

IN THE MISSOURI SUPREME COURT

SC 88981

CYNTHIA HILL,

Plaintiff/Appellant,

vs.

FORD MOTOR COMPANY, KEN HUNE, AND
PAUL EDDS,

Defendants/Respondents

SUBSTITUTE REPLY BRIEF OF
PLAINTIFF/APPELLANT CYNTHIA HILL

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Reply to Response to Point 1

In Point 1, Hill argued the trial court erred in sustaining Ford's summary judgment motion on Hill's sexual harassment claim.

I. Hill's claim under 8 CSR 60-3.040(17)(A)(2)

Ford argues Hill's claim, that her rejection of Hune's sexual advances was used as the basis for employment decisions, cannot be considered on appeal because Hill did not raise the claim at the trial court. *Resp. Brief*, 25. Since Hill alleged both in her Petition and Amended Petition that Kenny Hune refused to give her a position on his line because she rebuffed his sexual advances (LF 8, ¶¶ 11, 16; 12, ¶¶ 11, 16), Ford's argument is incorrect.

II. Hill's hostile work environment claim¹

A. Ford does not argue it is entitled to summary judgment based on the elements set forth in either the MCHR regulation or MAI 31.24

¹"Hostile" is used as shorthand for "intimidating, hostile, or offensive work environment" based on gender, as described in the regulation.

In arguing it established its right to summary judgment on Hill's claim under 8 CSR 60-3.040 (17)(A)(3), which prohibits the creation of a hostile work environment based on gender, Ford mentions neither the MCHR regulation which interprets the meaning of sex discrimination nor MAI 31.24, with its 2007 Notes on Use, which states the elements of a harassment claim. In light of *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 820 (Mo. banc 2007), any requirement that a plaintiff prove elements other than those in the MAI verdict director is of questionable validity because of the potential of forcing a plaintiff to prove more to withstand a summary judgment motion than she would have to prove to obtain a verdict at trial. *Id.*, at 820.

Instead of asking this Court for summary judgment in light of the elements set forth in MAI 31.24 and/or the MCHR regulation, Ford gathers snippets from various sexual harassment cases and piles them into a mountain of summary judgment elements.

Citing *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 244 (Mo. App. 2006), Ford begins with four elements of a "prima facie" case of sexual harassment, with Ford's use of the term "prima facie" implying even those elements are insufficient to establish a claim of sexual harassment. *Cooper* (which predates *Daugherty* and the Notes on Use to MAI 31.24), while stating four elements, did not refer to them as a "prima facie" case. The elements of the "prima facie case" are: 1) membership in a protected group; 2) unwelcome

harassment; 3) based on sex; and, 4) affecting a term, condition, or privilege of employment. *Resp. Brief, 16.*

Taking language from federal cases, Ford also claims Hill must “clear a high threshold to demonstrate actionable harm,” meaning even if Hill proves the “prima facie” elements, she will not satisfy her summary judgment burden unless that proof reaches some unspecified magnitude. *Resp. Brief, 16.* Ford states Hill must also demonstrate “the unwelcome harassment was sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment” and further subdivides the severe element and the pervasive element. *Resp. Brief, 17.*

Finally, Ford cites a slew of federal cases in which various courts found the plaintiffs were not sufficiently harassed, without mentioning the standards under which the courts made their respective determinations or the context of the conduct found insufficiently hostile. Individual scenarios do not set a floor for what is actionable because, as federal courts are recognizing, “The highly fact-specific nature of a hostile environment claim tends to make it difficult to draw meaningful contrasts between one case and another for purposes of distinguishing between sufficiently and insufficiently abusive behavior.” *Billings v. Town of Grafton*, 515 F.3d 39, 49 (1st Cir. 2008).

In the only Missouri case Ford cites, *Cooper*, harassment of the plaintiff during the course of one dinner party was sufficient to establish an MHRA claim. The

Court of Appeals recognized, pre-MAI 31.24, with evidence of improper conduct and subjective offense, “whether the conduct rose to the level of abuse is largely in the hands of the jury.” *Cooper*, 245. Since it is incredibly unlikely a line supervisor at an automotive assembly plant is going to harass an assembler, in the plant, in the same manner and context as the CEO of a company harasses a corporate vice president, at a restaurant dinner party, what happened to the plaintiff in *Cooper* cannot be the standard for unlawful harassment under the MHRA.

