STATE OF MINNESOTA

IN SUPREME COURT

A19-0461

Court of Appeals

McKeig, J.
Dissenting, Gildea, C.J., Anderson, J.
Took no part, Chutich, J.

Meagan Abel,

Appellant,

vs.

Filed: July 29, 2020
Office of Appellate Courts

Abbott Northwestern Hospital, et al.,

Respondents,

St. Mary's University Minnesota,

Respondent.

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.

Robert L. McCollum, Cheryl Hood Langel, Brian J. Kluk, McCollum Crowley P.A., Minneapolis, Minnesota, for respondent St. Mary's University Minnesota.

Keith Ellison, Attorney General, Rachel Bell-Munger, Assistant Attorney General, Saint Paul, Minnesota, for amicus curiae Commissioner of the Minnesota Department of Human Rights.

Christy L. Hall, Gender Justice, Saint Paul, Minnesota, for amicus curiae Gender Justice.

Nicholas G.B. May, Fabian May & Anderson, PLLP, Minneapolis, Minnesota;

Matthew A. Frank, Nichols Kaster, PLLP, Minneapolis, Minnesota;

Frances E. Baillon, Baillon Thome Jozwiak & Wanta LLP, Minneapolis, Minnesota; and

Brian T. Rochel, Phillip M. Kitzer, Teske Katz Kitzer & Rochel, PLLP, Minneapolis, Minnesota, for amicus curiae National Employment Lawyers Association–Minnesota Chapter.

S Y L L A B U S

1. The district court erred in dismissing appellant's employment discrimination claim under the Minnesota Human Rights Act because the continuing violations doctrine tolled the statute of limitations, but the district court correctly dismissed her remaining statutory discrimination claims as time-barred.

2. The absence of compensation is not dispositive in deciding whether a graduate student providing services for a hospital through an unpaid practicum program has an employment relationship with the hospital for purposes of a claim brought under the Minnesota Human Rights Act.

3. Appellant's common-law negligence claims are not barred by the exclusive remedy provision of the Minnesota Human Rights Act, Minn. Stat. § 363A.04 (2018).

Affirmed in part, reversed in part, and remanded.

O P I N I O N

MCKEIG, Justice.

A graduate student brought Minnesota Human Rights Act and common-law negligence claims against a university and a hospital for race- and sex-based discrimination she allegedly experienced during a practicum program. The district court dismissed the Human Rights Act claims, concluding they were barred by the statute of limitations. The common-law negligence claims were dismissed as well, based on appellant Meagan Abel's failure to establish that respondents St. Mary's University Minnesota (St. Mary's) and Allina Health System[1] (Allina) owed her a common-law duty separate from the obligations owed under the Human Rights Act. The court of appeals affirmed.

We hold that Abel's employment discrimination claim under the Human Rights Act against respondent Allina was timely pled and, moreover, that the district court erred in determining that Abel's lack of compensation from the practicum barred her claim. We hold that Abel's remaining statutory discrimination claims against respondents Allina and St. Mary's are time-barred. We further hold that Abel has alleged sufficient facts to maintain her common-law negligence claims. We affirm in part and reverse in part the court of appeals' decision, and remand to the district court to reinstate certain claims and for further proceedings.

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[1] Abbott Northwestern Hospital is an assumed name of Allina Health System. In this opinion, we refer to respondents Abbott and Allina collectively as "Allina" and use "Abbott" to refer to the location of Abel's practicum.

FACTS

This appeal arises from the district court's grant of a motion to dismiss and motion for judgment on the pleadings, which resulted in the dismissal of four discrimination claims under the Minnesota Human Rights Act and two common-law negligence claims. The complaint alleges the following facts.[2]

Appellant Meagan Abel was a doctoral student in the psychology program at St. Mary's. As part of the program, Abel was required to complete a certain number of practicum hours at an accredited institution. She was encouraged by her program advisor to apply for placement with respondent Allina in its clinical psychology program at respondent Abbott Northwestern Hospital. Abel applied for the program and was selected. She began the practicum in September 2015.

The practicum program was supervised by Dr. Jeffrey Gottlieb, a clinical psychologist and Abbott's practicum training director. Over the course of the practicum, Dr. Gottlieb regularly engaged in inappropriate and harassing behavior. Dr. Gottlieb required Abel to participate in highly sexualized group and individual sessions, which included role-play exercises where Dr. Gottlieb would touch students' chests; force students to mimic having sex with him; and make remarks on and critique students' bodies. He gave shoulder massages to his female students—called "his girls" throughout the

[2] When reviewing a district court's grant of motions to dismiss and motions for judgment on the pleadings, we accept the factual allegations in the complaint as true. *See Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010) (motion for judgment on the pleadings); *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (motion to dismiss).

clinic—and engaged in flirtatious and sexual conduct. Dr. Gottlieb also referred to Abel, who is of Asian Indian descent, as "the graduate student of color" or "the brown one." The derogatory terms were used frequently and publicly. When Abel informed Dr. Gottlieb that she had reported incidents of racial discrimination in the past, he responded that if he had known, he would never have let her join the program.

Supported by Abbott's lack of written program policies, Dr. Gottlieb fostered a climate of isolation and dependence within the practicum program. Dr. Gottlieb told the practicum students that others at the clinic did not want them there and considered them a nuisance, and that it was only by virtue of his power and influence that the practicum program continued. He intimidated students by telling them that obeying him was integral to their continued participation in the practicum and future paid employment.

Allina removed Dr. Gottlieb as training director on December 23, 2015, and he was given a no-contact order with students. Abel took several weeks off due to stress and anxiety. When she returned, she started working for Dr. Elizabeth LaRusso, the medical director of mental health services. Despite the no-contact order, Dr. Gottlieb would often make "threatening eye contact" with Abel and other students, and the clinic layout resulted in Abel seeing Dr. Gottlieb on a daily basis. A few weeks after the no-contact order was issued, Dr. Gottlieb "approached [Abel] from behind and stood breathing in a simultaneously sexualized and threatening manner." Abel was also harassed and intimidated by allies of Dr. Gottlieb at the clinic following her return. This included harassment by the interim practicum program director following Dr. Gottlieb's removal, who continued some of Dr. Gottlieb's controversial methods.

Abel raised concerns with Allina throughout her practicum experience. Informally, she spoke with Dr. Kimberly Finch, who was the intern supervisor at Abbott. Dr. Finch shared Abel's concerns with her colleagues at the clinic. Abel also spoke informally with Dr. LaRusso, who, like Dr. Finch, agreed to share the information.

On a number of occasions, Abel met with Dr. Michael Schmitz, a clinical director at Abbott. Initially, Dr. Schmitz told Abel that she should bring her concerns to Dr. Gottlieb, but he later agreed to meet with her privately. During one private meeting, Dr. Schmitz instructed Abel to be "emotionally tough" and implied that Abel would have to tolerate Dr. Gottlieb's misconduct. An Abbott human resources representative joined several of Abel's meetings with Dr. Schmitz, and it was typical in these meetings for Abel to be asked yes or no questions, but she was otherwise prevented from sharing the details of her experiences and concerns. In one meeting, Dr. Schmitz and the HR representative acknowledged that they knew Dr. Gottlieb was violating the no-contact order, but asserted that it was probably unintentional. After Abel filed a formal complaint with the Board of Psychology, Dr. Schmitz requested a follow-up meeting where he and the HR representative focused primarily on keeping news of the complaint suppressed.

Abel had similar conversations with St. Mary's. After her initial interview with Dr. Gottlieb, Abel voiced concerns to the program advisor who had recommended she apply for Dr. Gottlieb's program. Her advisor counseled her to go along with Dr. Gottlieb's requests, dismissing his misconduct as "normal" and saying that he is "just funny." During the first month of the practicum, Abel raised concerns with Dr. Phyllis Solon, another St. Mary's faculty member. Dr. Solon acknowledged that Dr. Gottlieb was

culturally incompetent and admitted that she had advised St. Mary's to discontinue sending students to work with him. Abel discovered that other students had experienced similar race- and sex-based discrimination during their own training under Dr. Gottlieb and that St. Mary's had merely counseled them on how to "get through" it.

Abel complained to Dr. Solon a second time two months after their first discussion, and Dr. Solon gave Abel tips on how to deflect Dr. Gottlieb's harassment and sexual advances, revealing that she knew of "at least three previous students who had been sexually and racially harassed." Dr. Solon advised Abel to avoid unwanted attention from Dr. Gottlieb because the school's efforts, including past complaints about Dr. Gottlieb and remediation plans, had gone nowhere. By December 2015, Abel "was raising her concerns with St. Mary's on a weekly basis." That same month, Abel announced to the class at her practicum seminar that Dr. Gottlieb was engaged in "racial and sexual violence."

In the spring and summer of 2016, faculty members at St. Mary's were hostile to Abel and made her feel that completion of her degree was contingent on her silence. Abel asserts that St. Mary's ignored Dr. Gottlieb's misconduct because St. Mary's depended on practicum sites under his control for its continued accreditation, and noted that Dr. Gottlieb sat on the advisory board for the psychology doctorate program at St. Mary's.

