STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0461

Meagan Abel,
Appellant,

vs.

Abbott Northwestern Hospital, et al.,
Respondents,

St. Mary's University Minnesota,
Respondent.

Filed September 30, 2019
Affirmed
Halbrooks, Judge
Dissenting, Klaphake, Judge*

Hennepin County District Court
File No. 27-CV-18-16589

Christopher W. Madel, Ellen M. Ahrens, Matthew J.M. Pelikan, MADEL PA, Minneapolis, Minnesota (for appellant)

Melissa Raphan, John T. Sullivan, Briana Al Taqatqa, Dorsey & Whitney LLP, Minneapolis, Minnesota (for respondents Abbott Northwestern Hospital, et al.)

Cheryl Hood Langel, Robert L. McCollum, McCollum, Crowley, Moschet, Miller & Laak, Ltd., Minneapolis, Minnesota (for respondent St. Mary's University Minnesota)

Christy L. Hall, Ashlynn Kendzior, Gender Justice, St. Paul, Minnesota (for amicus curiae Gender Justice)

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Klaphake, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the dismissal of her discrimination and negligence claims against respondents arising out of alleged harassment during her practicum as a doctoral student in psychology. Because the district court did not err by concluding that appellant's discrimination claims are time-barred and that she did not plead viable negligence claims, we affirm.

FACTS

At all relevant times, appellant Meagan Abel was a doctoral student at respondent St. Mary's University Minnesota. As part of her doctorate program, Abel was required to obtain and complete a practicum placement with an accredited institution. Abel applied for and was selected for a practicum with respondent Allina Health System in its clinical psychology program at respondent Abbott Northwestern Hospital.[1] Abel began her practicum in September 2015.

For the first three to four months of her practicum, Abel was supervised by Jeffrey Gottlieb, Ph.D., a clinical psychologist who was Abbott's training director at that time.

[1] The parties agree that Abbott is an assumed name of Allina. Allina argues that, accordingly, Abbott has no separate capacity to be sued and should be dismissed as a party. Because we affirm the district court's dismissal of all of Abel's claims, we do not reach this issue. In this opinion, we refer to respondents collectively as "Allina," and use "Abbott" to refer to the location of Abel's practicum.

Abel alleges that, during these months, Dr. Gottlieb engaged in a variety of sexualized and racially charged conduct. The conduct ranged from Dr. Gottlieb calling female practicum students "his girls" and Abel "the graduate student of color" and "the brown one" to Dr. Gottlieb requiring students to tell him that he is "good in bed" during highly sexualized role-playing in training sessions and touching students' chests and shoulders. According to Abel, Dr. Gottlieb also fostered a climate of isolation and dependence, emphasizing his power over the careers of practicum students and prohibiting them from talking to other doctors.

Abel alleges that she raised concerns about Dr. Gottlieb with two other Allina doctors, Dr. Kimberly Finch, who was Dr. Gottlieb's colleague,[2] and Dr. Michael Schmitz, who was the clinical director of hospital-based psychology services for Allina and the supervisor of Dr. Gottlieb and Dr. Finch. Abel first disclosed "racial and discriminatory comments" to Dr. Finch, who reported them to Dr. Schmitz, who Abel alleges took no action. Abel later more fully disclosed, again to Dr. Finch, Dr. Gottlieb's "misconduct, especially his racial discrimination and threats." Dr. Finch again advised Dr. Schmitz, which prompted a meeting of Abel, Dr. Schmitz, and a human-resources (HR) representative. Abel alleges that during this meeting she was prevented by Dr. Schmitz and the HR representative from fully describing Dr. Gottlieb's conduct. Following the meeting, the hospital held a "series of meetings purportedly related to an 'internal

[2] Dr. Finch was also Abel's co-plaintiff in this action until the district court severed their claims so that judgment could be entered on the dismissal of Abel's claims. The district court dismissed some of Dr. Finch's claims against Allina, but denied Allina's motion to dismiss Dr. Finch's reprisal claim.

investigation' of Dr. Gottlieb." Abel attended a second meeting with Dr. Schmitz and the HR representative, and alleges that they again prevented her from fully disclosing Dr. Gottlieb's conduct.

