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Anti-discrimination Law—Sexual Harassment and Battery: Mutually Exclusive Remedies for Independent Harms—Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990)

Joan Fluegel

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**Anti-Discrimination Law—Sexual Harassment and Battery: Mutually Exclusive Remedies for Independent Harms—**Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990)

"Sexual harassment...is not about sex. If someone were to kill another person with a rolling pin, we would not consider it cooking."¹

### Introduction

Sexual harassment is an assertion of power. Sexual harassment in employment promotes the belief that a woman's sexuality is valued above her role as a contributing worker. Sexual harassment is discrimination with the purpose and effect of keeping women in their historical positions as persons able to change their circumstances only by trading on their sexuality.² This socially imposed incon-

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gruity between the role of worker and the role of woman may be the quintessential discriminatory stereotype.  

Sexual harassment is perpetuated by the enduring belief that sexual innuendo at work is “both natural to men and flattering to women.” Pervading the workplace is the maxim that “there’s no harm in asking.” While it is widely acknowledged that racial slurs in the workplace are intolerable, offensive and probably illegal, references to a woman’s sex or sexuality are tolerated as “human nature.”

Sexual harassment on the job places tremendous barriers on women’s road to economic and social equality. Victims are forced into the untenable dilemma of either acceding to a hostile work environment, or suffering the consequences. One option promises continued harassment, blows to self-worth and professional reputation, and possible physical harm. The second option engenders dismissal, lost promotions or lost benefits. Either choice affirms stereotypes that women, absent sexuality, are powerless.

Sexual harassment covers an expansive range of physical and verbal contact which takes many forms and is pervasive in all employment arenas. Women are two and one half times more likely to be harassed by supervisors than their male colleagues. A study of federal employees published several years ago revealed that forty-two percent of 694,000 women and fifteen percent of 1,168,000 men said they had experienced some form of sexual harassment.

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3. See id. at 361-62. Discriminatory behavior in the workplace reminds women of this incongruity and can interfere with their job performances. As a result, women are often seen as persons less capable than men of performing demanding tasks. Id.


5. Barnes v. Costle, 561 F.2d 983, 1001 (D.C. Cir. 1977). “We are not here concerned with racial epithets . . . which serve no one’s interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm.” Id.

6. See generally Dolkart & Malchow, Sexual Harassment in the Workplace: Expanding Remedies, 23 TORT & INS. L.J. 181, 181-82 (1987) (setting forth examples of typical sexual harassment scenarios and their results, such as loss of economic benefits and work in a hostile and offensive environment).

7. Vermeulen, supra note 4, at 505 n.32 (citing U.S. MERIT SYS. PROTECTION Bd. OFF. OF MERIT SYS. OF REV. & STUDIES, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? 35 (Mar. 1981)). In 1987, a similar study of federal employees was done revealing virtually identical results as the study done over six years earlier: 42% of the female employees and 14% of the men still complained of being sexually harassed in the workplace. U.S. MERIT SYS. PROTECTION Bd. OFF. OF POL’Y & EVALUATION, SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE 16 (1988).

A recently published poll found that one in four of the 803 people surveyed had
For over two decades, sexual harassment in employment has been deemed a form of gender discrimination in violation of both federal and state antidiscrimination laws. At their inception, state and experienced some form of prejudice on the job. Among the types of discrimination reported, gender bias was the most frequently mentioned. The National Law Journal, July 16, 1990 at 1; see also Hodgdon, Fighting Sexual Harassment 9 to 5, Law & Politics, Feb. 1991, at 16 (reporting that 85% of working women say they have experienced sexual harassment, with 15% having experienced severe harassment or physical assault).

"The phenomenon [of sexual harassment] is so widespread precisely because there is nothing socially or psychologically remarkable about the men who practice it." Id. A 1988 survey of 13 schools in the St. Paul-Minneapolis metropolitan area found that 80% of the students considered sexual harassment "prevalent" within their schools. Tanick, Bedbugs, Law & Politics, Feb. 1991, at 19.

8. Any definition of sexual harassment is forced to encompass a wide spectrum of behavior. The term is defined as "sexual pressure imposed on someone who is not in an economic position to refuse it." C. MacKinnon, Feminism Unmodified 103 (1987) [hereinafter Feminism Unmodified]. More simply, sexual harassment is "the unwanted imposition of sexual requirements in the context of a relationship of unequal power." C. MacKinnon, Sexual Harassment of Working Women 1 (1979). Such behavior can range from staring at, commenting upon or touching a woman's body, to demands for sexual intercourse and rape. Vermeulen, supra note 4, at 499.

For an interesting historical perspective on sexual harassment, see Goodman, Sexual Harassment: Some Observations on the Distance Travelled and the Distance Yet to Go, 10 Cap. U.L. Rev. 445 (1981) (Although the legal system, in responding to "changes in the political climate and popular conceptions," has recognized a cause of action for gender discrimination, substantial developments in the law will only occur through changes in the fundamental relations between the sexes.).

9. Men can also be victims of sexual harassment. This Note's focus on sexual harassment of women by men is not intended to suggest otherwise.

10. Sexual harassment cases differ from more readily understood discrimination cases. MacKinnon writes:

To hold that a woman target of unwanted heterosexual advances would not be in that position if she were not a woman is both the point and very different from requiring a plaintiff to prove that she was victimized as a woman because a man made sexual advances to her meaning to discriminate against women.


Sexual harassment has a dual nature. It is class-based discrimination enforced by individual victimization. Id. at iv. Frequently, gender-based inequality is enforced by patronizing or profit-motivated acts which are no less denigrating or damaging because they lack a tangible discriminatory motivation. The intent to discriminate should not be an element of sexual harassment. Id. at v.

Gender discrimination occurs when women are generally paid lower wages than men, or, as a rule, are promoted at a slower rate than men. These are examples of discrimination that courts will impute to the employer and will punish. It may be much more difficult, however, to prove harassment of a single or small number of employees than to show a general trend of discrimination. All sexual harassment is gender discrimination; not all gender discrimination is sexual harassment.

The acceptance of sexual harassment as gender-based discrimination acknowledges that sexual initiatives which men may perceive as acceptable and normal sex-role behavior are, in fact, damaging to women. From one male perspective, no harm occurred if none was intended. See id. at ii. Balancing this harm with the absence of
federal statutes provided victims with some recourse. Now, these statutes provide victims with a comprehensive remedy for sexual harassment and other forms of gender discrimination.

Victims of sexual harassment have historically chosen to bring any valid business, governmental or societal purpose to the practice of sexual harassment tips the scale in favor of eliminating the damaging behavior. MacKinnon believes that "[t]he existence of a neutral ground between women's and men's perspectives on sexual issues, and the proper posture of the law, depend upon the relation between the sexes, the role of sexuality in work... and a theory of the state [opposing sexual harassment]." Id. at iii.

11. In 1969, the Minnesota Legislature amended the Act Against Discrimination by adding prohibitions against gender-based discrimination in employment. See Act approved June 6, 1969, ch. 975, 1969 Minn. Laws 1938 (codified as amended at MINN. STAT. § 363.03, subd. 1 (1990)). The 1969 amendment obligated employers, employment agencies and labor unions to refrain from such discrimination, giving Minnesotans an alternative to actions based on Title VII. Id. The State Act Against Discrimination is now the Minnesota Human Rights Act. MINN. STAT. ch. 363 (1990).


   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.


The Equal Employment Opportunity Commission created guidelines on sexual harassment for the benefit of federal courts and others grappling with the somewhat vague language of Title VII. See 29 C.F.R. § 1604.11 (1980). Section 1604.11 of the EEOC guidelines states in pertinent part:

   (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment 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 such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.

   (b) In determining whether alleged conduct constitutes sexual harassment, the [Human Rights] Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.

Id. (footnote omitted).

claims under state or federal discrimination statutes while simultaneously bringing claims under other theories. Plaintiffs often raised parallel claims because Title VII and earlier versions of the Minnesota Human Rights Act (MHRA) were interpreted to authorize only equitable remedies. The MHRA currently allows recovery of compensatory damages up to three times the amount of actual damages, punitive damages (capped at $8,500), damages for mental anguish, attorney's fees and a civil penalty. Such recovery is limited to damages resulting from discrimination, including those resulting from sexual harassment. Such recovery is not excessive in light of the damaging and pervasive nature of the wrongful act.

Still, remedies under the MHRA were not intended to, and cannot, adequately compensate victims of torts such as battery. Nevertheless, in Wirig v. Kinney Shoe Corp., the Minnesota Supreme Court held that a woman who was battered in an environment charged with sexual harassment is not entitled to damages for that battery, but is limited to the remedies provided by the MHRA.

The Wirig court interpreted the exclusive remedy clause of the MHRA to allow parallel battery claims, and then crippled such actions by disallowing parallel damage recovery. As a result, Wirig will change the way that sexual harassment claims are litigated in Minnesota.