Allina and St. Mary's discussed whether Abel should complete her practicum in the spring of 2016. Dr. Solon of St. Mary's indicated to Dr. Finch of Allina that she was aware of Dr. Gottlieb's history of misconduct; the school had coached students on how to deal with him; and the school had conversations with him "about sexist and racist behaviors as well as abuse of power in supervision."

On May 2, 2016, Abel decided that she would end her practicum 3 months early. She allowed herself a few remaining weeks to "facilitate patient transitions" and complete her required hours. Abel ended her practicum on May 27, 2016.

Despite the practicum ending, Abel continued to work for Allina through the fall of 2016 with Dr. LaRusso. She explained that the work with Dr. LaRusso was off-site and "safe." In June 2016, at the request of Dr. LaRusso, Abel met with Dr. Paul Goering, Allina's Vice President of Mental Health. They discussed Abel's practicum experience and ongoing hostility among clinic staff. Dr. Gottlieb resigned in June 2016.

Abel also had several conversations with St. Mary's related to her practicum experience after the practicum had ended. In spring 2017, Abel was instructed by a faculty member at St. Mary's to apply to an internship site that Dr. Gottlieb was affiliated with, telling Abel she would have to "suck it up." During the internship application process, Dr. Solon also told Abel that she needed to put the experience behind her because she "represent[ed] St. Mary's."

Dr. Solon further contacted Abel in January 2018, in the wake of the Larry Nassar trial in Michigan, to see how Abel was reacting to the news. Abel responded that she was having a difficult time, and she asked Dr. Solon a series of follow-up questions related to her own harassment. Dr. Solon responded, making it clear that she and St. Mary's "were aware of the extent of [the] misconduct," but implying that completion of Abel's degree program depended on her continued silence.

On May 26, 2017, Abel filed a charge of discrimination with the Minnesota Department of Human Rights. She alleged race- and sex-based discrimination in the area

of employment against Allina. Abel brought a civil lawsuit against Allina about 9 months later, on March 2, 2018. Under the Human Rights Act, Minn. Stat. §§ 363A.01–.44 (2018), she brought a reprisal claim and race- and sex-based discrimination claims in the areas of employment, education, and public accommodation. She also asserted a common-law negligence claim.

Abel brought a civil lawsuit against St. Mary's 3 days later, on March 5, 2018,[3] including Human Rights Act discrimination claims in the areas of education and public accommodation and a common-law negligence claim.

Allina filed a motion to dismiss, and St. Mary's filed a motion for judgment on the pleadings. The district court granted both motions as to all of Abel's claims. In relevant part, the court concluded that (1) the Human Rights Act discrimination claims were time-barred as a matter of law, and (2) the negligence claims failed because Abel had not sufficiently alleged that Allina and St. Mary's owed her a cognizable common-law duty.

Abel appealed the dismissal of her claims except for her reprisal claim against Allina and her discrimination claim in the area of public accommodation against St. Mary's. A divided panel of the court of appeals affirmed in an unpublished opinion. *Abel v. Abbott Nw. Hosp.*, No. A19-0461, 2019 WL 4745372, at *1 (Minn. App. Sept. 30, 2019). The majority did not reach the merits of Abel's discrimination claims. *Id.* at *3–7. The court concluded that, "even when calculated using the charge-filing date, the statute of

[3] The claims against both Allina and St. Mary's were brought in the same summons and complaint, but service of process on St. Mary's occurred 3 days later than service on Allina. *See* Minn. R. Civ. P. 3.01(a) (providing that a civil action commences against each defendant "when the summons is served upon that defendant").

limitations bars all of Abel's MHRA claims against Allina" because "the last incidents of harassment occurred in January 2016, outside of the statute-of-limitations period." *Id.* at *5–6. The majority agreed with the district court that Abel did not plead viable negligence claims absent respondents owing her a common-law duty. *Id.* at 7. Judge Klaphake dissented on both issues. *Id.* at *7–10 (Klaphake, J., dissenting). We granted Abel's petition for further review.

ANALYSIS

We review a district court's grant of a motion to dismiss for failure to state a claim and a motion for judgment on the pleadings de novo to determine whether the pleadings set forth a legally sufficient claim for relief. *See Zutz v. Nelson*, 788 N.W.2d 58, 61 (Minn. 2010) (motion for judgment on the pleadings); *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (motion to dismiss). A claim is legally sufficient "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). "The reviewing court must 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*, 663 N.W.2d at 553. Construction of the Human Rights Act's provisions is an issue of statutory interpretation which we review de novo. *Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858, 861 (Minn. 2010).

Abel challenges the district court's dismissal of four discrimination claims brought under the Human Rights Act and two common-law negligence claims. We consider these claims in turn, beginning with the discrimination claims.

I.

The district court dismissed all of Abel's Human Rights Act discrimination claims against Allina and St. Mary's as time-barred. We first consider the timeliness of the discrimination claims against Allina.

A.

Abel appeals the dismissal of three Human Rights Act claims against Allina, including race- and sex-based discrimination in the areas of employment, education, and public accommodation. We conclude that the district court did not err in dismissing the education and public accommodation claims as time-barred, but that Abel's employment discrimination claim was timely commenced.

As a preliminary matter, we must decide the measuring date for the statute of limitations periods on each of Abel's discrimination claims against Allina. The measuring date is uncontested for the employment discrimination claim, which is measured from May 26, 2017, when Abel filed a charge of discrimination against Allina with the Commissioner of Human Rights. The parties dispute the measuring date for the two remaining claims: the education and public accommodation discrimination claims.

Abel argues that the education and public accommodation discrimination claims, like the employment discrimination claim, should be measured from the date she filed her charge of discrimination. She asserts that the charge was sufficient to put Allina on notice of the several claims later brought against it. Allina argues that the date Abel commenced her civil action against Allina by service of her complaint—March 2, 2018—is the proper measuring date for the claims. We agree with Allina.

The Human Rights Act requires individuals to identify the practices that they allege to be discriminatory in the charging documents they file with the Department of Human Rights. *See* Minn. Stat. § 363A.28, subd. 1. Any charge filed with the Department must contain "a clear and concise statement of the facts that . . . may constitute the alleged unfair discriminatory practice," Minn. R. 5000.0400, subp. 1C (2019), to inform the scope of the Department's investigation and put the respondent on notice of the nature of the allegations against it. An "[u]nfair discriminatory practice" is "any act described in sections 363A.08 to 363A.19." Minn. Stat. § 363A.03, subd. 48.

Discrimination in the areas of employment, education, and public accommodation are three distinct unfair discriminatory practices that are described in separate sections of the Human Rights Act. *See* Minn. Stat. §§ 363A.08 (employment), .13 (education), .11 (public accommodation). Each discriminatory practice includes different elements, although they may be based in part on common facts, as they are here. *Compare, e.g.*, Minn. Stat. § 363A.11, subd. 1(a)(1) (providing that it is an unfair discriminatory practice under that section "to deny any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation" based on a protected status), *with* Minn. Stat. § 363A.08, subd. 2(3) (providing that it is an unfair discriminatory practice under that section to "discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment" based on a protected status). And any separate unfair discriminatory practice must be identified and detailed separately in any charge of discrimination filed with the commissioner. *See* Minn. Stat. § 363A.28, subd. 1.

Here, the May 26, 2017 charge of discrimination that Abel filed with the Department of Human Rights did not allege discrimination in the areas of education and public accommodation. Instead, it detailed Abel's asserted employment with Allina, and it specifically cited the employment discrimination provision, Minn. Stat. § 363A.08. In response to the prompt, "[t]he discrimination was in the area of," Abel wrote "Employment." And in the section of the charge in which she was to "[d]escribe the discriminatory act, setting forth in statutory language the violation of Minnesota Statutes, Section §363A," Abel wrote in relevant part: "I therefore allege that the above-named Respondents have discriminated against me in the area of employment on the basis of my sex and race . . . ."

About 9 months later, on March 2, 2018, Abel commenced her civil lawsuit against Allina. Like the charge of discrimination, the complaint alleged discrimination in the area of employment, but it also included allegations of discrimination in the areas of education and public accommodation. Abel did not amend her pending charge with the Department in the intervening months to include discriminatory practices in the areas of education or public accommodation. And there is nothing in the record to suggest that Abel was somehow prevented from doing so. No material change occurred between May 26, 2017, and March 2, 2018, that would explain the omission of the education or public accommodation claims, as the practicum program had ended long before either date.

We have barred a discriminatory practice claim as untimely for failing to name the perpetrator of the discriminatory practice—a separate requirement of the charging rules. *State ex rel. Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 700 (Minn. 1996); *see also* Minn. Stat.

