sexual orientation, that conduct is prohibited by the MHRA. See Minn. Stat. § 363A.08, Subd. 2. However, under the court of appeals' opinion, if harassing conduct is directed at an individual because of their "sex," no matter how severe or pervasive the conduct, the conduct is legal unless it is "sexual harassment." See Minn. Stat. § 363A.03, Subds. 42, 43. This is an absurd result clearly contrary to the purposes of the MHRA. Disparate, harassing conduct based on hostility towards women in the workplace would be completely legal in Minnesota.

There is no reason to believe that the legislature intended that by defining "sexual harassment," it was permitting differential treatment on the basis of "sex."

5. Given the Broad Remedial Purposes of the MHRA, Harassment Based on Sex Must Be Prohibited, even if it is not Sexual.

The MHRA is a statute designed to eradicate discrimination in the work place. It expressly states that it is to be interpreted liberally to accomplish its purposes. See Minn. Stat. § 363A.04, Subd. 1. That section states:

> The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age, disability, marital status, status with regard to public assistance, national origin, sexual orientation, or familial status[.]

Id. A statute that is designed to be broadly interpreted to eradicate discrimination in the workplace based on any protected status would not fail to prohibit harassment based on the protected status of sex, even if the conduct is not sexual harassment. A decision from this Court containing that holding would be contrary to the construction required of the MHRA.

For all of these reasons, the court of appeals critically misinterpreted the MHRA in concluding that it does not prohibit a hostile work environment based on sex. This Court should join many other federal and state courts which have clearly held that harassment on the basis of sex is illegal, even if that conduct is not sexual.

III. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE HARASSMENT LAMONT SUFFERED WAS NOT SUFFICIENTLY SEVERE OR PERVASIVE TO BE ACTIONABLE UNDER THE MHRA.

Although the court of appeals did not reach this issue, the district court also erroneously concluded as a matter of law that no reasonable fact-finder could conclude that the harassing conduct LaMont suffered was sufficiently severe or pervasive to constitute a hostile work environment. (Add. 17.) Although whether conduct is severe or pervasive enough to constitute a hostile work environment is a fact intensive, totality of the circumstances test in which no one factor is required, the district court based its conclusion largely on the fact that some of Miner's remarks were not directed at LaMont, but were overheard by or known to her. (Add. 16.) The district court also erred failing to address several aggravating factors, any or some of which could permit a reasonable fact-finder to find the existence of a hostile work environment. Once those factors are taken into account (although none of them are required to establish a hostile work environment), it is clear that the district court erred in deciding as a matter of law in concluding the conduct was not severe or pervasive.

To make a claim for hostile work environment, "[t]he objectionable environment 'must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" Wenigar v. Johnson, 712 N.W.2d 190, 207 (Minn. Ct. App. 2006) (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)). "This is not, and by its nature cannot be, a mathematically precise test." Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may 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.

Id.; See also Wenigar, 712 N.W.2d at 207. "[N]o single factor is required or determinative and the relevancy and weight of any factor must be evaluated in light of all the facts of a specific case." Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1997). Under the totality of the circumstances analysis, courts should not "divide the work environment into a series of discrete incidents and then measure the harm occurring in each episode." Burns v. McGregor Elec. Indus., Inc., 989 F. 2d 959, 961 (8th Cir. 1993).

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

The district court erroneously concluded, without citing to any legal authority, that because some of the harassing remarks were not directed to LaMont (but were said in her presence) they cannot be considered in determining if the harassment LaMont suffered was sufficiently severe or pervasive to be actionable. (Add. 16.) This is an erroneous statement of the law. See, e.g., Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 880 (D. Minn. 1993) (finding a hostile environment even when much of the language was not directed at a specific woman or women); see also Hicks v. Gates Rubber Co., 833 F.2d 1406, 1416 (10th Cir. 1987) ("incidents involving employees other than the plaintiff are relevant in establishing a generally hostile work environment"); Schwapp v. Town of

Avon, 118 F.3d 106, 111-12 (2d Cir. 1997) (plaintiff's second-hand knowledge of racially derogatory comments or jokes can impact the work environment); Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 336 (6th Cir. 2008) (court "may consider evidence of other acts of harassment of which a plaintiff becomes aware during the period [of] his or her employment, even if the other acts were directed at others and occurred outside of the plaintiff's presence"); Rodgers v. W.S. Life Ins. Co., 12 F.3d 668, 673-75 (7th Cir. 1993) (noting that racial epithets targeted at other employees were relevant to a plaintiff's hostile work environment claim and considering racial statements made outside of the plaintiff's presence); Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985) ("[E]vidence tending to show Taylor's harassment of other women working alongside Vinson is directly relevant to the question whether he created an environment violative of Title VII."), aff'd in part and rev'd in part, 577 U.S. 57 (1986); Jones v. Yellow Freight Sys., Inc., No. C9-00-79, 2000 WL 1052167, at *4 (Minn. Ct. App. Aug. 1, 2000) (upholding a finding of a hostile work environment, noting that acts not directed at Jones contributed to the hostile work environment because he was aware of them).[13]