B. Ford disputes Hill was offended by Hune’s conduct, and asks the Court to decide which version of the evidence to believe

Assuming Hill needs to prove “subjective offense” as a separate element in order to survive summary judgment, Ford maintains Hill failed to do so because her actions were inconsistent with her testimony. Since Ford concedes its motion is dependent on a credibility issue, it did not prove its right to judgment as a matter of law. *Swartz v. Mann*, 160 S.W.3d 411, 415 (Mo. App. 2005); *Larison v. Public Water Supply Dist. No. 1 of Andrew County*, 998 S.W.2d 192, 196 (Mo. App. 1999).

Moreover, in arguing its interpretation of the evidence should be believed, Ford does not mention Michael Gorski’s statement that Hill complained to him about Hune’s inappropriate behavior many times during July, August, and early

September of 2002, controverting Ford's claim Hill was not offended by Hune's conduct. LF 362, ¶ 5. Ford does, however, address the part of Gorski's affidavit in which Gorski says he heard Hill tell Hune, "Don't call me 'baby'! I'm not your baby," arguing the statement is hearsay. Since Gorski's affidavit is based on his personal observation (LF 361-62) and is offered to prove Hill made the statement, not that Hill is not Hune's baby, Gorski's statement is not hearsay. *See, State v. Stufflebean*, 604 S.W.2d 737, 741 (Mo. App. 1980); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 663 (Mo. App. 1978).

C. Hune's treatment of other women establishes his course of conduct was based on gender

Ford argues evidence of Hune's treatment of other women is immaterial to Hill's claim of unlawful harassment. As Hill explained in her opening brief, evidence of Hune's abusive behavior toward other female employees supports the inference that Hune's intimidating and offensive conduct toward Hill, even when not overtly sexual, was based on Hill's gender. *Billings v. Town of Grafton*, 515 F.3d at 50-51; *Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383, 386-86 (7th Cir. 2007); *O'Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001)("Courts should avoid disaggregating a hostile work environment claim, dividing conduct into instances of sexually oriented conduct and instances of unequal treatment, then discounting the latter category of conduct").

Ford dismisses the affidavits of Pete Wade, Lillian Mathis Stevenson, and

Michael Gorski regarding Hune's conduct toward women as "nothing more than rank hearsay on multiple levels." *Resp. Brief*, 24, n. 5. The witnesses' statements regarding Hune's conduct are not hearsay. For example, Lillian Mathis Stevenson describes her observation of Hune staring at her crotch while he grinned and said, "you shouldn't sit like that." LF 364, ¶ 6. Stevenson's statement is based on her personal knowledge of what she saw Hune do and heard Hune say and is offered to prove Hune's conduct toward Stevenson. It is therefore not hearsay. *See, State v. Stufflebean*, 604 S.W.2d at 741; *Rinker v. Ford Motor Co.*, 567 S.W.2d at 663. Likewise, Michael Gorski's affidavit, recounting his observation of Hune stepping between two women and saying, "I could do both of you. This would make a good sandwich (LF 361, ¶ 3)," is not hearsay. Hill offers Gorski's affidavit to prove what Gorski observed, not to prove Hune could "do" both women or the women would make a good sandwich.

In support of its hearsay argument, Ford cites three cases, one of which explains why certain statements were considered hearsay. In *Cooper v. Albacore Holdings, Inc.*, the plaintiff offered her own deposition testimony to prove a conversation – which she did not witness – took place between two other people. Cooper testified that defendant's Chief Financial Officer, Mark Wright, said he heard Cooper received a boob job and was starting to date someone who worked for the company. *Cooper*, 246. Cooper did not hear Wright make the statement; instead, another person, Kevin Cantwell, told Cooper he heard Wright make the

statement. *Id.*, 241, 246. Thus, Cooper attempted to introduce, through her own testimony, what Cantwell said about what Wright said, which is hearsay. Here, Hill is not offering her own testimony to prove what Hune said to Stevenson or Gorski, so *Cooper* is inapposite.

Reply to Response to Point 2

In Point 2, Hill argued the trial court erred in granting summary judgment on the issue of Ford's vicarious liability for Hune's conduct. Ford claims it is not vicariously liable for Hune's harassment because: 1) with regard to Hill's claim for which no affirmative defense is available (8 CSR 60-3.040(D)(2)), Ford asserts Hune was not Hill's supervisor and she did not suffer a "tangible employment action" within the meaning of the MCHR regulations; and, 2) with regard to Hill's hostile environment claim, Ford contends it established all elements of the regulatory affirmative defense as a matter of law.

