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How Exclusive Is the Exclusivity Provision of the Minnesota Human Rights Act?

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HOW EXCLUSIVE *IS* THE EXCLUSIVITY PROVISION OF THE MINNESOTA HUMAN RIGHTS ACT?

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I. INTRODUCTION

Although the Minnesota Human Rights Act has been in effect for over forty-five years, the provision stating that it is the exclusive procedure for certain claims has only recently been applied. The provision has been held to preempt certain claims but not to bar others. This article provides a brief historical perspective of the exclusivity provision, discusses how courts have applied the provision in connection with various employment-related claims, and analyzes the provision and its application.

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II. THE HISTORY OF THE PROVISION

The Minnesota Human Rights Act ("MHRA") was enacted on April 20, 1955. In its original form, the statute included the exclusivity provision now set forth at Minnesota Statute section 363.11. Presumably because the language was clear and unambiguous, there was no legislative discussion regarding the terms. Thus, it is a provision without a "legislative history."

The exclusivity provision in Minnesota Statute section 363.11 states "as to acts declared unfair by section 363.03, the procedure herein provided shall, while pending, be exclusive." Although the MHRA has been amended several times since its enactment, the exclusivity provision has remained constant.

Almost thirty-five years passed before any court discussed the exclusivity provision. Ironically, the first decision citing to the provision was *Karst v. F.C. Hayer Co., Inc.*[1] In *Karst*, the Minnesota Supreme Court held the exclusivity provision of the Minnesota workers' compensation statute preempted the MHRA.[2] The court held that the exclusivity provision of the workers' compensation statute prevailed over the MHRA with respect to an individual claiming disability discrimination based on the same facts as a workers' compensation claim. The court reasoned:

> In a situation such as this, imposing liability under the Human Rights Act in addition to the remedies provided in the Workers' Compensation Act will add a tremendous financial burden on employers. Defending these suits is burdensome enough. Together with potential damage awards, this dual liability will fundamentally change the workers' compensation system. Such a dramatic change in employer liability should be made, if necessary, by the legislature following hearings and legislative debate.[3]

1. 447 N.W.2d 180, 186 (Minn. 1989).

2. *Id.* The court noted that normally the statute most recently enacted prevails. *Id.* Here, the MHRA was enacted in 1955 and the exclusivity provision in the workers' compensation law was enacted in 1953. *Id.* Nevertheless, the court did not apply this rule of construction as both statutes were amended in 1983. *Id.* at 186-87.

3. *Id.* It is noteworthy that the legislature amended both statutes several times since the *Karst* decision yet it has not amended either exclusivity provision.

III. APPLICATION OF THE PROVISION

A. *Battery*[4]

A month after the *Karst* decision, the Minnesota Court of Appeals issued its decision in *Wirig v. Kinney Shoe Corp.*,[5] the first reported decision interpreting the exclusivity provision of the MHRA. In this case, the plaintiff alleged that she had been kissed and touched in a sexually offensive manner by one of her supervisors. In holding that the exclusivity provision of the MHRA preempted her common law battery claim, the court of appeals had explained:

> From the definition of battery and the statutory definition of sexual harassment, it is clear that the Minnesota Human Rights Act makes it an unfair employer practice to subject an employee to battery of sexual nature in connection with employment. Under the preemption section of the Act, a sexually motivated battery at work is an "act declared unfair by section 363.03." ...Wirig's battery claim arose out of the same acts which give rise to the sexual harassment claim. The record is devoid of any unpermitted, offensive bodily contact other than the contact of a sexual nature at work. Although the bodily contact here amounted to a battery, it is also sexual harassment, an unfair act under the statute. There were many acts of sexual harassment shown not constituting battery; the gravamen of the complaint sounds in sexual harassment.[6]

The supreme court reversed the court of appeals' decision in *Wirig*.[7] The supreme court noted there is a presumption that statutory law is consistent with common law. Thus, if a statute was meant to abrogate common law, there must be an express provision to that effect in the statute.[8] The court reviewed the exclusivity provision of the MHRA and found that nothing in the statute expressly abrogated common law battery.[9]

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4. A battery is defined as an intentional, unpermitted offensive bodily contact with another. Paradise v. City of Minneapolis, 297 N.W.2d 152, 153 (Minn. 1980). An employer may be liable for a battery by its employee if (1) the employer approves of or should have reasonably foreseen the battery, and (2) the battery occurred at a time and place related to the employment. Marston v. Minneapolis Clinic of Psychiatry, 329 N.W.2d 306, 310-11 (Minn. 1982).

5. 448 N.W.2d 526 (Minn. Ct. App. 1989).

6. *Id.* at 530.

7. Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 374 (Minn. 1990).

8. *Id.* at 377-78.

9. *Id.* at 378.

