

# LABOR & EMPLOYMENT REPORT

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## Court says: "boorish chauvinistic...immature" behavior is not sexual harassment

In a remarkable decision, the Eighth Circuit of Appeals (which includes Minnesota) rejected a sexual harassment claim filed by a woman whose supervisor engaged in a series of sexually oriented behaviors around her. Although the facts looked bad for the employer, the court determined that there still was not a sufficient showing of a hostile work environment.

While this alone is unusual, given the rather graphic nature of the supervisor's behavior in this case, the truly surprising element of the case is that the appeals court overturned a jury verdict (of more than one million dollars!) in favor of the employee in the lower court. This rarely happens because

under the law, the appeals court should not overturn the jury just because they disagree with the findings. Instead, they have to conclude that no reasonable jury could have found in favor of the employee based on that set of facts.

If that is what the court said, the following are the facts as described by the opinion:

Just two weeks after Diana Duncan was hired by General Motors as a training clerk, her supervisor, James Booth, invited her to dinner to solicit a sexual relationship with her. After declining, Booth engaged in a series of sexually oriented behaviors towards her, including having a naked woman as a screen saver on his computer (which Duncan had to use because it was the only computer with certain software that she needed), unnecessarily touched

Duncan on the hand numerous times, had a planter in his office shaped like a male with a hole in the front of the pants for a cactus to protrude; occasionally showed Duncan a sexually-oriented pacifier; required Duncan to draw his planter instead of auto parts to demonstrate her drawing ability to obtain an advancement to an illustrator's position; hung a poster that depicted Duncan as President of the Man Hater's Club of America; and asked Duncan to type the beliefs of the "He-Men Woman Hater's Club."

Duncan complained about this behavior to other supervisors and to her union officials, who directed her to the Director of Personnel at the plant. The Director of Personnel removed some of the offending articles from Booth's work area, and requested that the company's EEO Coordinator undertake a full investigation. The EEO Coordinator promptly met with Duncan to ask for a complete, written account of the allegations, while she herself began to prepare a series of recommendations for changing the workplace environment. However, Duncan never finished the written account, choosing instead to quit her job and sue the company.

Duncan presented her claims of sexual harassment and constructive discharge (being forced to quit to escape intolerable working conditions) to a jury in federal court. The jury awarded her \$4600 in back pay and \$1,000,000 in

### ■ WHAT'S INSIDE ■

- New Law Protects Some Employers Giving References *Page 2*
- It Just Got Harder For Employers to Win Unemployment Cases *Page 3*
- Labor & Employment Section *Page 3*
- Welcome Our New Attorneys! *Page 4*

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emotional distress damages. An award of that size for emotional distress is a clear indication that the jury sympathized greatly with Duncan for the behavior that she had to endure from her supervisor.

The Eighth Circuit reversed the jury award, finding that the above conduct was not sufficiently severe or pervasive under the law, and was not sufficient to force a reasonable person to quit. The judges stated that Duncan should have let GMC have a reasonable opportunity to solve the problem, and she failed to do so. The court said "Booth's actions were boorish, chauvinistic, and decidedly immature" but they did not create a hostile work environment and were not sufficient to force a reasonable person to quit. *Duncan v. General Motors Corp.*, Nos. 00-3544/02-1411.

Could this decision be a signal that the Eighth Circuit is going to scrutinize hostile work environment cases more carefully? Might we see juries instructed to find that sexual harassment took place only if they are presented with such outrageous behavior that nobody could disagree? Maybe, or maybe this case tells us that the Circuit Court might be more sympathetic to employees if they wait to see what the company would do in response to the claims. Perhaps it did not seem fair to the judges that Duncan reported the incidents, got a very positive and encouraging response from the company and then quit and sued them anyway. This case proves how very important it is for an employer to demonstrate a quick, serious response to complaints of harassment in the workplace.

We'll have to wait for more decisions but this one certainly gives us hope that the courts are going to take a close look at what behavior is needed to show illegal harassment and what employers can do to persuade the courts that they are not legally responsible.

For more information, please contact Janet Ampe at 612.373.8431.



