

IN THE MISSOURI SUPREME COURT

SC 88981

CYNTHIA HILL,

Plaintiff/Appellant,

vs.

FORD MOTOR COMPANY, KEN HUNE, AND
PAUL EDDS,

Defendants/Respondents

SUBSTITUTE BRIEF OF PLAINTIFF/APPELLANT CYNTHIA HILL

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Jurisdictional Statement

This Court's jurisdiction is based on Supreme Court Rule 83.04 in that this Court transferred this case after an opinion by the Court of Appeals.

The Court of Appeals' jurisdiction was based on Supreme Court Rule 74.01(b): Appellant appealed from a final judgment order as to defendants Ford Motor Company and Paul Edds, and the circuit court determined that there was no just reason for delay. A1, LF 477.¹ Defendant Kenny Hune did not appear in the case. LF 1-5.

The circuit court entered judgment against Hill, in favor of defendants Ford Motor Company and Paul Edds on October 26, 2006 (A1, LF 447) and Hill filed her Notice of Appeal on November 14, 2006 (LF 478), making the appeal to the Court of Appeals timely under Rule 81.05(b).

The Court of Appeals Order was filed October 16, 2007. A2. Appellant filed her Application for Rehearing or Transfer to Supreme Court on October 30, 2007. The Court of Appeals denied Appellant's Application on November 27, 2007. A14. Appellant filed her Application for Transfer in this Court on December 6, 2007 and this Court sustained Appellant's Motion on January 22, 2008.

¹References are to the page numbers of the Legal File.

Statement of Facts

I. Background

A. The parties

Cynthia Hill worked for defendant Ford Motor Company as a production employee. LF 20, ¶ 1. Defendant Kenny Hune was a supervisor on the Trim Line (LF 352, ¶ 7) and defendant Paul Edds was the Labor Relations Supervisor at Ford's Hazelwood Plant from October 2000 to January 2004. LF 223, ¶ 2.

B. Hill's 2001 Charge of Discrimination

In 2001, around one year before the conduct described in Parts II-V of the Statement of Facts, Hill filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights (MCHR) against Ford. LF 353, ¶ 14; LF 354. In the normal course of business, Paul Edds, in his role as Labor Relations Supervisor, received EEOC/MCHR Charges and assigned them to others for internal investigation. LF 228, ¶ 39.

In June 2002, the MCHR and the EEOC issued their respective Notices of Right to Sue in connection with Hill's 2001 Charge. LF 356; 355. By operation of law and as stated in the Notices, the Notices expired 90 days later, meaning that Hill had to decide whether to sue Ford by the latter part of September 2002. At Ford, copies of Notices of Right to Sue sent by the two governmental agencies were transmitted to the Labor Relations Supervisor, Paul Edds. LF 367-69.

II. Hune's conduct and related complaints

In 2002, Hill was working as a windshield finesse operator in Ford's Trim Department ("Trim"). During the summer, Ford moved Hill from that position and made her a floater, meaning that she moved from job to job, as assigned, but still within Trim. LF 351-52, ¶ 6. Kenny Hune became a supervisor in Trim in April 2002. LF 352, ¶ 7.

A. Hune's sexual comments and gestures

1. Hune's behavior toward Hill

During the time Hune and Hill were in Trim, Hune made sexual comments to Hill when she walked past him or when she was assigned to Hune's line. LF 374, pp. 66-68; 375, pp. 70-71, 73; 300-01; 376, pp. 74-76; 377, p. 78; 394, pp. 202-03; 379, pp. 91-92.

Hune repeatedly questioned Hill about her bra and panties: he asked if her panties matched her bra; he asked if her underwear had a zebra print revealing her animal instincts; he wanted to know the size of Hill's underwear; and, he asked if she was wearing Victoria's Secret. LF 374, pp. 66, 68; 375, pp. 70-71; 300-01. Hune bragged to Hill that he could have sex with her and one particular coworker. With regard to a different coworker and Hill, he said he wanted to have one on the bottom and one on top. LF 301; 358, ¶ 4; 375, p. 73; 376, pp. 74-76; 377, p. 78. Hune asked Hill what she weighed and said he thought he could bench press her. LF 377-78, pp. 80-82. He would stand and stare at Hill, looking her up and down in an unusual way, in the same way he stared at Hill's coworker, Tracy Stevens. LF 364, ¶ 8.

Hill was offended by Hune's treatment of her (LF 64; 374, p. 67) and would rebuff him each time he made his sexual statements. LF 376, p. 74; 377, p. 79; 377-78, pp. 79-82; 379, p. 91; 380, pp. 94-95.

In mid to late August, Hune asked Hill why she did not like him; she responded that she was not interested in him. Hune reacted by making a motion with his body, with his hands on his hips and weight on one leg, as if to say "what about all this?" Hill said she was not interested in "none of that" and asked him to leave. LF 379, pp. 91-92; 380, p. 95. Shortly before Labor Day, Hune told Hill that he could use an hour of head. LF 379, p. 93; 394, p. 202; 352, ¶ 12.

2. Hune's behavior toward other female employees

Hill was not the lone target of Hune's sexually-based behavior. As discussed above Hune would stare at Tracy Stevens. LF 364, ¶ 8. Stevens told Group Leader Edgar "Pete" Wade that Hune made sexual advances toward her. Wade suggested that Stevens go to Labor Relations and she said she would. LF 358, ¶ 5. Stevens and Hill also complained to coworker Michael Gorski about Hune's sexual innuendos. Stevens said Hune "thinks all the girls are here for his picking and it's like a little candy store." LF 362, ¶ 5.

In July or August 2002, Hune stepped between two of the employees whom he supervised and said, "I could do both of you. This would make a good sandwich." LF 361, ¶ 3; 363, ¶ 4. Hune regularly called the women "baby" or "honey." LF 361-62, ¶ 4. While looking at three female employees, Hune said, "I can do plus-sized women." LF

358, ¶ 6.

When Lillian Mathis Stevenson went to Hune's office to see about taking a day off, Hune stared at her crotch, grinned, and said, "you shouldn't sit like that." Stevenson was wearing pants, sitting with her legs together. Stevenson could see Hune was getting aroused as he stared at her crotch, so she left. LF 364, ¶ 6.

B. Complaints about Hune

Ford has an anti-harassment policy which covers sexual and other types of harassment and under which a report can be initiated through a supervisor. If someone reports a violation, Human Relations is required to investigate "usually within 24 hours." LF 288.

Hill and other women spoke with Group Leader Pete Wade about Hune's conduct and Wade observed some of it himself. LF 377, pp. 78-79; 358, ¶¶ 4, 5, 6. Wade reported to Hune's supervisor, Superintendent Maurice Woods, that there was a problem with Hune, that his way of talking to the females was out of line and he was saying things that were inappropriate. Woods said he would talk to Hune. LF 359, ¶ 8. During his deposition in this case, Woods denied that anyone brought a complaint about Hune to his attention. LF 401-02, pp. 24-25.

III. September 4, 2002 – Woods assigns Hill to a permanent position

In September 2002, Hill was still floating in Trim. LF 381, p. 99; 299. Superintendent Maurice Woods did not like having unassigned employees (LF 402, p. 26), so on September 4, he instructed Hill to find available permanent jobs within her medical

restrictions, then he would decide which job she would fill. LF 93; 397, p. 8. Hill told Woods about three jobs and Woods selected a cladding position. LF 80; 378, pp. 82-83, 381, p. 99; 397, p. 8. Woods and Hill then went to Hune's office where Woods told Hune that he was assigning Hill to the job starting the next day. LF 378, pp. 82-83. Hune said he did not want Hill on his line and she would work there over his dead body. LF 378, pp. 82-83. Woods told Hune that it was not his call. Woods said, "I was assigning her there; and as his supervisor, he didn't have no recourse." LF 398, p. 11. Woods sent Hill out of the room and continued to talk with Hune. LF 399, p. 14. Woods emerged from Hune's office around five minutes later. Hune stood in the doorway and, with one hand on his hip and the other hand on the doorjamb, told Hill that if she worked for him, she needed to act like a lady. LF 344, ¶ 199; LF 378, pp. 83-84.

