No. A07-1859

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal

Minnesota

Statutory Provisions

Federal

Minnesota

STATEMENT OF ISSUES

I. Whether Appellant established a prima facie case of sexual harassment discrimination under the Minnesota Human Rights Act.

The district court incorrectly held no.

Most apposite cases and constitutional and statutory provisions:

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)
Continental Can Co. v. State, 297 N.W.2d 241 248 (Minn. 1980).

The Minnesota Human Rights Act, Minn. Stat. Ch. 363A

II. Whether Respondents had actual or constructive notice of the existence of the harassment claimed by Appellant.

The district court incorrectly held no.

Most apposite cases and constitutional and statutory provisions:

Continental Can Co. v. State, 297 N.W.2d 241 (Minn. 1980)
McNabb v. Cub Foods, 352 N.W.2d 378 (Minn. 1984)
Kay v. Peter Motor Co., Inc., 483 N.W.2d 481 (Minn. Ct. App. 1992)

The Minnesota Human Rights Act, Minn. Stat. Ch. 363A

III. Whether the district court erroneously applied the "severe and pervasive" standard under Title VII to Appellant's claims under the Minnesota Human Rights Act.

The district court erroneously applied the standard.

Most apposite cases and constitutional and statutory provisions:

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-7 (1986)
Duncan v. Gen. Motors Corp. 300 F.3d 928 (8th Cir. 2002)

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq.
The Minnesota Human Rights Act, Minn. Stat. Ch. 363A

IV. Whether Respondents had a legitimate, non-discriminatory reason for terminating Appellant.

The district court incorrectly held yes.

Most apposite cases and constitutional and statutory provisions:

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973)
Sigurd v. Isanti County, 386 N.W.2d 715, 721-22 (Minn. 1986)
Benassi v. Back & Neck Pain Clinic, Inc., 629 N.W.2d 475, 481 (Minn. Ct. App. 2001).

The Minnesota Human Rights Act, Minn. Stat. Ch. 363A

V. Whether Appellant established a prima facie case of reprisal under the Minnesota Human Rights Act.

The district court incorrectly held no.

Most apposite cases and constitutional and statutory provisions:

Dietrich v. Canadian Pac., 526 N.W.2d 319, 327 (Minn. 1995)

The Minnesota Human Rights Act, Minn. Stat. Ch. 363A

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' 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.

STATEMENT OF FACTS

Plaintiff's employment with Defendants

Geist-Miller worked for Sun Place, Inc., from December 1994 until December 3, 2003. (Comp. ¶ 7, 29)[App. 2,6]. She worked for Sun Place Tanning Studios, Inc., from its creation in 1999 (Geist-Miller dep. 13)[App.57] until she was terminated on December 3, 2003 (Comp. ¶ 29)[App. 6]. Her employment was governed by two employment agreements, under which she could be fired only for "dishonesty or misuse of [her] job description." (Geist-Miller Aff., Exs. 1 and 2)[App. 16,17]. Geist-Miller was not fired for either of these reasons. (Geist-Miller Dep. 94-6[App. 138-140]; Boedigheimer Aff., Ex. E)[App.41]. She worked as a shift manager, salon and training manager, and general manager of Sun Place and Sun Place Tanning Studios. (Geist-Miller dep. 11)[App. 55]. Geist-Miller worked as general manager from April 2000 until June 2003 when, due to the birth of her son, she elected to cut back her responsibilities and work only as general manager for Sun Place Tanning Studios and as salon manager for the Rochester airport salon. (Geist-Miller dep. 16 [App. 60]; S. Mitchell dep. 36-7)[App. 170-171].

As general manager of both companies, Geist-Miller was responsible for the day-to-day management of all the tanning salons of both companies, was expected to work sixty-five to seventy-five hours per week, and was on call twenty-four hours a day, seven days a week. (Geist-Miller dep. 11 [App. 55]; S. Mitchell dep. 24)[App. 166]. She was Defendants' most senior employee, and

Sandra Mitchell referred to Geist-Miller as a "prodigy." (S. Mitchell dep. 29, 42)[App. 167, 173]. Sandra Mitchell testified at her deposition that Geist-Miller was the best employee of Sun Place and Sun Place Tanning Studios over the nine years she worked there and at the time she was terminated from Sun Place Tanning Studios (Id. at 42)[App. 173]. Sandra Mitchell said she would give Geist-Miller a job again (Id. at 59.)[App. 174].