The court then discussed the purpose of the MHRA and the provision that it be liberally construed. The court noted that the "essence of the MHRA is societal change"[10] and stated:

> Elimination of employment discrimination and establishment of equal employment opportunities and conditions for both sexes is not effectuated by declaring common law battery preempted by an MHRA sexual harassment action. Battery does not address discriminatory tendencies. It did not develop to change society's biases or prejudices. Although under certain circumstances sexually motivated battery might fit the definition of sexual harassment, the purpose of the MHRA does not suggest that sexually motivated battery should be impliedly abrogated as an act declared unfair by the statute. The legislature did not design the MHRA to redress intentional offensive physical contact already addressed by a tort battery action. Therefore, we hold that a sexual harassment action brought pursuant to the MHRA does not bar a parallel action for common law battery.[11]

B. Negligent Infliction Of Emotional Distress[12]

Initially, it appeared that the supreme court's decision in *Wirig* created a "bright line" test: a pre-existing common law claim would not be preempted by the exclusivity provision of the MHRA. However, less than a week after deciding *Wirig*, the supreme court denied review of the court of appeals' decision to apply the exclusivity provision in *Melsha v. Wickes Cos, Inc.*[13]

In *Melsha*, the plaintiff asserted both a common law claim for negligent infliction of emotional distress and a sexual harassment claim. The court of appeals, relying on its earlier decision in *Wirig*,

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10. *Id.*

11. *Id.* at 378-79. The court did hold, however, that Wirig could not recover double damages for the same harm. *Id.* at 379.

12. In order to establish a claim for negligent infliction of emotional distress, a plaintiff must show the "plaintiff is within a zone of danger of physical impact, reasonably fears for his or her own safety, and consequently suffers severe emotional distress with resultant physical injury." Bohdan v. Alltool Mfg. Co., 411 N.W.2d 902, 907-08 (Minn. Ct. App. 1987), Nov. 13, 1987 (citing *Stadler v. Cross*, 295 N.W.2d 552, 553 (Minn. 1980)). *See also* Leaon v. Washington County, 397 N.W.2d 867, 875 (Minn. 1986). In addition, in lieu of being physically within the "zone of danger," a plaintiff may also recover for emotional distress for "a direct invasion of his rights, such as defamation, malicious prosecution, or other willful or malicious conduct." *Bohdan*, 411 N.W.2d at 907 (citations omitted).

13. 459 N.W.2d 707, 709 (Minn. Ct. App. 1990), *rev. denied*, Oct. 25, 1990.

held the exclusivity provision of the MHRA preempted plaintiff's negligence claim since there were no separate facts to support her negligent infliction of emotional distress claim.[14] The court of appeals, acknowledging that *Wirig* was under review by the supreme court, stated:

> Both parties agree that if *Wirig* is affirmed, respondent's negligent infliction of emotional distress claim would be barred. The trial court acknowledged the holding in *Wirig*, and its acceptance of the claim was premised on uncertainty how the decision would be affected by Supreme Court review. At present, we have no cause to disregard this part of the holding in *Wirig*; we rather confirm it. Because no damages were awarded on the negligent infliction of emotional distress claim, we reverse solely to exclude the judgment that this was a valid cause of action.[15]

Ironically, the court of appeals did not address how its decision would be affected if the supreme court reversed *Wirig*. It is also noteworthy that the court of appeals chose to reverse judgment in connection with a cause of action that did not affect the ultimate determination. Curiously, the supreme court declined review of the case.

As can be seen in the following discussions as to other claims, and in the conclusion of this article, the supreme court has yet to define the entire scope of the MHRA's exclusivity provision.

C. *Negligence*[16]

The tort of negligence in employment actions has only been discussed in one case. The plaintiff in the unpublished case of *Wise v. Digital Equip. Corp.*,[17] apparently asserted a negligence claim, in addition to negligent training and supervision claims. The court of appeals held that her negligence claims were preempted by the exclusivity provision of the MHRA. The court distinguished *Wirig* and held:

> Wise's negligence claims...are distinguishable from a bat-

14. *Id.*

15. *Id.* at 709-710.

16. The common law claim of negligence is based on the theory that a defendant owes a duty of care to a plaintiff, and in breaching that duty causes an injury, the proximate cause of which is the breach. Hudson v. Snyder Body, Inc., 326 N.W.2d 149, 157 (Minn. 1982).

17. No. C9-94-461, 1994 WL 664973, at *1 (Minn. Ct. App. Nov. 29, 1994).

> tery claim in that the very duty that Wise claims that Digital breached is created by the MHRA. Prior to the enactment of the MHRA, the common law imposed no duty on employers to take prompt remedial action in response to an employee's complaint about allegedly inappropriate behavior nor to exercise due care in training and supervising employees to prevent harassment. Thus Wise's negligence claims are not parallel with her sexual harassment claim, but rather are identical, and we agree with the trial court that they are preempted by the MHRA.[18]

In addition to the *Wise* case, there are at least two cases involving general negligence claims in which courts have considered whether to apply the exclusivity provision of the MHRA.

In *Vaughn v. Northwest Airlines, Inc.*,[19] the supreme court held the exclusivity provision of the MHRA did not preempt a negligence claim. In *Vaughn*, the plaintiff claimed that she was injured when she was carrying and stowing her luggage on board a Northwest Airlines flight. She claimed that she repeatedly informed Northwest agents that she was disabled and under a doctor's orders to avoid straining herself. She asserted that despite her repeated requests, she received no assistance and was injured. Vaughn sued for negligence as well as a violation of the MHRA.[20]

The supreme court relied on its earlier decision in *Wirig* and held that Vaughn's negligence claim was not preempted. In so ruling, the court again "rejected the notion that factually parallel causes of action are not mutually exclusive."[21] Significantly, the court acknowledged but did not overrule or even clarify the court of appeals' holding in *Melsha*.[22]

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18. *Id.* at *2. The plaintiff in *Wise* alleged that her supervisor made bodily contact with her by bumping or touching her. She claimed that the contact made her uncomfortable. *Id.* at *1. Significantly, the "battery" in the *Wirig* case involved her supervisor kissing, pinching, patting her and putting his arm around her. Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 377 (Minn. 1990). Perhaps if the plaintiff in *Wise* had claimed battery instead of negligence, the court would have reached a different result. Although it appears that Wirig's battery was clearly more sexual than the contact alleged in *Wise*, the court held the battery was a breach of the duty created by the MHRA. *Wise*, 1994 WL 664973, at *2.