IV. September 5, 2002

A. Hill appears for work

The next day Hill reported to Hune's office to begin work. LF 382, pp. 108-09. She waited outside Hune's office for around 35 minutes, with her gloves and wearing her glasses. LF 382, p. 109. Hune arrived, pushing his way around Hill, into his office. Hill tried to step in behind Hune, but he slammed the door in her face. LF 382, p. 109; 395, p. 206. Hune stuck his head out of the door and said, "What are you here for?" LF 382-83, pp. 109-10. Hill replied, "I'm here to train on the left side cladding job per Maurice Woods's instruction." LF 383, p. 110. Hune said he was not going to let Hill have the job.

LF 383, p. 110; 357, ¶ 3. Hill said she wanted to speak with Maurice Woods and Hune told her to go find him. LF 357, ¶ 3; 383, p. 110. Hill asked Hune if he would use his radio to find Woods; the plant is huge, so radios are used to locate people. LF 383, p. 110; 399-401, pp. 15-17, 19, 22. Hill also asked Pete Wade, who had a radio and was standing nearby, if he could help find Woods. LF 383, pp. 110-11.

Hune was becoming increasingly angry. LF 383, p.111. He started going toward Hill while reaching for in a way that made Hill believe he was going to hit her; Hill backed away and asked Hune not to get any closer. LF 383, pp. 111-12; 387, p. 160. Hune continued reaching for Hill and she continued to back up; she told him not to put his hands on her, but he kept advancing. As Hill backed away, she her pushed her safety glasses up on her head. The moment she did so Hune said, “Aha, you’re not wearing your glasses. Go upstairs for not wearing your glasses.” LF 383, pp. 111-12. Hune called Security on his radio and announced he had a hostile worker. LF 383, p. 112; 357-58, ¶ 3. Pete Wade, who observed the scene, said Hill caused no disturbance. LF 357, ¶ 3. Security arrived and led Hill upstairs to the Labor Relations Department. LF 383, p. 112; 385, p. 150.

B. The meetings at Labor Relations

1. The first meeting – Hill protests to Sheron Wright

At Labor Relations, management employee Sheron Wright (now Marteen) had Hune speak first. LF 385, pp. 150-51. When allowed to talk, Hill explained that when she

reported to work that morning, Maurice Woods instructed her to go to the line to wait for Hune. Hill said she waited around 35 minutes and when Hune arrived, she tried to tell him that Woods sent her to train on the job, but Hune slammed the door in her face. LF 385, p. 152. Hill told Wright that when Hune opened the door, he asked her why she was there and she answered she was there to train on the cladding job. Hune said he had no job for Hill and she should find Woods. Hill said she asked Hune to please call Woods to the area to solve the problem. Hill told Wright that she explained to Hune that she did not know where to find Woods and asked Hune if he could use the radio to call Woods. LF 386, pp. 156-57. Hill told Wright that Hune was angry and she backed up as he approached her. LF 387, p. 158.

Wright asked Hill why she was looking for a job. Hill explained that the previous day, Woods instructed her to find a job and they selected a job for her. LF 387, p. 159. Hill said she and Woods told Hune she would be training the next day, and Hune said Hill would have the job over his dead body. LF 387, p. 159. Hill told Wright that Hune tried to hurt her (LF 387, p. 159) and he opposed her getting the job because of her objections to his numerous sexual advances. LF 387, pp. 160-61. As Hill was telling Wright the details of Hune's remarks about her panties, Wright interrupted and said she needed to confer with Paul Edds. LF 388, pp. 162-63; 393, pp. 196-97. In her deposition, Wright denied that Hill complained about sexual harassment during the meeting. LF 214-15.

2. The second meeting – Hill protests to Paul Edds

The group reconvened half an hour later, with Paul Edds in attendance. LF 388, pp. 163-64. Wright had Hill repeat what happened. Hill told Edds she thought Hune refused to let her have the cladding job in retaliation for turning down Hune's sexual harassment. LF 388, pp. 164-65. As Hill was giving Edds specific information about Hune's harassment, Edds interrupted and told Hill not to come back to work until she got psychiatric help. LF 389, p.166; 390, p. 170. Edds instructed the Employee Assistance Program coordinator to take Hill to the plant physician and set up a consultation. The physician was not in, so no appointment was scheduled. LF 389, p. 167-68. In his Affidavit, Edds stated at no time during the meeting did he understand Hill to state she believed Hune harassed her. LF 226, ¶ 16.

V. Post–September 5, 2002

The next day, Kenny Hune told Tracy Stevens he would get Stevens a different assignment in the plant if she would deny that he had made sexual comments to Hill. LF 357-58, ¶ 3.

A. Hill calls Ford's hotline

The following week, Hill called Ford's Hotline and reported that after she complained about being sexually harassed, she was told she was crazy, needed psychiatric help, and was sent home from work. LF 391, p. 175. An hour after Hill called the Hotline, Edds called Hill at home and withdrew his demand that Hill see a psychiatrist; he told Hill, for the first time, that she was suspended for three days. LF 391, pp. 175-76; 389, p. 168.

In his Affidavit, Edds stated he withdrew his demand that Hill see a psychiatrist because he conferred with the plant physician, Dr. Thomas, about the need for a psychiatric evaluation and Dr. Thomas said no evaluation was necessary. LF 226, ¶ 21. Edds also stated in his Affidavit he determined Hill should be suspended; he did not state that he told Hill she was being suspended during the September 5, 2002 meeting. LF 225, ¶ 14.

B. Ford's investigation

In September 2002, Tracy Stevens complained about Hune's conduct to Maurice Woods. LF 402, pp. 26-28; 404, pp. 37-38.² Woods reported Stevens's complaint to Paul Edds and offered his notes. Edds said Ford was already investigating and he would be in touch. Edds did not mention Cynthia Hill when he said he was already investigating and he did not get back in touch with Woods. LF 404, pp. 38-40.

Edds stated in his Affidavit that he commenced an investigation of Kenny Hune's conduct on September 10, 2002, sixteen employees were interviewed, and none corroborated Hill's allegations. LF 226-27, ¶¶ 24-31.

After September 5, 2002, Ford interviewed Pete Wade about Hune's conduct toward female employees. Wade reported that Hune made inappropriate sexual comments to

²Woods testified at length about Stevens's complaint, commencing at LF 402; as discussed above, on page 5 of the Facts, Woods also testified that he never heard anyone say that Hune behaved inappropriately toward any of the female employees. LF 401-02.

female employees, including Hill. LF 359-60, ¶10.

Ford interviewed Lillian Mathis Stevenson several times about Hune's conduct. Ford asked Stevenson about Hune's conduct in general and specifically about his conduct toward Tracy Stevens, but did not ask her any questions about Hune's conduct toward Hill. LF 364, ¶ 7.

Edds never interviewed Hill as part of any investigation of her complaints. Edds explained in his Affidavit that he did not interview Hill because she was on medical leave at the time. LF 227, ¶ 27. Edds telephoned Hill at home about a week after she went on medical leave. During their phone conversation, Edds did not mention an investigation and did not ask Hill about her allegations of sexual harassment. LF 352, ¶ 10.

VI. 2002 Charge of Discrimination

Hill filed a new Charge of Discrimination in November 2002, in which she alleged unlawful discrimination and retaliation. LF 295. She described various acts which she believed were unlawful, including that after she complained to Labor Relations about sexual harassment, she was told she was suspended and could not return to work without a psychiatric release.

Points Relied On

Point 1

The trial court erred in granting summary judgment on Hill's sexual harassment claim because there are genuine issues of fact as to whether Hune's conduct toward Hill constituted unlawful sexual harassment under the Missouri Human Rights Act and the Missouri Commission on Human Rights's regulations where there is evidence that Hill's rejection of Hune's sexual advances was used as the basis of decisions regarding her employment and where there is evidence that Hune's conduct created a hostile working environment for Hill.