I. Hill's claim under 60-3.040(D)(2), harassment resulting in "tangible employment action"

A. Ford did not move for summary judgment on the issue of whether Hune was a supervisor

Ford's vicarious liability for Hune's conduct is premised on Hune being a supervisor within the meaning of the MCHR's affirmative defense regulation, 8 CSR 60-3.040(17)(D). In a footnote, Ford argues Hune was not a supervisor and

therefore Ford is not liable for Hune's harassment based on the regulation and, further, since Hune was not a supervisor, Ford is not liable unless it knew or should have known of Hune's harassment. *Resp. Brief, 27 n. 7*. Ford did not move for summary judgment based on either argument it now makes in footnote 7. See, LF 14; LF 489-511 (Ford's memorandum of law). Since Ford did not state either basis in its motion, make a prima facie showing of its right to summary judgment. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 380-81 (Mo. banc 1993).

Even if Ford had moved for summary judgment on the two new bases, a jury could conclude from evidence in the record that Hune was a supervisor and Ford should have known Hune was harassing Hill (and undoubtedly there would have been a more well-developed record had Ford raised the claims in its motion).

Under federal caselaw, knowledge of sexual harassment can be imputed where the evidence shows a reasonable employer intent on complying with the law would have known about the harassment. *Ocheltree v. Scollon Productions, Inc.*, 335 F.3d 325, 334 (4th Cir. 2003), *cert. denied*, 540 U.S. 1177 (2004). As described in Hill's opening brief, Hill was not Hune's only victim, and another employee had complained directly to Ford management about Hune's harassing conduct. LF 359, ¶ 8. Since a jury could reasonably conclude that if Ford was intent on complying with the MHRA it would have investigated Pete Wade's complaint, particularly when Ford represents in its written policy it *will* investigate

“usually within 24 hours (LF 228),” Ford did not establish entitlement to judgment as a matter of law. See, *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 341 (6th Cir. 2008)(failure to adhere to a sexual harassment policy gives the harasser license to create new victims). Ford’s indifference to Pete Wade’s complaint is sufficient to establish constructive knowledge of Hune’s harassment of Hill. See, *id.*, at 341(constructive notice where employer knew harasser engaged in same type of conduct in the past).

Assuming Ford may now raise the issue of whether Hune was a supervisor within the meaning of 3.040(17)(D), a jury could reasonably conclude Hune exercised supervisory power over Hill or she reasonably believed he did. At times, Hill was a “floater” on Hune’s line (LF 170-71), including when he made some of his harassing comments. LF 173. By the time Hune took his tangible actions against Hill, Maurice Woods had assigned Hill to work for Hune. In Woods’s words, “If I brought her to Kenny, that was the end of it. I just turned her over to the supervisor.” LF 398, p. 12. Hune told Hill if she worked *for him*, she would have to act like a lady. LF 378, p. 84. In an affidavit Respondents submitted in support of their motions, Edds states he suspended Hill for “disrespecting her supervisor,” referring to Hune. LF 225, ¶ 14. Since Ford’s own evidence controverts its argument that Hune was not a supervisor within the meaning of the regulation, Ford failed to establish even a prima facie right to judgment as a matter of law. *ITT*, at 382 (“materials submitted by the movant that

are, themselves, inconsistent on the material facts defeat the movant's prima facie showing.”)

B. Hune’s “tangible employment actions”

1. Keeping Hill from her work assignment

Ford argues even if Hune kept Hill from the cladding job, his conduct is not actionable because it did not amount to a “tangible employment action,” listing a number of reasons why the cladding job was no different from other jobs in the plant. None of those reasons, however, negates the fact that Hune kept Hill from commencing the job assignment Maurice Woods made the day before (LF 398, p. 10) which violated the plain language of the MCHR affirmative defense regulation. 8 CSR 60-3.040(D)(5). Ford downplays Hune’s interference with Hill’s job assignment, arguing it could have been an assignment only for a particular day. *Resp. Brief*, 28. Regardless of whether Ford *could*, hypothetically, have moved Hill to another job in the future, Hune’s obstruction kept Hill from the job to which Woods, in reality, assigned Hill. Therefore, Hune took a tangible employment action against Hill within the meaning of the MCHR regulation.

2. Hill’s suspension

Ford argues Hill’s suspension is not a tangible employment action because Paul Edds, not Hune, decided to suspend Hill. If Edds is to be believed, he disciplined Hill because of Hune’s accusation. LF 225, ¶ 13. Thus, Hune used his

power as a supervisor to have Security take Hill to Labor Relations where he accused Hill of insubordination. LF 225, ¶ 14. While Hune did not directly mete out the discipline, his conduct was the means by which he, as Hill's supervisor, brought "the official power of the enterprise to bear" on Hill, in violation of 8 CSR 60-3.040(D)(3).

II. Ford's affirmative defense

Although Ford now states Hune was not Hill's supervisor, inconsistent with its claimed affirmative defense, Hill will address Ford's claim that it established all elements of the affirmative defense to the creation of a hostile work environment by a supervisor.