Geist-Miller was never given a "pink slip" or any other written warning while employed with Sun Place or Sun Place Tanning Studios. (R. Mitchell dep. 44 [App. 176]; S. Mitchell dep. 26)[App. 167].

Sexual harassment suffered by Geist-Miller

Beginning in June 2003, after the start of the Mitchells' divorce proceedings and her assumption of day-to-day general manager and salon manager duties for Sun Place Tanning Studios, Geist-Miller began to experience sexual harassment at the hands of Defendant Ronald Mitchell (Compl. ¶ 15)[App. 3]. It continued through her termination in December 2003. (Id. at 29)[App. 6]. Geist-Miller documented and testified to numerous incidents of sexually-harassing conduct, including the seventeen[1] that follow.

[1] Not nine, as Defendants state. (Defs' Mem. in Supp. of Mot. for Summ. J. 7)[App. 190].

1. Ronald Mitchell would touch Geist-Miller's hair and pull it forward over her face, saying she should wear her hair that way more often. (Geist-Miller Aff., Ex. 5)[App. 18-20].

2. Ronald Mitchell and Larry Campion came into the Northwest Rochester salon while Geist-Miller was cleaning a tanning bed. Ronald Mitchell entered the room, grabbed her, and forcibly kissed her. (Geist-Miller Aff., Exs. 5 and 15)[App. 18-20, 35-38].

3. Geist-Miller was with Ronald Mitchell in his home office waiting for Sandra Mitchell to finish getting ready for a business trip to the Twin Cities. Geist-Miller was applying Chapstick when Ronald Mitchell asked her to "give me some of that" before leaning forward, grabbing Geist-Miller, and attempting to kiss her on the lips. Geist-Miller backed away and said "no," and Ronald Mitchell accused her of having "no guts." (Geist-Miller Aff., Exs. 5 and 15)[App. 18-20, 35-38]

4. Geist-Miller accompanied Ronald Mitchell to an eye appointment in the Twin Cities. While in the car, he put his hand on Geist-Miller's leg and suggested that they "run away together." When Geist-Miller moved her leg and refused him, he accused her of having "no guts." (Geist-Miller Aff., Ex. 9)[App. 26].

5. On February 26, 2003, Ronald Mitchell had the locks changed on the Rochester business office. He handed Geist-Miller a key and asked her if

she would protect him. (R. Mitchell dep. 97-8 [App. 177-178]; Geist-Miller Aff, Ex. 6)[App. 21-22].

6. Ronald Mitchell took Geist-Miller from the Crossroads salon for a meeting. They were early, so they stopped at the Hanger Bar for a drink. Both had a drink—Ronald Mitchell had three—and then went to the meeting. Later, Ronald Mitchell made several comments about how Geist-Miller was denying him sexually, and that if her husband ever "messed up," that he would get her. He also told Geist-Miller that he bought a Lincoln Navigator so that he, Geist-Miller, her son, Parker, and their future children could watch DVDs while they travelled. Geist-Miller rebuffed him. (Geist-Miller dep. 28-30[App. 72-74]; Geist-Miller Aff., Ex. 7)[App. 23-24].

7. On September 17, 2003, Ronald Mitchell told Geist-Miller about a dream he had wherein he and his wife, Sandra Mitchell, had divorced, and that he and Geist-Miller had gotten married, had a little girl, and opened up five new salons. (Geist-Miller dep. 31[App. 75]; Geist-Miller Aff., Ex. 8)[App. 25].

8. In October 2003, Geist-Miller met with Ronald Mitchell at the new airport salon. When she asked him why he was in such a pleasant mood, he responded "My one true love, will you run away with me." Geist-Miller refused, and he responded "no guts, Trisha, you have no guts." (Geist-Miller dep. 32-3[App. 76-77]; Geist-Miller Aff., Ex. 9)[App. 26].