RSMo. 213.055

8 CSR 60-3.040(17)(A)

MAI 31.24, Notes on Use (2007 Revision)

Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238 (Mo. App. 2006)

Point 2

The trial court erred in granting summary judgment on Hill's hostile environment claim because Ford is vicariously liable for Hune's conduct in that he was a supervisor whose harassment resulted in tangible employment actions against Hill and, even if Hune's conduct did not result in tangible employment actions, Ford is still vicariously liable because it failed to establish each element of the regulatory affirmative defense to vicarious liability, specifically that: 1) it exercised reasonable care to prevent and correct

promptly Hune's sexually harassing behavior; and, 2) Hill unreasonably failed to take advantage of any preventive or corrective opportunities which Ford provided or avoid harm otherwise.

8 CSR 60-3.040(17)

Harris v. Niehaus, 857 S.W.2d 222 (Mo. banc 1993)

Greene v. Dalton, 164 F.3d 671 (D.C. Cir. 1999)

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

Point 3

The trial court erred in granting summary judgment in favor of Ford and Edds because there are disputed issues of fact as to whether they retaliated against Hill for complaining about Hune's sexual harassment and for filing her earlier Charge of Discrimination.

RSMo. 213.070

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622 (Mo. banc 1995)

Daugherty v. City of Maryland Heights, 231 S.W. 814 (Mo. banc 2007)

Barekman v. City of Republic, Mo., 232 S.W.3d 675 (Mo. App. 2007)

Point 4

The trial court erred in granting summary judgment in favor of Paul Edds because he can be held liable under the MHRA and he had notice that Hill was basing her Charge of Discrimination on his conduct.

RSMo. 213.070

RSMo. 213.075(3)

Sedlacek v. Hach, 752 F.2d 333 (8th Cir. 1985)

Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177 (10th Cir. 1999)

Argument

Point 1

The trial court erred in granting summary judgment on Hill’s sexual harassment claim because there are genuine issues of fact as to whether Hune’s conduct toward Hill constituted unlawful sexual harassment under the Missouri Human Rights Act and the Missouri Commission on Human Rights’s regulations where there is evidence that Hill’s rejection of Hune’s sexual advances was used as the basis of decisions regarding her employment and where there is evidence that Hune’s conduct created a hostile working environment for Hill.

RSMo. 213.055

8 CSR 60-3.040(17)(A)

MAI 31.24, Notes on Use (2007 Revision)

Cooper v. Albacore Holdings, Inc., 204 S.W.3d 238 (Mo. App. 2006)

Standard of review

The standard of review applied to a trial court’s grant of summary judgment is *de novo*. *Eisenberg v. Redd*, 38 S.W.3d 409, 410 (Mo. banc 2001). Review of the record is in the light most favorable to the party against whom judgment was entered, according the non-moving party the benefit of all reasonable inferences. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993)(hereinafter, “*ITT*”).

Argument

Hill alleged she was sexually harassed in violation of the Missouri Human Rights Act (“MHRA”), RSMo. 213.010, *et seq.* LF 12. Ford moved for summary judgment on Hill’s claim. Ford’s motion should have been denied because Hill established: 1) her rejection of Hune’s sexual advances was used as the basis for employment decisions affecting her, in violation of 8 CSR 60-3.040(17)(A)(2); and, 2) Hune’s conduct created an intimidating, hostile, or offensive working environment based on her gender, in violation of 8 CSR 60-3.040(17)(A)(3).

The MHRA makes harassment based on sex a violation of the law. RSMo. 213.055; 8 CSR 60-3.040(17); *Pollack v. Wetterau Food Distribution Group*, 11 S.W.3d 754, 767 (Mo. App. 1999)(MCHR’s regulations have effect of law and are not interpretive). The regulations describe three distinct types of sexual harassment under the MHRA when there are “unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.” Such behavior is unlawful 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 the 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. 8 CSR 60-3.040(17)(A)(1), (2), and (3).

I. Submission to or rejection of Hune's unwelcome sexual advances was used as the basis for employment decisions affecting Hill

There is evidence from which a jury could infer Hune used Hill's rejection of his sexual advances as the basis for decisions affecting her employment, including her assignment to the cladding job, in violation of 8 CSR 60-3.040(17)(A)(2).

Over and over, Hune tried to get Hill interested in him sexually and she rejected him every time. LF 374-80; 364 ¶ 8. Then, on the heels of Hill's rejections, when she told Hune that she was not interested (LF 379, pp. 91-92; 380, p. 95), Maurice Woods told Hune he was assigning Hill to Hune's line. LF 378, pp. 82-83. Hune said Hill would get the job over his dead body and *if* she got the job, she needed to act "like a lady." LF 398, pp. 10-11; 378, pp. 82-83. True to his word, when Hill reported for work the next day, Hune successfully barred her from the job by falsely reporting she was a hostile worker, and having Ford's Security take her away; a trip which led to Edds's command that she get a psychiatric evaluation and her suspension. LF 383, p. 112; 357-58, ¶ 3; 389, pp. 166-68; 390, p. 170; 391, pp. 175-76. Thus, Hill's rejections of Hune's sexual advances led to employment decisions affecting her, in violation of subsection 2 of the MCHR's sexual harassment regulation.

The trial court therefore erred in granting Ford's summary judgment motion on the issue of sexual harassment.

II. Hune's sexual advances created a hostile work environment for Hill

Ford did not establish it was entitled to summary judgment on Hill’s sexual harassment claim under 8 CSR 60-3.040 (17)(A)(3), which prohibits the creation of an intimidating, hostile, or offensive work environment based on gender.

Under the caselaw relating to the “hostile work environment” type of sexual harassment, “Once there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury.” *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d 238, 245 (Mo. App. 2006)(internal quotes omitted). The Notes on Use to MAI 31.24 (2007 Revision), which became effective after this case was before the circuit court, are consistent with the *Cooper* court’s analysis. The Notes on Use provide, “If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo,” the first paragraph of MAI 31.24 may be appropriately modified.

Hill established that Hune engaged in a gender-based course of harassment toward her through evidence of his repeated comments about her bra and panties (LF 374-75), his suggestions for group sex (LF 301; 375-77), and his September 5, 2002 assault (LF 383).

Ford argued to the circuit court that Hill could not establish a hostile work environment under caselaw interpreting the meaning of that term. Supp. LF 500-04. Assuming that such caselaw still applies in light of the Notes on Use to MAI 31.24,³ this caselaw has

³Under this Court’s recent decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 820 (Mo. banc 2007), the standards set forth in the MAI are the appropriate

generally imposed a requirement that a plaintiff establish both that she was subjectively offended by the conduct in question and that said conduct would be objectively viewed as offensive by a reasonable person. *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d at 245. Here, Ford failed to demonstrate the absence of a material issue of fact as to either “element” found in the caselaw.

A. A reasonable person could find Hune’s conduct offensive

A jury could reasonably conclude that a reasonable person would view Hune’s conduct as offensive. Hune pursued Hill sexually during work; for Hill to perform her job and move around the worksite, she had to endure Hune’s sexually offensive comments and gestures. Hune repeatedly asked Hill about her underwear during the several months in which he was a supervisor in Trim, inquiring about the size of her undergarments, the brand, and the pattern, to see if it reflected her animal instincts. LF 374-75; 300-01. He discussed involving Hill in a menage à trois. LF 301; 375-77. He stopped and stared at Hill while she worked, running his eyes up and down her body in a manner noticeable to others. LF 364, ¶ 8. He asked Hill, “wouldn’t it be nice if I could work for head?” LF 379, p. 93. After Hill’s repeated rejection, when Hune asked Hill why she did not like him, he preened his body in a display of sexual prowess. LF 379-80. For Hill to work at Ford and be anywhere around Hune, she had to run the metaphorical gauntlet of sexual

standards for deciding a summary judgment motion “because a plaintiff has no higher standard to survive summary judgment than is required to submit a claim to a jury.”

abuse, which is impermissible. *See, Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)(Title VII); *McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d 162, 168 (Mo. App. 2006) (federal caselaw can be used to interpret MHRA, where appropriate).

When Maurice Woods decided Hill was to start working for Hune, Hune told Hill she needed to act like a lady. LF 379, pp. 83-84. A jury could reasonably infer that needing to “act like a lady,” a direct reference to Hill’s gender, meant that Hune wanted Hill to stop rejecting his sexual overtures. Instead, he expected Hill to relish his questions about her undergarments and to accept his thinly veiled demand for “an hour of head.”