19. 558 N.W.2d 736 (Minn. 1997).

20. *Id.* at 736. Vaughn claimed a violation of the public accommodation provision of the MHRA. MINN. STAT. § 363.03 (3)(a) (1994).

21. *Vaughn*, 558 N.W.2d at 745.

22. *Id.* The court stated: "Northwest argues that Vaughn did not allege 'separate facts to support a negligence claim,' and cites *Melsha v. Wickes Cos., Inc. Melsha* was decided before our decision in *Wirig*, and Northwest's reliance on it is misplaced." *Id.* (citation omitted).

In *B.F. v. Smith*,[23] a subsequent unpublished decision, the court of appeals held the plaintiff's common law negligence claim was preempted by the MHRA. In *Smith*, the plaintiff asserted she had been sexually harassed in school by one of her teachers.[24] Relying on an earlier decision,[25] and completely ignoring the supreme court's holdings in *Wirig* and *Vaughn*, the court of appeals held "that a litigant may not bring a common-law negligence claim alleging discriminatory practices, injuries, and damages identical with [her] MHRA claim."[26]

It is unclear why the supreme court and the court of appeals appear to come to completely opposite conclusions based on the same question, namely: Can identical factual allegations giving rise to a common law claim that would also be discriminatory conduct under the MHRA survive the exclusivity provision in the MHRA? This *Alice in Wonderland* question remains to be answered.

1. Negligent Hiring[27]

At the time of writing this article, there were no published or unpublished decisions in which the MHRA exclusivity provision was applied to a claim of negligent hiring. Presumably, the courts will apply the same reasoning as they have in the negligent retention and negligent supervision cases discussed in the next sections.

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23. No. C8-97-1468, 1998 WL 101348, at *1 (Minn. Ct. App. March 10, 1998).

24. *Smith*, 1998 WL 101348, at *1. The plaintiff claimed that her teacher massaged her shoulders, then touched her stomach and moved his hands up to her breasts and fondled her breasts. *Id.* She also claimed that he inserted his fingers into the top of her pants, touched her genital area and attempted to expose himself to her. *Id.*

25. Sullivan v. Spot Weld, Inc., 560 N.W.2d 712 (Minn. Ct. App. 1997).

26. *Smith*, 1998 WL 101348, at *5 (citing *Sullivan*, 560 N.W.2d at 717).

27. The tort of negligent hiring was recognized in 1983. Ponticus v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983). Liability under negligent hiring is "predicated on the negligence of the employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others." *Id.*

2. *Negligent Retention*[28]

In *Huffman v. Pepsi-Cola Bottling Co. of Minneapolis and St. Paul*,[29] (an unpublished decision), the plaintiff asserted claims of sexual harassment, along with claims of negligent retention and negligent supervision. In addition to harassment that was clearly sexual in nature (e.g. sexual comments, inappropriate touching, sexually explicit magazines, cartoons and computer games at work):

> [The plaintiff was] threatened with a knife by a coworker who had a history of threatening and physically assaulting coworkers. Pepsi had a duty of care to Huffman. Pepsi breached that duty by failing to take any disciplinary action against this employee. The record also contains evidence that Huffman was subjected to verbal and physical threats that were not sexual in nature or related to her sex, such as being thrown into a bay truck, having her timecard altered, and having her forklift moved.[30]

The court noted that there were separate incidents of sexual harassment and non-sexual conduct. In holding that the exclusivity provision would not be applied in this case, the court stated:

> Sexual harassment requires that the conduct be sexually motivated. Negligent retention/supervision, on the other hand, applies to intentional conduct by an employee, generally outside the scope of employment. Threats of physical violence by a coworker or physical contact unrelated to sex would not fall under the Minnesota Human Rights Act. The facts support Huffman's negligence claims. There are also facts sufficient to support a claim completely separate from her Minnesota Human Rights Act claim.[31]

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28. Minnesota has long recognized that an employer has a duty to refrain from retaining employees with known dangerous proclivities. Porter v. Grennan Bakeries, Inc., 219 Minn. 14, 21-22, 16 N.W.2d 906, 910 (1944); Travelers Indem. Co. v. Fawkes, 120 Minn. 353, 357-58, 139 N.W. 703, 705 (1913); Yunker v. Honeywell, Inc., 496 N.W.2d 419, 423 (Minn. Ct. App. 1993); Negligent retention is distinct from negligent hiring. *Yunker*, 496 N.W.2d at 423. A claim of negligent hiring arises "when the employer was on notice that an employee posed a threat and failed to take steps to insure the safety of third parties." *Id.* Negligent retention occurs when, *after the employee has been hired*, the employer becomes aware or should have become aware of facts that show the employee posed a threat and the employer failed to investigate or take some action such as terminating the employee or reassigning the employee. *Id.*

29. No. C7-94-2404, 1995 WL 434467, at *1 (Minn. Ct. App. July 25, 1995).

30. *Id.* at *4.