§ 363A.28, subd. 1 (providing that a charge of discrimination "must state the name of the person alleged to have committed an unfair discriminatory practice"). In *RSJ, Inc.*, the Department of Human Rights filed a complaint against the owner and operator of a restaurant in his individual capacity, alleging that he had aided and abetted discriminatory practices. The owner/operator argued that the claims should be dismissed because "they were not filed in a verified charge within one year" of the discriminatory practice. 552 N.W.2d at 697–98; *see also* Minn. Stat. § 363.06, subds. 3, 4(3) (1994) (providing that a charge must have been filed within one year of a discriminatory practice before the Department could file a complaint). The Department asserted that the complaint was timely based on a discrimination charge filed against the restaurant within the appropriate timeframe. 552 N.W.2d at 699–70. We disagreed, noting that "no charge ha[d] been filed by either a charging party or the Commissioner against the respondent alleging a discriminatory practice on the part of the respondent," and the existing charge was never amended to include the owner/operator. *Id.* at 700. We found no basis for tolling the limitations period, particularly because the Department knew or should have known the necessary information to include the owner/operator in the charge. *Id.*

A federal district court in Minnesota has reached a similar conclusion when a charge of discrimination and a civil complaint alleged unfair discriminatory practices based on different types of discrimination. *See Hayes v. Blue Cross Blue Shield of Minn., Inc.*, 21 F. Supp. 2d 960 (D. Minn. 1998). In *Hayes*, a party timely filed a charge of discrimination based on disability. *Id.* at 968. In a civil complaint filed later, the plaintiff alleged pregnancy discrimination. *Id.* The court concluded that, because the charge did not

mention pregnancy discrimination, the pregnancy discrimination claim was time-barred under the Human Rights Act. *Id.* at 977.

As in *RJC, Inc.* and *Hayes*, we conclude that Abel's charge of discrimination cannot be read to encompass her education and public accommodation discrimination claims. Abel's charge of discrimination identifying and detailing her employment discrimination claim—and only her employment discrimination claim—did not meet the charging requirements as to her education and public accommodation discrimination claims and did not put Allina on notice that those claims would be leveled against it 9 months later by civil complaint. Accordingly, we conclude that the filing date of the civil complaint, March 2, 2018, is the measuring date for the education and public accommodation claims.

B.

Having established the relevant measuring dates for the claims against Allina, we must consider whether the charge was filed or the civil action was brought "within one year after the occurrence of the practice." Minn. Stat. § 363A.28, subd. 3(a).

Even considering the discrimination claim with the earliest measuring date for the claims against Allina—May 26, 2017—it is clear that most of the alleged misconduct occurred outside of the one-year statute of limitations periods. The final day of Abel's practicum was May 27, 2016. Accordingly, only the last two days of Abel's practicum fall within the limitations period. The rest of the practicum, and Dr. Gottlieb's and respondents' alleged misconduct during that time, thus occurred outside of the one-year limitations period.

Abel argues, however, that all of her claims are timely under the continuing violations doctrine. The continuing violations doctrine is an equitable doctrine that can toll the statute of limitations where a pattern of discriminatory conduct "constitute[s] a sufficiently integrated pattern to form, in effect, a single discriminatory act." *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 440 n.11 (Minn. 1983). "Under Minnesota law, each individual discriminatory act which is part of a continuing violation triggers anew the time period for reporting the entire pattern of discrimination, 'as long as at least one incident of discrimination occurred within the limitations period.' " *Smith v. Ashland, Inc.*, 250 F.3d 1167, 1172 (8th Cir. 2001) (quoting *Treanor v. MCI Telecomms. Corp.*, 200 F.3d 570, 573 (8th Cir. 2000)).[4] A plaintiff can prove a continuing violation of the Human Rights Act by demonstrating "(1) a series of related acts, one or more of which fell within the limitations period, or (2) the maintenance of a discriminatory system both before and during the limitations period." *Id.* at 1172. The critical question is "whether any present

[4] Although "a federal interpretation of state law is not binding on our court," *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 228 n.3 (Minn. 2019), we find the Eighth Circuit's interpretation to be an accurate reflection of our holdings in *Sigurdson v. Isanti County*, 448 N.W.2d 62 (Minn. 1989) and *Brotherhood of Railway & Steamship Clerks v. State*, 229 N.W.2d 3 (Minn. 1975). In those cases, we applied the continuing violations doctrine to extend discrimination claims under the Human Rights Act. In *Sigurdson*, we concluded that "[t]he wrongful denial of plaintiff's claim to be a deputy assessor with a deputy assessor's pay was a continuing act," and was thus not barred by the statute of limitations. 448 N.W.2d at 68. And in *Brotherhood*, we concluded that discriminatory acts in pay, job rights, and job classification constituted a continuing violation and thus were not barred, despite some of the acts having taken place more than 8 years before the charges were filed. 229 N.W.2d at 8–9, 12.

violation exists" within the statute of limitations period. *Sigurdson v. Isanti County*, 448 N.W.2d 62, 67 (Minn. 1989) (citation omitted) (internal quotation marks omitted).

Abel alleges that the violations she experienced "were part of a series of related acts of discrimination" based on her sex and race. Essentially, Abel argues that the complicity of Allina and St. Mary's in Dr. Gottlieb's ongoing misconduct constitutes a continuing violation which tolls the statute of limitations as to each discrimination claim.[5] Although we agree that applying the continuing violations doctrine is appropriate in this case, we do not conclude that the doctrine saves all of Abel's claims. We will discuss the matter in the context of each statute of limitations period.

C.

We start with Abel's employment discrimination claim. *See* Minn. Stat. § 363A.08, subd. 2(3). The measuring date for this claim is May 26, 2017, when Abel filed her charge of discrimination. To survive the motion to dismiss on this claim, Abel must have

[5] In her complaint, Abel characterizes several of her discrimination claims as hostile environment claims, although she did not make that point in briefing to our court. We note that the continuing violations doctrine is particularly relevant in hostile environment claims. *See Smith*, 250 F.3d at 1173 (stating that "a hostile work environment claim, by nature, constitutes a continuing violation"). This is because hostile environment claims of any kind are by nature analyzed differently than discrimination based on discrete acts. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116–17 (2002) ("A hostile work environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice.") (citation omitted) (internal quotation marks omitted). Hostile environment claims may be based on "[p]ervasive incidents, any of which may not be actionable when considered in isolation." *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 232 (Minn. 2020).

sufficiently pled a continuing violation with one or more acts falling on or after May 26, 2016. We conclude that she did.

The district court should dismiss claims based on the running of a statute of limitations "only when it is clear from the stated allegations in the complaint that the statute of limitations has run." *Hansen v. U.S. Bank Nat'l Assoc.*, 934 N.W.2d 319, 326 (Minn. 2019). "We will not make inferential leaps in favor of the defendant to conclude that a lawsuit is time-barred." *Id.* "An assertion that the statute of limitations bars a cause of action is an affirmative defense and 'the party asserting the defense has the burden of establishing each of the elements.' " *Id.* (quoting *MacRae v. Grp. Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008)).

The complaint asserts that the "violations were part of a series of related acts of discrimination based on the sex and race of [Abel] and constitute continuing violations." Abel alleged that Dr. Gottlieb broke the no-contact order every day, routinely walking past the practicum students and making threatening eye contact or entering their workspace "looking for something." In one instance, Dr. Gottlieb "approached [Abel] from behind and stood breathing in a simultaneously sexualized and threatening manner." Abel also alleged aggravating and humiliating conduct at the hands of Dr. Gottlieb's colleagues nearly every day that contributed to the hostile climate at the clinic. These interactions ranged from Dr. Gottlieb's ability to send messages through allies at the clinic to disparaging remarks about Abel made by his colleagues.

Under these allegations, taken as true, Allina has not met its burden of showing that Abel's employment discrimination claim is barred by the statute of limitations. Abel has

plausibly alleged a continuing violation extending through the final 2 days of her practicum. Accordingly, the statute of limitations is tolled for Abel's employment discrimination claim. This claim was improperly dismissed as time-barred.

Next, we consider the timeliness of Abel's discrimination claims against Allina in the areas of education and public accommodation. *See* Minn. Stat. §§ 363A.13, .11. The measuring date for these claims is March 2, 2018, when Abel brought her civil lawsuit against Allina. The claim survives the motion to dismiss unless it is clear that Allina has established there was not a continuing violation with one or more acts falling within the statute of limitations period. We conclude that Allina has met this burden and affirm the dismissal of these claims as time-barred.

Unlike the employment discrimination claim, which included the final two days of the practicum, there are no alleged discriminatory acts that are part of the continuing violation—or even any conversations or discussions with Allina—on or after March 2, 2017. Abel alleges that she remained affected by Allina's ongoing failure to remedy the earlier discriminatory practices. But, by March 2, 2017, Abel's practicum would have already ended even if she had not prematurely left the program. Dr. Gottlieb had resigned 9 months earlier, and even the Abbott clinical director who formally handled Abel's concerns, Dr. Schmitz, was no longer at Abbott.