When Hill appeared for work on September 5 to train for the new assignment, Hune’s reaction was abusive, evidence that he was doing everything he could to keep Hill from working for him, regardless of Woods’s instruction the day before. Hune shoved past Hill to get in his office and slammed the door in her face. When he emerged from his office and saw Hill was still there, waiting to start the job, he snapped, “What are you here for?” LF 382-83. When Hill replied that she was there to start training for the job, Hune reached for Hill, advancing closer and closer, as Hill backed away and asked Hune to stop. LF 383. Hill believed Hune was trying to hurt her. LF 387, p. 159. Given Hune’s sexually based behavior toward Hill and other women, a jury could conclude that Hune’s September 5 assault was based on her gender. *Carter v. Chrysler Corp.*, 173 F.3d 693, 701 (8th Cir. 1999)(Title VII); *Hathaway v. Runyon*, 132 F.3d 1213, 1222 (8th Cir. 1997).

Viewing the totality of the circumstances, a jury could conclude that a reasonable person would have found Hune’s gender-based conduct offensive. *See, Cooper v.*

Albacore Holdings, Inc., 204 S.W. 3d at 245 (conduct during one 2 ½ hour dinner party was sufficiently offensive).

B. Hill was offended by Hune's conduct

Ford argued that Hill was not offended by Hune's conduct, as a matter of law. Unless there was a complete lack of evidence that Hill was offended, Ford was not entitled to summary judgment. *ITT*, 854 S.W.2d at 378. Evidence of Hill's offense includes:

1) Hill's sworn statements and testimony that she rejected Hune's advances and that she found Hune's behavior repugnant, offensive, and totally out of line (LF 64; 66; 295, ¶ III; 375, pp. 71-73; 377, p. 79; 352, ¶ 13);

2) Hill's testimony that she complained to both Wright and Edds about Hune's conduct (LF 387-89);

3) Hill's response to Hune, when he asked her why she did not like him, and she said that she was not interested and asked him to leave (LF 379, p. 91); and,

4) Michael Gorski's statement that Hill complained about Hune's conduct and that he observed Hill say to Hune, "Don't call me 'baby!' I'm not your baby." LF 361-62.

With evidence showing Hill was subjectively offended by Hune's sexual conduct toward her, summary judgment should have been denied.

Point 2

The trial court erred in granting summary judgment on Hill's hostile environment claim because Ford is vicariously liable for Hune's conduct in that he was a supervisor whose harassment resulted in tangible employment actions against Hill and, even if Hune's conduct did not result in tangible employment actions, Ford is still vicariously liable because it failed to establish each element of the regulatory affirmative defense to vicarious liability, specifically that: 1) it exercised reasonable care to prevent and correct promptly Hune's sexually harassing behavior; and, 2) Hill unreasonably failed to take advantage of any preventive or corrective opportunities which Ford provided or avoid harm otherwise.

8 CSR 60-3.040(17)

Harris v. Niehaus, 857 S.W.2d 222 (Mo. banc 1993)

Greene v. Dalton, 164 F.3d 671 (D.C. Cir. 1999)

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

Standard of Review

The standard of review applied to a trial court's grant of summary judgment is *de novo*. *Eisenberg v. Redd*, 38 S.W.3d at 410. Review of the record is in the light most favorable to the party against whom judgment was entered, according the non-moving party the benefit of all reasonable inferences. *ITT*, 854 S.W.2d at 376.

Argument

I. Ford is vicariously liable for Hune's conduct

The MCHR's regulations provide that an employer is vicariously liable for a supervisor's creation of a hostile work environment where the harassment results in a tangible employment action. 8 CSR 60-3.040(17)(D).

A supervisor is a person with immediate or successively higher authority over the plaintiff or another supervisor whom the "employee reasonably believes has the ability to significantly influence employment decisions . . ." *Id.* A tangible employment action, "is the means by which the supervisor brings official power of the enterprise to bear on subordinates, as demonstrated by the following: it requires an official act of the enterprise; it usually is documented in official company records; it may be subject to review by higher level supervisors; and it often requires the formal approval of the enterprise and use of its internal processes . . ." and, by way of example, includes work assignments and disciplinary suspensions. 8 CSR 60-3.040(17)(D)(3) and (4).

A jury could reasonably conclude that Hune, as Hill's new supervisor, brought the institutional power of Ford onto Hill because she spurned his sexual advances.⁴ After Hill repeatedly rejected Hune, Hune said she would work for him over his dead body, then carried out his threat by preventing Hill from commencing her new, permanent assignment (LF 299; 378; 378, 383, 357-58, ¶ 3) and falsely accusing her of being a

⁴Hune was no stranger to abusing his supervisory power. He offered Tracy Stevens a new job if she would lie for him about his conduct toward Hill. LF 357-58, ¶ 3.

hostile worker. Hune's accusation led to Hill's suspension and the command that she be evaluated by a psychiatrist. Since Hune was directly responsible for bringing the power of Ford Motor Company to bear on Hill in the form of a tangible employment action, Ford is vicariously liable for Hune's conduct.

II. Ford failed to prove, as a matter of law, that it established the regulatory affirmative defense to hostile work environment claims

Ford moved for summary judgment based on the regulatory affirmative defense to the second type of sexual harassment claim Hill raised, *i.e.*, hostile work environment. 8 CSR 60-3.040(17)(D).⁵ As the movant/claimant, Ford's motion should have been denied unless Ford established the absence of contested issues of fact as to each element of the affirmative defense. *ITT*, 854 S.W.2d at 381.

Ford had to prove: 1) it exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and, 2) Hill unreasonably failed to take advantage of any preventive or corrective opportunities which Ford provided or avoid harm otherwise. 8 CSR 60-3.3040(17)(D)(1).

A. Ford did not prove it exercised reasonable care to prevent

⁵The regulatory affirmative defense is not available to a claim of sexual harassment based on the conduct described in 8 CSR 60-3.040(17)(A)(2) and discussed above in Point 1, Part I.

and correct promptly any sexually harassing behavior

**1. A jury could believe Ford did not exercise reasonable care
to prevent Hune's conduct**

Ford argued that its anti-harassment reporting policy and training prove that it acted reasonably to prevent Hune's harassment, as a matter of law. While the standard of care is a question of law, whether Ford's conduct met that standard is a question of fact. *Harris v. Niehaus*, 857 S.W.2d 222, 225 (Mo. banc 1993). Since the affirmative defense regulation does not state having a sexual harassment policy and training is sufficient, *per se*, to establish the employer acted reasonably to prevent harassment, a jury could consider other evidence in deciding whether Ford met its burden of proof.

Ford knew Hune was sexually harassing women from Pete Wade's complaint to Maurice Woods (LF 359, ¶ 8) as well the pervasive nature of Hune's conduct toward Hill and other women (Statement of Facts, Part II.A, *supra*). *Mason v. Wal-Mart Stores, Inc.*, 91 S.W.3d 738, 742 (Mo. App. 2002). Despite its knowledge, Ford did nothing to stop Hune, so a jury could conclude Ford did not act reasonably to prevent Hune's conduct and Ford's affirmative defense would fail.

Moreover, the existence of a harassment policy does not prove Ford acted reasonably to prevent Hune's conduct without evidence that Ford gave Hune the policy or otherwise communicated to Hune that certain conduct was prohibited. There was no such evidence. The policy, in any event, had no effect on supervisors charged with its enforcement.

There is no evidence Hune's supervisor, Maurice Woods, knew of the policy or received training on his obligations thereunder before Pete Wade complained to him about Hune's conduct, which would explain why Woods cannot even recall the complaint – the complaint had no significance. LF 401-02, pp. 24-25. Since Woods cannot recall Wade's complaint, a jury could conclude that Woods did not act on it, either.

Similarly, there is no evidence that Paul Edds or Sheron Wright received Ford's harassment policy. The only evidence either received any training relating to harassment was Edds's statement he was trained on investigating harassment claims. LF 227. Edds did not say, however, what the training consisted of (he could have been trained to limit the employer's liability by focusing on the conduct of the person who made the complaint, for example), whether the training included instruction on the particular policy Ford advanced to support its affirmative defense, or, even whether he got his training at Ford. The lack of specific evidence regarding Edds's training and the complete lack of evidence regarding Wright's training would explain why neither followed Ford's policy when Hill complained. Had Ford acted reasonably to prevent harassment by training Edds on its sexual harassment policy, Edds would have known – without the necessity of Hill calling the Hotline – that the policy mandated he investigate sexual harassment complaints within 24 hours (LF 288) – not assume a sexual harassment complainant is mentally ill.