At the same time Abel was sharing her concerns with those at Abbott, she was also sharing them with faculty at St. Mary's. Abel alleges that she disclosed concerns about Dr. Gottlieb's inappropriate behavior to her advisor, Dr. Ashley Sovereign, beginning during Abel's interview with Dr. Gottlieb. According to Abel, Dr. Sovereign told her that she would have to "go along with Dr. Gottlieb's bizarre requests because he was extremely important within the medical community and had a lot of power over her future career." Abel alleges that she also raised her concerns to Dr. Phyllis Solon in September 2015. In November 2015, after Abel "complained to her school and sought additional guidance," Dr. Solon "provided advice on how to avoid Dr. Gottlieb's harassment and gave tips of deflecting his sexual advances." In December 2015, Abel fully disclosed Dr. Gottlieb's conduct to Dr. Sovereign.

On December 23, 2015, Allina removed Dr. Gottlieb as training director and ordered him to have "no contact" with students, including Abel. Abel took several weeks off because of the stress of dealing with Dr. Gottlieb and the situation at Abbott. Abel returned in January 2016, and that same month she began reporting to Dr. Elizabeth LaRusso, who had recently become the medical director of mental-health services.

Abel alleges that, upon her return to work, "the problems with Dr. Gottlieb and others at Abbott continued unabated." She alleges that Dr. Gottlieb regularly violated the "no contact" order, and that Allina had knowledge of this but took no action to address

these violations. She alleges that the arrangement of student offices meant that she "saw Dr. Gottlieb on a daily basis," and that "Dr. Gottlieb would routinely walk past the student work space and make threatening eye contact with [her] and others." She alleges that once, while she was working in the office alone, "Dr. Gottlieb approached her from behind and stood breathing in a simultaneously sexualized and threatening manner." And she alleges that she attempted to address her continuing concerns with Dr. Schmitz, but that he declined to meet with her privately.

Around January 27, 2016, Abel filed a formal complaint about Dr. Gottlieb with the Minnesota Board of Psychology, and provided copies to Dr. Schmitz and the HR representative.[3] Abel subsequently met a third time with Dr. Schmitz and the HR representative, and she alleges that they again prevented her from fully disclosing Dr. Gottlieb's conduct and urged her to address matters internally.

In the spring of 2016, Dr. Gottlieb was removed from St. Mary's advisory board. On April 28, 2016, Dr. Finch, from Allina, and Dr. Solon, from St. Mary's, had a "lengthy exchange" during which Dr. Solon was "candid" about "the history of interactions that the school has [had] with Dr. Gottlieb."

[3] Dr. Finch also filed a complaint with the board. On March 16, 2018, Dr. Gottlieb entered into a stipulation and consent order with the board that limits his license to practice psychology, requiring him to complete diversity and sensitivity training and precluding him from supervising "any licensed or unlicensed mental health provider, student, or supervisee (pre-degree or post-degree)." https://mn.gov/boards/assets/Gottlieb_Jeffrey_Stipulation%20and%20Consent%20Order_3.16.18_tcm21-340450.pdf

On May 2, 2016, Abel decided to end her practicum early—on May 27, 2016. She "decided this timeline would facilitate patient transitions and appropriate closure and would be after she had fulfilled her required hours."

In June 2016, Abel met with Dr. Paul Goering, Allina's vice president of mental health "to discuss her experiences from her practicum and to alert them about ongoing hostility between staff in the clinic." In July 2016, Abel returned to Allina to begin a mentorship in the mother-baby mental-health service line.

In the spring of 2017, Abel alleges that she was instructed by Dr. Nestingen, a St. Mary's faculty member, to apply for an internship at a site that Dr. Gottlieb was affiliated with and told that she would have to "suck it up." Abel alleges that Dr. Solon also was hostile to her during the internship-application process, telling her that she needed to put the Abbott experience behind her and that she "represent[ed] St. Mary's."

On May 26, 2017, just shy of one year after the last day of her practicum, Abel filed a charge of discrimination against Allina (but not St. Mary's) with the Minnesota Department of Human Rights.