This Note examines the Minnesota Human Rights Act as it relates to sexual harassment in employment. This Note will also examine the remedies currently available under the MHRA and the future consequences of the Wirig decision. The history of the MHRA, legislative intent, and rudimentary legal principles all support the supreme court's decision to allow battery claims in sexual harassment litigation—but there is no support for the court's exclusion of damages in those actions.

13. See 42 U.S.C. § 2000e-5(g) (1988) (Title VII allows courts to award a victorious plaintiff reinstatement, backpay or any other equitable relief as the court deems appropriate.).


15. See generally FEMINISM UNMODIFIED, supra note 8, at 47-55 (discussing studies by Working Women United Institute and Redbook showing physical as well as emotional effects of women who have experienced harassment).

16. 461 N.W.2d 374 (Minn. 1990).

17. Id. at 377-79.

I. HISTORY OF THE LAW

A. The Minnesota Human Rights Act

The MHRA has been evolving into its present state for nearly fifty years. Prohibitions against gender-based discrimination are surprisingly recent, yet the Act as it now stands, is a relatively comprehensive piece of legislation. The MHRA secures freedom from gender-based discrimination in employment. This freedom is effectuated by allowing aggrieved parties to bring administrative or district court actions against perpetrators of gender discrimination.

19. See Auerbach, The 1967 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioners' Model Anti-Discrimination Act: A Comparative Analysis and Evaluation, 52 MINN. L. REV. 231 (1967). In 1943, Governor Edward J. Thye created the Governor's Interracial Commission. Id. at 232 n.2. In 1955, Governor Orville Freeman created the Governor's Commission on Human Rights. The State Commission Against Discrimination was created in 1961 by amendment to the State Fair Employment Practices Commission. The State Act Against Discrimination was passed in 1965. Id. at 231. In 1967, the Minnesota Legislature amended the State Act Against Discrimination, creating a new Department of Human Rights in order to replace the State Commission Against Discrimination as an administrative agency and to assume the duties of the Governor's Commission of Human Rights and the Governor's Commission on the Status of Women. Id. at 231-32.

20. The 1969 amendments to the Act were the first to add gender to the list of protected classes. Act approved June 6, 1969, ch. 975, § 3, 1969 Minn. Laws 1937, 1938 (codified as amended at MINN. STAT. § 363.03, subd. 1(2) (1990)).

When the Minnesota Legislature amended the Act in 1967, they looked to the Uniform Law Commissioners' Model Anti-Discrimination Act, which prohibited employment discrimination on the basis of race, color, religion, sex or national origin. Auerbach, supra note 19, at 232 (emphasis added) (citing NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM LAW COMMISSIONERS' MODEL ANTI-DISCRIMINATION ACT (1966)). However, the Legislature's amendments prohibited discrimination only on the basis of “race, color, creed, religion or national origin.” See Act approved May 25, 1967, ch. 897, § 12, 1967 Minn. Laws 1932, 1934 (codified as amended at MINN. STAT. § 363.03, subd. 1). Only the Model Act's reference to sex was eliminated; thus, gender discrimination was not prohibited. Auerbach, supra note 19, at 245-46.

This exclusion was supported by educated members of the bar. See Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 MINN. L. REV. 877, 881 (1967). Miller wrote:

The sharp contrast between constitutional doctrines in the areas of sex and racial classifications must be considered as a relevant factor by the Equal Employment Opportunity Commission in interpreting Title VII. The growing and well-defined national policy that a man should be measured by his individual worth, with his race regarded as an irrelevancy, points the way for the Commission in that area. Hence, a vigorous application of a law banning discrimination in employment against individuals on the basis of race is justified.

Just as clearly, our national policy with respect to equality for women has not been aimed at the same goal. Conceding that women are or should be entitled to the same rights as men with respect to citizenship, few foresee or hope for a day when a person will be viewed as an individual without regard to sex.

Id. at 887 (emphasis added).

21. See MINN. STAT. § 363.06, subd. 1(2) (1990) (grievances filed with the Depart-
Section 363.03 of the Minnesota Statutes states that, unless based on a bona fide occupational qualification, it is unfair for an employer, because of gender:

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or
(b) to discharge an employee; or
(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.\(^{22}\)

The 1982 amendments to the MHRA added sexual harassment to the definition of discrimination:\(^{23}\)

"Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:

(1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment . . . ;

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment . . . ; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . ; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.\(^{24}\)

B. Legal Theories of Sexual Harassment

Two legal theories of sexual harassment have been applied by courts and analyzed by scholars: *quid pro quo* sexual harassment and hostile or offensive environment sexual harassment.\(^{25}\) Both subject employers to liability under federal and state law.

*Quid pro quo*\(^{26}\) sexual harassment occurs when "submission to sex-
ual conduct is made a condition of concrete employment benefits."27 Victims of this type of sexual harassment are explicitly or implicitly forced to choose between "accrediting to sexual demands and forfeiting job benefits, continued employment or promotion, or otherwise suffering tangible job detriments."28 To establish a *quid pro quo* sexual harassment claim, a plaintiff must prove the following elements as a part of the prima facie case:

1. the employee belongs to a protected group.
2. the employee was subject to unwelcome sexual harassment.
3. the harassment complained of was based upon sex.
4. the employee's reaction to the harassment complained of affected tangible aspects of the employer's compensation, terms, conditions, or privileges of employment. . . [and]
5. Respondeat superior.29

In order to rebut a prima facie case in a *quid pro quo* action, the employer must show some legitimate, nondiscriminatory motive for the termination or change in employment circumstances. The plaintiff can overcome this rebuttal by showing that the motive offered by mutual consideration which passes between the parties to a contract, and which renders it valid and binding." BLACK'S LAW DICTIONARY 1248 (6th ed. 1990).

*Quid pro quo* sexual harassment also may provide a cause of action to employees other than the victim. The EEOC guidelines suggest that an employer may be liable for gender discrimination to applicants who were denied a position, for which they were qualified, or employment benefits because the position or employment benefits were given to another in exchange for submission to sexual demands. 29 C.F.R. § 1604.11(g) (1990).

Albeit rare, a few courts have heard reverse *quid pro quo* claims. See, e.g., DeCintio v. Westchester County Medical Center, 807 F.2d 304, 308 (2d Cir. 1986) (Male employees failed to establish prima facie case of discrimination under Title VII when supervisor hired paramour rather than promoting plaintiffs.); King v. Palmer, 778 F.2d 878, 881 (D.C. Cir. 1985) (Prima facie case established by showing that less qualified employee, who had sexual relations with the individual partially responsible for making promotions, was promoted over better qualified plaintiff.); Toscano v. Nimmo, 570 F. Supp. 1197, 1199 (D. Del. 1983) (Supervisor promoted employee who had submitted to his demands for sex instead of promoting plaintiff.).


The issue of notice is hotly debated. See generally, Note, Hostile Environment Sexual Harassment and the Imposition of Liability Without Notice: A Progressive Approach to Traditional Gender Roles and Power Based Relationships, 24 NEW ENG. L. REV. 917 (1990) (encouraging the imposition of liability without notice); see also Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979) (the first case to impose vicarious liability for *quid pro quo* sexual harassment without notice to the employer). Closer examination of notice requirements is beyond the scope of this Comment.
the employer was merely pretext for a discriminatory motive.\textsuperscript{30}

Hostile environment sexual harassment occurs when "an employer create[s] or condone[s] a substantially discriminatory work environment, regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination."\textsuperscript{31} Requiring an employee to endure sexual harassment while working inflicts disparate, discriminatory treatment on that employee, and is prohibited.\textsuperscript{32} A plaintiff proceeding under a hostile environment theory must meet elements substantially similar to those listed above regarding \textit{quid pro quo} harassment.\textsuperscript{33}

\textbf{C. \textit{Damages under the Minnesota Human Rights Act}}

The MHRA, like its federal counterpart, Title VII, provides for recovery of back pay, reinstatement, injunctive relief, attorneys fees and costs.\textsuperscript{34} The Minnesota Legislature modelled the MHRA after

\begin{itemize}
\item \textsuperscript{30} \textit{See} McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) (setting forth the three-part burden-shifting analysis); \textit{see also} Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) (model for the Supreme Court McDonnell Douglas test).
\item Minnesota courts must apply the McDonnell Douglas analysis in actions brought under the MHRA. \textit{See} Sigurdson v. Isanti County, 386 N.W.2d 715, 720-21 (Minn. 1986); \textit{see also} Danz v. Jones, 263 N.W.2d 395 (Minn. 1978) (adopting of the three-part McDonnell Douglas analysis).
\item Bundy v. Jackson, 641 F.2d 934, 943-44 (D.C. Cir. 1981) (emphasis in original) (Firm's discriminatory service toward Hispanic clients created a discriminatory work environment for its Hispanic employees.).
\item \textit{See} Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982); \textit{see also} Moylan v. Maries County, 792 F.2d 746, 750 (8th Cir. 1986) (The Eighth Circuit Court of Appeals adopted the hostile environment theory and the test set out in \textit{Henson}).
\item The \textit{Henson} court identified the elements necessary to establish a prima facie case of hostile work environment harassment:
\begin{itemize}
\item The employee belongs to a protected group . . . ;
\item The employee was subject to unwelcome sexual harassment . . . In order to constitute harassment, this conduct must be unwelcome in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive . . .
\item The harassment complained of was based upon sex . . . In proving a claim for hostile work environment due to sexual harassment, therefore, the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment . . .
\item The harassment complained of affected a 'term, condition, or privilege' of employment . . . [The sexual harassment] must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment . . .
\item Respondeat Superior. . . . The employer knew, or should have known, of the harassment in question and failed to take prompt remedial action.
\end{itemize}
\item Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982) (citations and footnotes omitted).
\item \textit{Minn. Stat.} § 363.071, subd. 2 (1990). In a case involving discrimination in employment, the "judge may order the hiring, reinstatement or upgrading of an ag-
\end{itemize}
Title VII. Consequently, decisions interpreting Title VII justify similar treatment under the MHRA. However, the MHRA is far more comprehensive than Title VII because it provides for recovery of treble damages, punitive damages, damages for mental anguish and suffering, in addition to payments for civil penalties.