9. Also in October 2003, Geist-Miller was standing outside of the airport salon with Ronald Mitchell, Brian McCoy, Katie Roch, and Julie Ellinghuysen. Roch asked if Ronald Mitchell and Geist-Miller had ever slept together. Geist-Miller replied "God, no," but the conversation devolved into sexual comments and innuendo and Geist-Miller walked away. (Geist-Miller dep. 34-5[App. 78-79]; Geist-Miller Aff., Ex. 10)[App. 27-28].

10. A couple of days later, on October 15, 2003, Geist-Miller was in the salon after having talked to Roch about the previous day's conversation. Ronald Mitchell entered the salon, put his arm around her, and said "seeing that we have had sex, maybe we should run away and continue having sex." Geist-Miller responded "we have never had sex, nor will we ever have sex." In her signed incident report the same day, Geist-Miller noted that she was concerned that Ronald Mitchell was not joking with all his sexual comments and innuendo. She wrote that he was making her uncomfortable and that she was unsure what to do. (Geist-Miller dep. 35-6[App. 79-80]; R. Mitchell dep. 106-07[App. 179-180]; Geist-Miller Aff., Ex. 10)[App. 27-28].

11. On October 20, 2003, Ronald Mitchell walked behind Geist-Miller and intentionally brushed his hand against her buttocks. He also put his arm around her. Geist-Miller told him she just wanted to be left alone to do her

job. (Geist-Miller dep. 36-40[App. 80-84]; Geist-Miller Aff., Ex. 11)[App. 29].

12. Another salon manager, Jamie Brewington, called Geist-Miller on November 25, 2003, to inform her about a conversation she had with Ronald Mitchell. He told Brewington that he needed to be careful about who he talked to because “everyone” was talking to Sandra Mitchell. (Geist-Miller dep. 56-60[App. 100-104]; Geist-Miller Aff., Ex. 12)[App. 30].

13. Geist-Miller was told by another employee of Sun Place Tanning Studios about another incident, this time at Deer Creek Speedway. The employee observed Ronald Mitchell making sexual comments to other young women at the event, and that he showed up in the tent smelling foully and with wet pants. He said “Yah, I pissed and shit myself.” The employee reported being embarrassed and offended by Ronald Mitchell's behavior. (Geist-Miller dep. 59-62[App. 103-106]; Geist-Miller Aff., Ex. 13)[App. 31-32].

14. Ronald Mitchell and Geist-Miller met with employees of Lanmark and JVC Builders regarding blueprints for and modifications to the airport salon location, and afterwards went to the Hanger Bar for a drink. The employees of Lanmark and JVC were talking to another woman about her breasts, and Ronald Mitchell began comparing the women's breasts. He said one woman's were nice, then looks at Geist-Miller's breasts, and said “yours are so-so.” This was embarrassing and upsetting to Geist-Miller, and she told him not to look at her like that. Geist-Miller got up and walked away, and

Ronald Mitchell shouted "[b]ye honey. We will talk to you tomorrow." (Geist-Miller dep. 63-5[App. 107-109]; Geist-Miller Aff., Ex. 14)[App. 33-34].

15. In the presence of several other employees, Ronald Mitchell stated he "did not care if [Geist-Miller] was in the back pleasuring herself so long as she was getting her vacuuming done." (Geist-Miller dep. 68-9, 113)[App. 112-113, 157].

16. Ronald Mitchell and several employees were outside smoking cigarettes when he observed that a female employee should not wear the shirt she had on because it made her nipples show. (Geist-Miller dep. 110)[App. 154].

17. Finally, Ronald Mitchell said that he "could be out to lunch with two hairdressers one minute and the next minute he could be in bed with them." (Geist-Miller dep. 113-14[App. 157-158]; R. Mitchell dep. 150)[App. 193].