In January 2018, Abel exchanged emails with Dr. Solon, who had reached out to see how Abel was doing in light of the recent sentencing of Larry Nasser, the USA Gymnastics team doctor convicted of criminal sexual conduct. Abel questioned in her email why St. Mary's had not taken further steps to prevent the harassment she suffered. Dr. Solon defended St. Mary's actions.

In March 2018, Abel initiated this civil action against Allina and St. Mary's asserting: (1) employment discrimination against Allina, (2) education discrimination

against Allina and St. Mary's, (3) public-accommodations discrimination against Allina and St. Mary's, (4) reprisal against Allina, and (5) negligence against Allina and St. Mary's. Allina moved to dismiss the complaint and St. Mary's moved for judgment on the pleadings. By order dated August 28, 2018, the district court dismissed all of Abel's claims. On appeal, Abel challenges the dismissal of her employment, education, and public-accommodations discrimination claims, and her negligence claims against Allina, and her education and negligence claims against St. Mary's. She does not challenge the district court's dismissal of her reprisal claim against Allina.

D E C I S I O N

The district court's grant of respondents' motions to dismiss and for judgment on the pleadings is subject to de novo review by this court. *See Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018) (dismiss); *Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010) (judgment on the pleadings). "A claim is sufficient against a motion to dismiss for failure to state a claim if it is possible on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014). This court should consider "only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003); *see also Zutz*, 788 N.W.2d at 61 (stating same standard for appeal from judgment on pleadings).

On appeal, Abel argues that the district court erred by (1) dismissing her discrimination claims as time-barred and for failure to state a claim upon which relief can

be granted and (2) dismissing her negligence claims based on a determination that neither Allina nor St. Mary's owed a duty to protect her. We address Abel's arguments in turn. But because our analysis on the statute of limitations for Abel's discrimination claims is dispositive, we do not address the merits of Abel's claims.

I.

The Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01-.44 (2018), states a policy to "secure for persons in this state freedom from discrimination . . . because of race, color, creed, religion, national origin, sex, marital status, disability, status with regard to public assistance, sexual orientation, and age" in areas including employment, public accommodations, and education. Minn. Stat. § 363A.02. In furtherance of this policy, the MHRA prohibits certain enumerated "unfair discriminatory practices." *See* Minn. Stat. §§ 363A.08-.19, .28, subd. 10; *see also* Minn. Stat. § 363A.03, subd. 48 (defining "unfair discriminatory practice" to mean acts described in those statutory sections). As relevant in this case, prohibited unfair discriminatory practices include discrimination on the basis of race and sex with respect to the terms or conditions of employment, Minn. Stat. § 363A.08, subd. 2(3); denial on the basis of race or sex of the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation," Minn. Stat. § 363A.11, subd. 1(a)(1); and discrimination on the basis of race or sex "in the full utilization of or benefit

from any educational institution, or the services rendered thereby," Minn. Stat. § 363A.13, subd. 1.[4]

The MHRA defines sex discrimination to include sexual harassment. Sexual harassment is expressly defined to include

> 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, public accommodations or public services, education, or housing;
>
> (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, public accommodations or public services, education, or housing; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

Minn. Stat. § 363A.03, subd. 43. Claims under subsection (3) above are generally referred to as claims of a hostile work environment. *See, e.g.*, *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2001). Consistent with its express prohibition of sex-based hostile work environments, the MHRA has been interpreted to also allow for a claim of hostile work environment based on race. *See Williams v. Metro. Waste Control Comm'n*, 781 F. Supp.

[4] Allina asserts that the conduct alleged by Abel does not fall within the prohibitions of these sections because it was not Abel's employer, it is not an education institution, and the practicum program was not a public accommodation. St. Mary's similarly asserts that its doctoral program is not a public accommodation. As we note above, we do not reach these merits arguments. For purposes of our statute-of-limitations analysis, we assume without deciding that the MHRA applies.

1424, 1426 (D. Minn. 1992); *cf. Goins*, 635 N.W.2d at 725 (assuming without deciding that MHRA authorizes claim of hostile work environment based on sexual orientation); *Wenigar v. Johnson*, 712 N.W.2d 190, 205 (Minn. App. 2006) (recognizing claim of hostile environment based on disability).