The MHRA sets no guidelines for treble damage awards. It merely states: "In all cases where the judge finds . . . an unfair discriminatory practice, the . . . judge shall order . . . compensatory damages in an amount up to three times the actual damages sustained." The MHRA caps punitive damages at $8,500. These damages are awarded pursuant to Minn. Stat. § 549.20. This section currently requires a showing of "deliberate disregard" for the rights or

grieved party . . . with or without back pay, admission or restoration to membership in a labor organization, . . . or any other relief the . . . judge deems just and equitable." Id. § 363.071, subd. 2(a).

Standard equitable remedies, such as the ones noted above are insufficient to compensate victims:

[D]standard equitable remedies, such as backpay and reinstatement, provide no compensation to a plaintiff who has not quit or been fired from her job. Moreover, the issuance of an injunction cannot compensate a plaintiff who remains on the job for the abuse she has already suffered. Thus, whether an employee stays on the job or leaves, her personal injuries such as her anguish, her physical symptoms of stress, her sense of degradation and humiliation, and the cost of her psychiatric or psychological care will remain uncompensated if she relies solely on Title VII.


35. See Danz v. Jones, 263 N.W.2d 395, 398-99 (Minn. 1978) (The language of Title VII is "remarkably similar" to that of Minnesota Statutes Chapter 363, and Title VII principles are applied in construing Minnesota Statutes Chapter 363.); Hubbard v. United Press Int'l., Inc., 330 N.W.2d 428, 441 (Minn. 1983) (Because of the substantial similarities in the language and purpose of Title VII and the MHRA, the Minnesota Supreme Court has applied principles developed in the adjudication of claims arising under Title VII in construing the MHRA.).

36. See Danz, 263 N.W.2d at 399; Hubbard, 330 N.W.2d at 441.

37. MINN. STAT. § 363.071, subd. 2 (1990).


Judge Short dissented in Maeser because the trial court trebled the back pay award. She viewed the trial court's use of section 363.071 as an attempt to circumvent the punitive damages cap. Judge Short described the legislative intent behind the statute as victim restoration and not perpetrator punishment. Id. (Short, J., dissenting).

39. MINN. STAT. § 363.071, subd. 2 (1990) (emphasis added).

40. The statute now reads, in part: "In all cases the administrative law judge may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees, in addition to punitive damages in an amount not more than $8,500." Id.

41. Id. § 549.20.
When Wirig was decided, however, the standard was one of willful indifference. Damages for mental anguish are not limited by Minn. Stat. § 363.071. Section 363.071 mandates the imposition of civil penalties, but gives a judge discretion in determining the amount of such penalties. This section instructs that the amount should be determined by "taking into account the seriousness and extent of the violation, the public harm occasioned by the violation, whether the violation was intentional, and the financial resources of the respondent." Despite the plenary nature of the MHRA, claimants have traditionally brought parallel tort claims to compensate for nondiscriminatory harm. Claimants most frequently utilized battery, assault and emotional distress as parallel theories.

42. Id. This section also provides a list of factors for courts to examine. It reads in pertinent part:

Punitive damages shall be allowed... only upon clear and convincing evidence that the acts of the defendant show a willful indifference for the rights or safety of others.... Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public..., the profitability of the misconduct..., the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damages awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Id. § 549.20.

43. With regard to the defamation claim, the court held that Kinney's public firing of Wirig without an investigation rose to the level of gross negligence, but not to the level of willful indifference, the standard necessary to award punitive damages. See Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 381 (Minn. 1990). The punitive damages standard employed by the court has since been modified to a standard of "deliberate disregard." Act approved Aug. 1, 1990, ch. 555, § 15, 1990 Minn. Laws 1563 (codified at MINN. STAT. § 549.20, subd. 1(a) (1990)).

44. MINN. STAT. § 363.071, subd. 2 (1990).

45. Id. The language of the statute, "[t]he... judge shall order any respondent found to be in violation of [this] section... to pay a civil penalty to the state," mandates the imposition of civil penalties. Id. (emphasis added).

"Shall" makes the provisions to which it applies mandatory. Id. § 645.44, subd. 16.

46. Id.

47. In tort, barring certain exceptions, a percentage of the money recovered under the suit must be used to pay attorney's fees, while the MHRA provides for the recovery of attorney's fees. Id. § 363.071, subd. 2.

48. See Note, Legal Remedies for Employment-Related Sexual Harassment, 64 MINN. L. REV. 151, 167-73 (1979) [hereinafter Legal Remedies] (setting forth tort recovery as a means of attaining just recovery); see also Note, Sexual Harassment Claims of Abusive Work Environment Under Title VII, 97 HARV. L. REV. 1449, 1463-66 (1984) ("A Title VII plaintiff should not have to depend on the existence of favorable state tort laws in
A battery claim addresses single instances involving physical force.49 When an unconsented touching is part of a continual pattern of harassment, a battery claim justifies compensation for damages proximately caused by the touching alone.50 The economic and emotional harm must stem from the touching itself, not from previous or subsequent harassment.51 Consent is a defense to battery but not to sexual harassment.52

Like battery, parallel assault claims are limited to specific acts and the resulting, proximate harms.53 Assault, however, addresses only

order to be fully compensated for violations of rights created by the federal statute."). See generally Note, Continental Can Co. v. Minnesota: Sexual Harassment by Nonsupervisory Employees Makes Employer Liable, 10 CAP. U.L. REV. 625, 627 (1981) ("The law of intentional torts, however, has, at best, provided the victim of sexual harassment with only a limited recovery."). But see Note, Kyriazi v. Western Electric Co.: Damages for Sexual Harassment Title VII and State Tort Law, 10 CAP. U.L. REV. 657, 666 (1981) (Parallel tort recovery within sexual harassment actions under Title VII allows the victims compensation for emotional damage and provides compensatory and punitive damages, all of which may be more appropriate than the reinstatement of employment allowed under Title VII.).

In 1975, the Supreme Court held that Title VII does not limit a claimant's search for relief so as to preclude other tort remedies. Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459 (1975).


50. Id.

51. Id.

52. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 68 (1986) (Correct inquiry on issue of sexual harassment was whether sexual advances were unwelcome, not whether employee's participation in them was voluntary.); see also PROSSER AND KEETON, supra note 49, at 11.

Consent ordinarily bars recovery for intentional interference with person or property. It is not, strictly speaking, a privilege, or even a defense, but it negates the existence of any tort in the first instance. It is a fundamental principle of the common law that volenti non fit injury—to one who is willing, no wrong is done. See id. at 112. However, in the context of a sexual harassment suit, the Supreme Court has stated that:

The fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit .... The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome" .... The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.


53. Assault is any act which raises an apprehension of battery. See PROSSER AND KEETON, supra note 49, at 43. More specifically, a cause of action for assault requires an intentional, unlawful offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt. See Dahlin v. Fraser, 206 Minn. 476, 478, 286 N.W. 851, 852-53 (1939).
one piece of the misconduct. A regular pattern of sexual harassment may create a hostile atmosphere without creating a reasonable apprehension of imminent offensive contact. The theory of assault is, therefore, less than completely adequate to redress harms caused by sexual harassment.

Common law theories of intentional and negligent infliction of emotional distress are well-suited for cases of sexual harassment. Nevertheless, a plaintiff utilizing these theories may be required to present evidence of conduct sufficient to meet a threshold higher than that required of claimants under the MHRA. For example, infliction of emotional distress is actionable only when conduct is deemed "extreme and outrageous."55

54. One goal in punishing sexual harassment is protection of an individual's peace of mind. Neither intentional nor negligent infliction of emotional distress focuses solely on physical injury. The two torts also require an examination of the mental impact of the wrongful acts on the victim.

Development of the intentional and negligent infliction of emotional distress causes of action, like sexual harassment, has been fairly recent. Judicial reluctance to develop the distress theories stemmed in part from a perceived inability to value mental injuries: "Mental pain or anxiety . . . the law cannot value, and does not pretend to redress, when the unlawful act causes that alone." PROSSER AND KEETON, supra note 49, at 55 (quoting Lynch v. Knight, 9 H.C.L. 577, 598, 11 Eng. Rep. 854 (1861)).