2. A jury could believe Ford did not exercise reasonable care to correct Hune's behavior

The second element of the affirmative defense to a violation of 8 CSR 60-3.040(17)(3) Ford had to prove was that it exercised reasonable care to correct Hune's behavior. The issue of whether Ford exercised reasonable care, as discussed above, should be left to the jury because it is a question of fact. *Harris v. Niehaus*, 857 S.W.2d at 225.

Ford offered no evidence that it took any actions, let alone reasonable ones, to correct Hune's harassment of Hill. Both Edds and Wright denied that Hill complained about Hune during the September 5 meetings, so any actions they took could not have been in response to her complaints. LF 214-15; 226. ¶ 16. Edds stated in his Affidavit that he learned on September 10, 2002 that Hill called the Ford Hotline to report she was being harassed by Kenny Hune. LF 226, ¶ 24. There is no evidence, however, that Edds learned about Hill's call from anyone in particular and no evidence he learned a single detail of Hill's allegations. *See, Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1208-09 (10th Cir. 2000)(evidence supported jury's finding that defendant failed to meet its burden of proof where investigator did not speak to plaintiff, did not know that plaintiff was the person who complained, and did not know all allegations). Indeed, Edds does not even characterize the information he received as being a complaint about *sexual* harassment. Edds did not contact Hill to ask her about her allegations. LF 227, ¶ 17. So, notwithstanding the investigation discussed below, Ford cannot prove that Edds took reasonable measures to correct Hune's behavior toward Hill.

Despite its claimed ignorance of the specifics of Hill's allegations, Ford argued it acted

reasonably to correct Hune's behavior by investigating his conduct. Ford offered no undisputed evidence, however, that Edds's claimed investigation addressed Hill's complaints about Hune. Ford's only evidence there was an investigation is found in the carefully measured words of Edds's Affidavit. LF 226-27. Ford offered no notes from any interviews, no lists of questions, and nothing to substantiate Edds's claims about what the other investigator supposedly learned.

In his Affidavit, Edds studiously avoided stating the investigation was of Hune's conduct toward Hill; instead, he claimed the investigation involved interviews with at least sixteen different employees and none corroborated Hill's "allegation," with no indication he knew what Hill's "allegation" was. Edds identified only two of the people interviewed and did not say what he asked either. *See, Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000)(investigator's questions focused on plaintiff's performance); *Smith v. First Union Nat'l Bank*, 202 F.3d 234, 245 (4th Cir. 2000)(investigation into matters other than plaintiff's sexual harassment complaint). Given Edds's vague description of the interviews, a jury could reasonably infer that Edds did not ask any of the employees about Hill's allegations.

Ford offered the Affidavit of only one of the sixteen people it claimed to have interviewed, that of Tracy Stevens. Stevens did not say what she was asked in any investigative interview relating to Hill's allegations, nor did she say such an interview transpired. In fact, in her Affidavit, she refers to a "Kenny Hume," not "Kenny Hune," repeating a misnomer from the original Petition in this case (LF 6, 10), which would allow a jury to

infer Stevens had little to do with drafting her Affidavit, there was no investigation, and Stevens was not even referring to the harasser involved in this case. LF 311-12.

During the several interviews Ford conducted with Lillian Mathis Stevenson about Hune's conduct, however, and assuming Ford counts her among the sixteen employees interviewed as part of Edds's investigation, Ford did not ask about Hune's behavior toward Hill. LF 364, ¶ 7. Moreover, while Ford insists no one corroborated Hill's "allegation," when Pete Wade was interviewed (again, assuming he was one of the sixteen), Wade reported that Hune made inappropriate sexual comments to Hill. LF 359, ¶ 10.

Ford argued its decision to discharge Hune more than two months after Hill complained, in the best interest of the company (LF 227, ¶ 32), proves that it acted reasonably to correct Hune's harassment of Hill. Timing alone does not conclusively establish a cause and effect relationship between Hill's complaint and Ford's decision to discharge Hune. *Cf., Medley v. Valentine Radford Communications, Inc.*, 173 S.W.3d 315, 325-26 (Mo. App. 2005)(timing alone does not establish causal connection between two events). A jury could reasonably conclude that the intervening two months, coupled with Ford's characterization of Hune's discharge as being "in the best interest of the company," with no mention of Hill, meant that Ford discharged Hune for reasons unrelated to Hill. A jury could reasonably conclude Ford's discharge of Hune was a coincidence, not the result of a decision to correct Hune's harassment of Hill. *See, Smith v. Sheahan*, 189 F.3d at 535

(under Title VII affirmative defense, issue is not whether harassment fortuitously stopped, but rather whether response was designed to remedy the illegal harassment).

Since Ford failed to establish that it acted reasonably to correct Hune's behavior toward Hill, another element of its affirmative defense, summary judgment should have been denied.

B. A jury could believe Hill acted reasonably in her reaction to Hune

Ford cannot establish the third element of the regulatory affirmative defense, *i.e.*, that Hill acted unreasonably in failing to take advantage of preventive or corrective opportunities or in avoiding harm otherwise. 8 CSR 60-3.040(17)(D)(1)(b).

Ford argued Hill acted unreasonably in failing to take advantage of its sexual harassment reporting procedure because she did not complain when Hune first began harassing her. No interpretation of law automatically exonerates an employer if the victim does not complain at the onset of what turns out to be the beginning of a course of conduct. As recognized in the Notes on Use to MAI 31.24, unlawful discrimination occurs where the evidence demonstrates a "course of conduct or harassment" based on sex. If a plaintiff can succeed in her MHRA case by proving a "course of conduct or harassment" based on sex, it makes no sense that an affirmative defense to sexual harassment would be the failure to complain on the first instance of what eventually turns out to be a "course of conduct."

Whether Hill behaved reasonably is a question of fact. *Greene v. Dalton*, 164 F.3d 671,

675 (D.C. Cir. 1999)(federal standard).⁶ When Hune began his campaign of harassment, Hill tried to protect herself by shunning him. Later, Hill told Hune their relationship was professional only. LF 376-80. A jury could conclude Hill's reactions to Hune were reasonable efforts to end Hune's harassment. *Cf., Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc.*, 473 F.3d 11, 19 (1st Cir. 2007)(action under federal under 38 U.S.C. § 4301, *et seq.*). In fact, Hill's reaction was consistent with Ford's harassment policy, which includes a flow chart showing the first line of defense to sexual harassment as, "stop it." LF 283.

A jury could find Hill behaved reasonably based on evidence she spurned Hune's advances, since following Ford's harassment policy would have been an exercise in futility. Complaints under Ford's policy did nothing except produce memory lapses like Maurice Woods's denial that anyone complained to him about Hune (LF 401-02) and Edds and Wright's denials that Hill complained to them about Hune during the September 5 meeting. LF 214-15; 226, ¶ 16.

Hill tried to avoid Hune's harassment, then complained to Wright and Edds immediately after Hune ratcheted up the conduct. This is ample evidence for a jury to conclude Hill acted reasonably and, therefore, that Ford failed to establish another one of the

⁶In *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d at 242, the court held Cooper failed to act reasonably, as a matter of law. Cooper's reaction to the first and only instance of harassment was to never show up for work again. Hill stuck it out.

elements of the regulatory affirmative defense.

Point 3

The trial court erred in granting summary judgment in favor of Ford and Edds because there are disputed issues of fact as to whether they retaliated against Hill for complaining about Hune's sexual harassment and for filing her earlier Charge of Discrimination.

RSMo. 213.070

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622 (Mo. banc 1995)

Daugherty v. City of Maryland Heights, 231 S.W. 814 (Mo. banc 2007)

Barekman v. City of Republic, Mo., 232 S.W.3d 675 (Mo. App. 2007)

Standard of Review

The standard of review applied to a trial court's grant of summary judgment is *de novo*. *Eisenberg v. Redd*, 38 S.W.3d at 410. Review of the record is in the light most favorable to the party against whom judgment was entered, according the non-moving party the benefit of all reasonable inferences. *ITT*, 854 S.W.2d at 376.