"A claim of an unfair discriminatory practice must be brought as a civil action" or filed in a charge with the commissioner of human rights (or a local human-rights commission) "within one year after the occurrence of the practice." Minn. Stat. § 363A.28, subd. 3(a). Thus, for instance, a party alleging a discriminatory discharge must initiate a civil action, or file a charge, within one year of the date that she receives notice of the discharge. *See Turner v. IDS Fin. Servs., Inc.*, 471 N.W.2d 105, 108 (Minn. 1991) (holding that statute of limitations runs from the time of notice of termination).

Relying on United States Supreme Court decisions, the Minnesota Supreme Court has held that the statute of limitations may be extended in cases involving so-called continuing violations. *See Sigurdson v. Isanti County*, 448 N.W.2d 62, 66-67 (Minn. 1989) (citing *Lorance v. A T & T Techs., Inc.*, 490 U.S. 900, 907, 109 S. Ct. 2261, 2266 (1989), and *Del. State Coll. v. Ricks*, 449 U.S. 250, 257, 101 S. Ct. 498, 503 (1980)); *see also Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 n.11 (Minn. 1983) ("The continuing violation doctrine has been applied by courts to toll the statute of limitations in employment discrimination actions when the discriminatory acts of an employer over a period of time indicate a systematic repetition of the same policy and constitute a sufficiently integrated pattern to form, in effect, a single discriminatory act."); *Bhd. of Ry.*

& S.S. Clerks v. State by Balfar, 229 N.W.2d 3, 9-11 (Minn. 1975) (first recognizing doctrine).

Although the existence of a continuing *violation* may avoid the running of the statute of limitations, "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Sigurdson*, 448 N.W.2d at 67 (quoting *Ricks*, 449 U.S. at 257, 101 S. Ct. at 503). Moreover, "[o]ne must distinguish between discriminatory acts and discriminatory effects; 'the proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Id.* (quoting *Lorance*, 490 U.S. at 907, 109 S. Ct. at 2266 (additional quotation omitted)). Our supreme court has explained that "if a mere continuing effect will extend the limitation period, the statute of limitations would be effectively emasculated." *Id.*

In *Nat'l R.R. Passenger Corp. v. Morgan*, the United States Supreme Court addressed the application of the continuing-violation doctrine to hostile-environment claims. 536 U.S. 101, 114, 122 S. Ct. 2061, 2072 (2002). The Supreme Court in *Morgan* began by observing that "[h]ostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *Id.* at 115, 122 S. Ct. at 2073. Based on this distinguishing feature of the claim, the Supreme Court held that a hostile-environment claim is timely if any act that is part of the hostile environment falls within the statute-of-limitations period. *Id.* at 118, 122 S. Ct. at 2075. The Supreme Court explained:

> It does not matter, for purposes of the statute [of limitations], that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by the court for purposes of determining liability.

Id. at 117, 122 S. Ct. at 2074. Thus, under *Morgan*, the latest act that contributes to a hostile environment preserves a claim that encompasses all previous acts that have contributed to that hostile environment. *Id.* at 118, 122 S. Ct. at 2075 (explaining that a claim may be based on acts occurring on days 1-100 and 401 because "a hostile environment constitutes one 'unlawful employment practice' and it does not matter whether nothing occurred within the intervening 301 days so long as each act is part of the whole"). But *Morgan* also recognizes that not all alleged acts are properly construed as part of the hostile environment. *See id.* ("On the other hand, if an act on day 401 had no relation to the act between days 1-100, or for some other reason, such as certain intervening action by the employer, was no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts, at least not by reference to the day 401 act.").

A. MHRA Claims Against Allina

As a threshold matter, Abel and Allina dispute whether the statute of limitations for all of Abel's MHRA claims should be calculated using the date that she filed her charge of discrimination (May 26, 2017). Allina argues that Abel's education and public-accommodations claims were not preserved by Abel's charge and that the statute of limitations for those claims must be calculated using the date that the complaint was served

on Allina (March 2, 2018). We need not resolve this dispute because we conclude that, even when calculated using the charge-filing date, the statute of limitations bars all of Abel's MHRA claims against Allina.