The argument that mental injury is impossible to measure, falls apart upon the realization that "'mental suffering is scarcely more difficult of proof, and certainly no harder to estimate in terms of money, than the physical pain of a broken leg, which never has been denied compensation.'" Id. "'As all pain is mental and centers in the brain, it follows that as an element of damage . . . the injured party is allowed to recover for actual suffering of mind and body when they are the immediate and necessary consequence of the negligent injury.'" Id. at 55 n.5 (quoting Hargis v. Knoxville Power Co., 175 N.C. 31, 33, 94 S.E. 702, 703 (1917)).

Prosser and Keeton's discussion of emotional distress includes direct reference to the sexual harassment theory:

The work environment, for example, is one in which employees must expect to be evaluated, not always favorably; thus questioning, criticism, and discharge of an employee do not necessarily constitute [actionable intentional infliction of emotional distress]. The work culture in some situations may contemplate a degree of teasing and taunting that in other circumstances might be considered [actionable]. But though the social context may make some questionable conduct tolerable, the same social context may make other acts especially outrageous. Sexual harassment on the job is undoubtedly an intentional infliction of emotional distress, for example, and harassment is probably more readily found in the acts of a supervisor than in the acts of acquaintances at a dinner party. PROSSER AND KEETON, supra note 49, at 18.


A plaintiff must prove four elements in order to sustain an intentional infliction of emotional distress claim:

(1) the conduct must be extreme and outrageous;
(2) the conduct must be intentional or reckless;
(3) it must cause emotional distress; and
(4) the distress must be severe.
II. **Wirig v. Kinney Shoe Corporation**

A. The Facts

Margaret Wirig was employed by Kinney Shoe Corporation as a part-time cashier in a retail store from December 1984 until July 31, 1985, when she was fired.\(^{56}\) For approximately four months prior to her termination, a nonsupervisory, nonmanagerial salesperson, Mark Thorson, was employed at the same store and worked with Wirig.\(^{57}\)

Without Wirig's consent, Thorson repeatedly patted, pinched, kissed or put his arm around Wirig. Several co-workers and managers observed this behavior. Additionally, Thorson made statements to and about Wirig, including "comments about her body, offensive sexual names, repeated requests for dates with her after she expressed her refusal to date him, and discussions of what he would like to do to her sexually."\(^{58}\)

Wirig complained to several managers, asking them to stop Thorson's behavior. Thorson was never disciplined.\(^{59}\) The managers had not been trained to recognize or handle sexual harassment. At the time the harassment occurred, Kinney had no sexual harassment policy in effect.\(^{60}\)

In July of 1985, Wirig and two others were publicly fired during a special meeting of all store employees. The terminations primarily resulted from uninvestigated allegations of theft made by Thorson.\(^{61}\)

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\(^{56}\) *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374 (Minn. 1990).

\(^{57}\) *Id.* at 376-77 (Thorson was hired in April, 1985.).


\(^{59}\) *Id.* At one point after observing him pinch or pat Wirig, an assistant manager pushed Thorson against a storeroom wall and threatened to fire him the next time he harassed Wirig. The assistant manager's inappropriate threats went unheeded and Thorson's harassment of Wirig continued.

One assistant manager to whom Wirig had complained described Thorson only as a "forward sort of guy." *Id.* When this assistant manager reported to a manager that there were problems between Thorson and Wirig, the manager said: "You are going to have to get them guys working together .... We are all a team." *Id.*

\(^{60}\) *Id.*

\(^{61}\) *Wirig*, 461 N.W.2d at 377. Thorson told a manager and two assistant managers that he had seen Wirig and two other employees steal a carload of shoes. Shortly thereafter, that manager was transferred from the store. Thorson and the assistant managers told the new store manager that they knew of witnesses to the theft. However, these witnesses were never identified and no investigation was ever made. The assistant managers justified the firing with the following assertions:

1. Thorson was certain of his version of the theft;
2. Both assistant managers had heard of the theft;
As a result of the sexual harassment and the resulting termination, Wirig suffered physical effects connected with the ordeal for two years following her termination. The trial court allowed recovery under both the MHRA claim and the common law battery claim.

B. The Court of Appeals’ Analysis

The issue before the Minnesota Court of Appeals was whether the MHRA precluded recovery for a common law battery claim which was based on acts constituting sexual harassment. Both parties cited the same section of the Act to support their arguments.

Kinney argued that Minn. Stat. § 363.11 preempted recovery under the parallel battery claim. Kinney pointed to the portion of the accused employees socialized together; and
4. Actual loss occurred as shown by an audit.

Id.

The firing of the accused employees was done at an employee meeting as an example of the new manager’s attitude toward short audits. Id. Subsequently, Wirig brought a defamation claim based on her termination. Id. at 376. Although significant, the defamation claim is not the focus of this note.

62. Wirig, 448 N.W.2d at 529. Wirig’s psychiatrist testified that she suffered from either post-traumatic stress disorder or adjustment disorder from a depressed emotional state. In addition, Wirig experienced vomiting, significant weight loss and sleep disturbances. Id.

63. Id. at 530. The court impaneled a jury which returned special verdicts on each claim and acted in an advisory capacity on the sexual harassment claim. Id. at 529. The jury determined the following damages:

Compensatory Damages:
- Sexual Harassment $30,000
- Battery $14,000
- Defamation $10,000

Future Damages:
- Sexual Harassment $7,100

Punitive Damages:
- Sexual Harassment $5,000
- Battery $100,000
- Defamation $225,000

Id. at 529-30.

The trial court determined that Kinney had a qualified privilege with respect to the defamation claim and allowed no recovery on that claim. Id. at 530. The court also raised the amount of punitive damages for sexual harassment to the statutory limit of $6,000. Id. at 534. This statutory limit has since been raised to $8,500. See Minn. Stat. § 363.071, subd. 2 (1990).

64. Wirig, 448 N.W.2d at 530. Kinney admitted liability for sexual harassment and sought only to preclude recovery of battery damages. Id. at 528.

Two issues pertaining to the defamation claim were also raised on appeal: first, whether Kinney enjoyed a qualified privilege to accuse Wirig of stealing at a store meeting, and second, whether the $225,000 defamation damages awarded by the trial court were excessive. Id.

65. Id. at 530-31.


67. Wirig, 448 N.W.2d at 530.
that statute which reads: "[A]s to acts declared unfair by section 363.03 . . . , the procedure herein provided shall, while pending, be exclusive." 68

Wirig, in turn, cited the first portion of Minn. Stat. § 363.11, which states:

The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof. Nothing contained in this chapter shall be deemed to repeal any of the provisions of the civil rights law or of any other law of this state relating to discrimination because of race, creed, color, religion, sex, age . . . . 69

The court's goal was to resolve the alleged conflict between the parties' interpretations of section 363.11. 70

The court looked first to the statutory definition of sexual harassment. 71 The definition encompasses sexually motivated physical con-

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68. Id. at 530 (citing MINN. STAT. § 363.11 (1990)) (emphasis added).
69. Id. at 531 (citing MINN. STAT. § 363.11 (1990)) (emphasis added).
70. Id. at 530-31. Both parties argued that the intent of the legislature supported their position. Compare Brief for Appellant at 15-16, Wirig v. Kinney Shoe Corp., 448 N.W.2d 526 (Minn. Ct. App. 1989) (No. C5-89-653) (Legislature has expressly declared that the MHRA’s procedure shall be the exclusive procedure while pending, for claims seeking damages for employment-related batteries of a sexual nature.) with Brief for Respondent at 23-25, Wirig v. Kinney Shoe Corp., 448 N.W.2d 526 (Minn. Ct. App. 1989) (No. C5-89-653) (Statute creating a new remedy or method of enforcing a right that existed before is regarded as cumulative rather than exclusive of the previous remedies, unless an express intention to the contrary exists.).

Kinney argued that legislative intent determines whether common law and statutory procedures are cumulative or if one excludes the other. Brief for Respondent at 35, Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990) (No. C5-89-653) (citing Mulroy v. Sioux Falls Trust & Sav. Bank, 165 Minn. 295, 298, 206 N.W. 461, 463 (1925)). Specifically, Kinney argued:

A statute providing a new method for securing or enforcing an old right does not take away or abrogate previously existing methods, unless the intention to do so is expressly declared or is necessarily implied from the language used. The statute is regarded as giving an additional or cumulative remedy, unless it plainly manifests an intention to make such remedy exclusive. Id. at 36 (emphasis added).

Kinney argued that the Legislature has the power to declare a statutory procedure exclusive, and further, that the language of section 363.11 expressed such an intent, making MHRA procedures exclusive. Id.