In deciding whether one or more related acts fell within the limitations period, "[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." *Sigurdson*, 448 N.W.2d at 67 (citation

omitted) (internal quotation marks omitted). As we stated in *Sigurdson*, "[i]n one sense, a discriminatory act always has some continuing consequences. There is always the effect of the loss of 'what should have been.' But if a mere continuing effect will extend the limitation period, the statute of limitations would be effectively emasculated. This cannot be." *Id.* We do not doubt that the consequences of the alleged discrimination continued to be painful for Abel following the termination of her practicum. Nevertheless, we conclude that the education and public accommodation discrimination claims against Allina are barred by the statute of limitations and were therefore properly dismissed.

D.

Abel appeals the dismissal of her discrimination claim against St. Mary's in the area of education. *See* Minn. Stat. § 363A.13. The education discrimination claim against St. Mary's is measured from March 5, 2018, when Abel commenced her civil action against St. Mary's by service of complaint. The claim survives the motion for judgment on the pleadings unless St. Mary's shows that there was not a continuing violation with one or more acts falling on or after March 5, 2017. We conclude that St. Mary's has met this burden, and that this claim was therefore properly dismissed.

As noted above, the continuing violations doctrine applies to toll the statute of limitations where a pattern of discriminatory conduct constitutes a single discriminatory act. *Hubbard*, 330 N.W.2d at 440 n.11. We must look to whether any present violation exists within the statute of limitations period. *See Sigurdson*, 488 N.W.2d at 67. Three events allegedly occurred on or after March 5, 2017: a spring 2017 conversation with a St. Mary's faculty member where Abel was told to "suck it up"; a similar conversation where

Dr. Solon told Abel that she represented St. Mary's and that she needed to put the Abbott experience behind her; and an email conversation between Dr. Solon and Abel regarding Larry Nassar and St. Mary's role in Abel's practicum experience.

Abel's conversations about the practicum after the fact are insufficient to extend her claim under the continuing violations doctrine because they are not within the series of acts that constitute the continuing violation. As above, we note that the continuing consequences for Abel may be significant, but this is insufficient to extend her claim. We conclude that the education discrimination claim against St. Mary's is barred by the statute of limitations and was therefore properly dismissed.

In sum, we conclude that the district court properly dismissed three of Abel's four discrimination claims as time-barred. We further conclude that Abel's employment discrimination claim against Allina was not time-barred and dismissal of the claim on that basis was improper.

II.

Because dismissal of Abel's employment discrimination claim based on the statute of limitations was improper, we turn next to the question of whether Abel's claim is otherwise barred because she cannot maintain the claim as an unpaid practicum student. Essentially, the district court concluded that compensation is a necessary prerequisite to the maintenance of Abel's employment discrimination claim, noting that the lack of

compensation would have barred the claim "even if it were timely." The court of appeals did not reach this question.[6] *Abel*, 2019 WL 4745372, at *3 n.4.

We must decide whether the employment discrimination provision, Minn. Stat. § 363A.08, subd. 2(3), provides a cause of action for a practicum student despite a lack of compensation. This decision requires construction of the Human Rights Act, which we review de novo. *Krueger*, 781 N.W.2d at 861.

The section of the Human Rights Act governing unfair employment practices is broad and encompasses a wide range of actions from unlawful hiring policies to unlawful discharge. *See generally* Minn. Stat. § 363A.08. Relevant here, the Human Rights Act provides that it is an unfair employment practice for an employer, because of race or sex, to "discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363A.08, subd. 2(3).

The Human Rights Act does include several enumerated exemptions from employment discrimination liability. *See* Minn. Stat. § 363A.08 note ("Any statutory exemptions to this section are covered under sections 363A.20 and 363A.26."); Minn. Stat. § 363A.20 (exempting certain employers and employment practices from liability); Minn.

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[6] Abel raised this issue in her petition for review, which we granted. Although we could remand this issue to the court of appeals, we address it here in the interests of judicial economy. *See Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 628–29 (Minn. 2012) (addressing three separate grounds not reached by the court of appeals because "the relevant questions have been briefed by the parties and the record is sufficient for us to decide the remaining issues"); *see also Hoffman v. N. States Power Co.*, 764 N.W.2d 34, 48 (Minn. 2009) (addressing a jurisdiction question in the interests of judicial economy).

Stat. § 363A.26 (exempting religious associations from liability for certain practices). Unpaid practicum students, however, are not expressly exempted from the protections of the Human Rights Act by any of these provisions.[7]

Because we have not yet had the opportunity to consider whether an unpaid practicum student may state a claim under section 363A.08, subdivision 2(3), a discussion of approaches taken in the Title VII context is helpful.[8] For the reasons that follow, we conclude that the "hybrid" test used in certain Title VII cases provides the appropriate framework for Human Rights Act claims. Under this framework, we do not agree with the

[7] We note that the Commissioner of the Department of Human Rights encourages us to construe the Human Rights Act to allow employment discrimination claims by "an individual working in a workplace as a mandatory practical component of their education even if the individual is not paid for that work." The Commissioner discourages a bright-line test based on compensation and instead urges a more holistic fact-based determination. Although this interpretation is not binding on our court, it reinforces our conclusion that the plain terms of Minn. Stat. § 363A.08, or its attendant definitions, do not require the person asserting the discrimination claim to be compensated, and, while compensation may be a relevant factor in determining whether an employment relationship exists, it should not be dispositive.

[8] "In construing the MHRA, we have at times 'relied on principles developed under Title VII' but we are not bound by interpretations of Title VII." *Ray v. Miller Meester Advert., Inc.*, 684 N.W.2d 404, 408 (Minn. 2004) (quoting *Turner v. IDS Fin. Servs. Inc.*, 471 N.W.2d 105, 107 (Minn. 1991)). The definitions of "employer" and "employee" are not identical between the MHRA and Title VII. *Compare* Minn. Stat. § 363A.03, subds. 15–16, *with* 42 U.S.C. § 2000e(b), (f) (2018). They are, however, sufficiently similar to consider Title VII principles in this context.

district court that unpaid practicum students are excluded from the protections of the Human Rights Act as a matter of law.

We begin with the approach used most frequently in the Title VII context: application of common-law agency doctrine.[9] When determining whether an individual is an employee or an independent contractor in the workers' compensation context, for example, we consider the following non-exhaustive common-law factors: "(1) The right to control the means and manner of performance; (2) the mode of payment; (3) the furnishings of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge." *Wangen v. City of Fountain*, 255 N.W.2d 813, 814–15 (Minn. 1977).[10] Of these, the most important is "the right to control the means and manner of performance." *Id.*

To be sure, at least two federal courts have read in to these common-law factors a requirement of compensation. *See O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997)

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[9] As the dissent notes, many federal courts have taken this approach in Title VII cases rather than applying the "hybrid" or "economic realities" tests discussed later. This is largely because the economic realities test was precluded in the Title VII context by the U.S. Supreme Court. As one federal court explained, "when Congress uses the term 'employee' without defining it with precision, courts should presume that Congress had in mind 'the conventional master-servant relationship as understood by the common-law agency doctrine.' " *O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992)). Use of the economic realities test was not allowed post-*Darden* because "the construction is broader than at common law." *Wilde v. County of Kandiyohi*, 15 F.3d 103, 106 (8th Cir. 1994). Minnesota is under no obligation to follow this limiting construction in the context of the Human Rights Act.

[10] The factors from *Wangen* arose from common-law agency doctrine. *See Graf v. Montgomery Ward & Co.*, 49 N.W.2d 797, 801 (Minn. 1951) (discussing Restatement (First) of Agency § 220 (Am. Law Inst. 1933)).

(concluding that an unpaid intern was not an employee under Title VII because "a prerequisite to considering whether an individual is [an employee or an independent contractor] under common-law agency principles is that the individual have been hired in the first instance"); *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 72–73 (8th Cir. 1990) (concluding that a rodeo association's membership roster could not be construed as a list of employees because compensation "is an essential condition to the existence of an employer-employee relationship").[11]

This interpretation is not universal, however. *See Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 221–22 (4th Cir. 1993) (concluding that summary judgment on the issue of whether an employment relationship existed was inappropriate where the putative employee was an unpaid volunteer with a fire company, but received certain benefits); *cf. Marie v. Am. Red Cross*, 771 F.3d 344, 353 (6th Cir. 2014) (declining to adopt a "threshold remuneration test" for the determination of whether a volunteer is an employee); *Waisgerber v. City of Los Angeles*, 406 Fed. Appx. 150, 151 (9th Cir. 2010) (explaining that "the fact that a person is not paid a salary does not necessarily foreclose the possibility" of an employment relationship).

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[11] In *Graves*, a rodeo association was "organized for the principal purpose of sanctioning rodeo barrel races." 907 F.2d at 72. Its members could participate in rodeo association-endorsed competitions but were not trained or paid by the association, and its members transported their own horses and equipment. *Id.* As the Eighth Circuit pointed out, the rodeo association was "so unlike an employer to its members that plunging into questions of control or economic realities is on the order of considering whether mitigating circumstances were present during the commission of a crime before determining whether there is [in fact a crime]." *Id.* at 74. The analysis in *Graves* is therefore of limited use in this case, where Abel's situation much more closely approximated a traditional employment relationship.