Geist-Miller repeatedly told Ronald Mitchell that his comments were unwelcome and offensive, and reported some of these incidents to Denys Rain, an office manager for Sun Place Tanning Studios. (Geist-Miller dep. 113-14 [App. 157-158]; R. Mitchell dep. 150)[App. 183]. She placed multiple incident reports in her personnel file. (See generally Geist-Miller Aff.)[App. 13-38].

Termination of Geist-Miller's employment

Geist-Miller was fired on December 3, 2003, ostensibly for refusing to sign an employment policy change agreement. (Geist-Miller Dep. 94-6[App. 138-140]; Boedigheimer Aff., Ex. E)[App. 41]. The policy change agreement would have required her to have no contact with Sandra Mitchell and to immediately notify Ronald Mitchell if Sandra Mitchell attempted to contact Geist-Miller. (Boedigheimer Aff., Ex. E)[App. 41]. However, Ronald Mitchell refused to show her the policy change agreement at the time, and told her that if she did not sign it, she was choosing to discontinue her employment with Sun Place and Sun Place Tanning Studios. (Geist-Miller dep. 97-8[App. 141-142]; R. Mitchell dep. 127)[App. 182].

Ronald Mitchell drafted the policy change agreement just after the Hon. Kevin A. Lind, judge of Olmstead County District Court, issued a temporary order in the Mitchells' divorce proceeding. (R. Mitchell dep. 124)[App. 181]. Judge Lind's order, however, did not enjoin Sandra Mitchell from contacting employees of Sun Place Tanning Studios, and she was still an owner of Sun Place Tanning Studios at the time. (Boedigheimer Aff., Ex. F)[App. 42-44].

At the time she was presented with the policy change, Geist-Miller remained an employee of Sun Place, which Sandra Miller was given responsibility for in Judge Lind's order. (S. Mitchell dep. 39)[App. 172]. Geist-Miller had a duty to report to Sandra Miller in her capacity as general manager. (Id.)[App. 172]. Geist-Miller explained that she was not choosing to discontinue her employment, and

asked if Ronald Mitchell was firing her. (Geist-Miller dep. 94-6, 98)[App. 138-140, 142]. She was terminated and instructed to turn in her keys. (Id.)[App. 138-140, 142].

SUMMARY OF THE ARGUMENT

This case arises out of a four-month period wherein Plaintiff Trisha Geist-Miller was sexually harassed by Respondent Ronald Mitchell, co-owner of Respondent Sun Place Tanning Studios, Inc. Ronald Mitchell sexually harassed her verbally and physically. When Geist-Miller refused to submit to the harassment, Respondents terminated her employment.

The district court erroneously granted summary judgment in Respondents' favor because it found Respondents did not have actual or constructive notice of the sexual harassment. However, Ronald Mitchell was both harasser and employer, so Respondents had actual knowledge, or at least constructive knowledge, of the sexual harassment, but did nothing about it.

Respondents had no legitimate, non-discriminatory reason for terminating Geist-Miller. Under her employment agreements, Geist-Miller could be terminated only for dishonesty or misuse of her job description. In fact, she was terminated for refusing to sign an agreement not to have any communication with the other owner of Sun Place Tanning Studios, Sandra Mitchell. This was mere pretext, but pretext in this case is a genuine issue of material fact for a jury to decide.

Geist-Miller also stated a prima facie case of reprisal under the Minnesota Human Rights Act. She complained of the sexual harassment, and in response, Respondents used as a pretext her refusal to sign the non-communication agreement, and terminated Geist-Miller.

ARGUMENT

I. Standard of review on appeal of a motion for summary judgment.

On appeal from summary judgment, there are two questions before a reviewing court: (1) whether there are any genuine issues of material fact 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, a reviewing 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)).

In considering the record, 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).

The principal inquiry on a motion for summary judgment is whether a material fact exists. *Campion v. Wright County*, 347 N.W.2d 289, 291 (Minn. Ct. App. 1984). The moving party carries the burden of proving and persuading the court that no genuine issue of material fact exists. *Ahlm v. Rooney*, 143 N.W.2d 65, 68 (Minn. 1966).