In contrast, Wirig argued that "[i]n the absence of a clearly expressed intention to the contrary, the presumption is that the legislature did not intend to change the existing law." Brief for Appellant at 25, Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990) (No. C5-89-653) (citing Claseman v. Feeney, 211 Minn. 266, 271, 300 N.W. 818, 820 (1941)). Wirig also argued that the Minnesota Supreme Court had sanctioned common law causes of action in cases where gender discrimination claims arise from statutorily proscribed behavior. Id. at 26 (citing Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428 (Minn. 1983)). Therefore, reasoned Wirig, since the statute did not explicitly rule out battery claims, the claim should not be preempted under the MHRA. Id. at 25.

71. Wirig, 448 N.W.2d at 530.
tact 72 which, the court reasoned, included battery of a sexual nature.73 Therefore, the court held that a sexually motivated battery occurring at a place of employment is an act declared unfair by Minn. Stat. § 363.03.74

The court examined the distinctions between common law claims and statutory claims under the MHRA.75 These differences, reasoned the court, pointed to an intent by the Legislature to treat claims under the MHRA different from common law claims.76 The court rejected Wirig’s attempt to “circumvent the balance”77 of the scheme specifically created by the Legislature to handle claims under the MHRA.

In effect, the court of appeals allowed sexually-motivated battery to be swallowed up by the “exclusive” provisions of the MHRA when that battery is linked to violations of the MHRA. The court ruled that the gravamen of the complaint sounded in sexual harassment and because Wirig’s procedure under the MHRA was pending, that procedure was exclusive, barring her parallel battery claim arising

72. See Minn. Stat. § 363.01, subd. 10a (1990).

73. Wirig, 448 N.W.2d at 530. The court reasoned further “it is clear that the Minnesota Human Rights Act makes it an unfair employer practice to subject an employee to battery of a sexual nature in connection with employment.” Id. This reasoning led the court to preempt the battery claim. Id.

74. Id. The court examined the definitions of several terms in Minn. Stat. § 363.11 and, specifically, examined the relationship of “procedure” to “remedy.” Id. at 531. “Procedure” is the “mode of proceeding by which a legal right is enforced, as distinguished from the substantive law which gives or defines the right.” Black’s Law Dictionary 1203-04 (6th ed. 1990). “Remedy” is the “means by which a right is enforced or the violation of a right is prevented, redressed or compensated.” Id. at 1294. “Procedure” was deemed to be interchangeable with “remedy.” See Wirig, 448 N.W.2d at 531. The court found that the MHRA provided a new procedure for redress of sexual battery in the workplace, with important differences in procedure and damages. Id. The court reasoned that since the MHRA made the procedure exclusive, and since both common law and statutory acts provided remedies, the common law claim was precluded. Id.

75. Id. at 531. Under the MHRA, punitive damages are capped at $8,500. Minn. Stat. § 363.071, subd. 2 (1990). The limit for punitive damages was $6,000 when Wirig was tried. Wirig, 448 N.W.2d at 531. No common law limit exists for punitive damages. Id. Common law allows jury trials; the MHRA does not. Id. (citing Minn. Stat. § 363.14 subd. 2 (1990)). The common law does not allow awards of attorney fees; the MHRA does. Id. (citing Minn. Stat. §§ 363.14, subd. 3, 363.071, subd. 2 (1990)). Common law does not allow civil penalties or treble damages; the MHRA does. Id. (citing Minn. Stat. § 363.071, subd. 2 (1990)). The statute of limitations under the MHRA is one year. Minn. Stat. § 363.06, subd. 3 (1990). For most common law tort claims, the limitations period is two years. Minn. Stat. § 541.07(1) (1990).

76. Wirig, 448 N.W.2d at 531.

77. Id. The court saw the MHRA as a carefully crafted tool created by the legislature for dealing with complex discrimination claims. The court was hesitant to interfere with the Legislature’s determinations about how such claims should be handled. Id.
out of the same acts which were declared unfair under the Act.\textsuperscript{78} The battery verdict and damages award were vacated.\textsuperscript{79}

\section*{C. The Supreme Court Analysis}

The Minnesota Supreme Court ruled that battery claims may be maintained parallel to claims under the MHRA, but refused to allow recovery of damages under both claims.\textsuperscript{80} The court reasoned that elimination of employment discrimination is a goal that is not best served by eliminating common law battery claims in sexual harassment cases.\textsuperscript{81} Justice Keith, writing for the court, said:

The short of it is that the prohibition of sexual harassment aims at abolishing the pernicious societal prejudices and biases against women that impede the equal opportunity due them in our democracy. For that reason, the essence of the MHRA is societal change. Redress of individual injuries caused by discrimination is a means of achieving that goal.\textsuperscript{82}

In examining the long-held presumption that statutory law is consistent with common law,\textsuperscript{83} the court interpreted Minn. Stat. § 363.11 as not \textit{expressly} excluding battery.\textsuperscript{84} In its effort to liberally construe the MHRA, the court ruled that the legislature did not intend for the MHRA to redress a wrong already encompassed by the common law claim of battery. The court, therefore, held that battery was not an act declared unfair by the statute.\textsuperscript{85}

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\textsuperscript{78} \textit{Id.} at 530-31.
\textsuperscript{79} \textit{Id.} Beyond the court's holding on the parallel battery claim, the court of appeals affirmed the lower court's award of punitive damages for sexual harassment and reversed the trial court's defamation decision by holding that Kinney had no qualified privilege to publish the defamatory statements about Wirig. Finally, the court of appeals decided that the trial court erred in failing to order Kinney to pay a civil penalty to the state pursuant to Minn. Stat. §§ 363.14, subd. 2 and 363.071, subd. 2. \textit{Wirig}, 448 N.W.2d at 536.
\textsuperscript{80} \textit{Wirig}, 461 N.W.2d at 379 (Minn. 1990) (Plaintiff may pursue claims for sexual harassment and/or battery, provided there is no double recovery.).
\textsuperscript{81} \textit{Id.} at 378-79 (Legislature did not design the MHRA to redress intentional, offensive, physical contact already addressed by a common law battery action.).
\textsuperscript{82} \textit{Id.} at 378.
\textsuperscript{83} \textit{Id.} at 377 (citing \textit{In re} Shetsky, 239 Minn. 463, 469, 60 N.W.2d 40, 45 (1953)). “Statutory enactments, even though they provide new procedures to enforce pre-existing rights . . . , are to be read in harmony with the existing body of law, . . . unless an intention to change or repeal it is apparent.” Swogger v. Taylor, 243 Minn. 458, 465, 68 N.W.2d 376, 382 (1955).
\textsuperscript{84} \textit{Wirig}, 461 N.W.2d at 378-79. “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.” \textit{Id.} (footnote omitted).
\textsuperscript{85} \textit{Id.} at 378. The court stated: “Battery does not address discrimination. It does not propose to redress injuries occasioned by society's discriminatory tendencies. It did not develop to change society's biases or prejudices.” \textit{Id.}.
\end{flushleft}
Despite its emphasis on liberal construction and furtherance of the MHRA's policies, the court drastically limited the effect of parallel battery claims. The court disallowed additional recovery for battery when compensatory and punitive damages are awarded for harm suffered as a result of both sexual harassment and battery. In order to recover damages under both theories, the plaintiff must show, by clear and convincing proof, that the conduct upon which battery damages are based is different in kind than that upon which the sexual harassment claim is based.

The court found that Wirig, in recovering attorney’s fees, implicitly chose to recover damages for sexual harassment, and not for battery. Based on this analysis, the court vacated the battery damages.

Finally, the Minnesota Supreme Court held that although Minn. Stat. § 363.071, subd. 2 states that those in violation of the MHRA “shall” pay a civil penalty to the state, the amount of that penalty is left to the discretion of the trial court. Therefore, the court held that the trial court did not abuse its discretion in not assessing a civil penalty.

86. Id. at 379. The court framed the relevant issue as the “question of whether an employee can maintain against her employer both a statutory cause of action for sexual harassment under the ... [MHRA] and a common law cause of action for battery, when both claims arise from the same set of operative facts.” Id. at 377 (emphasis added). Despite the issue set forth, the court’s main focus was damages, not causes of action.

87. Id. at 379.

88. Id. The Minnesota Supreme Court rejected Wirig’s argument that the battery damages were in fact damages for physical misconduct, while the statutory damages were for verbal misconduct. The court stated: “The difference in the size of the two awards, by itself, tells us little; it may only reflect adroit trial tactics in persuading the jury to allocate the major portion of punitive damages to the battery so as to avoid the limitation on such damages in the sexual harassment claim.” Id. (footnote omitted).

89. See Minn. Stat. § 645.44, subd. 16 (1990) (“‘Shall’ is mandatory.”).

90. Wirig, 461 N.W.2d at 381. In actions under the MHRA, “administrative law judges shall order any respondent found to be in violation of any provision of section 363.03 to pay a civil penalty to the state.” Minn. Stat. § 363.071, subd. 2 (1990).

91. Minn. Stat. § 363.071, subd. 2 (1990). The court may have stepped into the shadows when it ruled that civil penalties are not mandatory. This holding flies in the face of clear statutory language depicting the mandatory nature of such penalties. See generally Brief of Amicus Curiae, Minnesota Human Rights Department at 1-6, Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990) (No. C5-89-653) (The Legislature clearly intended to impose a civil penalty in addition to fully adequate compensatory and punitive damages.).