The district court determined that none of the discrimination alleged by Abel occurred within one year before she filed her charge of discrimination. The district court explained that the only events that occurred within the statute-of-limitations period were the final day of Abel's practicum on May 27, 2016; her June 2016 meeting with Dr. Goering to discuss her practicum experiences and hostility within the clinic; and the start of her mentorship with Allina in July 2016. The district court reasoned that "[n]one of these events constitute acts of discrimination and as a result, they are not actionable under the statute." The district court expressly considered Abel's hostile-environment theory, but concluded that none of the acts comprising the alleged hostile environment occurred within the statute-of-limitations period.

Abel argues that the district court erred by failing to consider the entire course of the alleged discriminatory conduct and that, because she alleges a continuing violation, alleged conduct outside the statute-of-limitations period may be considered. We disagree. Abel did allege multiple incidents of racial and sexual harassment by Dr. Gottlieb. But, as the district court correctly observed, the last incidents of harassment occurred in January 2016, outside of the statute-of-limitations period.

Abel argues that "Allina's failure to stop ongoing discrimination, even on Abel's last day, can constitute an act of discrimination as a matter of law." In support of this argument, she relies on this court's decision in *Costilla v. State*, 571 N.W.2d 587 (Minn.

App. 1997), *review denied* (Minn. Jan. 28, 1998). But *Costilla* is distinguishable because the plaintiff in that case alleged harassment within the statute-of-limitations period. *See* 571 N.W.2d at 592. The issue in *Costilla* was whether an employer could be held liable for harassment by a third party. This court concluded that "the MHRA may impose liability upon an employer when it is aware that its employee is subject to sexual harassment by a non-employee, yet fails to take timely and appropriate action to protect its employee." *Id.* This court expressly noted that the plaintiff was being sexually harassed during the statute-of-limitations period, and thus framed the statute-of-limitations issue as whether the employer "acted in an untimely or inappropriate manner sometime during" the statute-of-limitations period. *Id.* at 593.

In this case, Abel alleges the failure of Allina to take appropriate action during the statute-of-limitations period, but she does not allege any harassment during the statute-of-limitations period.[5] Allina may be held liable for a hostile environment created by its employees, but that liability is contingent on the existence of harassment creating (or continuing) that hostile environment. *See Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 570 (Minn. 2008) (holding that "an employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over a victimized employee"); *cf. Costilla*, 571 N.W.2d at 593 (explaining that employer could be held liable for harassment by third party that continued during statute-of-limitations period). Under *Morgan*, the statute of limitations runs from the latest

[5] Abel also makes allegations of reprisal, but, as previously noted, she does not challenge the district court's dismissal of her reprisal claim against Allina.

conduct contributing to the hostile environment, i.e., the latest incident of harassment. Once the racial and sexual harassment ended—whether through Allina's efforts or otherwise—there was no longer a continuing violation. Because the latest acts of harassment occurred outside of the statute-of-limitations period, we affirm the dismissal of Abel's MHRA claims as untimely.

B. MHRA Claims Against St. Mary's

There is no dispute that the statute-of-limitations period for Abel's MHRA claims against St. Mary's runs from March 5, 2017 to March 5, 2018, the date that Abel served the complaint on St. Mary's. The district court determined that none of the conduct that occurred after March 5, 2017, could be "characterized as acts of discrimination based on Ms. Abel's race or sex" nor could it "be considered part of a continuing violation, because none of the acts involve discrimination based on sex or race, or part of an ongoing pattern of harassment." The district court explained that the only alleged events involving St. Mary's after March 5, 2017, are: the spring 2017 conversation during which Drs. Nestingen and Solon told Abel to "suck it up" and to put the Allina experience behind her; the January 27, 2018 email from Dr. Solon to Abel checking on her well-being in light of the Larry Nassar case; and Dr. Solon's January 31, 2018 email responding to Abel's "questions about the school's role, culpability, and decision-making during the practicum experience." We agree with the district court that these hindsight discussions of the alleged harassment cannot be construed as part of the hostile environment that Abel seeks to challenge. To hold otherwise would allow a plaintiff to extend a statute of limitations

simply by initiating discussion of past conduct. Accordingly, we affirm dismissal of Abel's MHRA claims against St. Mary's as untimely.