Proximate cause and causation are generally questions of fact for a jury unless a jury could arrive at only one result. *Lubbers v. Anderson*, 539 N.W.2d 398, 402

(Minn. 1995); *Paidar v. Hughes*, 615 N.W.2d 276, 281 (Minn. 2000) (quotation omitted).

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

II. Geist-Miller established a prima facie case of sexual harassment discrimination under the Minnesota Human Rights Act.

The district court found that Appellant failed to establish a prima facie case of sexual harassment under the MHRA because Sun Place and Sun Place Tanning Studios had no notice of the alleged harassment. However, Ronald Mitchell was an owner of both companies, and had actual knowledge that he was harassing Geist-Miller.

Because of the general similarity between the *purpose* of Title VII and the Minnesota Human Rights Act, Minnesota courts use the *McDonnell-Douglas* burden-shifting analysis formulated by the U.S. Supreme Court on a motion for summary judgment in employment discrimination cases. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983). Under *McDonnell-Douglas*, in order to survive summary judgment, the plaintiff-employee must establish a prima facie case of discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). The burden then shifts to the defendant-employer to show a legitimate, non-discriminatory reason for any adverse action. *Id.* If the employer is able to articulate a legitimate, non-discriminatory reason, the employee must

show that the employer's articulated reason was merely pretextual in order to survive summary judgment. *Id.* at 804.

Under the Minnesota Human Rights Act, sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature." Minn. Stat. § 363A.03, Subd. 43. An employee has a claim for sexual harassment if the harassment (1) is a term or condition of employment; (2) is a factor in decisions affecting employment; or (3) substantially interferes with employment or creates an intimidating, hostile, or offensive employment environment. *Id.*

In order for an employee to establish a prima facie case of sexual harassment, the employer must have actual or constructive knowledge of the sexual harassment so that it may respond appropriately. *Continental Can Co. v. State*, 297 N.W.2d 241, 248 (Minn. 1980).

The definition of employment discrimination in the MHRA is similar to the language used in the Civil Rights Act of 1964, as amended, although there are important differences. *See* 42 U.S.C. § 2000e-2(a) ("**Title VII**"). Most importantly, Title VII does not explicitly state causes of action for sexual harassment or hostile environment discrimination.

a. Because Ronald Mitchell was the harasser, Respondents had actual and constructive notice of the harassment claimed by Geist-Miller.

In *Kay v. Peter Motor Co., Inc.*, this Court determined that an employee is not required to complain to his or her supervisor when the supervisor himself is the harasser. 483 N.W.2d 481, 484 (Minn. Ct. App. 1992).[2] This is based on the principle that an employee need not make a formal complaint of harassment where the employer has actual knowledge it is occurring. *Id.* (*citing McNabb v. Cub Foods*, 352 N.W.2d 378 (Minn. 1984); *see also Bersie v. Zycad Corp.*, 417 N.W.2d 288, 291 (Minn. Ct. App. 1987) (employer liability may be created through either actual knowledge of incidents or the fact that incidents were so obvious or pervasive employer should have known of alleged misconduct), *pet. for rev. denied* (Minn. May 5, 1988)). In *McNabb*, the Minnesota Supreme Court rejected the employer's argument that while he knew what was happening, he did not know it was harassment. 352 N.W.2d at 383. An employer has actual knowledge when it is the employer doing the harassing.

This case is analogous to *McNabb* and *Kay*. Ronald Mitchell was the owner of Sun Place and Sun Place Tanning Studios. Geist-Miller was the highest-placed employee at either business; her only supervisor was Ronald Mitchell.

When Ronald Mitchell began sexually harassing Geist-Miller, she noted the harassment in incident reports and rebuffed Ronald Mitchell's advances. Ronald

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[2] The District Court erroneously cited *Munro Holding, LLC, v. Cook*, an unemployment law decision in which this Court explicitly declined to apply case law interpreting the MHRA. 695 N.W.2d 379 (2005).