The Legislature demonstrated its intent to distinguish civil penalty awards from other types of damages when it stated that a judge “may ... [award] damages for mental anguish and suffering,” showing such awards to be discretionary. Minn. Stat. § 363.071, subd. 2 (1990) (emphasis added). In contrast, the Legislature wrote that civil penalties “shall be awarded” when discriminatory action is found. Id. (emphasis added).

Upon ruling that the civil penalty was discretionary, the Wirig court reasoned that failure to impose a civil penalty was not an abuse of the trial court’s discretion.
penalty against Kinney.92

III. ANALYSIS

The Wirig decision will have a dramatic impact on sexual harassment litigation in Minnesota. The court of appeals decision disallowing battery claims evoked an outcry from concerned parties throughout the state.93 These parties presented the supreme court with amicus briefs containing well-reasoned analyses in opposition to the court of appeals' decision.94 The Minnesota Supreme Court allowed parallel battery claims, but limited their effect by disallowing parallel damage recovery in most circumstances.

The supreme court purported to rest its decision on policy goals which are diametrically opposed to the outcome in Wirig. The decision, at first blush, may appear to neatly mesh the terms of the MHRA with the judicially entrenched refusal to grant double recovery for a single harm,95 but a fundamental flaw fatally wounds the

The supreme court thereby reversed the court of appeal's sua sponte remand for reconsideration of a civil penalty. Wirig, 461 N.W.2d at 381.

Unlike other awards, civil penalties are paid to the state. This distinction emphasizes the societal nature of harm caused by sexual harassment. See Brief of Amicus Curiae, Minnesota Department of Human Rights at 4. In its brief, the Minnesota Department of Human Rights argued for a mandatory interpretation of the civil penalty clause:

Payment of a civil penalty conveys the important symbolic message that employers who engage in discriminatory acts are answerable for the harm they inflict on the society as a whole. Moreover, payment of a civil penalty serves to compensate the public for its support of an expensive human rights enforcement mechanism, which requires the time, resources, and effort of an entire state agency, government attorneys, and the judiciary.

Id.

92. Wirig, 461 N.W.2d at 381-82. Although the court cited section 363.071, subd. 2, it noted that neither party appealed the trial court's decision on this issue. The court went on to state that "[u]nder the circumstances of this case, we do not find that the trial court abused its discretion." Id.

93. The state bar and related groups showed intense interest in the Wirig decision. Several organizations were granted leave by the supreme court to submit briefs of amicus curiae: the Minnesota Department of Human Rights; the Women's Legal Defense Fund; the Minnesota Chapter of the National Organization of Women (NOW) and Les Soeurs; and the Minnesota Trial Lawyers Association.

94. Each amicus brief generally supported Wirig's argument that her battery claim should not be preempted by the act. See generally Briefs for Amicus Curiae: Minnesota Department of Human Rights; Minnesota NOW and Les Soeurs; Minnesota Trial Lawyers Association; and Women's Legal Defense Fund, Wirig v. Kinney Shoe Corp., 461 N.W.2d 374 (Minn. 1990) (No. C5-89-653).

95. See Greenwood Ranches, Inc. v. Skie Constr. Co., 629 F.2d 518, 521 (8th Cir. 1980) (vacating judgment, refusing to multiply compensatory damages by the number of theories under which claim was asserted); Cunningham v. M—G Transp. Serv., Inc., 527 F.2d 760, 761 (4th Cir. 1975) (finding plaintiff entitled to recover on either theory chosen, but not on both theories); Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 533 (Minn. 1986) (refusing to allow double recovery when evidence
SEXUAL HARASSMENT

analysis: the theories of battery and sexual harassment do not address like injuries. Damages for sexual harassment serve to compensate a victim for harm suffered as a result of discriminatory treatment in employment. Damages for battery serve to compensate a victim for the harm caused by interference with physical autonomy.

In a sexual harassment context, harassing and battering behavior may blur in the eyes of those who choose not to examine the behaviors carefully. But upon mindful examination, the two theories emerge as utterly distinct, independent causes of action which should not be combined to prejudice a class already battling prejudice.

The Wirig holding, while professing to champion the advancement of antidiscrimination policies in Minnesota, effectively creates a novel form of discrimination. Under Wirig, the predominantly female class of sexual harassment victims will be barred from recovering the damages available to all other victims of unconsented touching. The apparent basis for this disparate treatment is the assailant's choice of weapon. If the batterer chooses sex as a weapon, the victim's remedies will be cut short. However, if the batterer chooses nonsexual intimidation as his weapon, the battery will be treated as a "valid" interference with a person's autonomy, and will be punished without the constraints of the MHRA.

The motivation behind sexual and nonsexual battery is identical. In both instances, the aggressor seeks to intimidate and to interfere with the victim's physical autonomy. It is unclear why the addition of supported liability as breach of contract, common law fraud and a violation of the Minnesota Securities Act).

In Clappier v. Flynn, the court was faced with a situation somewhat analogous to that of the Wirig court. Clappier v. Flynn, 605 F.2d 519, 529 (10th Cir. 1979). In Clappier, the Tenth Circuit Court of Appeals reasoned that "[t]he interest protected by the common law of negligence . . . parallels closely the interest protected by the Eighth Amendment prohibition against cruel and unusual punishment . . . Thus the relief afforded under the common-law of torts and [42 U.S.C. §] 1983 is identical." Id. at 529 (citation omitted).

The Clappier court held that if the defendant's liability was grounded only in negligence theory, then standard negligence damages would apply, subject to an offset for contributory negligence. Id. at 530. Further, if the defendant was found liable under 42 U.S.C. § 1983 only, standard damages under that act would be awarded. Id. However, the Clappier court held that if the defendant was found to be both negligent and in violation of section 1983, the section 1983 damages should prevail with damages in the amount allowed by that section. Id. The Tenth Circuit reasoned that the higher standard of culpability under section 1983 required such an apportionment of damages. The court assumed that section 1983 damages would be equal to or greater than those awarded under the negligence claim. Id.

Clappier is clearly distinguishable from Wirig. In Wirig, the court was presented with different acts which caused distinct harms, not two theories addressing the same harm. Furthermore, any damages awarded under the MHRA will generally be lower than those awarded under common law theories, such as battery.
sexual content to the physical contact by the aggressor should result in less compensation to the victim.

Apparently, the addition of sexual content by the aggressor transforms the battery into "sexual harassment." Therefore, under Wirig, a victim's gender effectively becomes a factor in determining, and limiting, the measure of damages. Ironically, the fundamental purpose of the MHRA is to prevent gender from being a factor in decisions affecting employment.

The Wirig holding turned on the interpretation of a single phrase: "[A]s to acts declared unfair by sections 363.03 and 363.123, the procedure herein provided shall, while pending, be exclusive." This phrase led the court to search for legislative intent, and proper policy goals.

A. Legislative History

The legislative history of the MHRA does not support the contention that Minn. Stat. § 363.11 prohibits any and all parallel tort recovery. The exclusivity clause relates only to the administrative processes set out by the legislature when the statute was first enacted. The exclusive procedure provision has remained the same since the predecessor to the MHRA was enacted over thirty years ago. At that time, administrative hearings were the only option for human rights claimants.

The legislature subsequently amended the MHRA to allow parties to bring a civil action after filing with the Human Rights Commission

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96. Wirig, 461 N.W.2d at 378 (quoting Minn. Stat. § 363.11 (1988)).

97. Section 645.16 provides the following guidance for determining legislative intent:

When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

(1) The occasion and necessity for the law;
(2) The circumstances under which it was enacted;
(3) The mischief to be remedied;
(4) The object to be attained;
(5) The former law, if any, including other laws upon the same or similar subjects;
(6) The consequences of a particular interpretation;
(7) The contemporaneous legislative history; and
(8) Legislative and administrative interpretations of the statute.


and waiting at least ninety days. The exclusivity provision mandated an exhaustion of administrative proceedings before filing a court action. At that time, the Legislature refused to amend the exclusivity provision in Minn. Stat. § 363.11 or to allow claimants direct access to the court system. This history strongly suggests that the exclusivity provision was meant to apply to the use of administrative procedures alone. Tort claims are not specifically mentioned. If the legislature so intended, language regarding parallel tort claims could have been added to the MHRA at some time during its fifty-year existence.

More recent legislative treatment supports the above interpretations of the exclusivity provision. Of late, amendments to the MHRA reflect an effort to aid claimants by enticing attorneys to take discrimination cases and by consistently expanding available remedies under the MHRA. Amendments to the MHRA’s damages provisions have been made to encourage private attorneys to accept discrimination cases. Attempts to limit remedies available to claimants would stand in direct contradiction to the intent of these amendments.