31. *Id.* at *5.

In *Mandy v. Minnesota Mining and Manufacturing Co.*,[32] Judge Tunheim, discussed the application of the MHRA exclusivity provision in the context of a negligent retention claim and a sexual harassment claim.[33] After determining the plaintiff had asserted a claim of negligent retention, Judge Tunheim proceeded to address the issue of preemption by the MHRA and reversed Magistrate Judge Mason's decision that the negligent retention claim was preempted. Judge Tunheim stated:

> The Magistrate Judge concluded that the claims were preempted based solely on the holdings in an unpublished Minnesota Court of Appeals case, *Wise v. Digital Equipment Corp.* The *Wise* court held that prior to the MHRA there was no duty imposed on an employer to take prompt remedial action to respond to sexual harassment. The court held that because the duty alleged in *Wise* was created by the MHRA, the plaintiff's negligence claim was preempted by the exclusivity provision of the MHRA found in Minnesota Statute section 363.11...The Minnesota Supreme Court has never addressed the issue of preemption of negligent retention or supervision claims by the MHRA or the [Workers' Compensation Act]. The *Wise* case is unpublished and contains little analysis of these important state law issues...Under these circumstances, it is unclear how the Minnesota Supreme Court would resolve the MHRA preemption issue in this case.[34]

Because the defendant in *Mandy* failed to sustain the burden required for judgment as a matter of law, Judge Tunheim reversed Magistrate Mason's decision and denied the defendant's motion for summary judgment on the negligent retention claim. The judge did state, however, that he might entertain a motion for partial summary judgment on the preemption issue when the record was more fully developed.[35]

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32. 940 F. Supp. 1463 (D. Minn. 1996).

33. *Mandy*, 940 F. Supp. at 1466. Mandy claimed that her supervisor made repeated comments about her body, sexual advances toward her (including grabbing her sweatshirt and looking down her shirt and commenting on her breasts) and gave her unwelcome attention, including telephone calls, cards and gifts. *Id.*

34. *Id.* at 1471-72 (footnote and citations omitted).

35. *Id.* at 1472-73. Approximately a year after his decision in *Mandy*, Judge Tunheim reached a similar decision in *Thompson v. Olsten Kimberly Qualitycare, Inc.*, 980 F. Supp. 1035, 1041 (D. Minn. 1997). In *Thompson*, Judge Tunheim again discussed the Minnesota Supreme Court's holdings in *Vaughn* and *Wirig*, but noted that the confusion apparently was amplified by the Minnesota Court of Appeals' ruling in *Sullivan v. Spot Weld, Inc.*, 560 N.W.2d 712 (Minn. Ct. App. 1997) and its

Judge Doty, in *Moss v. Advance Circuits, Inc.*,[36] came to a different conclusion than Judge Tunheim did in *Mandy*. In *Moss*, Judge Doty first discussed the Minnesota Supreme Court's decisions in *Vaughn* and *Wirig* and then held that the plaintiff's negligent retention claim was preempted by the MHRA.[37] Judge Doty stated:

> In this case, there is no doubt plaintiff's negligence claims arise from the same duty as her harassment claim under the MHRA. Plaintiff's negligence claims are based entirely on Advance Circuit's actions after being made aware of Maxon's alleged discriminatory conduct. Unlike *Vaughn* and *Wirig*, therefore, there is no distinction in duties owed between the MHRA and common law claims. Since plaintiff has not identified any duty owed her separate from the duty created by the MHRA, the negligen[t] [retention] claims are preempted and summary judgment on these claims is granted.[38]

In *Grozdanich v. Leisure Hills Health Ctr., Inc.*,[39] Magistrate Judge Erickson, following Judge Doty's decision in *Moss*, ruled the MHRA will preempt a negligent retention claim were an employee's claim (in a sexual harassment action) is based entirely on the employer's actions after being made aware of the harassment.[40] Similarly, in *Breitenfeldt v. Long Prairie Packing Co., Inc.*,[41] Judge Frank held that

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reliance on the Minnesota Supreme Court's decision in *Williams v. St. Paul Ramsey Med. Ctr.*, 551 N.W.2d 483 (Minn. 1996). Judge Tunheim then stated that he agreed with his earlier holding in *Mandy*, and because of the continued unsettled state of the law on the preemption issue, he declined to dismiss the negligent retention claim on preemption grounds. *Thompson*, 980 F. Supp at 1039-40.

36. 981 F. Supp. 1239 (D. Minn. 1997).

37. *Id.* at 1252. The plaintiff asserted both race and sex discrimination violations of the MHRA. She claimed that her supervisor stared at her breasts when talking with her and made a comment about his dancing at a company event, telling her "hey, not bad for a white guy." *Id.* at 1243. She also claimed that another supervisor, when passing her in the hall, said "yo, mama." *Id.* She also asserted that another supervisor rubbed her shoulders and back on one occasion. *Id.* at 1242-43.

38. *Id.* at 1252 (footnote omitted).

39. 25 F. Supp. 2d 953 (D. Minn. 1998).