Mitchell knew what he was doing, and as in *McNabb*, he cannot escape the consequences of his actions by claiming he did not know he was harassing Geist-Miller. By sexually harassing Geist-Miller, Ronald Mitchell had actual notice of his own sexual harassment. Respondents apparently assumed so, as well, because they did not raise the issue of notice in their summary judgment memorandum below. (*See generally* Defs' Mem. in Supp. of Mot. for Summ. J)[App. 184-204].

The district court erroneously found that Respondents did not have notice of the sexual harassment, and that Geist-Miller did not establish a prima facie case of sexual harassment. It granted Respondents' motion for summary judgment on Geist-Miller's MHRA sexual harassment claim on no other grounds. Since Respondents had notice of the sexual harassment, Geist-Miller respectfully requests this Court to vacate the judgment on her MHRA sexual harassment claims and remand this case for trial.

b. The district court erroneously applied the "severe and pervasive" standard because Geist-Miller is not making a hostile environment discrimination claim.

In reaching its decision on Geist-Miller's MHRA sexual harassment claim, the district court erroneously cited case law relating to hostile environment claims. In fact, Geist-Miller did not allege a hostile environment theory of sexual harassment, and so the district court erred when it decided that the harassment must have been "severe and pervasive" in order for Geist-Miller to state a claim under the MHRA. The "severe and pervasive" standard applies to hostile environment claims under Title VII, and potentially to hostile environment

claims under the MHRA, but not to all sexual harassment claims under the MHRA.

Hostile environment sexual harassment under the MHRA is an *alternative* claim to (1) sexual harassment in the terms or conditions of employment or (2) sexual harassment that is a factor in decisions affecting employment. Minn. Stat. § 363A.03, Subd. 43. In order to make out a prima facie case of hostile environment discrimination, a plaintiff must show "substantial interference" or that the employer has created an "intimidating, hostile, or offensive employment environment." *Id.*

None of the cases cited by Respondents in their brief below address the MHRA. In every case Respondents cited, the federal court was applying Title VII. While the two statutes are similar, the MHRA goes further than Title VII in its coverage of sexual harassment. Sexual harassment is covered by Title VII as a form of discrimination based on *gender*, while it is explicitly covered by the MHRA as a distinct category of employment discrimination. Minn. Stat. § 363A.03, Subd. 43; *cf* 42 U.S.C. § 2000e *et seq*. The difference is apparent in, for example, the Eighth Circuit's opinion in *Duncan v. Gen. Motors Corp.* 300 F.3d 928 (8th Cir. 2002). In *Duncan,* the court observed "[t]he fundamental issue is whether members of one sex are subjected to unfavorable conditions of employment that the members of the opposite sex are not." 300 F.3d at 933. The same issue would not arise under the MHRA, because sexual harassment is

prohibited whether or not the harasser sexually harassed both genders equally or not.

In *Duncan*, the Eighth Circuit found that harassment had occurred, but determined that the harassment was not severe or pervasive enough to create a hostile working environment. *Id*. at 934. Again, the MHRA is more expansive. Title VII includes the hostile environment theory only by judicial recognition. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-7 (1986) (recognizing hostile environment theory of recovery under Title VII). The MHRA, on the other hand, explicitly prohibits any harassment that has "the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment." Minn. Stat. § 363A.03, Subd. 43; *see also Goins v. West Group*, 635 N.W.2d 717, 726 n. 6 (Minn. 2001) ("The MHRA is to be construed liberally . . . with reference to federal law.")

If the "severe and pervasive" requirement applies at all to MHRA claims, it applies only to hostile environment claims. No Minnesota court has extended this requirement to harassment that is made a term or condition of employment; or to sexual harassment that is a factor in decisions affecting employment. In *Goins*, the only case cited by the district court for the proposition that sexual harassment must be "severe and pervasive" in order to be actionable, the Minnesota Supreme Court was considering only hostile environment claims. 635 N.W.2d 717 (Minn. 2001).