Furthermore, the district court should have considered the testimony of LaMont's co-workers when assessing the severity of her hostile work environment claim. Sandoval v. Am. Bldg. Maint. Indus., Inc., 578 F. 3d 787, 803 (8th Cir. 2009) ("When judging the severity and pervasiveness of workplace sexual harassment, this court has long held harassment directed towards other female employees is relevant and must be considered"); see also Kay v. Peter Motor Co., Inc., 483 N.W.2d 481, 486 (Minn. Ct.

[13] P.A. 60.

App. 1992) (allowing coworker testimony when offered to demonstrate hostile working environment).

The district court erred in disregarding the remarks made in LaMont's presence in determining whether a hostile work environment existed. Miner made sexual remarks about another custodian's wife in LaMont's presence. (LaMont Dep. 87-8; Case Dep. 14.). Further, he stated, "Women have their place" and "The only place women should be is in the kitchen and the bedroom" in LaMont's presence. (LaMont Dep. 87-8; 89.) Moreover, LaMont was well aware that both she and Case were being treated differently than the men with whom they worked, and the district court failed to take this into account.

Whether the harassment was directed at LaMont or women in general, Miner fostered a workplace atmosphere in which LaMont was the target of constant degrading language and conduct toward women (which included segregation and not being allowed to speak), directly affecting the conditions of her employment. These remarks contribute to LaMont's hostile work environment claim and it was error for the district court to discount them in its analysis and conclude that no reasonable fact-finder could find that the conduct was severe or pervasive.

B. Miner was LaMont's Immediate Supervisor.

The district court erred in failing to consider that when harassment is perpetrated by a supervisor as opposed to a co-worker, it intensifies the severity of a hostile work environment. See, e.g., Cotrill v. MFA, Inc., 443 F.3d 629, 641 (8th Cir. 2006) (quoting Faragher, 524 U.S. at 805) ("Acts by supervisors generate special concern, as 'courts

have consistently held' that they have 'greater power to alter the environment than acts of coemployees generally.'"); see also Taylor v. Metzger, 706 A.2d 685, 691 (N.J. 1998) (severity of a remark can be exacerbated by the fact that it was spoken by a supervisor because a supervisor has a unique role in shaping the work environment); White v. Monsanto Co., 585 So.2d 1205, 1209-1210 (La. 1991) (supervisor's harassment of a subordinate is more apt to rise to the level of intentional infliction of emotional distress than harassment by a coemployee); Contreras v. Crown Zellerbach Corp., 565 P.2d 1173, 1176 (Wash. 1977) (same); Alcorn v. Anbro Eng'r, Inc., 2 Cal.3d 493, 498-499, and n.2 (Cal. 1970) (same); Fletcher v. St. Paul Pioneer Press, No. C7-95-2, 1995 WL 379140, at *2 (Minn. Ct. App. June 27, 2005) (citing Rodgers, 12 F.3d at 675) (supervisor's use of racial epithet impacts work environment more severely than co-equals').[14]

It is well-established that a supervisor's remarks, when directed to a subordinate, impact the severity of a hostile work environment claim more so than if the harassment was instigated by a coworker. The district court erred in failing to consider this factor in its analysis.

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

The district court erred when it failed to consider Miner's conduct as a whole. "There is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim." Fletcher, 1995 WL 379140, at *2 (citing Rodgers 12 F.3d at 674). When viewed as a whole, the evidence demonstrates a

[14] P.A. 55.

pervasive pattern of harassment. Gagliardi v. Ortho-Midwest, Inc., 733 N.W.2d 171, 181 (Minn. Ct. App. 2007) (determining that the facts "in the aggregate" establish a hostile work environment); Giuliani v. Stuart Corp., 512 N.W.2d 589, 594 (Minn. Ct. App. 1994) (holding that "[w]hile the incidents examined individually might seem inconsequential, in the aggregate they illustrate a course of conduct creating a hostile environment"); Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1993) (impact of separate incidents may accumulate, creating hostile work environment beyond sum of individual episodes).

Minor's conduct extended from May 2006 until at least the spring of 2007 and it had a constant impact on LaMont during that time. When viewed properly in the aggregate, a reasonable fact-finder could determine that Miner's harassing conduct was sufficiently severe and pervasive to constitute a hostile work environment, precluding summary judgment.