40. *Grozdanich*, 25 F. Supp. 2d at 981. Grozdanich, a nurse, claimed that her supervisor engaged in three separate acts of sexual assault on her in one day. In the first incident, he grabbed her buttocks while she was performing a delicate procedure on a patient. In the second incident, her supervisor sat next to her, placed his hand on her right inner thigh and slid his hand up and touched her vagina. The third incident involved the supervisor pinning her against a bed rail from behind and grabbing her hips and pressing his pelvic area against her buttocks, so that she could feel his erect penis. *Id.* at 962.

41. 48 F. Supp. 2d 1170 (D. Minn. 1999). Here, Breitenfeldt claimed that his

because the plaintiff failed to allege any separate factual predicate for his negligent retention claim, the MHRA preempted that claim.[42]

3. Negligent Supervision[43]

The Minnesota Supreme Court has not yet decided whether negligent supervision claims are preempted by the MHRA. However, the court of appeals, in two reported cases, held negligent supervision claims are preempted by the MHRA. In *Sullivan v. Spot Weld, Inc.*,[44] the court held that "Sullivan's negligent supervision claim alleges discriminatory practices, injuries, and damages identical with those in his MHRA claim. Furthermore, Sullivan cites no authority for the proposition that his common law negligent supervision claim against his employer has a basis independent of the MHRA."[45]

In *Hoover v. Norwest Private Mortgage Banking, A Div. of Norwest Funding, Inc.*,[46] a very recent case, the court of appeals affirmed the dismissal of plaintiff's disability discrimination and reprisal claims. Relying on its earlier decision in *Sullivan* and the Minnesota Su-

male co-workers would hold him down, sometimes in a bin of raw meat or a trough of blood, and simulate oral and anal sex acts. The co-workers also grabbed or hit his testicles, forcing or rubbing a steel rod between his legs, and subjected him to verbal acts of sexual harassment including calling him "Fargo Fag," and referring to oral and anal homosexual acts. *Id.* at 1170.

42. *Id.* at 1180.

43. Unlike negligent hiring or negligent retention, the claim of negligent supervision is based on a theory of *respondeat superior*, since the basis of the liability is that the wrongful conduct is actually committed in the scope of the individual's employment. Bruchas v. Preventive Care, Inc., 553 N.W.2d 440, 443 (Minn. Ct. App. 1996). An employer that conducts an activity through its employees is subject to liability for harm resulting from the conduct, if (i) the employer is negligent in the supervision of the employee, *Id.* at 443, and (ii) the employee's conduct was foreseeable. Olsin v. State of Minn., 543 N.W.2d 408, 415 (Minn. Ct. App. 1996). Thus, the employee must actually be engaged in some conduct on behalf of the employer, using the employer's "chattels," or on the employer's premises when the injury occurs. Yunker v. Honeywell, Inc., 496 N.W.2d 419, 422 (Minn. Ct. App. 1993).

44. 560 N.W.2d 712 (Minn. Ct. App. 1997).

45. *Id.* at 716. Sullivan claimed that he was subjected to racial epithets by co-workers and supervisors that created a hostile work environment. He asserted that his employer failed to take any corrective action. *Id.* at 712.

46. 605 N.W.2d 757 (Minn. Ct. App. 2000), *rev. granted on other issues*, Apr. 25, 2000. Hoover claimed she was subjected to disability discrimination (based on her diagnosis of fibromyalgia, with symptoms of severe headaches, back pain, neck pain, shoulder pain, exhaustion, and sleep disturbances) and reprisal in violation of the MHRA. *Id.* at 760.

preme Court's decision in *Williams v. St. Paul Ramsey Medical Center, Inc.*,[47] the court of appeals stated:

> Hoover cites as an independent common law duty the employer's duty to provide a reasonably safe workplace by providing her with processor support to accommodate her disability. The duty Hoover describes is not a duty to prevent known hazards or dangers, but a duty to accommodate a disability. This duty did not exist at common law, but was created by the MHRA. The exclusivity provisions of the MHRA therefore preempt Hoover's negligent supervision claim.[48]

In addition to the *Sullivan* and *Hoover* decisions, the Minnesota Court of Appeals applied the same holdings from the negligent retention claims to the negligent supervision claims. Thus, in *Wise*, the court of appeals affirmed summary judgment dismissing the plaintiff's negligent supervision claim, as well as her negligent retention claim, because the claims were identical to her sexual harassment claim.[49] In contrast, but coming to the same conclusion with respect to the negligent retention claim, the court of appeals in *Huffman*, held the plaintiff alleged sufficient separate facts from her sexual harassment claim to assert an independent claim for negligent supervision.[50]

Similarly, judges for the Federal District of Minnesota who ruled on the preemption issue, reached the same conclusions regarding the negligent supervision claims as they did regarding the negligent retention claims.[51]

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47. 551 N.W.2d 483 (Minn. 1996); *see also* discussion *infra* Part IV.D.

48. *Hoover*, 605 N.W.2d at 768 (citations omitted).

49. Wise v. Digital Equip. Corp., No. C9-94-461, 1994 WL 664973, at *1 (Minn. Ct. App. Nov. 29, 1994).

50. Huffman v. Pepsi Cola Bottling Co., No. C7-94-2404, 1995 WL 434467, at *5 (Minn. Ct. App. July 25, 1995), *rev. dismissed*, Sept. 20, 1995.