Even if the "severe and pervasive" requirement applies to all MHRA claims, a court must consider all of the circumstances, and should not simply add up the number of instances of harassment and divide by the number of months during which it occurred. *See Continental Can Co., Inc. v. State*, 297 N.W.2d 241, 249 (Minn. 1980). It is true that not every sexual comment in the workplace becomes sexual harassment. *See Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997). However, under *Continental Can Co.*, a court must consider all of the circumstances surrounding the harassment. 297 N.W.2d at 249. Determining whether an employee has experienced sexual harassment is not simple mathematics. The determination whether a hostile environment exists must be made by the trier of fact in light of the totality of the circumstances.

Plaintiff has alleged, testified to, and documented numerous instances of unwelcome sexual advances, requests for sexual favors, sexually-motivated physical contact, and other verbal or physical conduct and communications of a sexual nature. *Compare* Minn. Stat. § 363A.03, Subd. 43. Respondents did not argue below that sexual harassment never took place, or that the employment environment was not charged with sexual harassment. Respondents merely argued that the harassment was not bad enough, and that the employment environment was not hostile enough, to support Geist-Miller's cause of action.

As already pointed out, Geist-Miller's claim is not based on a hostile environment theory, but she alleged that she was sexually harassed in the terms

or conditions of her employment, or the sexual harassment was a factor in Respondents' terminating her employment.

c. Respondents had no legitimate, non-discriminatory reason for terminating Geist-Miller, and the reasons they did give were pretextual.

Geist-Miller has established a *prima facie* case of discrimination based on sexual harassment, so the burden shifts to Respondents to articulate a legitimate, non-discriminatory reason for her termination. *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 481 (Minn. Ct. App. 2001). Respondents' stated reason for terminating Geist-Miller is that "Plaintiff's employment with defendants ended based upon her refusal to sign a document agreeing not to have any contact with Mrs. Mitchell." (Defs' Mem. in Supp. of Mot. for Summ. J. 11)[App. 194]. Even if this reason is legitimate and non-discriminatory, it is also pretextual.

Because of the factual nature of discrimination claims, a trial court must not be overly rigid in considering evidence of pretext. *Sigurd v. Isanti County*, 386 N.W.2d 715, 721-22 (Minn. 1986); *see also Johnson v. Minnesota Hist. Soc'y*, 931 F.2d 1239, 1244 (8th Cir. 1991). The question on summary judgment is not whether the employee proves pretext, but whether the employee raises a genuine issue of fact regarding pretext. *Johnson v. Canadian Pac. Ltd.*, 522 N.W.2d 386, 391 (Minn. Ct. App. 1994) (*citing Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 646 (5th Cir. 1985). An employee can survive a motion for summary judgment by producing circumstantial evidence from which a trier of

fact could reasonably infer that discrimination was a motivating factor in the adverse action. *See Rothmeier v. Investment Adv., Inc.*, 85 F.3d 1328, 1335 (8th Cir. 1996).

Geist-Miller was not fired for dishonesty or "misuse of [her] job description," the only two permissible reasons for termination given in her two employment agreements. Respondents may argue the policy change agreement gave effect to Ronald Mitchell's temporary divorce order; in fact, it did no such thing. Geist-Miller was presented with the policy change agreement shortly after she complained about the harassment to others.

As already pointed out, Geist-Miller was an exemplary employee. She was, in Sandra Mitchell's words, a "prodigy." She had also been with the company for nine years and oversaw all the day-to-day operations of the entire company. Respondents could not have had a legitimate or non-discriminatory reason to terminate their prodigy's employment.

Genuine issues of material fact remain in this case, as a brief glance at the parties' statements of facts will show. The record now reveals at least seventeen different incidents of sexually-harassing conduct. Given the nature of this case, where the number and severity of the instances of sexual harassment are central to the claim, particularly if this Court determines that the "severe and pervasive" standard applies under the MHRA, it was premature for the district court to grant summary judgment for Respondents.

Geist-Miller plead and discovery has revealed a prima facie case of employment discrimination by sexual harassment. The sexual harassment endured by Geist-Miller influenced the terms and conditions of her employment and led to her termination. Respondents never took any curative action in response to Geist-Miller's claims that sexual harassment was occurring, even though it had ample notice.