A. Ford did not exercise reasonable care to prevent any harassment

Ford relies on its sexual harassment policy and training to prove it took reasonable care to prevent any harassment, but Ford offered no evidence Hune or others knew of Ford's policy or attended training. Ford claims it proved the key actors attended a seminar, "On the Road to Mutual Respect," citing LF 38 and 328 (presumably, LF 26, at ¶ 38 and LF 328). At ¶ 38 of the Statement of Uncontroverted Material Facts, Ford said it shut down production in the Plant so all employees could attend the seminar. The citations to the record in ¶ 38 show the seminar was in December of 2000. LF 140. While Edds was assigned to the plant as of December 2000 (LF 223), Respondents point to no evidence showing

Edds was in attendance that particular day and no evidence the other key actors, particularly Kenny Hune, were in attendance either.

Ford complains Hill did not specifically emphasize Ford's lack of evidence that Hune and others were trained on Ford's sexual harassment policy earlier. Hill has consistently maintained throughout this litigation Ford failed to prove it acted reasonably to prevent Hune's harassment and simply having a harassment policy is not dispositive of exercising reasonable care. It is the moving party's burden, as claimant on its affirmative defense, to both plead and prove facts showing its entitlement to judgment as a matter of law. *ITT*, at 381-83.

Evidence controverting Ford's claim that it took reasonable care to prevent harassment is found in Pete Wade description of his complaint to Plant Superintendent, Maurice Woods. LF 126; 128; 21, ¶ 5 (explaining chain of command). Ford argues Wade's affidavit is inadmissible or immaterial because Wade did not utter the words "sexual harassment" when he told Woods about Hune's conduct. A jury, however, could reasonably conclude Woods understood Wade was reporting sexual harassment when Wade said, "we had a problem with Kenny, that his way of talking to the females was out of line and he was saying things that were inappropriate." LF 359, ¶ 8. Apart from sexual harassment, there is little else Wade could have meant. Ford notes there is no evidence Hill knew of Wade's report to Woods, but Hill's knowledge is immaterial to Ford's proof of this element of its affirmative defense. The "prevention"

element is an examination of the reasonableness of Ford's conduct, not Hill's knowledge.

B. Ford did not exercise reasonable care to correct promptly any sexually harassing behavior

Ford is not entitled to judgment on the "correction" element of its affirmative defense since Ford did not prove it exercised any, let alone reasonable, care to correct promptly Hune's sexually harassing behavior as reported by Pete Wade. LF 349, ¶ 8. The affirmative defense is intended to exonerate the employer who does everything reasonable to stop harassment; here, Ford did the opposite. By doing nothing, Hune was only encouraged to continue harassing women.

Hawkins v. Anheuser-Busch, Inc., 517 F.3d at 341.

Ford claims Edds's investigation establishes the correction element. Since a jury could reasonably conclude Edds's investigation had nothing to do with Hill's complaints to Edds and to Ford's hotline, the element is controverted and Ford failed to establish its right to judgment as a matter of law. As demonstrated in Hill's opening brief, Edds could not possibly have been investigating Hill's allegations if he did not know what it was Hill alleged. See, LF 226, ¶¶ 14, 16 (Edds's denial that Hill complained and statement that he learned about Hill's call to hotline, with no details of what he learned).

Ford argues any suggestion Edds did not investigate Hill's allegations is "a

complete distortion of the record,” citing LF 226-27, ¶¶ 24-25. At the cited portion of the record, Edds says he learned Hill called the hotline to report she believed Hune was harassing her (Edds does not even claim to have known Hill’s complaint was about “sexual” harassment) and he began an investigation of Hune the same day, but Edds does not say he investigated Hill’s allegations against Hune. Since Edds does not link Hill’s complaints to his investigation, a jury would have to draw an inference in Ford’s favor to conclude Edds investigated Hill’s complaints, meaning Ford did not establish its undisputed right to summary judgment on this element.

Ford asks this Court to draw even more inferences in its favor to make it appear Edds investigated Hill’s allegations. Ford states, “The investigation revealed that Appellant was not present at the time when Hune allegedly made a comment regarding oral sex, which Appellant claimed in her hotline call had been made to her and two other employees.” *Resp. Brief*, 35, citing LF 227, ¶ 29. At the cited portion of the record, Edds does not claim to know what Hill told the hotline or that anyone said Hill was not present when Hune asked for oral sex. Instead, Edds states only,

[T]he investigation revealed that Ms. Hill was not even present at the time that Mr. Hune allegedly made a sexual comment to two other employees which Ms. Hill claimed was directed at her. LF 227, ¶ 29.