II.

"Negligence is generally defined as the failure to exercise such care as persons of ordinary prudence usually exercise under such circumstances." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011) (quotation omitted). "To recover for a claim of negligence, a plaintiff must prove (1) the existence of a duty of care, (2) a breach of that duty, (3) an injury, and (4) that the breach of the duty of care was a proximate cause of the injury." *Id.* The existence of a duty is a threshold question because, "in the absence of a legal duty, the negligence claim fails." *Id.* (quotation omitted).

The existence of a duty is generally a question of law for the court to decide. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 629 (Minn. 2017). "[T]he general common law rule [is] that a person does not have a duty to give aid or protection to another or to warn or protect others from harm caused by a third party's conduct." *H.B. by Clark v. Whittemore*, 552 N.W.2d 705, 707 (Minn. 1996).

The district court determined that neither Allina nor St. Mary's owed a duty to protect Abel from Dr. Gottlieb's harassment separate from duties potentially owed under the MHRA, which provides an exclusive remedy. *See* Minn. Stat. § 363A.04. Accordingly, the district court concluded that Abel did not state a viable negligence claim.

On appeal, Abel argues that she sufficiently pleaded a negligence claim, but she does not explain on what basis this court could conclude that Allina or St. Mary's owed a common-law duty to protect her from third-party conduct. With respect to St. Mary's,

Abel is silent on the issue of duty. With respect to Allina, Abel argues for the first time on appeal that her negligence claim is sufficient "at least under theories of negligent supervision and negligent retention." Abel did not plead these claims in her complaint and did not argue to the district court that her negligence claim should be allowed to proceed under these theories in opposing Allina's motion to dismiss. And the district court did not address these theories in its order. As such, they are forfeited. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it." (quotation omitted)); *see also Pomush v. McGroarty*, 285 N.W.2d 91, 93 (Minn. 1979) (rejecting attempt to raise new theory of negligence on appeal).

Abel also argues on appeal, as she did to the district court, that she should be allowed to elect a negligence remedy if not permitted to recover under the MHRA. But absent a basis for concluding that Allina owed a common-law duty to Abel, the district court properly dismissed the negligence claim against Allina and St. Mary's.

Affirmed.

KLAPHAKE, Judge (dissenting)

According to the allegations in the complaint, which are accepted as true in this appeal from dismissals under Minn. R. Civ. P. 12.02 and 12.03, Meagan Abel suffered egregious sexual and racial harassment while completing a required practicum at Abbott Northwestern Hospital, a site that was recommended by St. Mary's and run by Allina. Despite her repeated reports to St. Mary's and Allina over an extended period of time, neither entity took appropriate steps to protect her. Then, when Abel sued them, each entity disclaimed any responsibility, arguing that she filed her claims too late, and that they owed no statutory or common-law duty to protect her. The district court agreed, and today this court affirms the denial of any remedy to Abel. I respectfully dissent.

The Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01-.44 (2018), states a broad policy "to secure for persons in this state, freedom from discrimination," Minn. Stat. § 363A.02, and recognizes such freedom as a civil right, Minn. Stat. § 363A.02, subd. 2. "From the outset, the overriding purpose of the MHRA has been to free society from the evil of discrimination that threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 378 (Minn. 1990) (quotation omitted). The provisions of the MHRA are to be construed liberally to accomplish the purposes of the act. Minn. Stat. § 363A.04.