51. Breitenfeldt v. Long Prairie Packing Co., Inc., 48 F. Supp. 2d 1170, 1181 (D. Minn. 1999) (holding the negligent supervision and negligent retention claims were preempted by the MHRA); Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 991-92 (D. Minn. 1998) (holding the negligent supervision and negligent retention claims would be preempted when based entirely on a sexual harassment claim); Moss v. Advance Circuits, Inc., 981 F. Supp. 1239, 1254 (D. Minn. 1997) (granting summary judgment dismissing the negligent supervision and negligent retention claims as being preempted by the MHRA); Thompson v. Olsten Kimberly Qualitycare, Inc., 980 F. Supp. 1035, 1041 (D. Minn. 1997) (declining to dismiss the negligent supervision and negligent retention claims due to the "unsettled" state of the law); Mandy v. Minn. Mining and Mfg., 940 F. Supp. 1463, 1474 (D. Minn. 1996) (denying summary judgment preempting the negligent supervision and retention claims).

4. Negligent Training

Minnesota does not recognize the tort of negligent training.[52] Thus, there has been no occasion for the courts to determine whether such a claim would be preempted by the MHRA. Presumably, if such a claim existed, the courts would apply the same standard they apply in claims of negligent retention and negligent supervision.

D. Minnesota Whistleblower Act[53]

In *Williams v. St. Paul Ramsey Med. Ctr., Inc.*,[54] the Minnesota Supreme Court held the plaintiff's reprisal claim under the MHRA preempted her whistleblower claim under the Minnesota Whistleblower Act ("MWA"). In *Williams*, the plaintiff asserted her employment was terminated because she filed a charge of sexual harassment with the Minnesota Department of Human Rights.[55] She also asserted a claim under the MWA based on the identical facts. In its decision, the supreme court offered insight into its position on the exclusivity provision when it distinguished *Wirig*. Rather than address the issue in terms of the philosophical application and intent of the MHRA as it did in *Wirig*, the court appeared to take a more pedestrian view of the issue stating:

> While in *Wirig v. Kinney Shoe Corp.*, the plaintiff was authorized to maintain a sexual harassment action under the [Minnesota] Human Rights Act and a parallel action for common law battery arising from the same facts, *we so held because these separate causes of action require different ele-*

52. M.L. v. Magnuson, 531 N.W.2d 849, 856 (Minn. Ct. App. 1995), *rev. denied*, July 20, 1995; Fletcher v. St. Paul Pioneer Press, No. C7-95-2, 1995 WL 3791401, at *4 (Minn. Ct. App. June 27, 1995). Interestingly, a claim of negligent training was apparently asserted in *Wise*, but the court did not address the issue of whether such a claim is recognized in Minnesota, but applied the same logic in dismissing the negligent supervision claim when it dismissed the negligent training claim as being preempted by the MHRA. *Wise*, 1994 WL 664973, at *1.

53. The Minnesota Whistleblower Act prohibits an employer from, *inter alia*, discharging or discriminating against an employee who reports a violation of a state or federal law to the employer or to a governmental agency. MINN. STAT. § 181.932 (1994).

54. 551 N.W.2d 483 (Minn. 1996).

55. *Id.* at 483. Williams, a pharmacy technician, claimed that one of the pharmacists repeatedly asked her for dates and when she refused, he began to make sexual comments to her and became hostile. She complained to her supervisor and an investigation ensued. The investigation found her claims to be without merit. *Id.* at 484.

> *ments of proof and address different injuries.* We conclude that [the same] analysis is not appropriate here and that the exclusivity provision of the [Minnesota] Human Rights Act operates as a bar to the separate maintenance of this claim under the [Minnesota] Whistleblower Act.[56]

Thus, the supreme court's holding in *Williams* appears to adopt the standard articulated by the court of appeals in *Melsha.*

E. Breach Of Contract

In the unpublished decision of the court of appeals in *Humenansky v. Board of Regents,*[57] the plaintiff asserted an age discrimination claim and retaliation claim under the MHRA. He also alleged a breach of contract claim.[58] In a novel attempt to avoid the holdings in *Williams* and *Sullivan,* plaintiff asserted that his breach of contract claim did not rely on his MHRA claims. However, the court of appeals held that the exclusivity provision preempted the contract claim based on two rationales:

> [T]he only acts described in Humenansky's complaint as the basis for either of his MHRA claims or the breach of contract claim are age discrimination and retaliation, both declared unfair by the MHRA....[But], [u]nlike the claims of the plaintiffs in *Wirig* and *Vaughn,* Humenansky's MHRA claims and breach of contract claim *require the same elements of proof and address the same injury.*[59]

While a breach of contract claim could certainly address the same "injury" as a statutory violation of the MHRA (i.e., termination of employment), it is difficult to understand how the court of appeals concluded that a breach of contract claim could involve the same elements of proof as a statutory claim. The courts in Minnesota have routinely applied the "shifting burden of proof" criteria to establish a violation of the MHRA,[60] while a breach of contract

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56. *Id.* at 485 (emphasis added, citation omitted).