Moreover, the Human Rights Act has historically "provided more expansive protections to Minnesotans than federal law." *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 229 (Minn. 2020). The purpose of the Human Rights Act is "to secure for persons in this state, freedom from discrimination," as discrimination "threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy." Minn. Stat. § 363A. 02, subd. 1. The provisions of the Human Rights Act are to be "construed liberally for the accomplishment of the purposes thereof." Minn. Stat. § 363A.04. We therefore avoid a construction of Minn. Stat. § 363A.08, subd. 2(3), which reads in compensation as a prerequisite for a discrimination claim when that is not mandated by the statutory language.

Further, we conclude that reliance on common-law agency principles alone is unnecessarily restrictive in light of the liberal construction we must afford the Human Rights Act. While common-law principles impose reasonable constraints on the maintenance of employment discrimination suits, we conclude that Title VII's hybrid test is the more appropriate approach in this case. Under the hybrid test, the existence of an employment relationship "is construed in light of general common-law concepts, taking into account the economic realities of the situation." *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994) (describing consideration of economic realities as being "based on the court's view that the statute should 'be read in light of the mischief to be corrected and the end to be attained' " (quoting *Armbruster v. Quinn*, 711 F.2d 1332, 1340 (6th Cir. 1983), *abrogated on other grounds by Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006))).

To determine whether an employment relationship exists—and a suit may be maintained—the hybrid test "examines the economic realities underlying the work relationship to decide whether the worker is likely to be susceptible to the discriminatory practices Title VII was designed to eliminate." *Id.* at 105; *see also Krueger*, 781 N.W.2d at 863 (explaining that we are called to "determine whether the statute actually *provides* a cause of action to a particular class of persons"). Courts have also weighed "additional factors related to the worker's economic situation, like how the work relationship may be terminated, whether the worker receives yearly leave, whether the worker accrues retirement benefits, and whether the hiring party pays social security taxes." *Wilde*, 15 F.3d at 105. In this totality-of-the-circumstances analysis, no single factor is dispositive. *See Hanson v. Friends of Minn. Sinfonia*, 181 F. Supp. 2d 1003, 1007 (D. Minn. 2002) (citing *Wilde*, 15 F.3d at 104–05).

Turning to the facts of this case, we examine whether Allina has sufficiently demonstrated that Abel cannot, as a matter of law, be "susceptible to the discriminatory practices [the Human Rights Act] was designed to eliminate," *id.* at 105, because of her lack of compensation. Based on the statutory language and common-law factors, we do not agree that Abel's employment discrimination claim should be dismissed for lack of compensation. Like a traditional employee, Abel underwent an application process and was selected to take part in the practicum program. Once she was a part of the practicum program, Abel accessed traditional employee resources, like human resources and the IT department. Moreover, Abel asserts in her complaint that she "performed the work of an

employee." Like her paid colleagues, she provided services to Allina and its patients and clients, and Allina—albeit not Abel—was compensated for this work.

The absence of compensation does not bar Abel's employment discrimination claim as a matter of law. Abel has alleged that she had an employment relationship with Allina. We therefore conclude that Abel has stated a claim for employment discrimination under the Human Rights Act. *See Walsh*, 851 N.W.2d at 603.

III.

Finally, we turn to Abel's common-law negligence claims against Allina and St. Mary's. The district court dismissed these claims, and the court of appeals affirmed. Essentially, both courts stated that, to avoid preemption under the Human Rights Act, Abel must have alleged facts sufficient to show a cognizable common-law duty separate and apart from any obligations owed under the Human Rights Act.[12] The courts further concluded that Abel had not done so. These decisions thus require us to consider which

[12] The Human Rights Act provides that "as to acts declared unfair by sections 363A.08 to 363A.19, and 363A.28, subdivision 10, the procedure herein provided shall, while pending, be exclusive." Minn. Stat. § 363A.04. The district court's formulation of when common-law negligence is preempted by the Human Rights Act stems from a decision by a federal district court in Minnesota, which held "that the MHRA preempts a common law cause of action if (1) the factual basis and injuries supporting the common law claim also would establish a violation of the MHRA, and (2) the obligations the defendant owes to the plaintiff, as a practical matter, are the same under both the common law and the MHRA." *Pierce v. Rainbow Foods Grp., Inc.*, 158 F. Supp. 2d 969, 975–76 (D. Minn. 2001). For the purposes of our discussion, we assume, without deciding, that this formulation is appropriate.

common-law duties, if any, a graduate school and hospital owe to a graduate student involved in a practicum program.[13]

We discuss each negligence claim in turn, beginning with the claim against Allina.

A.

"The basic elements of a negligence claim are: (1) existence of a duty of care; (2) breach of that duty; (3) proximate causation; and (4) injury. *Bjerke v. Johnson*, 742 N.W.2d 660, 664 (Minn. 2007). When asserting a negligence claim, "[t]he existence of a duty of care is a threshold question because a defendant cannot breach a nonexistent duty." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014). Generally, "a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party's conduct." *Id.* at 177–78.

There are two instances, however, where "a negligent defendant may be held liable to a plaintiff for harm caused by a third party." *Fenrich v. Blake School*, 920 N.W.2d 195, 202 (Minn. 2018). One of these instances occurs "when there is a special relationship between a plaintiff and a defendant and the harm . . . is foreseeable." *Doe 169*, 845 N.W.2d at 178. Another occurs "when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Domagala v. Rolland*, 805 N.W.2d 14, 23 (Minn. 2011). We review the existence of a duty of care de novo. *Id.* at 22.

[13] The parties did not argue or brief whether Allina was responsible for Dr. Gottlieb's misconduct under a theory of respondeat superior. Our decision today does not foreclose any party from moving to amend its pleadings to address this theory.

Abel claims that Allina owed her a duty under both theories.[14] "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*, 851 N.W.2d at 603. It is not required that a plaintiff "allege facts and every element of a cause of action." *Id.* at 602 (quoting *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963)). We "construe the complaint to allow the plaintiff's claim to go forward unless there is no way to construe the alleged facts—and the inferences drawn from those facts—in support of the plaintiff's claim." *Hansen*, 934 N.W.2d at 326.

We begin with whether the facts alleged support a conclusion that Allina's own conduct created a foreseeable risk of injury to a foreseeable plaintiff. "In analyzing a

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[14] Judge Klaphake of the court of appeals agreed, concluding that under either exception, "Abel allege[d] facts that could support a duty." *Abel*, No. A19-0461, 2019 WL 4745372, at *9 (Klaphake, J., dissenting).

Abel has not forfeited her right to argue that Allina and St. Mary's owed her a duty under a foreseeable risk theory. In her complaint, Abel alleged at length that both Allina and St. Mary's were aware of discrimination and harassment taking place at Abbott, both before and during her practicum. She alleged that respondents owed her duties of care and breached those duties by knowingly exposing her to discrimination and harassment at Abbott. And in briefing to the district court, Abel maintained that St. Mary's owed a duty to protect her from harm caused by "third parties."

Pleadings are to be construed so "as to do substantial justice," Minn. R. Civ. P. 8.06, and our rules demonstrate a "preference for non-technical, broad-brush pleadings," *Walsh*, 851 N.W.2d at 605. Negligence is not among the special matters requiring enhanced factual specificity in pleading. *See* Minn. R. Civ. P. 9. Further, sample forms for negligence in the Rules of Civil Procedure fail to mention the word "duty" at all. *See* Appendix of Forms 8–9; *see also* Minn. R. Civ. P. 84 (stating that the forms "sufficiently reflect the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate"). We decline to impose a more rigorous standard in this matter than is required by our rules. Under the broad pleading standards that govern the case at this early stage in the proceedings, we conclude that Abel properly preserved this theory.

defendant's 'own conduct,' we have drawn a distinction between misfeasance and nonfeasance." *Fenrich*, 920 N.W.2d at 203. Whereas misfeasance is "active misconduct working positive injury to others," nonfeasance is "passive inaction." *Id.* (quoting *Doe 169*, 845 N.W.2d at 178). "If a defendant's conduct is mere nonfeasance, that defendant owes no duty of care to the plaintiff for harm caused by a third party." *Id.*

The facts alleged support a conclusion that Allina's conduct was not passive inaction. The practicum was run through Abbott's clinical psychology program, and Allina authorized Dr. Gottlieb to supervise the program. Allina fielded the complaints of practicum students. Upon receiving Abel's complaints, an Allina clinical director instructed Abel to bring her concerns back to Dr. Gottlieb. Allina clearly attempted to exercise its control when its leadership removed Dr. Gottlieb as training director and instituted the ultimately unsuccessful no-contact order. And, when Dr. Gottlieb was removed, Abbott replaced him with an interim program director who engaged in similar misconduct. Contrary to Allina's assertions, these allegations, at least at this early stage of litigation, constitute misfeasance on the part of Allina.