Ford notes Hill experienced no further harassment after her complaint because

it fired Hune and that firing Hune proves Ford exercised reasonable care to promptly correct Hune's harassment of Hill. No element of the affirmative defense is based on such evidence. Instead, the defense is based on evidence of the reasonableness of Ford's behavior. Moreover, while Ford suggests firing Hune in November proves it acted reasonably to *promptly* correct Hune's harassment of Hill, a jury could conclude otherwise. Given the delay between Hill's complaints (early September) and Ford's decision to fire Hune, even Ford would have to concede the temporal link between the two events is too long to prove a causal connection as a matter of law. See e.g., *Resp. Brief, 54* (arguing passage of time negates inference of retaliation).

C. Ford did not prove Hill acted unreasonably as a matter of law

Ford must prove Hill acted unreasonably as a matter of law to establish this element of its affirmative defense. Ford argues Hill did not behave reasonably because she did not complain under its sexual harassment policy until September 5, 2002, citing *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), in which the United States Supreme Court stated an employee's failure to use the employer's complaint procedure "normally" suffices to satisfy the employer's burden.² (Ford

²In *Faragher*, the "normal" evidence did not suffice to establish the affirmative defense. To the contrary, the Supreme Court took the unusual step of holding the City liable without remand, because the City did not establish it adequately distributed its

also cited *Cooper*, mistakenly stating it was a decision from this Court. *Resp. Brief, 41.*)

In explaining its reasoning, the U.S. Supreme Court stated,

An employer may, for example, have provided a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense. If the plaintiff unreasonably failed to avail herself of the employer's preventive or remedial apparatus, she should not recover damages that could have been avoided if she had done so. *Id.*, at 807.

Thus, before Hill can be judged unreasonable as a matter of law for not utilizing Ford's sexual harassment complaint procedure until September 5, 2002, Ford must establish it had a "proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." *Id.*

policy, meaning there was no proven, effective mechanism. *Id.*, at 808.

Ford offered no evidence its policy was “proven,” *i.e.*, that the policy worked in the past,³ and there is evidence to controvert even such an argument. The mechanism did not work when Pete Wade complained to Maurice Woods about Hune’s conduct. LF 359. Since Woods denies Wade complained (LF 401-02), the inescapable inference is that Woods did nothing in response. LF 401-02, pp. 24-25. Nor did the policy work when Hill complained on September 5, 2002, or to the hotline (LF 387-88), since Edds denies the former complaint (LF 226) and there is no evidence, as discussed above, anything was done to investigate the latter complaint. Likewise, Ford offered no evidence employees could utilize the mechanism without undue risk, and there is evidence to controvert even such an argument. When Hill complained on September 5, 2002, she exposed herself to undue risk - Edds ordered her to get a psychiatric evaluation. LF 389, p. 166; 390, p. 170. When Hill complained to Ford’s hotline, she again exposed herself to undue risk. As soon as Edds found out, he suspended Hill. LF 391, pp. 175-76;

³In its statement of facts, Ford noted Hill often used the word “harassment” in her union grievances. *Resp. Brief*, 3. While Ford does not mention this evidence in its argument relating to the reasonableness of Hill’s behavior, presumably Ford included the evidence to leave the impression Hill used the sexual harassment policy before. There is no evidence Hill made her union grievances pursuant to Ford’s sexual harassment mechanism.

389, p. 168. Since whether Ford's policy was a proven, effective mechanism for resolving complaints of sexual harassment is controverted, Ford failed to prove its entitlement to judgment as a matter of law.

Reply to Response to Point 3

In Point 3, Hill argued the trial court erred in granting summary judgment on her claim of unlawful retaliation.

I. MAI 31.24 provides the appropriate guideline for the elements of an MHRA retaliation claim

Respondents argue this Court should require persons suing under the MHRA's retaliation provision to prove the "elements" set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) instead of elements analogous to MAI 31.24, claiming:

1) MAI 31.24 does not apply to retaliation claims; and, 2) *McDonnell Douglas* "adds particular value in properly analyzing retaliation claims." *Resp. Brief*, 48.

Hill's argument is not that 31.24 already applies to MHRA retaliation claims, but rather the reasoning behind *Daugherty v. City of Maryland Heights* should be applied to retaliation claims, *i.e.*, a plaintiff should not have to prove more to survive summary judgment than she would have to prove to be entitled to a verdict in her favor. *Daugherty*, at 820. Since MAI 31.24 accurately states the

elements of an MHRA discrimination claim, and the causal element of the retaliation section of the MHRA is analogous to the causal element in the discrimination section, a modified MAI 31.24 properly states the elements of a retaliation claim.