In 1981, the Legislature amended Minn. Stat. § 363.14 to allow private attorneys to bypass the Human Rights Department by bringing an action directly in district courts. Hearings on this amendment reflect the legislators’ fears that, without monetary enticement, private attorneys would not make use of the bypass system. Prompted by these fears, the Legislature amended the MHRA to allow awards for mental anguish and suffering and raised the limit on punitive damages from $1,000 to $6,000. The limit has since been raised to $8,500. In 1984, the Legislature again amended the MHRA by allowing treble compensatory damages and attorneys’


103. Id. at 15 (citing Act approved Apr. 26, 1984, ch. 567, § 5, 1984 Minn. Laws 1091, 1095-96 (codified as amended at MINN. STAT. § 363.071 (1990)) and Governor’s Blue Ribbon Task Force on Human Rights, Report (Feb. 1984) (documenting Department backlog and recommending increased damages to encourage private enforcement)).

104. Act approved June 1, 1981, ch. 364, § 2, 1981 Minn. Laws 2343, 2345 (codified as amended at MINN. STAT. § 363.071, subd. 2 (1990)).

105. MINN. STAT. § 363.071, subd. 2 (1990).
In light of these amendments and their supporting intent, the MHRA should be interpreted as a law that supports ample damage awards, not a law seeking to limit recovery.

Courts in other jurisdictions have been called upon to interpret human rights and employment discrimination statutes and to determine whether those statutes were intended to preempt common law claims. For example, the Wisconsin Fair Employment Act classifies sexual harassment as a form of employment discrimination, and claimants there are allowed to maintain parallel battery claims. In Becker v. Automatic Garage Door Company, the Wisconsin Court of Appeals recently ruled:

If a complainant alleges an act of employment discrimination . . . he or she must pursue the administrative remedies through the [Wisconsin Fair Employment Act]. On the other hand, when an individual asserts the tort of battery, not as an act of employment discrimination, but as an independent and unlawful touching of the person, the mere fact that the [Wisconsin Act] defines sexual harassment broadly enough to include battery does not defeat the claim.

Similarly, the Ohio Supreme Court found no language in the state civil rights statute barring parallel tort claims for injuries arising out of sexual misconduct. Courts in Illinois and the District of Columbia have also held that state civil rights statutes do not preempt common law tort claims. A federal district court held that

106. Act approved Apr. 26, 1984, ch. 567, § 5, 1984 Minn. Laws 1091, 1095 (codified as amended at Minn. Stat. § 363.071, subd. 2 (1990)). Section 363.071, subd. 2 of the Minnesota Statutes currently reads:
In all cases where the administrative law judge finds that the respondent has engaged in an unfair discriminatory practice, the administrative law judge shall order the respondent to pay an aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained. In all cases, the administrative law judge may also order the respondent to pay an aggrieved party, who has suffered discrimination, damages for mental anguish or suffering and reasonable attorney's fees, in addition to punitive damages in an amount not more than $8,500.

Minn. Stat. § 363.071, subd. 2 (1990) (emphasis added).


108. Id. §§ 111.321, 111.36.


110. Id. at 414, 456 N.W.2d at 891.


certain contract-related claims are not preempted by the California Fair Employment and Housing Act.\textsuperscript{114} Within the Eighth Circuit, antidiscrimination statutes and case law reflect varying degrees of acceptance for the mixing of common law and statutory causes of action, and administrative and civil remedies.\textsuperscript{115}

\textbf{B. The Policy Behind the Minnesota Human Rights Act}

In its pursuit of policy goals, the Wirig court looked to the seminal version of the Human Rights Act, the Minnesota State Act for Fair Employment Practices.\textsuperscript{116} According to the court, the overriding purpose of the Act is to free society from the evil of discrimination that "threatens the rights and privileges of the inhabitants of this state and menaces the institution and foundations of democracy."\textsuperscript{117} The MHRA "foster[s] the employment of all individuals in this state in accordance with their fullest capacities."\textsuperscript{118} The court ruled that the MHRA's goals of eliminating employment discrimination and establishing equal employment opportunities would not be effectuated by the preemption of battery claims.\textsuperscript{119}

A review of the statutory policy at first glance appears purely academic. Yet it is vitally important to recognize the youth of legislative and judicial prohibitions against sexual discrimination.\textsuperscript{120} This lack of experience necessitates legislative direction in an area vitally im-

\textsuperscript{114} See Pfeiffer v. U.S. Shoe Corp., 676 F. Supp. 969, 972 (C.D. Cal. 1987) (California Fair Employment and Housing Act does not preempt claims for breach of contract or covenant of good faith and fair dealing, since such claims are not solely dependant on age discrimination allegation.). \textit{But see} Harrison v. Chance, 797 P.2d 200, 205 (Mont. 1990) (The court held that the Montana Human Rights Commission provided the exclusive remedy for an employee's sexual harassment claims, even though the employer's alleged acts may have provided grounds for numerous tort claims.).


\textsuperscript{117} \textit{Id.} (quoting Act approved Apr. 19, 1955, ch. 516, § 1, 1955 Minn. Laws 802, 803).

\textsuperscript{118} \textit{Id.}

\textsuperscript{119} \textit{Id.} at 378-79.

\textsuperscript{120} \textit{See generally supra} note 13 and accompanying text.
important to the state's economic and social growth. The Legislature's goals must be clearly enunciated and advanced. When policy is not crystalline, it is the duty of the court to seek out goals and to advocate action in compliance with those goals. Recent case history in other jurisdictions shows that the goal of equality is not always vigorously pursued by the judiciary. It cannot be assumed that the Legislature's struggle to promote equality will be unthinkingly championed by the courts. For these reasons, clearly stated policy considerations cannot be too greatly emphasized.

C. Battery and Sexual Harassment—Together

The supreme court correctly determined that battery was not "an act declared unfair by sections 363.03 and 363.13." Since unconsented touching is often only one piece of sexually harassing behavior, the line drawn by the court was necessarily fine, but it was in no way arbitrary. The court stated:

Battery does not address discrimination. It does not propose to redress injuries occasioned by society's 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 [Act] does not suggest that sexually motivated battery should be impliedly abrogated as an act declared unfair by the statute.

The societal/private harm distinction drawn by the Wirig court, effectively exposes an elementary difference between civil rights claims and tort (personal injury) actions. The first type of claim addresses discrimination, while the latter addresses physical interference. The distinction between the two types of claims is critical.
Kinney argued: "Surely, the threat of tort liability deters wrongdoing and encourages reasonable conduct, all to the benefit of society at large." Even conceding this point, a distinction still remains. Punishment for battery may benefit society, but battery is not discriminatory by nature.

In their amicus brief, the Minnesota chapter of the National Organization of Women (NOW) and Les Soeurs argued that the very acceptance of sexual harassment as a wrongful act stems from the relatively novel understanding of sexual harassment not as tortious conduct, but as evidence of social and economic inequality. Prior to the adoption of antidiscrimination statutes, a victim could gain re­dress only through tort actions. The adoption of human rights
determining the tax exemption of damages awards. Section 104 of the Internal Revenue Code excludes from gross income "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." I.R.C. § 104(a)(2) (1990). The above exemption is not applied "to any punitive damages in connection with a case not involving physical injury or physical sickness." Id. at § 104(a).

Minnesota courts have not specifically addressed the issue of whether damages under the MHRA are tax exempt. Courts in other jurisdictions have held that damages awarded in discrimination actions are excludable from gross income. See generally Byrne v. Commissioner, 883 F.2d 211 (3d Cir. 1989). In Byrne, the court held that the relevant inquiry in the taxation of damages is whether the settlement was received on account of personal or nonpersonal injuries, not whether the damages compensated the taxpayer for economic losses. Id. at 214. Based on this reasoning, the court excluded an entire personal injury settlement for violation of the Fair Labor Standards Act and wrongful discharge, finding the action "tort or tort-like" within the gross income exclusion of I.R.C. § 104(a)(2). Id. at 215.

The Third Circuit also allowed a complete exemption for a damage settlement of an age discrimination suit against an employer. See Rickel v. Commissioner, 900 F.2d 655, 663-64 (3d Cir. 1990). In Thompson v. Commissioner, the court included a backpay award in taxable income, but excluded liquidated damages in a gender discrimination action. Thompson v. Commissioner, 866 F.2d 709, 712 (4th Cir. 1989).


128. See Brief for Amicus Curiae, Minnesota NOW and Les Soeurs at 9, Wirig, 461 N.W.2d at 374 (No. C5-89-653).

129. Id. at 10. The brief for Amicus Curiae, Minnesota NOW and Les Soeurs, relied on Catherine MacKinnon in support of its view of the distinction as pivotal:

"The context which makes the impact of gender cumulative... is lost when sexual harassment is approached as an individual injury, however wide the net of damages is cast. Tort law compensates individuals for injuries while spreading their costs and perhaps setting examples for foresightful perpetrators, the purpose of discrimination law is to change the society so that this kind of injury need not and does not recur."

Id. at 10-11 (quoting Feminism Unmodified, supra note 8, at 172-73) (emphasis added).

130. See Tomkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553, 556-57 (D.N.J. 1976) (holding that sexual harassment was neither gender-based nor related to the workplace, but was a personal injury which should have been pursued under a state tort theory); see also Note, Continental Can Co. v. Minnesota: Sexual Harassment by Nonsupervisory Employees Makes Employer Liable, 10 CAP. U.L. REV. 625, 627-31 (1981) (Three
statutes evidenced an intent to distinguish between tort and discrimination theories. The flaw in the Wirig decision arises from a failure to recognize and respond to this distinction.