Moving to the foreseeability of the harm, "we 'look at whether the specific danger was objectively reasonable to expect, not simply whether it was within the realm of any conceivable possibility.' " *Foss v. Kincade*, 766 N.W.2d 317, 322 (Minn. 2009) (quoting *Whiteford ex rel. Whiteford v. Yamaha Motor Corp., U.S.A.*, 582 N.W.2d 916, 918 (Minn. 1998)). Here, it was objectively reasonable for Allina to expect Dr. Gottlieb's misconduct against Abel to occur. Dr. Gottlieb was vocal about "his girls" in the practicum program, and his colleagues knew about his problematic methods, including the role plays and

chest-touching. Further, Allina was aware that the harm was occurring during Abel's tenure with the program. Even when Allina instituted the no-contact order, practicum students were moved to a place in the clinic where Dr. Gottlieb could interact with them frequently and the order was not enforced. Not only could Allina reasonably expect harm, it knew the harm was occurring.

It is also clear that Abel was a foreseeable plaintiff. As a female student, Abel was in a class of students who had already been subjected to Dr. Gottlieb's inappropriate conduct, and was likely to be subjected to discrimination as one of Dr. Gottlieb's "girls." Moreover, Abel was placed and kept under the supervision of Dr. Gottlieb even though he openly referred to her as "the brown one" or "the graduate student of color" and described himself as "not culturally competent."

Taken together, these allegations support the conclusion that Allina had a duty to protect Abel based on its own conduct creating a foreseeable risk of harm to Abel, a foreseeable plaintiff. Because we conclude that the allegations under this theory are sufficient to support Abel's assertion that Allina owed Abel a duty, we decline to address whether a special relationship exists.

B.

We now turn to Abel's negligence claim against St. Mary's. As with Allina, we do not decide whether a special relationship exists in this instance because we conclude that Abel has sufficiently alleged that St. Mary's own conduct created a foreseeable risk of injury to a foreseeable plaintiff. On appeal from dismissal of a claim based on a motion for judgment on the pleadings, "we consider only the facts alleged in the complaint,

accepting those facts as true and drawing all reasonable inferences in favor of the nonmoving party." *Zutz*, 788 N.W.2d at 61. "Under our law, the pleading of broad general statements that may be conclusory is permitted." *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997). As with a motion to dismiss, we "construe the complaint to allow the plaintiff's claim to go forward unless there is no way to construe the alleged facts—and the inferences drawn from those facts—in support of the plaintiff's claim." *Hansen*, 934 N.W.2d at 326.

Taking Abel's factual allegations as true, the complaint alleges misfeasance on the part of St. Mary's. Far from "passive inaction," *Fenrich*, 920 N.W.2d at 203, Abel's advisor at St. Mary's knowingly endorsed a practicum that would likely subject Abel to race- and sex-based discrimination. Even after the interview with Dr. Gottlieb, when Abel could still have avoided the Abbott practicum program, her advisor dismissed her concerns and said that Dr. Gottlieb was "just funny." Rather than protecting Abel from harm, St. Mary's faculty actively encouraged her placement with Dr. Gottlieb and then counseled her on how to remain in the practicum despite the discrimination and harassment.

The risk of harm was also foreseeable, based on similar facts to those establishing misfeasance. St. Mary's knew that Dr. Gottlieb had committed race- and sex-based misconduct in the past, and it was "objectively reasonable to expect" that he would do so in the future. *Foss*, 766 N.W.2d at 322. The school had made past efforts to remedy the behavior, including submitting complaints and having Dr. Gottlieb work through remediation plans, but those efforts had failed. With full knowledge that Dr. Gottlieb's

tendencies for race- and sex-based misconduct had not been meaningfully addressed, St. Mary's encouraged students like Abel to apply for placements with Dr. Gottlieb.

Finally, Abel was a foreseeable plaintiff. Other students at St. Mary's, including female students of color, had experienced similar problems with Dr. Gottlieb. Dr. Solon indicated that she knew of at least three other students who had been sexually and racially harassed and gave Abel tips to avoid Dr. Gottlieb's advances. There is nothing in the record to indicate that expectations for Abel in the practicum should have been different than for any other female student who had been subjected to Dr. Gottlieb's misconduct.

Together, these allegations support the conclusion that St. Mary's owed a duty to Abel based on its own conduct, giving rise to a foreseeable risk of injury to a foreseeable plaintiff.

C.

Abel has alleged sufficient facts to establish that Allina and St. Mary's owed her a cognizable common-law duty. At this early stage in litigation, we cannot definitively say that the duties owed under the common law are the same as the statutory obligations owed to Abel under the Human Rights Act. No court has yet concluded that Allina or St. Mary's owe Abel any obligations under the Human Rights Act. The preemption provision applies only where a Human Rights Act claim is "pending" and only "as to acts declared unfair by sections 363A.08 to 363A.19, and 363A.28, subdivision 10." Minn. Stat. § 363A.04. Until a determination is made that the Human Rights Act does not cover the claims of an unpaid practicum student, then the Human Rights Act's exclusivity provision has no application. A decision preempting the negligence claims at this point is therefore premature.

CONCLUSION

For the foregoing reasons, we affirm in part and reverse in part the decision of the court of appeals and remand to the district court for reinstatement of certain claims and proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

CHUTICH, J., took no part in the consideration or decision of this case.

D I S S E N T

GILDEA, Chief Justice (dissenting).

The majority holds that an employment relationship may have existed between a graduate student and the host site of her practicum, even though the graduate student received no wages, salary, or benefits for her work. In doing so, the majority expands the potential liability of employers beyond the intent of the Legislature in a decision that will surely limit the practical opportunities available to Minnesota's students. The majority further errs by conflating misfeasance with nonfeasance in concluding that appellant's common-law negligence claims were improperly dismissed. The majority's error will inevitably create confusion and inconsistency in future cases. Because I disagree with the majority's conclusions that the absence of compensation is not dispositive of an employment relationship and that the respondents' conduct constitutes misfeasance, I respectfully dissent.[1]

I.

Appellant Meagan Abel, a doctoral student, brought an employment discrimination claim under the Minnesota Human Rights Act, Minn. Stat. ch. 363A (2018) ("MHRA"), against respondent Allina Health Systems. Abel alleged that she experienced race and sex discrimination while completing her practicum at one of Allina's hospitals. The district court dismissed Abel's claim because the court determined that Abel was not an employee

[1] Because I conclude that Abel's employment discrimination claim fails as a matter of law, I would not address the statute of limitations issue with respect to the employment discrimination claim. I agree with the majority's conclusion that Abel's remaining discrimination claims in the areas of education and public accommodation are time-barred.

under the MHRA. The court of appeals affirmed the dismissal of Abel's MHRA claim because it was untimely; the court did not reach the question of whether Abel was an Allina employee. *Abel v. Abbott Nw. Hosp.*, No. A19-0461, 2019 WL 4745372, at *6 (Minn. App. Sept. 30, 2019).

The MHRA protects employees from many types of discrimination, including discrimination based on race and sex. Minn. Stat. § 363A.08, subd. 2. The MHRA defines "employee" as "an individual who is employed by an employer and who resides or works in this state." Minn. Stat. § 363A.03, subd. 15. An "employee" "includes a commission salesperson, as defined in section 181.145, who resides or works in this state." *Id.* Although we have not considered the question of who is an employee under the MHRA, the statutory definition of "employee," case law from our court, and case law from federal courts interpreting Title VII, show that compensation is a necessary prerequisite in determining that an employment relationship exists.

The MHRA includes "a commission salesperson" in its definition of "employee." *Id.* A "commission salesperson" is "a person who is paid on the basis of commissions for sales[.]" Minn. Stat. § 181.145, subd. 1 (2018). By including "commission salesperson" in the definition of "employee," the Legislature made clear that to be considered an employee, an individual must receive some type of compensation in exchange for her work. *See* Minn. Stat. § 363A.03, subd. 15.

Our case law supports this interpretation. We have considered the nature of the employment relationship in distinguishing between employees and independent contractors in workers' compensation and unemployment compensation cases. *See, e.g.*,

Wangen v. City of Fountain, 255 N.W.2d 813, 814–15 (Minn. 1977) (workers' compensation); *Speaks, Inc. v. Jensen*, 243 N.W.2d 142, 144–45 (Minn. 1976) (unemployment compensation). In doing so, we considered five factors derived from common-law agency principles: "(1) The right to control the means and manner of performance; (2) *the mode of payment*; (3) the furnishing of material or tools; (4) the control of the premises where the work is done; and (5) the right of the employer to discharge."[2] *Wangen*, 255 N.W.2d at 815 (emphasis added); *see also* Restatement (Second) of Agency § 220 (Am. Law Inst. 1958). Notably, we did not consider *if* the employee or independent contractor was paid in those cases; rather, we considered *how* the employee or independent contractor was compensated. *See Wangen*, 255 N.W.2d at 815. The compensation factor of this test shows that remuneration is an essential condition of the employment relationship.