Respondents mistakenly assert *McDonnell Douglas* is particularly valuable in a retaliation case because a 31.24-type of analysis would mean anyone complaining about discrimination who is thereafter subject to an adverse action would be entitled to a trial regardless of the employer's reason for taking the action. *Resp. Brief, 48*. This argument incorrectly assumes the plaintiff's need not prove causation under 31.24. In fact, 31.24 requires the plaintiff to prove causation, *i.e.*, that the protected trait *contributed* to the employer's conduct. *Daugherty*, at 819. If Respondents' argument was correct, a plaintiff in an age discrimination case would not have to prove his age was a contributing factor in his discharge, but only that he was over 40 and had been fired. *Id.*, at 821. Since a plaintiff must prove his age contributed to the employer's decision under MAI 31.24, Respondents' claim that a 31.24-type of analysis for retaliation cases omits causation is wrong and does not justify applying *McDonnell Douglas* to retaliation claims.

II. Specific acts of reprisal

While Hill will address Respondents' separate retaliatory acts, the acts should

also be viewed collectively because they amount to an actionable course of conduct triggered by Hill's opposition to and complaints about Hune. *Billings v. Town of Grafton*, 515 F.3d at 54 n.13.

A. Hune's conduct in barring Hill from cladding job and using his authority to get Hill suspended

Respondents argue Hune's conduct in barring Hill from the cladding job (Ford does not address Hune's conduct in calling Security and what followed) cannot be actionable because Hill did not oppose Hune's conduct. Respondents argue Hill did not "tell Hune to cease his conduct." To be sure, Hill did not eloquently say, "cease your conduct," but rejection can wear many faces; here, Hune understood Hill was rejecting him as evidenced by his query: why don't you like me? LF 379, p. 91; 378, pp. 82-83. See e.g., *Black v. City and County of Honolulu*, 112 F.Supp.2d 1041, 1049-50 (D. Haw. 2000)

(supervisor should have comprehended plaintiff was opposing his conduct).

When Hune finally insisted Hill tell him why she was giving him the cold shoulder, she explained she was not interested and asked him to leave. LF 379, p. 91; 380, pp. 94-95.

Ford argues keeping Hill from the cladding job, regardless of Hune's motive, was not sufficiently adverse to be actionable under RSMo. 213.070 because the job was no different than other assembler jobs. Given the plain meaning of

213.070's prohibition on retaliation "in any manner," a jury could find Hune's conduct (preventing Hill from starting her work assignment and summoning Security to drag Hill to Labor Relations, setting in motion Hill's suspension) was retaliation "in any manner."

While the meaning of "in any manner" is plain, even if Hill had to feel some extra impact of Hune's conduct in order to have a claim, the MCHR regulations governing sexual harassment support the conclusion that keeping someone from a job is serious enough to be unlawful. Under 8 CSR 60-3.040(D)(4), the regulation governing vicarious liability for supervisory sexual harassment, a "tangible employment action" includes work assignments. If keeping a person from a work assignment constitutes a "tangible employment action" under the sexual harassment regulation, then surely the same conduct fits within 213.070's prohibition against retaliation "in any manner."

Ford claims Hill failed to establish any causal connection between rebuffing Hune's advances and Hune's refusal to allow her to work at the cladding job because Ford advanced a legitimate non-discriminatory reason for not assigning Hill to the cladding position. *Resp. Brief*, 52. Ford's argument ignores the fact that Maurice Woods assigned Hill to the cladding position. LF 398, p. 11. After Woods made the assignment, Hune took one last, successful shot at preventing Hill from commencing the job because, as Hune said, Hill would work for him over his dead body. LF 378, pp. 82-83.

B. Psychological evaluation

1. Edds's order is actionable under 213.070

Respondents argue requiring Hill to undergo a psychiatric evaluation was not retaliatory because, at first, Hill thanked Edds for his concern and said she would take advantage of the offer. As Hill testified, she was explaining Hune's conduct to Edds when Edds interrupted and said he was going to do Hill a favor and get her some psychiatric help. Hill stated, "when [Edds] said that, I sat up on my chair thinking that he understood my problem and told him that, thank you, someone understands what I'm going through and extended my hand to thank him." Edds refused to shake Hill's hand. LF 389, pp. 166-67. A few days later Hill realized Edds was not talking about counseling to deal with the effects of Hune's harassment, but rather Edds was conditioning her return to work on a psychiatric evaluation. LF 390, p. 170. Respondents latch onto Hill's mistaken initial impression in their brief, titling a section of their statement of facts, "Psychological Counseling" and stating Edds requested Hill "seek counseling" (*Resp. Brief*, 12), but Edds is clear in his affidavit that he conditioned Hill's return to work on a psychiatric evaluation and he does not refer to the evaluation as "counseling." LF 226, ¶¶ 17-22.