57. No. CX-98-218, 1998 WL 436879, at *1 (Minn. Ct. App. Aug. 4, 1998), *rev. denied,* Sept. 30, 1998.

58. *Humenansky,* 1998 WL 436879, at *1. "The breach of contract claim asserts no facts or injuries other than those asserted as the basis for the MHRA claims." *Id.*

59. *Id.* at *3 (emphasis added, citations omitted). Significantly, this is nearly the identical language used by the supreme court in *Williams.*

60. Feges v. Perkins Rests., Inc., 483 N.W.2d 701, 710-11 (Minn. 1992); Sigurdson v. Isanti County, 386 N.W.2d 715 (Minn. 1986); Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978).

claim requires proof of completely different elements.[61] The better rationale is that the only facts in the complaint were the facts supporting the MHRA claim.

F. Wrongful Discharge

Although Minnesota does not recognize a common law claim for wrongful discharge, at least one court held such a claim would be preempted by the MHRA. In *Thompson v. Campbell*,[62] Judge Doty acknowledged that Minnesota does not recognize a common law cause of action that "exists independently" of the Minnesota Whistleblower Act.[63] Interestingly, relying on the *Wirig* decision, he noted, however, "to the extent Thompson seeks redress for conduct redressed by the MHRA, her common law claim is precluded by that statute. Minnesota law precludes common law claims for adverse employment actions covered by the MHRA."[64]

Judge Doty's "virtual" application of the exclusivity provision of the MHRA to the plaintiff's non-existent wrongful discharge claim foreshadowed the later application of the provision to claims under the Minnesota Whistleblower Act and negligent retention, both of which were asserted by Thompson.[65]

G. Arbitration Agreements

The most recent discussion of the application of the MHRA's exclusivity provision by the Minnesota Supreme Court came in the context of an arbitration clause. In *Correll v. Distinctive Dental Servs., P.A.*,[66] the supreme court held an agreement to arbitrate disputes between an employee and an employer was preempted by the exclusivity provision of the MHRA.

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61. Pine River State Bank v. Mettille, 333 N.W.2d 622, 628-30 (Minn. 1983).

62. 845 F. Supp. 665 (D. Minn. 1994). Thompson claimed she was terminated because she complained she had been sexually harassed by her supervisor. Her allegations included that he commented on the breasts and buttocks of female employees and on one occasion, attempted to place his arm around her shoulders. She and other employees complained to management about his behavior. The supervisor was placed on probation as a result. Thompson was later terminated for violating the company's conflict of interest policy in connection with selling outside insurance. *Id.* at 670-71.

63. *Id.* at 675.

64. *Id.* at 676 n.11 (citations omitted).

65. Moss v. Advance Circuits, Inc., 981 F. Supp. 1239, 1254 (D. Minn. 1997); Sullivan v. Spot Weld, Inc., 560 N.W.2d 712 (Minn. Ct. App. 1997).

66. 607 N.W.2d 440, 447 (Minn. 2000).

In *Correll*, the plaintiff filed a charge with the Minnesota Department of Human Rights against his employer, alleging marital status discrimination. Based on an employment agreement signed by the plaintiff, which included an arbitration provision, the employer filed a demand for arbitration.[67] In response, the plaintiff petitioned the district court to stay the arbitration based on the exclusivity provision of the MHRA. The employer filed a cross motion to compel arbitration relying on the Minnesota Uniform Arbitration Act.[68]

The district court granted the plaintiff's petition to stay the arbitration and denied the employer's cross-motion to compel arbitration. The court of appeals reversed.[69] The supreme court reversed the court of appeals. The supreme court noted that, "[a]lthough section 363.11 of the Human Rights Act and section 572.08 of the Arbitration Act are unambiguous when considered separately, the relationship between the two sections is less clear and will determine whether Correll's claim is subject to arbitration."[70]

Initially, the supreme court discussed the circumstances in which the exclusivity provision would not apply, or stated differently, the situations in which arbitration of MHRA claims would be permitted. The supreme court noted that the MHRA permits arbitration of claims in two situations.[71] The first is if arbitration begins before filing a charge or bringing a lawsuit under the statute.[72] In that instance, the one-year limitation period for filing a charge or bringing a lawsuit does not run while the claim is being arbitrated. The employer must inform the Minnesota Department of Human Rights, however, of (i) the fact the claim is being arbitrated, (ii) the date the arbitration commences, and (iii) the date the arbitration ends.

The second situation in which arbitration of MHRA claims is permitted is if the Commissioner of the Minnesota Department of

67. *Id.* at 442. Correll's employment agreement included a provision that he would not compete with the clinic within a seven-mile radius. When the employer discovered that Correll's wife, who was also a dentist, was working for another clinic within the geographic limitation, it terminated Correll's employment. *Id.*

68. MINN. STAT. § 572.08 (2000).

69. Correll v. Distinctive Dental Svcs., P.A., 594 N.W.2d 222 (Minn. Ct. App. 1999), *rev'd*, 607 N.W.2d 440 (Minn. 2000).

70. *Correll*, 607 N.W.2d at 445.

71. *Id.* at 444.

72. *Id.*

Human Rights sanctions the arbitration before the issuance of a probable cause determination.[73] Here again, the one-year limitation period is suspended while the arbitration is proceeding.