Federal courts interpreting Title VII agree. Title VII defines "employee" similarly to the MHRA. *Compare* 42 U.S.C. § 2000e(f) (2018) (defining "employee" as "an individual employed by an employer"), *with* Minn. Stat. § 363A.03, subd. 15 (defining "employee" as "an individual who is employed by an employer and who resides or works in this state"). And "[w]e have relied on federal law interpreting Title VII in our

[2] The Department of Labor and Industry and the Department of Employment and Economic Development have since codified standards that are similar to these factors to determine whether an individual meets the definition of an employee. *See* Minn. R. 5224.0010, .0340 (2019) (workers' compensation); Minn. R. 3315.0555, subp. 1 (2019) (unemployment insurance).

interpretation of the MHRA." *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 796 (Minn. 2013). I would look to this persuasive authority here as well.

In *Graves v. Women's Professional Rodeo Ass'n*, for example, the Eighth Circuit rejected the appellant's claim that the members of the Women's Professional Rodeo Association were employees under Title VII. 907 F.2d 71, 73–74 (8th Cir. 1990). The Eighth Circuit explained that members of the Association received no compensation for being members and that compensation "is an essential condition to the existence of an employer-employee relationship." *Id.* at 73. The court declined to apply the "economic realities" test cited by the majority in this case and the "right to control" test we relied on in *Wangen* because courts turn to these tests "only in situations that plausibly approximate an employment relationship," *id.* at 74.

In *O'Connor v. Davis*, the Second Circuit agreed with the Eighth Circuit's conclusion that compensation is an essential condition of the employment relationship. 126 F.3d 112, 115–16 (2d Cir. 1997). In *O'Connor*, a student who was completing an unpaid internship at a hospital brought a sexual harassment claim against the hospital under Title VII. *Id.* at 113. In analyzing whether the student was an employee of the hospital, the Second Circuit explained that courts typically consider factors derived from common-law agency principles to determine whether an individual is an employee. *Id.* at 115. The court determined, however, that applying those factors to an unpaid intern "is flawed because it ignores the antecedent question of whether [the unpaid intern] was hired by [the hospital] for any purpose." *Id.* The court further explained that compensation " 'is an essential condition to the existence of an employer-employee relationship.' " *Id.* at 116

(quoting *Graves*, 907 F.2d at 73). And because the student received "no salary or other wages, and no employee benefits such as health insurance, vacation, or sick pay, nor was she promised any such compensation," the Second Circuit concluded that she was not an employee and therefore her Title VII claim failed.[3] *Id.*

The vast majority of federal courts that have addressed the issue have adopted the Second and Eighth Circuits' rule that remuneration is an essential condition of the employment relationship. *See, e.g.*, *Juino v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 439–40 (5th Cir. 2013) (holding that a volunteer firefighter was not an employee under Title VII because "there [wa]s no receipt of remuneration supporting an employer-employee relationship"); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1243 (11th Cir. 1998) ("[O]nly individuals who receive compensation from an employer can be

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[3] The majority points to *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211 (4th Cir. 1993), as evidence that not every federal jurisdiction views compensation as an essential condition of the employment relationship. But *Haavistola* supports my view that Abel was not an employee. In that case, the Fourth Circuit considered whether a volunteer firefighter—who received benefits but no direct wages as a member of the fire company—was an employee. 6 F.3d at 221 (explaining that the firefighter received a disability pension, "survivors' benefits for dependents," "scholarships for dependents upon disability or death," "tuition reimbursement," and workers' compensation coverage). Because compensation was not defined by law, the Fourth Circuit concluded that "[t]he district court must leave to a factfinder the ultimate conclusion whether the benefits represent indirect but significant remuneration[.]" *Id.* at 222. The court explained that if the factfinder concluded the firefighter received significant remuneration, then the test based on common-law agency principles would apply. *Id.* at 219–22. If the benefits were not significant remuneration, the cases in which the courts held that compensation was an essential condition of employment would apply. *Id.* (citing *Graves*, 907 F.2d at 73).

In this case, Abel did not receive any benefits and no issue of fact exists as to whether she received "significant remuneration," *id.* at 222. Under *Haavistola*, we would conclude that she was not an employee because she did not receive any compensation. *See id.* The majority's reliance on *Haavistola* is therefore misplaced.

deemed 'employees' under [Title VII]."); *McGuinness v. Univ. of N.M. Sch. of Med.*, 170 F.3d 974, 979 (10th Cir. 1998) (concluding that a medical student's claim under Title I of the ADA must fail because "[u]nless a student receives remuneration for the work he performs, he is not considered an employee"); *Melton v. Alaska Career Coll., Inc.*, No. 3:15-cv-209 RRB, 2016 WL 1312738, at *2 (D. Alaska Apr. 4, 2016) (concluding that a student's Title VII claim against the school must fail because the student did not receive any wages or employee benefits from the school and was therefore not an employee); *Cimino v. Borough of Dunmore*, No. 3:02CV1137, 2005 WL 3488419, at *6–8 (M.D. Pa Dec. 21, 2005) (dismissing the plaintiff's Title VII claim because she received no direct or indirect compensation from the defendant and was therefore not the defendant's employee).[4]

[4] The Sixth Circuit has rejected the threshold-remuneration test and instead weighs compensation as one of several nondispositive factors in determining whether an individual is an employee. *See, e.g.*, *Marie v. Am. Red Cross*, 771 F.3d 344, 353–59 (6th Cir. 2014) (concluding that nuns were not employees of two emergency management agencies in part because the nuns received no compensation or benefits nor did the agencies exercise control over the means and manner of their work).

The Seventh Circuit has not addressed whether compensation is dispositive in determining whether an employment relationship exists and courts in that circuit have taken varying approaches. *Compare Doe v. Lee*, 943 F. Supp. 2d 870, 876–77 (N.D. Ill. 2013) (weighing compensation as one of several factors in determining whether a plaintiff was an employee), *with Holder v. Town of Bristol*, No. 3:09-CV-32 PPS, 2009 WL 3004552, at *5–6 (N.D. Ind. Sept. 17, 2009) (concluding that a volunteer reserve police officer was not an employee because the benefits he received from the department were insufficient to establish an employment relationship).

The Ninth Circuit's position, like the Seventh Circuit's, is also unclear. In *Waisgerber v. City of Los Angeles*, the court explained that, in the past, the court has not treated remuneration as a dispositive factor in determining whether an individual is an employee. 406 Fed. App'x 150, 152 (9th Cir. 2010). But the court went on to say that "[i]t is possible [the appellant] can amend her complaint to allege the 'substantial benefits'

I would adopt this common sense view and join these courts in concluding that compensation is an essential requirement of the employment relationship.[5] Just like the student in *O'Connor*, the question of whether Abel received compensation for her work is dispositive. Abel does not dispute that she received no salary, wages, or employee benefits from Allina during her practicum. Accordingly, I would conclude that Abel is not an employee.

The majority reaches the opposite conclusion and holds that Abel has sufficiently alleged that she had an employment relationship with Allina. In reaching this decision, the majority relies on the "hybrid" test and concludes that compensation is one of several non-dispositive factors considered in determining whether an employment relationship exists.[6]

But even if I were to adopt the hybrid test, the result would be the same—Abel is not an employee. Under the hybrid test, courts consider common-law factors as well as "some additional factors related to the worker's economic situation, like how the work

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necessary to make her an employee under Title VII . . . ." *Id.* The Ninth Circuit therefore seems to require some evidence of compensation to consider an individual an employee.

[5] The majority dismisses this approach because "[t]his interpretation is not universal" yet the majority does not cite a single case in which a court has held that an individual who did not receive a salary, wages, or benefits for her work qualified as an employee.

[6] The test is called the hybrid test because it is "a hybrid of the common-law test and the economic realities test." *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). *Wilde* is a Title VII case, *see id*. at 104, and the majority cites *Wilde* to conclude that the hybrid test is appropriate for determining whether an individual is an employee. In a footnote, the majority explains that because Title VII and the MHRA define "employee" similarly, we can apply Title VII principles to interpret the MHRA. But in the very next footnote, the majority rejects those same Title VII principles because they contradict the majority's holding.

relationship may be terminated, whether the worker receives yearly leave, whether the worker accrues retirement benefits, and whether the hiring party pays social security taxes." *Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994). The common-law factors courts consider when applying the hybrid test are almost the same common-law factors we considered in *Wangen*, which, as explained above, assume that the individual is being compensated. *See Wilde*, 15 F.3d at 105; *Wangen*, 255 N.W.2d at 815 (explaining that we consider five factors, including "the mode of payment").

And the factors relating to Abel's economic situation show even more clearly that Abel was not an employee: she did not receive yearly leave or retirement benefits, nor did Allina pay social security taxes. *See Wilde*, 15 F.3d at 105. The only fact the majority points to with respect to the economic realities of the working relationship is that Abel provided services to Allina's patients and Allina was compensated for that work. But in determining whether there is an employment relationship, the relevant inquiry is about the economic relationship between the hiring party and the worker, not the economic relationship between the hiring party and the customers of the hiring party. *See id.* ("[A] court typically weighs . . . additional factors related to *the worker's* economic situation . . . ." (emphasis added)). Although the majority holds that the court must consider "the economic realities underlying the work relationship," the majority fails to do so.