The conduct that Abel alleges is precisely the type of conduct that the MHRA is meant to prevent, or, failing that objective, to remedy. Beginning during the interview process, Abel was exposed to egregious sexual and racial harassment by Dr. Jeffrey

Gottlieb, who supervised practicum students at Abbott. Dr. Gottlieb referred to Abel as "the graduate student of color" and "the brown one." He required her and other students to engage in hypersexualized patient role plays, often requiring them to pretend, as a client, that they wanted to have sex with the therapist, played by Dr. Gottlieb. He would force students to mimic having sex with him during those role plays and instruct them to tell him that he was "good in bed." He would require them to repeat the "good in bed" statement until they said it in "just the manner he wanted to hear." Other role plays involved Dr. Gottlieb touching students' chests to show "where emotion hurts in the heart," and instructing students to tell rape victims that the rape was their fault until the victim "learned" to yell back, "It's not my fault!" Dr. Gottlieb described Abel's and other students' bodies and provided feedback on how they looked and dressed. He insisted on giving students shoulder massages. When engaging in this inappropriate conduct, Dr. Gottlieb would display signs that he was sexually aroused, becoming short of breath and licking his lips.

St. Mary's faculty recommended that Abel apply for the practicum at Abbot, a practicum she had not been considering until faculty recommended it. St. Mary's faculty recommended the practicum despite knowledge that Dr. Gottlieb had engaged in inappropriate conduct with past students. When, as could have been predicted, Abel encountered sexual and racial harassment during her required and recommended practicum and reported that harassment to St. Mary's faculty, St. Mary's took no action to protect her. Instead, she was encouraged to "go along" with Dr. Gottlieb's behavior, and advised on how to avoid his harassment and deflect his advances.

For Allina's part, despite repeated reports from Abel and others that Dr. Gottlieb was engaged in sexual and racial harassment, Allina failed to take appropriate remedial action. Allina initially failed to act at all, allowing a hostile environment to form and fester. Only after Abel filed an external complaint, with the Minnesota Board of Psychology, did Allina remove Dr. Gottlieb from his supervisory position. And even then, it failed to put an end to the hostile environment. Abel continued to encounter hostility from Dr. Gottlieb—despite an ill-defined "no contact" order—and from other Allina employees who supported Dr. Gottlieb.

The dismissal of Abel's claims under a narrow application of the statute-of-limitations undermines the broad remedial purposes of the MHRA. I would conclude that the hostile environment suffered by Abel continued well past the most egregious harassment by Dr. Gottlieb, and was perpetuated by both St. Mary's and Allina's failure to take appropriate remedial measures. I would also conclude that later aspects of the hostile environment—although seemingly more benign—must be viewed in context of the most egregious conduct. *See McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 83-84 (2d Cir. 2010) (Calabresi, J., concurring) (explaining that "[a]ll other things being equal, incidents that occurred later in time are more likely to be part of the same hostile environment as pre-limitations period incidents when those earlier incidents are more severe" and that "earlier occurrences of severe hostility in the workplace may *reasonably* color one's interpretation of later events and hence whether those events are related"). Then, applying *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 118, 122 S. Ct. 2061, 2075 (2002), I

would conclude that Abel alleged conduct contributing to the hostile environment within the relevant statute-of-limitations periods.

Although only one day of Abel's practicum fell within the statute-of-limitations period for her claims against Allina, there is no reason to conclude that the hostile environment she alleges did not persist on that day. *See, e.g.*, *Jensen v. Henderson*, 315 F.3d 854, 862 (8th Cir. 2002) (reversing summary-judgment dismissal of hostile-environment claims where employee, who was absent from work because of harassment, "ha[d] received no indication that the environment of harassment ha[d] changed"). Abel alleges that, even after Dr. Gottlieb was removed from his supervisory position, he continued to approach her and behave in a threatening manner, that she continued to report these encounters, and that Allina allowed the conduct to continue. She alleges that other Allina employees also treated her in a hostile and threatening manner. The statute-of-limitations period for Abel's claims against St. Mary's similarly encompasses alleged discriminatory conduct by St. Mary's during the continuation of Abel's doctoral program after her practicum ended. Abel alleges that St. Mary's faculty instructed Abel to apply for an internship at a site where Dr. Gottlieb was affiliated; told her to "suck it up" and put the Abbott experience behind her; and generally treated her with hostility. I would conclude that these well-pleaded allegations are sufficient to survive a motion to dismiss

on statute-of-limitations grounds. And I would reverse the district court's dismissal of Abel's MHRA claims.[1]