Ronald Mitchell, co-owner of Sun Place Tanning Studios and Geist-Miller's boss, touched Geist-Miller inappropriately on at least four occasions, putting his hands on her hair, leg, buttocks, and grabbing her to kiss her against her will. He threatened to kiss her forcibly on at least one other occasion, made derogatory comments about her breasts, and on several occasions made reference to sexual activity with her. His sexual commentary and innuendo were so pervasive that a nearby shopkeeper thought he and Geist-Miller were sleeping together. This was patent sexual harassment.

Respondents' motion for summary judgment on Geist-Miller's sexual harassment discrimination claims should be denied. Geist-Miller has presented ample evidence to make out her *prima facie* case, and even if Respondents had a legitimate, non-discriminatory reason for presenting Geist-Miller with the policy change agreement and ultimatum, it was mere pretext for firing her as a result of her unwillingness to suffer continued sexual harassment. Firing Geist-Miller because she would not sign a document she was not even allowed to see was pretextual by its very nature. Coupled with the temporal proximity to her

complaints, the lack of any negative employment history, and the ongoing harassment, Geist-Miller has at least created a genuine issue of material fact as to pretext. This Court should therefore vacate summary judgment on Geist-Miller's sexual harassment claim and remand this case for trial.

III. Geist-Miller established a prima facie case of reprisal under the Minnesota Human Rights Act.

The MHRA also prohibits reprisal against an employee when the employee engages in a protected activity. Minn. Stat. § 363A.15. The elements of a reprisal claim are (1) the employee engaged in statutorily-protected conduct; (2) an adverse employment action or any other form of intimidation, retaliation, or harassment by the employer; and (3) causal connection between the two. *Id.*; *Dietrich v. Canadian Pac.*, 526 N.W.2d 319, 327 (Minn. 1995). "Statutorily-protected conduct" is, among other things, opposition to an employer's practices if those practices violate the MHRA. Minn. Stat. § 363A.15(1).

Whether or not Geist-Miller engaged in statutorily-protected conduct hinges on whether or not she was sexually harassed on the job. As outlined above, the dispute is not whether Geist-Miller was sexually harassed. She was. Numerous incidents of sexual harassment occurred while Geist-Miller was employed by Respondents. When she refused to accept the harassment and when she complained about it, her employment was terminated. She complained about the sexual harassment on several occasions, including direct complaints to Ronald Mitchell himself. Following Geist-Miller's complaints, Respondents took adverse

action against her by continuing to subject her to sexual harassment and ultimately by terminating her employment.

The short period of time between Geist-Miller's refusals to engage in sexual relations with Ronald Mitchell and her termination creates a causal connection between the statutorily-protected conduct and the reprisal. *See, e.g., Kuechle v. Life's Companion P.C.A., Inc.*, 653 N.W.2d 214, 222 (Minn. Ct. App. 2002). In addition to the timing of the termination, Ronald Mitchell, the sexual harasser and subject of Geist-Miller's complaints, was also the person who unilaterally terminated her employment, despite the employment agreements in effect, and by the pretextual nature of the termination, as outlined above.

Geist-Miller has made out a *prima facie* case of discrimination based on sexual harassment and reprisal under Title VII and the MHRA. The burden is on Respondents to articulate a legitimate, non-discriminatory reason for terminating her employment. As outlined above, Respondents have not done so. Geist-Miller therefore respectfully requests this Court to vacate summary judgment on Geist-Miller's reprisal claim and remand this case for trial.

CONCLUSION

Multiple issues of material fact remain as to whether Geist-Miller was subjected to sexual harassment, whether the harassment created a hostile work environment, whether Respondents retaliated against her, and whether Respondents' purported legitimate, non-discriminatory reason for terminating her employment was merely pretextual. A reasonable factfinder could find in

Geist-Miller's favor on both counts of discrimination under the MHRA. For these reasons, Geist-Miller respectfully requests this Court to vacate the district court's summary judgment in its entirety and remand this case 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 740 lines/6259 words.

Respectfully submitted,

Boedigheimer, Horejsi & Scott, P.A.

Dated: _____

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