D. Miner's Conduct Was Severe.

Finally, the district court erred in determining that although the contents of Miner's comments were inappropriate, they were not severe enough to be actionable. (Add. 17.) The Federal District Court for the District of Minnesota recently denied summary judgment on a claim for gender harassment in a case with remarkably similar facts to the present case. In Sturm-Sandstrom v. County of Cook, the court found that the plaintiff presented genuine issues of material fact as to whether she was subjected to a hostile work environment based on gender under Title VII and the MHRA. 552 F. Supp. 2d 945, 952 (D. Minn. 2008). The plaintiff in that case claimed that as the only female

sheriff's deputy, she was subjected to a sexist work culture fostered by a male sheriff. Id. at 949. Specifically, the plaintiff alleged she was treated differently than her male counterparts, and was not provided the same training opportunities or equipment. Further, she felt ostracized by other male deputies who were condescending towards her and would stop talking or leave when she walked into a room. Id. Finally, plaintiff submitted an affidavit from a previous female deputy as well as the sheriff's predecessor, who both stated that the sheriff treated other female deputies in the same humiliating and derogatory manner and stated "women don't belong in law enforcement." Id. The court denied summary judgment for the county, finding plaintiff's evidence of gender animus created genuine issues of material fact precluding summary judgment. Id.

Like the plaintiff in Sturm-Sandstrom, LaMont was also treated differently than her male counterparts. LaMont and Case had to report to Miner at the beginning of lunch breaks while the men did not. Miner required LaMont and Case to wear uniforms while the men could wear street clothes. Men could take breaks whenever they wanted but Miner did not allow LaMont to do the same. Miner physically segregated the women from the men, and did not allow the women to speak for an entire summer. The men were also instructed not to speak to the women. Like the plaintiff in Sturm-Sandstrom, LaMont presented evidence from the only other female employee stating she was subjected to the same demeaning and sexist treatment as LaMont. Furthermore, like the harasser in Sturm-Sandstrom, LaMont was told by Miner that "women have their place" and that Elk River High School is not the time or the place for a woman. The court in

Sturm-Sandstrom found this type of conduct sufficiently sever to preclude summary judgment. It was error for the district court to hold otherwise in this case.

Many other courts have found that similar conduct does create a hostile work environment. For example, the court has found a hostile environment to exist where "women are presented with constant and pervasive references to women, perhaps even themselves, as sexual objects and are subjected to acts in which their sexuality and sex role is elevated over their status as an employee." Jenson, 824 F. Supp. at 886; Hall v. Gus Constr. Co., 842 F.2d at 1014 ("Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances."); Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3d Cir. 1990) ("[t]he pervasive use of derogatory and insulting terms relating to women generally and addressed to female employees personally may serve as evidence of a hostile environment.")

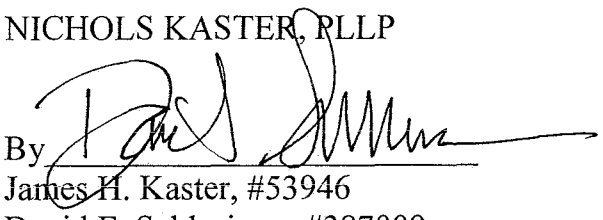
On the basis of this record, LaMont has presented a genuine issue of material fact as to the severity or pervasiveness of her hostile work environment claim. It was error for the district court to conclude, as a matter of law, that no reasonable fact-finder could conclude that Miner's conduct was sufficiently severe or pervasive to state a hostile work environment claim. This is particularly the case because whether conduct is sufficiently severe or pervasive to constitute a hostile work environment is to be determined based on the totality of the circumstances. Accordingly, summary judgment was improper and the district court must be reversed.

CONCLUSION

Because the MHRA protects individuals from harassment based on sex even if the conduct is not sexual harassment, and because a reasonable jury could conclude that the harassment LaMont suffered was sufficiently severe or pervasive to state a claim for hostile work environment, she respectfully requests that the judgment of the court of appeals be reversed.

Dated: May 19, 2011

NICHOLS KASTER, PLLP

By 

James H. Kaster, #53946
David E. Schlesinger #387009
Adam W. Hansen, #391704
4600 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone (612) 256-3200
ATTORNEYS FOR PETITIONER

STATE OF MINNESOTA

IN SUPREME COURT

Carol J. LaMont,

Petitioner,

CERTIFICATE OF BRIEF LENGTH

Independent School District #728,

Respondent.

Court of Appeals Case No. A10-543

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01 for a brief produced with proportional 13-point font. The length of the brief is 12,742 words. The brief was prepared using Microsoft Word 2007.

DATED: May 19, 2011

NICHOLS KASTER, PLLP

By _____

James H. Kaster #53946
David E. Schlesinger #0387009
4600 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 256-3200

ATTORNEYS FOR APPELLANT