The supreme court in *Correll* held that a provision in an employment agreement, in which an employer and employee agree to arbitrate a MHRA claim, may not be enforceable and may be preempted by the exclusivity provision of the statute.[74]

IV. CONCLUSION

A simple quantitative analysis of the holdings of Minnesota courts reveals that most courts considering the exclusivity provision have held it preempts various common law and statutory claims. The Minnesota Supreme Court has held the MHRA preempts the application of an arbitration provision and the Minnesota Uniform Arbitration Act (*Correll*), and the Minnesota Whistleblower Act (*Williams*). Similarly, the Minnesota Court of Appeals has applied the exclusivity provision of the MHRA to preempt claims of negligent supervision (*Hoover, Sullivan,* and *Wise*), negligent retention (*Wise*), negligent infliction of emotional distress (*Melsha*) and breach of contract (*Humenansky*).

In addition, the federal district court has generally applied the exclusivity provision and preempted the common law claims of negligent supervision and negligent retention (*Moss, Grozdanich,* and *Breitenfeldt*), and wrongful discharge (*Thompson*).[75]

In contrast, the Minnesota Supreme Court held the exclusivity provision did not preempt a common law battery claim *(Wirig)* and a general negligence claim (*Vaughn*). Only once did the Minnesota

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73. *Id.*

74. *Id.* at 447. However, the court did provide one potential avenue by which employers may be able to require arbitration of MHRA claims pursuant to an employment agreement. The court noted that the employer in *Correll* had not claimed its employment agreement was governed by the Federal Arbitration Act (FAA). *Id.* at 442. The inference is that the FAA may apply if an employer provides evidence that its agreement involves interstate commerce (a threshold requirement for application of the FAA). The court had held in another case that, if the FAA applies to an employment agreement containing an arbitration provision, it preempts the MHRA and an employee's MHRA claims will be subject to arbitration pursuant to the terms of the agreement. Johnson v. Piper Jaffray, Inc., 530 N.W.2d 790, 803-04 (Minn. 1995).

75. Although Judge Tunheim declined to dismiss claims of negligent supervision and negligent retention in *Mandy*, he did so on the grounds that there were sufficient facts in dispute to deny summary judgment. Mandy v. Minn. Mining & Mfg., 940 F. Supp. 1463, 1473 (D. Minn. 1996).

Court of Appeals decline to preempt negligent supervision and negligent retention claims on the grounds that the alleged conduct was clearly not prohibited by the MHRA (*Huffman*).

As noted earlier, these contradictory holdings tend to leave the issue in an *Alice in Wonderland* status. Although the supreme court in *Wirig* held the common law claim of battery "does not address discrimination,"[76] it is clear that the offensive physical contact in that case was entirely sexual in nature. In its zeal to liberally interpret the MHRA, it is respectfully submitted that *Wirig* was wrongly decided. The better interpretation is that the legislature expressly intended the statute to preempt any common law or statutory law claims based upon the same underlying facts.

In an apparent attempt to revise its prior holding, the Minnesota Supreme Court in *Williams* "clarified" its holding in *Wirig* by stating that it permitted the battery claim to proceed because it required "different elements of proof and address[ed] different injuries."[77] Significantly, nowhere in *Wirig* does the court even discuss the elements of proof of either claim. Indeed, the court specifically held that the battery and the sexual harassment were the "same wrongful conduct."[78]

Perhaps Magistrate Judge Erickson in *Grozdanich* stated the clearest analysis. After discussing *Vaughn* and Judge Doty's distinction of that holding in *Moss*, Magistrate Judge Erickson noted:

> This distinction is instructive in our consideration of this aspect of the Plaintiff's claims. Here, the duty imposed by the doctrines of negligent retention, and supervision have merged with those imposed by the MHRA, when, on May 22, 1996, the Plaintiff informed her Leisure Hills [employer] that Parson had sexually assaulted her. At that moment, Leisure Hills became aware that Parson posed a potential threat to the safety of others, and was placed on notice of Parson's sexual harassment. From that point forward, Leisure Hills' statutory duty—to take "timely and appropriate remedial action—necessarily *subsumed* any corresponding common law duty to take remedial measures, so as to ensure the safety of others, as required by the negligent retention doctrine, and to use ordinary care in supervising its workplace, as required by the negligent

76. Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 378 (Minn. 1990).
77. Williams v. St. Paul Ramsey Med. Ctr., Inc., 551 N.W.2d 483, 485 (Minn. 1996).
78. *Wirig*, 461 N.W.2d at 379.

> supervision doctrine. Thus, to the extent that the Plaintiff's negligent employment claims request damages, for these asserted breaches of Leisure Hill's duty of care to the Plaintiff, which occurred on or after May 22, 1996, they are preempted by the MHRA."[79]

Therefore, where the *same alleged conduct* would violate the MHRA, and would also state a separate common law or statutory cause of action,[80] the legislature's intent is clear in the express language of the MHRA that "as to acts declared unfair by section 363.03, the procedure herein provided shall, while pending, be exclusive."[81]

79. Grozdanich v. Leisure Hills Health Ctr., Inc., 25 F. Supp. 2d 953, 981 (D. Minn. 1998) (citations omitted, emphasis added). The magistrate judge then distinguished the negligent employment claims that occurred *before* May 22, 1996. He noted that those claims occurred prior to the sexual assault and therefore he permitted those claims to "pass, at this time, the preemption hurdle." *Id.*

80. *E.g.*, Karst v. F.C. Hayer Co., Inc., 447 N.W.2d 180, 187 (Minn. 1989).

81. MINN. STAT. § 363.11 (1994).

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