Argument

Hill alleged Ford and Edds retaliated against her because she protested Hune's sexually harassing conduct and to deter her from suing Ford based on her 2001 Charge of Discrimination.

The elements of a retaliation claim under the MHRA are that the plaintiff engaged in protected activity and as a direct result she suffered damages due to an act of reprisal.

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d 622, 626 (Mo. banc 1995); RS Mo. 213.070. Damages include the emotional distress which an ordinary person would

feel under the circumstances. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561, 568 (Mo. banc 2006).

I. Hill engaged in protected activity

Hill engaged in protected activity: she rejected Hune's advances numerous times, *Ogden v. Wax Works, Inc.*, 214 F.3d at 1007 (rejections are protected activity); she protested Hune's conduct to Wright and Edds on September 5, 2002; she called Ford's Hotline; and, she filed a Charge of Discrimination. LF 353-55.

II. Ford and Edds took acts in reprisal for Hill's protected conduct

Hune's reaction to Hill's objection to his discriminatory conduct was to bar her from a job and use his power to have Security march her up to Labor Relations where she was suspended and her return to work was conditioned on a psychiatric evaluation. LF 383, p. 112; 357-58. Edds retaliated because of Hill's protests against Hune's conduct as well as her 2001 Charge of Discrimination, with its looming deadline to sue, by requiring Hill to undergo a psychiatric evaluation before she could return to work and suspending her from her job. LF 390-92. *See, Clockedile v. New Hampshire Dep't of Corrections*, 245 F.3d 1, 7 (1st Cir. 2001)(reprisal based on issuance of Notice of Right to Sue sufficient to support causal link in Title VII case).

Edds's instant reaction to Hill's protests, interrupting her mid-complaint so he would not have to hear more details about Hune's conduct (LF 390-92) demonstrates the link between Hill's protests and his (Edds's) acts in reprisal. Further, Edds's denial that Hill

complained about Hune’s harassment at the September 5 meeting (LF 226, ¶ 16) and Edds’s decision, after Hill complained to the Hotline, to suspend her,⁷ show that Respondents are attempting to conceal the true motivations for their actions.

Citing federal caselaw, Respondents argued Hill was not subjected to “actionable retaliation” under the MHRA with regard to Edds’s order that Hill get a psychiatric evaluation (Ford did not claim that the suspension was not sufficiently adverse). Supp. LF 505. As this Court held in *Keeney*, the MHRA is broader than analogous federal law.⁸

⁷Ford claimed ¶ 14 of Edds’s Affidavit showed Hill knew she was suspended during the meeting. LF 452, Response to ¶ 263. In ¶ 14 of his Affidavit, Edds did not say that he or anyone else told Hill she was being suspended on September 5, 2002. To find that Edds told Hill she was suspended on September 5, 2002 requires drawing an inference in Respondents’ favor, which is not permitted. *ITT*, at 382.

⁸Federal law is not as narrow as Respondents suggested to the circuit court. After the parties briefed Respondents’ motions, the U.S. Supreme Court decided *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006), rejecting a narrow view of the meaning of retaliatory conduct under Title VII. The court held that to be actionable, the conduct had to be harmful to the point that it “could well dissuade a reasonable worker from making or supporting a charge of discrimination,” resting its interpretation on the language of Title VII which prohibits “discrimination” based on

Keeney v. Hereford Concrete Products, Inc., 911 S.W.2d at 624. The MHRA plainly states that it is unlawful to discriminate or retaliate “in any manner” against a person who has engaged in protected activity under the MHRA. RSMo. 213.070. Preventing an employee from assuming a job, conditioning her return to work on a psychiatric evaluation, and suspending her for more than three days are certainly acts of reprisal that fit within the MHRA’s prohibition against retaliating “in any manner.” The fact that Edds later rescinded his order for a psychiatric evaluation does not render his conduct any less actionable, even under federal law, *Burlington Northern & Santa Fe Ry. Co. v. White*, 126 S.Ct. at 2417. Moreover, a jury could conclude that even the threat of a psychiatric evaluation was designed to coerce Hill into backing off of her allegations against Hune’s conduct, in violation of 213.070.

III. The federal *McDonnell Douglas v. Green* paradigm for proving discrimination through indirect evidence does not apply to an MHRA retaliation case

Ford and Edds argued they were entitled to summary judgment on Hill’s retaliation claim because they articulated legitimate nonretaliatory reasons for suspending Hill and

protected activity. *Id.* at 2415; 42 U.S.C. § 2000e-3. *See also, Brenneman v. Famous Dave’s of America, Inc.*, 507 F.3d 1139, 1146 (8th Cir. 2007)(stating federal elements post-*Burlington Northern*).

sending her to a psychiatrist and Hill failed to prove those reasons were pretexts for retaliation, two parts of the paradigm used to establish discrimination indirectly under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). LF 14, 17.

The *McDonnell Douglas* proof paradigm is used by federal courts in reviewing summary judgment motions when an employee, in a statutory discrimination case involving a statute which does not otherwise allocate the burden of proof, has no direct evidence of his employer's discriminatory animus. The court analyzes the evidence using a three-part formula: 1) the plaintiff establishes a prima facie case which, in the context of retaliation, has come to mean the plaintiff proves he engaged in protected activity, he suffered some sort of adverse action, as that term is now construed in light of *Burlington Northern*, and the existence of a causal link between his protected activity and the adverse action; 2) the defendant articulates a legitimate nonretaliatory reason for the adverse action raised in step one of the prima facie case; and, 3) the plaintiff proves the reason defendant articulated for taking the adverse action is a pretext. *See e.g., Brenneman v. Famous Dave's of America, Inc.*, 507 F.3d at 1146.

Missouri courts regularly used the *McDonnell Douglas* test to analyze MHRA discrimination cases until this Court's decision in *Daugherty v. City of Maryland Heights*.⁹ In

⁹*Daugherty* was decided before oral argument in this case and became final while this case was under submission; the parties raised *Daugherty* in post-briefing communications to the Court of Appeals and discussed the case during oral argument.

Daugherty, this Court held that the correct standard for analyzing the sufficiency of the evidence in a discrimination claim “should more closely reflect the plain language of the MHRA and the standards set forth in MAI 31.24 and rely less on analysis developed through federal caselaw.” *Daugherty v. City of Maryland Heights*, 231 S.W.3d at 819. This Court held that the elements stated in the MHRA verdict directing instruction, MAI 31.24, requiring a plaintiff to prove his protected classification “contributed” to the conduct at issue, appropriately tracked the language of the MHRA. *Id.* at 820.

While *Daugherty* involved a claim under the MHRA’s discrimination section, RSMo. 213.055, and this case involves a claim under the MHRA’s retaliation section, RSMo. 213.070, the reasoning of *Daugherty* applies equally here. Summary judgment analysis should reflect the plaintiff’s burden of proof at trial, which should track the language of the statute. *Id.* at 819-20. Thus, the key issue is what evidence is necessary for proof at trial that Respondents’ actions were motivated by retaliation.

Because of the similarity between the causal language in 213.055 (discrimination) and 213.070 (retaliation), the MHRA verdict director for cases brought under 213.055 is an appropriate statement of the proof needed to survive summary judgment in a retaliation case. Under 213.070, it is unlawful “retaliate or discriminate in any manner against a person because such person” has engaged in protected conduct. Under 213.055, it is

The Court of Appeals rejected Hill’s argument that *McDonnell Douglas* did not apply to this claim. *Hill v. Ford Motor Co.*, No. ED88959, at 7 (Mo. App. 10/16/07).

unlawful “for an employer, because of” a person’s protected characteristic, to take certain actions. In both sections, it is unlawful to take an action “because of” the person’s membership in a statutorily protected class, whether that class is race, sex, age, or the like, as proscribed by 213.055, or the class of persons who protest discrimination, as proscribed by 213.070.