I would also reverse the district court's dismissal of Abel's negligence claim on the ground that neither Allina nor St. Mary's owed a duty to protect Abel. Although the general rule is that no duty is owed to protect another, an exception to this rule applies when the parties are in a special relationship. *Doe 169 v. Brandon*, 845 N.W.2d 174, 178 (Minn. 2014). Special relationships are well recognized to exist between parents and children, employers and employees, common carriers and passengers, innkeepers and guests, and land possessors and entrants onto land held open to the public—but this list is not exhaustive. *See* Restatement (Second) of Torts § 314A & cmts. a-b (1965); *see also Delgado v. Lohmar*, 289 N.W.2d 479, 483-84 (Minn. 1979) (listing categories of special relationships). "Typically, the plaintiff is in some respect particularly vulnerable and dependent on the defendant, who in turn holds considerable power over the plaintiff's welfare." *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995). A second exception to the no-duty rule applies when a party's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff. *Doe 169*, 845 N.W.2d at 178. Abel alleges facts that could support a duty under either of these exceptions.

Abel alleges that St. Mary's owed her a duty as a student; that she was required by St. Mary's to complete a practicum; and that she applied for the practicum at Abbot under

[1] In the event that Abel's claims are deemed timely, respondents urge that she fails to state viable MHRA claims on the merits. The district court did not reach this issue, and I do not address it.

Dr. Gottlieb's supervision on the recommendation of her St. Mary's faculty advisor. She alleges that St. Mary's knew about past inappropriate conduct by Dr. Gottlieb when faculty recommended the practicum to Abel, and that when she reported Dr. Gottlieb's conduct to St. Mary's faculty, she was told to "go along" with it because he was important within the medical community and sat on St. Mary's advisory board. And she alleges that St. Mary's faculty advised her on how to "avoid Dr. Gottlieb's harassment and gave tips on deflecting his sexual advances." These well-pleaded facts support inferences of vulnerability on Abel's part, and control on St. Mary's part, that could support the existence of a special relationship. *Cf. Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168-69 (Minn. 1989) (applying special-relationship analysis to conclude that duty is owed by owners of parking ramps to their customers). They also support inferences that St. Mary's conduct created a foreseeable risk (of sexual harassment) to a foreseeable plaintiff (Abel). *Cf. Fenrich v. The Blake Sch.*, 920 N.W.2d 195, 206-07 (Minn. 2018) (holding that genuine issues of material fact existed as to whether school engaged in misfeasance in supervising a field trip and whether there was a foreseeable risk to a foreseeable plaintiff).

With respect to Allina, Abel alleges a relationship much akin to that between an employer and employee. Indeed, she alleges that she "performed the work of an employee" and that her services "took the place of work by paid employees." She alleges that her "work was at the total control and discretion of Allina." And she alleges that Allina took insufficient action to protect her from sexual and racial harassment by Dr. Gottlieb after she reported his conduct. Instead, Allina required Abel to continue to work in a setting where she regularly encountered Dr. Gottlieb, who continued to behave in a threatening

manner. These well-pleaded facts also support inferences of a special relationship and misfeasance causing a foreseeable risk to a foreseeable plaintiff. *Cf. Fenrich*, 920 N.W.2d at 207; *Erickson*, 447 N.W.2d at 168-69.

Respondents assert that Abel's negligence claims are preempted by the exclusivity provision of the MHRA, *see* Minn. Stat. § 363A.04, but they also assert that the MHRA does not apply to their conduct. They cannot have it both ways. If the MHRA does not apply, neither does its exclusivity provision. Moreover, even when the MHRA applies, it does not preempt claims arising from independent common-law or statutory duties, although a plaintiff may not have double recovery for the same conduct. *See Vaughn v. Nw. Airlines, Inc.*, 558 N.W.2d 736, 745 (Minn. 1997) (holding that MHRA did not preempt otherwise viable common-law negligence claim); *Wirig*, 461 N.W.2d at 379 (holding that MHRA did not preempt common-law battery claim, but stating rule against double recovery).

Based on the foregoing analysis, I would reject the district court's grounds for dismissing the complaint, and I would reverse and remand for further proceedings.