Without citing to the record, Respondents assert Edds withdrew his demand that Hill undergo a psychiatric evaluation before returning to work because Hill

was already undergoing psychological treatment. *Resp. Brief*, 53. There is no evidentiary support for their statement. While Edds states in his affidavit he told Hill she did not need to be evaluated before returning to work, the only reason he gives for changing his mind is that the plant physician said the evaluation was unnecessary. LF 226, ¶¶ 21, 22.

Respondents argue that because Edds retracted the order, there was no actionable retaliation, using the old federal threshold of “adverse action” to support their argument, claiming “it is axiomatic that unfulfilled threats do not constitute adverse action.” *Resp. Brief*, 54. There is no “axiom” under which Edds’s order to Hill was not retaliation “in any manner.” If there were such an axiom, even if Edds said to Hill, “I am requiring you to be evaluated by a psychiatrist (or a gynecologist or a proctologist) before you can work here in retaliation for your report of sexual harassment,” Hill would be without recourse. Such an axiom would leave an employer free to say anything to an employee protesting discrimination, as long as, in the end, the employer did not follow through (in this case, not because it was an idle threat, but rather because the plant physician vetoed Edds’s order (LF 226, ¶¶ 18, 21)). Certainly, an employer’s expressed intention to perform an act is the type of conduct, even under federal law, which could well dissuade a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S.53, 126 S.Ct. 2405, 2415 (2006). Threats are coercive in nature,

designed to get the recipient to alter his behavior, see e.g., *State v. Adams*, 229 S.W.3d 175, 181 (Mo. App. 2007)(threatening judge with civil suit violated Act criminalizing attempts to influence proceedings), which is exactly what retaliation laws are meant to prevent.

In support of their argument, Respondents cite *Higgins v. Gonzales*, 481 F.3d 578, 587 (8th Cir. 2007), in which the court held a recommendation to discharge an employee was not an adverse action. *Higgins* is inapposite insofar as federal retaliation law is concerned. While Higgins filed suit for both discrimination and retaliation, she did not claim the negative recommendation (from someone who was not her supervisor) was retaliatory. *Id.*, at 590. Instead, the court analyzed the negative recommendation under the *McDonnell Douglas* prima facie test for race discrimination. Since Title VII has a different standard for actionable conduct under its discrimination and retaliation sections, *id.*, at 589, *Higgins* is inapposite.

2. Causal connection

Respondents argue Hill did not establish a causal connection between her complaint and Edds's conditioning Hill's return to work on a psychiatric evaluation because the Union asked Edds to send Hill for a psychological examination. *Resp. Brief*, 56. The issue on summary judgment is not whether Edds disputes his retaliatory motive, but rather whether his motive is controverted. A reasonable jury could conclude Edds was motivated by Hill's complaint since Edds

interrupted Hill as she was complaining with his instruction that she see a psychiatrist. LF 389, pp. 166-67. Edds denies Hill complained about Hune's harassment (LF 226, ¶ 16), creating an issue of fact as to whether Edds is concealing what prompted him to order the evaluation. Moreover, since Edds did not send Hill for psychiatric evaluation upon receiving the Union's request or even upon entering the September 5, 2002 meeting, a jury could reasonably infer that what Hill said during the meeting contributed to Edds's decision to send Hill for a psychiatric evaluation. LF 225, ¶ 13.

C. Suspension

Respondents' representations in their brief underscore the inconsistencies in their stories of why Edds suspended Hill. Respondents state Edds suspended Hill because of "her failure to wear safety glasses" (*Resp. Brief, 57*), while Edds says he suspended Hill "for disrespecting her supervisor which included, among other things, refusing to put on her safety glasses when instructed to do so." LF 225, ¶ 14. There is a difference between the offense of simply not wearing glasses and the offense of "disrespecting" a supervisor by refusing a direct order. One is like an infraction and the other is insubordination. Further, a jury could infer from Edds's admission that he punished Hill for other, unspecified acts of disrespect toward Hune, that those other acts included Hill's refusal to succumb to Hune's advances as well as her complaints about Hune's conduct.

Finally, given Respondents' new position that Hune was not Hill's supervisor (*Resp. Brief, p. 27 n. 5*), Respondents have controverted Edds's statement that he suspended Hill for "disrespecting her supervisor." A jury would therefore be entitled to conclude these ever-shifting stories, along with the evidence Hill cited in her opening brief, add up to an attempt to conceal Respondents' true, retaliatory motive.