It is unclear why the court so carefully articulated the distinctions between battery and discrimination claims and then stated, "What we have here are two legal remedies for the same wrongful conduct." The court based the damage preclusion solely on precedent disallowing double recovery for the same harm, but presented no support of damage preclusion for different injuries caused by different acts in a similar context.

Discrimination claims differ from tort claims most clearly in regard to the harm caused. Even if an employer battered an employee with motivation identical to that which also produced a sexually hostile work environment, the resulting harms would be distinct. If the actions in tort have been utilized to compensate victims of sexual harassment: battery, assault and intentional infliction of emotional distress.

131. Wirig, 461 N.W.2d at 379 (emphasis added).
132. One may select a remedy when more than one is appropriate to the facts, yet a plaintiff cannot, by so doing, change the measure of recovery. 15 AM. JUR. Damages § 14 (1938). There cannot be double recovery for the same loss even though different theories of liability are alleged. There is also no duplication of recovery if the damages are awarded for separate injuries. 22 AM. JUR. 2d Damages § 35 (1988).

133. Minnesota belongs to a minority of jurisdictions in which an employer’s liability for intentional torts turns on whether the tortious behavior of the harassing employee was foreseeable, related to and connected with acts otherwise within the scope of employment. See Marston v. Minneapolis Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 311 (Minn. 1982) (Question of fact existed as to whether acts of doctor were foreseeable, related to and connected with acts otherwise within scope of employment); see also Lange v. National Biscuit Co., 297 Minn. 399, 211 N.W.2d 783 (1973) (Employer is liable for an assault by an employee when source of attack is related to employee’s duties and occurs within work-related limits of time and place.).

Compare this limitation with the showing necessary to impute liability to an employer in a quid pro quo sexual harassment case. Section 363.01 of the Minnesota Statutes expressly forbids a supervisor’s quid pro quo harassment, without any of the qualifying language used in the hostile environment portion of the statute. In Continental Can Co. v. State, the Minnesota Supreme Court noted the strict liability standard used in federal Title VII cases of quid pro quo harassment and relied on federal cases in the court’s interpretation of the MHRA. Continental Can Co. v. State, 297 N.W.2d 241, 246-48 (Minn. 1980) (Principles developed in Title VII cases are instructive and have been applied by this court when construing the MHRA.).

In hostile environment cases, the court will impose liability if the employer knew or should have known of the improper conduct and failed to take timely and appropriate corrective action. See, e.g., Rabidue v. Osceola Refining Co., 805 F.2d 611, 621 n.6 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987); Minneapolis Police Dep’t v. Minneapolis Comm’n on Civil Rights, 425 N.W.2d 225, 239 (Minn. 1988).

Section 363.01, subd. 10a(3) of the Minnesota Statutes incorporates a “known or should have known” standard directly into the definition of an offensive work environment, and even a low-level supervisor’s knowledge of the harassment has been imputed to the employer. See, e.g., Tretter v. Liquipak Int’l, Inc., 356 N.W.2d 713,
Wirig court’s true goal was to “redress injuries occasioned by society’s discriminatory tendencies,” then the court should have focused its attention on those injuries rather than on a vague contextual analysis of the aggressor’s conduct. The harm occasioned by a battery is a distinct and legitimate harm even when suffered alongside discriminatory injuries.

D. The “Different in Kind” Test

The Wirig court held that battery damages may be awarded together with sexual harassment damages if the claimant shows, by clear and convincing proof, that the misconduct on which the battery action is based is different in kind from the misconduct on which the sexual harassment action is based. The court focused on the misconduct of the aggressor, not on the harm suffered by the claimant. Application of this test will undoubtedly lead to some curious results. One may predict lines being drawn based upon where the aggressor’s touch landed rather than on the harm caused. Contact with “private” body parts may be deemed discriminatory while contact with “nonsexual” areas of the body will remain valid batteries. Thus, we arrive at the absurd result of treating contact with “private” body parts as less harmful, or at least less costly to the aggressor, than contact with other parts of the body. The former will be subject to statutory caps under the MHRA, while the latter will not.

Of course, the court may draw other lines to give meaning to the “different in kind” test. Perhaps a battery will no longer give rise to a valid claim for damages when it occurs near in time or location to sexual harassment. Does battery become unbefitting of punishment if it occurs in conjunction with discrimination? These unnatu
rals parameters threaten to swallow up any battery suffered in an environment found to be “hostile” under the MHRA. Such a wide-sweeping application of the “different in kind” test would deprive numerous claimants of redress for harm caused not by a hostile environment, but by battery itself.

If the court had chosen to focus on the individual harms caused by discrimination and by battery, the “different in kind” test would be entirely unnecessary. With harm as the focus, as in all litigation involving multiple claims, counsel may present proof of the distinct harm caused by each wrongful act. Determining the amount and bases of damages is uniquely the province of the trier of fact. The court proffered no reason why trial courts cannot make such determinations in sexual harassment and battery cases. The victim would be compensated for each harm. Without harm, there would be no compensation. Claimants like Wirig would be awarded battery damages proximately related to the touching itself and damages under the MHRA for harm caused by the discrimination. No double recovery would be granted.

E. The Effect of Wirig on Parallel Tort Claims

How Wirig will affect damage recovery under parallel assault, infliction of emotional distress or other tort claims remains to be seen. The similar nature of these and battery claims certainly suggests similar treatment. In fact, it may now be more difficult to maintain parallel assault and emotional distress claims than parallel battery claims.

Assault and emotional distress claims are similar in nature to sexual harassment claims. The gravamen of each is not necessarily a specifically enumerated concrete act, but the motivation behind that act and its result. Proof that the tortious acts were different in kind from the harassment acts may be extremely difficult, if not impossible, to produce.

Victims may be hard pressed to present clear and convincing evidence showing that an actor on one occasion acted so as to create a hostile work environment, and yet on another occasion acted to create an apprehension of imminent bodily harm so as to cause severe emotional distress. The physical act of a battery may provide a clearer window into the actor’s motivation—an element made impor-
tant by the "different in kind" test. A pat on the buttocks, for example, apparently denotes an intent different from that of a left hook to the jaw. It may be more difficult to show that comments threatening physical harm are different in kind from an expression of what an actor would like to do to a victim sexually. Distinctions may turn on the sexual nature of offensive comments. Wirig did not expressly preclude damages for parallel tort claims, but the decision will probably implicitly curb such awards.

**F. The Practical Effect of Wirig on Sexual Harassment Litigation**

The practical effect of Wirig remains to be seen. The decision may prompt exercises in creative pleading, changes in the MHRA, lower damage awards or a short-term rise in parallel tort claims other than battery.

It is reasonable to expect a flurry of dubious pleading efforts as litigators attempt to determine the boundaries of the Wirig holding. One possible ramification is a greater emphasis on parallel torts other than battery. Plaintiffs' attorneys who are determined to override the damage limitations of the MHRA may, in certain circumstances, rely on assault, emotional distress and other tort claims. Without guidance from appellate courts and despite Wirig, trial courts may allow such claims. Certain fact situations may even compel plaintiffs to forego actions under the MHRA in favor of autonomous tort claims. In any event, pleadings will necessarily contain facts focused on the separate nature of tortious acts when parallel claims are raised.

Wirig may compel legislative change. Without parallel damages (battery or otherwise), there may be an overall drop in sexual harassment awards. Lower overall recovery would undoubtedly spur debate about whether MHRA damage limitations should again be raised. Such debate is fitting. Legislative history reveals that the Legislature intended the MHRA to be a plenary procedure for sexual harassment adjudication. If the Legislature approves the Wirig court's interpretation of this act of battery as synonymous with a claim of sexual harassment deemed unlawful by the MHRA, then it must scrutinize the consequences of the MHRA's application, and it must raise statutory damage caps. Without the Legislature as a vigilant monitor of its creation, courts will have difficulty finding justice in its application. Healthy debate should impel necessary change.

138. In the future, it will be interesting to see Wirig's effect on discrimination claims other than sexual harassment. The Wirig court's broad interpretation of the MHRA may result in changes in the treatment of the many other types of discrimination covered by the MHRA.
CONCLUSION

The Minnesota Human Rights Act was not designed to redress personal injuries occasioned by battery suffered in the workplace. The MHRA allows employees to secure relief from discriminatory employment practices; whereas, common law battery theory seeks to compensate victims for intrusion upon physical autonomy. Yet, the Wirig court held that when battery and sexual harassment arise in the same context, only one recovery is warranted.

The Wirig holding generates an absurd result. Although the court gave lip service to the policy of furthering a sexual harassment victim's search for relief, it pulled the rug out from under claimants seeking complete recovery for all harms suffered. If the court truly wished to champion the cause of discrimination victims, it would have recognized the independent nature of battery and sexual harassment theories by awarding separate damages for each.

Joan Fluegel