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# New Law Protects Some Employers Giving References

Minnesota recently passed a new law to protect some employers responding to requests for references. Certain providers or their employees are now protected when responding to written inquiries. The protections cover the following types of employers:

*residential treatment programs, service programs, or group homes for children and juveniles; nursing homes; home hospice programs; personal care provider organizations; day training and habilitation services for developmentally disabled individuals; intermediate care facilities and other facilities licensed to provide residential services to developmentally disabled individuals; and board and lodging facilities.*

The protection does not extend to disclosures that are made fraudulently or

with disregard for the truth of the information. When an employer receives a written request for information, it may disclose, in writing, the following information about the employee:

- dates of employment
- compensation and wage history
- the employee's job description and duties
- any training and education provided by the employer
- any acts of violence, theft, harassment, or illegal conduct by the employee documented in the personnel record that resulted in disciplinary action or resignation (If the employee provided a written response, the response must also be included.)

With additional written authorization from the employee, the employer can also provide:

1. written evaluations and the employee's written response
2. disciplinary warnings and the employee's written response from the five years prior to the signed authorization

If so requested, the employer must also provide a copy to the employee.

Please contact Marnie Polhamus at 612.373.8405 for more information.



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# It Just Got Harder for Employers to Win Unemployment Cases

Minnesota's unemployment compensation statute is designed to create a presumption of entitlement to benefits in favor of the departed employee. Generally, unless the employee resigned without good cause attributable to the employer, or was terminated for reasons of misconduct, the terminated employee would prevail in the claim for benefits.

To prove misconduct, the employer had to meet the "Tilseth standard", derived from an old Minnesota Supreme Court decision incorporating the standard developed at common law for interpreting a similar provision of the Wisconsin unemployment statute. The Tilseth standard required proof that the employee had intentionally disregarded the employer's interests or the standards of behavior that an employer had a right to expect of its workers, or had engaged in negligence to such a degree as to be deemed similarly culpable.

Two years ago, the unemployment compensation statute was amended and a specific definition of misconduct was inserted. This definition restated the essential principles of

the Tilseth standard but did not repeat it verbatim. Thus, postamendment decisions of the Minnesota Supreme Court concluded that the legislature did not intend the old definition to carry over into the new law, and that a fresh interpretation of the statutory definition was necessary without regard to previous decisions applying the old standard.

In *Houston v. International Data Transfer Corp.*, 645 NW 2d 144 (Minn 2002), the Minnesota Supreme Court considered the new definition in the context of a claim involving a telephone service representative whom a customer claimed was rude and unresponsive in a service call. Although the employee claimed that she had acted properly, the employer nevertheless fired her and sought to contest her claim for unemployment compensation benefits.

The Court decided to split the test into two sub-parts - the first required a showing that the employee intentionally engaged in the behavior that led to termination. No problem there - that was the same as the old definition. The second sub-part required proof that the employee intended to disregard the standards of behavior that the employer expected. Instead of merely hav-

ing to show the intent to act, the employer must now show the intent to misbehave. Naturally, the court then ruled that the operator who was trying to help the customer, but infuriated him instead, was entitled to benefits since she may have acted improperly but she did not intend to do so.

This case is a problem for employers because now, we have to pass two tests instead of one. It will not be enough to prove that the employee did something that no employer could tolerate. Now, we also have to show that the discharged employee knew that the behavior was wrong and just did not care. Given how contrite and innocent employees claim to be once they step into the appeal hearing, this will be a difficult standard to meet.

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# Welcome Our New Attorneys!

Felhaber, Larson, Fenlon and Vogt, P.A. is pleased to announce that Janet C. Ampe and Karen Ciegler Hansen have joined our firm. Please join us in welcoming our new attorneys!

## Janet C. Ampe

Ms. Ampe graduated with a B.A., summa cum laude, from the University of Minnesota Carlson School of Management, in 1989. She received her J.D., summa cum laude, from the William Mitchell College of Law in 2002, graduating in the Top 2% of her class. Ms. Ampe will focus her practice on labor and employment issues.



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## Karen Ciegler Hansen

Ms. Ciegler Hansen graduated from the University of Illinois at Urbana-Champaign in 1976 with her B.A. and in 1980 with her J.D. Ms. Hansen has over twenty years of experience, concentrating her practice in estate planning, probate, and trust administration.



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The *Labor & Employment Report* is an update on legal developments. It is not intended to be legal advice and should not be relied on without consulting counsel.

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