Reply to Response to Point 4

I. Hill complied with Rule 74.04

In Point 4, Hill argued it was error to grant Edds's separate summary judgment motion. Edds maintains Hill cannot raise the arguments in Point 4, premising his argument on a misrepresentation of the record, that Hill did not respond to the uncontroverted facts presented in Edds's motion for summary judgment. *Resp. Brief, 59*. This is untrue. Edds stated in his motion he was incorporating the "Joint Statement of Uncontroverted Facts submitted by both Ford Motor Company and Paul Edds." LF 18. Hill's Response to the Joint Statement begins at LF 324. Hill responded to all 137 paragraphs of Respondents' Joint Statement. LF 40; 338.

Edds also notes Hill did not write a memorandum of law in opposition to Edds's separate motion for summary judgment. The rules did not require her to do so. Rule 74.04(c) requires only a response to the statement of uncontroverted material facts. The case Edds cites in support of his waiver argument, *Reese v.*

Ryan's Family Steakhouse, Inc., 19 S.W.3d 749 (Mo. App. 2000), has nothing to do with any requirement for a non-movant to file a memorandum of law in opposition to summary judgment because there is no such requirement.

II. Edds's substantive argument

Edds advances three cases in arguing Hill did not satisfy jurisdictional requirements to file suit under the MHRA.

The lone Missouri case, *Igoe v. Dep't of Labor and Indus. Rel.*, 2004 WL 376872 (Mo. App. 3/2/04), *rev'd*, 152 S.W.3d 284 (2005), has no reference to requirements for charge filing or notices of right to sue.⁴ There is a passing

⁴In her opening brief, Hill stated Edds did not include a notice of right to sue in the record. While Respondents did not mention it in their brief, upon further review of the record, Hill's counsel realized Edds attached an unauthenticated notice as an exhibit to his memorandum of law at the trial court. LF 634. Edds did not, however, reference the exhibit in the Joint Statement of Uncontested Material Facts.

reference to plaintiff filing a charge, with no mention of who he named, let alone any indication the Court was ruling on administrative prerequisites to filing suit. *Id.*, at *1.

In *Whitemore v. O'Connor Management, Inc.*, 156 F.3d 796 (8th Cir. 1998), the only mention of a right-to-sue letter is in connection with the plaintiff's failure to obtain any letter from the MCHR. Even so, the Eighth Circuit predicted a right-to-sue letter would be a condition precedent and not a jurisdictional prerequisite under the MRHA.

The closest case is *Waldemeyer v. ITT Consumer Financial Corp.*, 782 F.Supp. 86, 88 (E.D. Mo. 1991), since it addressed suing a party not named in a charge. The district court recognized a party not named in a charge can be sued where that party "has been provided with adequate notice of the charge, under circumstances where the party has been given the opportunity to participate in conciliation proceedings aimed at voluntary compliance." *Id.*, quoting, *Greenwood v. Ross*, 778 F.2d 448, 451 (8th Cir. 1985). In *Waldemeyer*, the court found the defendant was totally unaware of the plaintiff's charge until plaintiff filed suit and defendant was never given the opportunity to participate in conciliation efforts. *Id.* As discussed in Hill's opening brief, based on Ford's charge handling procedures, Edds was obviously aware of Hill's charge when it was filed. Unlike the defendant in *Waldemeyer*, who unequivocally denied knowing about the plaintiff's charge until the lawsuit was filed, Edds does not deny knowledge of

Hill's charge. Instead, Edds admits he generally receives charges of discrimination but he "did not understand [Hill's charge] to assert claims against" him personally. LF 228, ¶ 39. As discussed in Hill's opening brief, since there were no "conciliation" efforts, which are a creature of statute, Edds missed no opportunity to conciliate. Therefore, under the considerations outlined in *Waldemeyer*, Edds's motion should have been denied.

Conclusion

For the reasons stated herein, as well as in the opening brief, Hill asks this Court to reverse and remand the case to the circuit court.

Respectfully submitted,

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Certificate of service

The undersigned hereby certifies that one copy of the foregoing was served on April 30, 2008, via U.S. mail, postage prepaid to the following counsel and an email containing same was served on the following counsel of record:

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Certifications Pursuant to Rule 84.06(c) and (h)

Pursuant to Supreme Court Rule 84.06(c), I certify that: 1) this brief includes the information required by Rule 55.03; 2) this brief complies with the limitations contained in Rule 84.06(b); 3) this brief contains 7,061 words, as calculated by the Word Perfect software used to prepare this brief; and, 4) the file and disk have been scanned for viruses and are virus-free.

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Appendix

RSMo. 213.070.....	A 1
MAI 31.24 and 2007 Notes on Use	A 2
8 CSR 60-3.040, <i>et seq.</i>	A 4