Since this Court held in *Daugherty* that the causal element of 213.055 is met with proof that the protected characteristic “contributed” to the employment decision, a plaintiff bringing a claim under 213.070 should survive summary judgment with evidence that her protected activity “contributed” to the challenged conduct. At a minimum, the summary judgment standard should not be the hodgepodge which *McDonnell Douglas* has become, particularly as applied to retaliation cases,¹⁰ where it is not enough for a plaintiff to prove

¹⁰Use of *McDonnell Douglas* is particularly inappropriate in a retaliation case as demonstrated by the result here. The Court of Appeals found that Hill established a prima facie case of retaliation, meaning she proved that Respondents’ decision to suspend her was causally related to her protest against Kenny Hune’s harassment (*Slip op.* at 9), a threshold strikingly akin to the elements set forth by this Court in *Keeney*, 911 S.W.2d at 626. Applying *McDonnell Douglas*, however, the Court of Appeals granted Respondents’ motion because it found Hill did not also prove Respondents’ articulated reasons for suspending Hill were pretextual. The Court of Appeals’ application of *McDonnell Douglas* thus required Hill to meet an enhanced burden of proof to survive summary

a causal link between her protected conduct and an adverse action; she must also prove that the employer is advancing a pretextual reason for the adverse action. Instead, the standard should more closely track 213.070, which has no language allowing an employer to merely “articulate” a legitimate nonretaliatory reason for its conduct and no requirement that the plaintiff prove an articulated reason is pretextual. *See, Korando v. Mallinckrodt, Inc.*, 239 S.W.3d 647 (Mo. App. 2007)(applying *Daugherty* analysis to retaliatory discrimination claim); *Barekman v. City of Republic, Mo.*, 232 S.W.3d 675, 681-82 (Mo. App. 2007)(same, relying on elements set forth in *Keeney*, 911 S.W.2d at 625-26); *Wallace v. Dollar Rent-a-Car, Inc.*, No. 03-6055-CV-SJ-DW (W.D. Mo. 2/1/08)(diversity case in federal court applying *Daugherty* to MHRA retaliation case).

Just prior to *Daugherty*, the Western District Court of Appeals applied the *McDonnell Douglas* factors, post-trial, to a retaliation claim in *Igoe v. Department of Labor and Indus. Relations*, 210 S.W.3d 264, 270-71 (Mo. App. 2006). The Court of Appeals in this case relied on *Igoe* to hold that *McDonnell Douglas* applied to MHRA retaliation claims. *Slip op.* at 7. Even pre-*Daugherty* and under federal standards, use of the *McDonnell Douglas* test in *Igoe* would have been inappropriate. When trial begins, *McDonnell Douglas* and its various prongs drop out. Instead, the court reviews the overall sufficiency of the evidence that there was discrimination. *See e.g., McBryde v. Ritenour Sch. Dist.*, 207 S.W.3d at 173; *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S.

judgment.

711, 715 (1983); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509-11 (1993).

IV. Respondents' articulated reasons are pretextual

Even assuming *McDonnell Douglas* applied and Hill had to prove not only that Respondents' acts were in reprisal for her protected activity, but also that Respondents' articulated reasons are pretextual, the circuit court erred in sustaining Respondents' motion.

Under *McDonnell Douglas*, the employer must articulate through the introduction of admissible evidence legitimate nonretaliatory reasons for each of the actions in question. *St. Mary's Honor Center v. Hicks*, 509 U.S. at 522-23 (1993)(attorney argument insufficient).

Since Respondents did not articulate a legitimate nonretaliatory reason for refusing to allow Hill to assume the cladding job, the burden never shifted to Hill to prove pretext. Hill's prima facie case, alone, established Respondents' violation of the MHRA. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

Respondents articulated nonretaliatory reasons for two of the actions at issue: conditioning Hill's employment on a psychiatric evaluation and suspending her. Hill demonstrated that both actions were pretextual and, therefore, the trial court should not have granted summary judgment.

In the context of a *McDonnell Douglas* analysis, evidence of pretext is evidence raising a genuine doubt as to the legitimacy of a defendant's motive, even if that evidence does not directly contradict or disprove defendant's articulated reasons for its actions. *Strate v.*

Midwest Bankcentre, Inc., 398 F.3d 1011, 1018 (8th Cir. 2005). Where the employer's explanation for its reason is not believable, pretext is established. *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779 (8th Cir. 2004); *cf.*, *Tyler v. Re/Max Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000)(pretextual character of one reason offered can be "so fishy" that the plaintiff may prevail). The court looks to the totality of the circumstances to determine whether there is a sufficient factual dispute as to the pretextual nature of the claimed reason for taking an action and does not isolate each part of the evidence, since a jury would be looking at all of the evidence when making its decision. *Abramson v. William Paterson College*, 260 F.3d 265, 285 (3rd Cir. 2001). In the totality of the circumstances, there is ample evidence of pretext.

A. Respondents' reasons for requiring Hill to undergo a psychiatric evaluation before she could work are pretextual

The reason Respondents articulated for conditioning Hill's continued work on a psychiatric evaluation is found in Edds's Affidavit, where he stated his reasons were: "the specific request of the union" and his understanding about Hill's behavior, based on Sheron Wright's statements to him during the break in the two September 5 meetings. LF 225-26, ¶¶ 12, 17.

A jury could conclude that Edds's reasons are pretextual, and not the true reason for his decision based on the evidence discussed below.

First, Edds's Affidavit about conversations with other people is inconsistent with his

testimony in November 2003, that he never discussed Cynthia Hill with anyone else in the Labor Relations Department. LF 218-22 (discussion of a different matter only).

Second, Hill disputed engaging in the type of behavior supposedly described by Wright. LF 351, ¶ 2. Edds claimed Wright told him about Hill's behavior during the break in the September 5 meeting, which is just after Wright abruptly stopped the meeting because of Hill's complaints about Hune's sexual harassment and sought out Edds. LF 388, pp. 162-63; 393, pp. 196-97. In light of Edds and Wright's efforts to conceal their knowledge that Hill complained about sexual harassment (LF 214-15; 226, ¶ 16), a jury could reasonably conclude Edds and Wright met to discuss how they were going to stop Hill from complaining about Hune and one way, if Hill persisted, was to get her off the premises by ordering an unnecessary psychiatric evaluation. Their strategy would have worked had Hill not called the Hotline a few days later. LF 391.

Third, Edds admitted that after the fact, he asked the plant physician, Dr. Thomas, if Hill needed a psychiatric evaluation. LF 226, ¶ 19. Thus, Edds understood he lacked the qualifications necessary to determine whether an employee needed a psychiatric evaluation. A jury could infer, therefore, that Edds's order to Hill that she be evaluated by a psychiatrist before returning to work was a retaliatory response to her complaint about Hune's conduct. Edds demanded Hill be evaluated by a psychiatrist to deter her from filing her lawsuit within the next few weeks or complaining about Hune, both of which constitute unlawful retaliation under the MHRA and federal caselaw. RSMo. 213.070(2);

Burlington Northern & Santa Fe Ry. Co. v. White, 126 S.Ct. at 2417-18.

B. Respondents' reason for suspending Hill is a pretext

The reason Respondents articulated for suspending Hill is found in Edds's Affidavit, in which Edds stated 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.

As an articulated reason, "among other things" does not suffice to shift the burden to Hill to demonstrate pretext because it is impossible for anyone to prove that a decision based on "other things" was pretextual. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 258 (articulated reason must be specific to give plaintiff full and fair opportunity to demonstrate pretext). Therefore, the only properly articulated reason Respondents advanced for suspending Hill was "disrespecting her supervisor . . . [by] refusing to put on her safety glasses when instructed to do so."

A jury could conclude that Edds's reason for suspending Hill was not the true reason for his decision based on the evidence discussed below.

First, there is no evidence that Hune instructed Hill to put on her safety glasses, nor is there any evidence Hune told anyone he instructed Hill to put on her safety glasses. LF 383, pp. 111-12. Likewise, there is no evidence Hill refused to put on her safety glasses in the face of an instruction to do so. In fact, Respondents offered evidence inconsistent with ¶ 14 of Edds's Affidavit. Randall Smith stated Hill was charged with "disrespecting her

supervisor which included her failure to wear safety glasses as required,” not that Hune gave Hill an order which she ignored or refused to carry out. LF 315, ¶ 5. Since Respondents, as the moving parties, submitted inconsistent evidence on the material facts, they failed to make their prima facie showing that they were entitled to summary judgment. *ITT*, 854 S.W.2d at 382.

Second, no one told Hill that she was being suspended on September 5, 2002, a fact which Respondents disputed without any evidence. *See*, note 7, *supra*. There is no evidence Edds or, for that matter, anyone else gave Hill a written disciplinary form on September 5, the normal practice at Ford, as evidenced by the numerous disciplinary forms relating to Hill with which Respondents loaded the summary judgment record. LF 258-71; 475-76; 351, ¶ 3. A jury could therefore reasonably infer that Edds invented the idea of suspending Hill only after he learned Hill had gone over his head and protested to Ford’s Hotline.

Third, Edds’s justification for the level of discipline he imposed is evidence of pretext. Edds stated that he meted out a penalty consistent with penalties for other employees accused of behavior similar to refusing a supervisor’s order to put on safety glasses. LF 225, ¶¶ 14, 15. As discussed above, however, there was no evidence Hune ordered Hill to put on her glasses, that Hill refused any such order, or that anyone told Edds that Hill had refused such an order. Thus, by his own admission, Edds punished Hill at a level befitting an offense he knew she did not commit, further evidence of pretext.

Since Respondents failed to establish the absence of factual disputes as to whether Hill's suspension and Edds's decision to condition Hill's employment on a psychiatric evaluation were pretextual, and Respondents failed to articulate in their respective motions a legitimate nonretaliatory reason for Hune's interference with Hill assuming the cladding job, summary judgment should have been denied on Hill's retaliation claim, even analyzing the case under *McDonnell Douglas*.

Point 4

The trial court erred in granting summary judgment in favor of Paul Edds because he can be held liable under the MHRA and he had notice that Hill was basing her Charge of Discrimination on his conduct.

RSMo. 213.070

RSMo. 213.075(3)

Sedlacek v. Hach, 752 F.2d 333 (8th Cir. 1985)

Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177 (10th Cir. 1999)

Standard of Review

The standard of review applied to a trial court's grant of summary judgment is *de novo*. *Eisenberg v. Redd*, 38 S.W.3d at 410. Review of the record is in the light most favorable to the party against whom judgment was entered, according the non-moving party the benefit of all reasonable inferences. *ITT*, 854 S.W.2d at 376.

Argument

Paul Edds separately sought summary judgment, arguing that he cannot be held liable for a violation of the MHRA because he was not an "employer" within the meaning of the Act and because Hill did not specifically use his name in her Charge of Discrimination. Edds also raised substantive bases for his motion, which Hill addressed in Point 3.

I. Edds is subject to liability under the MHRA

Edds argued he could not be held liable for a violation of the MHRA because the Act

does not provide for individual liability. LF 17.

The MHRA retaliation section does not limit who can be liable for a violation. It simply states, “It shall be an unlawful discriminatory practice: . . .(2) To retaliate or discriminate in any manner against any other person . . .” RSMo. 213.070 is broader than the MHRA’s discrimination section, 213.055, which confines liability to “employers.” Even under 213.055, however, the Court of Appeals has held that individual managers can be liable for violations based on the definition of “employer” under RSMo. 213.010(7). *Cooper v. Albacore Holdings, Inc.*, 204 S.W.3d at 244; *Brady v. Curators of University of Missouri*, 213 S.W.3d 101, 112 (Mo. App. 2006). Given the plain language of 213.070, which does not define or limit who can be liable for retaliation, Edds is subject to liability.

II. Hill satisfied the prerequisites for filing suit against Edds

Edds argued he cannot be liable for a violation of the MHRA because Hill did not exhaust administrative prerequisites to filing suit (LF 17), specifically, that Hill did not name him in her Charge of Discrimination and no Notice of Right to Sue was issued to him.

Edds did not include the MCHR’s Notice of Right to Sue in the summary judgment record at the circuit court, precluding a finding that Edds established his “undisputed right to judgment” based on whether or not a Notice of Right to Sue was issued to him. *ITT*, at 380.

With respect to Edds’s former argument, Hill stated in her Charge:

IV. After I complained to Labor Relations, I was told that I was suspended and could not return to work without a psychiatric release. LF 295.

Edds acknowledged being the one who decided to suspend Hill and condition her return to work on a psychiatric evaluation. It is his conduct which Hill described in her Charge. LF 225-26, ¶¶ 14, 17. Based on evidence of Ford's procedures for Charge handling, which placed Hill's Charge in Edds's hands, a jury could readily infer that Edds received the Charge and understood that it was directed at his conduct. LF 228, ¶ 39; 228, ¶ 2.

Based on the evidence, the issue then is whether, in the face of actual notice that Hill alleged, in her Charge, Edds's actions violated the MHRA, Hill could sue Edds without having used his name in the Charge.

Counsel could locate no Missouri caselaw specifically addressing this issue. As referenced by the court in *Hill v. Ford Motor Co.*, 324 F.Supp.2d 1028, 1034 (E.D. Mo. 2004)(this case, when it was in federal court), there is a body of federal caselaw which allows a plaintiff to sue a party who was not named in the Charge.

In this particular instance, federal caselaw should be instructive given similarities between federal and state law concerning Charge filing. The EEOC's regulations¹¹ require

¹¹Title VII's Charge filing requirement is found at 42 U.S.C. § 2000e-5(b) and calls upon the EEOC to prescribe the form of the Charge. Under 42 U.S.C. § 2000e-12(a), the EEOC was given the authority to issue regulations to carry out the provisions of the Act. Where an agency is authorized to promulgate such regulations, those regulations have the

a Charge to include “The full name and address of the person against whom the charge is made, if known . . .” 29 C.F.R. § 1601.12(a)(2), much like the MHRA’s requirement that a Charge shall “state the name and address of the person alleged to have committed the unlawful discriminatory practice . . .” RSMo. 213.075. In light of the similarity in requirements and given there is no Missouri holding on point, this Court can look to federal law for interpretation. *Medley v. Valentine Radford Communications, Inc.*, 173 S.W.3d at 320.

Under Title VII, parties who are not named in a Charge can be sued provided there is a substantial identity between the parties sued and those charged. *Sedlacek v. Hach*, 752 F.2d 333, 336 (8th Cir. 1985). The “identity-of-interest” exception satisfies the purpose in naming someone in the Charge: notice and giving the EEOC an opportunity to conciliate. *Knowlton v. Teltrust Phones, Inc.*, 189 F.3d 1177, 1185 (10th Cir. 1999). Those purposes were satisfied here.

The notice requirement was satisfied by Hill’s specific reference to Edds’s conduct and evidence from which a jury could infer that Edds read the Charge.

The conciliation requirement was moot, as there was no evidence that “conciliation” took place. “Conciliation” with the administrative agencies occurs only after the respective agencies determine: there is reasonable cause that a violation occurred, in the case of the EEOC under 42 U.S.C. § 2000e-5(b); or, there is probable cause for crediting the

effect of law. *Butera v. Apfel*, 173 F.3d 1049, 1055 (7th Cir. 1999).

allegations in the complaint, in the case of the MCHR under RSMo. 213.075(3). There is no evidence that either agency found “cause.” Thus, while Edds stated he did not participate in any conciliation efforts in front of the EEOC and MCHR (LF 228, ¶ 38), there is no evidence that anyone did or could have, and therefore no evidence Edds missed out on an opportunity.

All purposes for naming a person in a Charge were satisfied in this case, so the fact that Hill did not name Edds should not be fatal to her suit, particularly in light of this Court’s admonition that the purpose of the MHRA is to protect important societal interests via broad enforcement authority. *State ex rel. Dean v. Cunningham*, 182 S.W.3d at 565. Therefore, summary judgment should have been denied.

Conclusion

For the reasons stated herein, Appellant asks this Court to reverse summary judgment and remand this case for trial.

Respectfully submitted,

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Certificate of service

The undersigned hereby certifies that two copies of the foregoing and a floppy disk containing same were served on February 27, 2008, via U.S. mail, postage prepaid on:

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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 12,893 words, as calculated by the Word Perfect software used to prepare this brief; and, 4) the disk has been scanned for viruses and is virus-free.

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