The majority further explains that the absence of compensation does not bar Abel's employment discrimination claim because "[t]he provisions of the Human Rights Act are to be 'construed liberally for the accomplishment of the purposes thereof,' " quoting Minn.

Stat. § 363A.04.[7] But in *Wangen*, we recognized that while "[t]here is no doubt that the Worker's Compensation Act should be liberally construed[,] . . . there must be limitations on the findings of an employee-employer relationship in cases in which the facts will not support such a relationship." 255 N.W.2d at 816; *see also Krueger v. Zeman Constr. Co.*, 781 N.W.2d 858, 863 (Minn. 2010) ("The 'remedial nature' of a statute does not justify the adoption of 'a meaning not intended by the legislature.' " (quoting *Beck v. Groe*, 70 N.W.2d 886, 897 (Minn. 1955))). Compensation is one such limitation. And because Abel did not receive any wages, salary, or benefits from Allina, she was not an employee.[8]

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[7] To support its conclusion that compensation is not a dispositive factor in determining whether an employment relationship exists under the MHRA, the majority cites the interpretation of the Commissioner of the Department of Human Rights. The Commissioner argues that the MHRA's definition of "employee" does not require compensation. The majority's reliance on the agency's interpretation is flatly inconsistent with our well-settled statutory interpretation precedent. That precedent directs that we do not turn to an agency's interpretation of a statute unless we have first determined that the statute is ambiguous. *Schwanke v. Minn. Dep't of Admin.*, 851 N.W.2d 591, 594 n.1 (Minn. 2014) ("[W]e owe no deference to an agency's interpretation of an unambiguous statute."). Because the majority does not conclude that the MHRA's definition of "employee" is ambiguous, the agency's views on the statute's interpretation are irrelevant.

[8] The majority points to the MHRA's enumerated exemptions from employment discrimination liability, noting that unpaid practicum students are not expressly exempted from the MHRA. But the exemptions apply to what are clearly employment relationships. *See, e.g.*, Minn. Stat. § 363A.20, subd. 1 ("The provisions of section 363A.08 shall not apply to the *employment* of any individual [by certain family members]; or . . . in the domestic service of any person." (emphasis added)); *id.*, subd. 2 (exempting religious organizations "when religion or sexual orientation shall be a bona fide occupational qualification for *employment*" (emphasis added)); *id.*, subd. 6 (exempting employers who offer varying insurance or benefits to "*employees* of differing ages" (emphasis added)); *id.*, subd. 8 (exempting employers that require a physical examination "for the purpose of determining the person's capability to perform available *employment*"); Minn. Stat. § 363A.26 ("Nothing in this chapter prohibits any religious [organization] . . . from . . . taking any action with respect to education, *employment*, housing and real property, or use of facilities." (emphasis added)). Because the MHRA's employment discrimination

In an effort to justify its decision to reach the opposite conclusion, the majority asserts that the purpose of the MRHA is to secure freedom from all discrimination for all Minnesotans. The Legislature made its purpose clear in the statute, and that is "to secure for persons in this state, freedom from discrimination" in five specific areas: employment, housing and real property, public accommodations, public services, and education. Minn. Stat. § 363A.02, subd. 1. The area at issue here is employment discrimination, which the Legislature designed to protect employees and prospective employees. *See* Minn. Stat. § 363A.08. There is no doubt that Abel has alleged that she experienced discrimination and harassment and that Allina failed to take action to stop it. And if Abel had brought a timely education discrimination claim under the MHRA, her complaint likely would survive a motion to dismiss. The majority's attempt to save Abel's only viable MHRA claim—her employment discrimination claim—through the adoption of an unbounded rule of law for employment discrimination claims does not serve the Legislature's purpose; it undermines that purpose.

Because Abel was not an employee of Allina, I would hold that her employment discrimination claim fails.

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provision does not apply to non-employees, such as unpaid practicum students, it is not surprising that the statute contains no exception for those students.

The majority also relies on Abel's assertion in her complaint that she "performed the work of an employee" in concluding that Abel has sufficiently alleged that she had an employment relationship with Allina. Of course, there is a vast difference between being an employee and doing the work of an employee. Moreover, adopting the majority's interpretation, which ignores this difference, has severe implications. Extending the liability of employers under the MHRA to unpaid interns will discourage employers from offering these learning opportunities in the future. The options for students seeking practical experience will be limited and their education will suffer as a result.

II.

Abel also brought common-law negligence claims against Allina and respondent St. Mary's University Minnesota (collectively, "respondents"). The district court dismissed Abel's claim against Allina, determining that Allina did not owe Abel a duty of care because she was not an employee of Allina. The district court also determined that the MHRA preempted Abel's negligence claim against St. Mary's. The court of appeals affirmed, explaining that Abel did not provide a basis for concluding that Allina and St. Mary's owed a common-law duty to Abel. *Abel*, 2019 WL 4745372, at *7.

Abel argues that the district court and the court of appeals improperly dismissed her negligence claims and asserts that Allina and St. Mary's owed her a duty of care under two theories. The first theory is that the conduct of Allina and St. Mary's "created a foreseeable risk of injury to a foreseeable plaintiff." The second theory is that Abel had a special relationship with Allina and St. Mary's. The majority agrees with Abel's first theory and therefore does not reach Abel's second theory.

Because I conclude that Abel forfeited the argument that the conduct of Allina and St. Mary's created a foreseeable risk of injury to a foreseeable plaintiff, I would decide the question of whether Abel's negligence claims were improperly dismissed based on the second theory.

A.

A negligence claim has four elements: "(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." *Domagala v. Rolland*, 805 N.W.2d 14, 22 (Minn. 2011). The

threshold question in analyzing a negligence claim is whether the defendant owed a duty to the plaintiff "because a defendant cannot breach a nonexistent duty." *Doe 169 v. Brandon*, 845 N.W.2d 174, 177 (Minn. 2014).

The general rule is "that a person does not owe a duty of care to another—e.g., to aid, protect, or warn that person—if the harm is caused by a third party's conduct." *Id.* at 177–78. We have recognized two exceptions to this rule. The first is that a defendant owes a duty of care to a plaintiff "when there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable." *Id.* at 178. The second is that a defendant owes a duty of care to a plaintiff "when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." *Domagala*, 805 N.W.2d at 23.

In her appeal to our court, Abel asserts that Allina and St. Mary's owed her a duty because their own conduct created a foreseeable risk of injury to her, a foreseeable plaintiff. The majority agrees, even though Abel did not raise this argument before the district court or the court of appeals.[9] But we "consider 'only those issues that the record shows were

[9] The majority holds that Abel did not forfeit the argument that Allina and St. Mary's owed her a duty under a foreseeable risk theory because Minnesota Rule of Civil Procedure 8.01 prefers "non-technical, broad-brush pleadings," *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 605 (Minn. 2014). But our longstanding precedent requires pleadings "to give fair notice to the [defendant] . . . with sufficient clarity *to disclose the pleader's theory* upon which his claim for relief is based[.]" *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963) (emphasis added); *see also Walsh*, 851 N.W.2d at 603 ("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." (emphasis added)). And we do not allow appellants to assert new theories on appeal that were not litigated or argued to the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *Pomush v. McGroarty*, 285 N.W.2d 91, 93 (Minn. 1979) (rejecting a plaintiff's attempt to raise a new theory of negligence on appeal).

presented and considered by the trial court in deciding the matter before it.' " *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quoting *Thayer v. Am. Fin. Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982)). A party cannot "obtain review by raising the same general issue litigated below but under a different theory." *Id.*; *see also Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 633–34 (Minn. 2013) (concluding that an issue was properly before our court in part because appellants raised the issue in their briefs to the district court and the court of appeals).

In her complaint, the bases for Abel's negligence claims were that Allina owed her a duty of care as an employee and as a client, and that St. Mary's owed her a duty of care as a student. In her responses to respondents' motions to dismiss, Abel's only arguments with respect to duty were that (1) Allina "owed a duty to care to" Abel and (2) "[s]chools carry a common law duty to protect students from harm by third parties." Taken together, Abel alleged that Allina and St. Mary's owed her a duty based on a special relationship. She did not argue that Allina and St. Mary's owed her a duty because of their own conduct.

In her complaint, Abel alleged that St. Mary's owed her a duty as a student and that Allina owed her a duty as an employee and as a client. These allegations did not give Allina and St. Mary's fair notice of the theory that they owed Abel a duty because their own conduct created a foreseeable risk to her. Abel's responses to respondents' motions to dismiss in the district court also failed to put respondents on notice of this theory: Abel's only arguments with respect to the duty owed by St. Mary's were that "[e]ducational institutions owe a common law duty to their students" and "[s]chools carry a common law duty to protect students from harm by third parties." And Abel's only argument with respect to Allina's duty was that "Allina owed a duty to care to" her. By holding that the court can properly consider Abel's foreseeable risk theory because she made a conclusory statement that Allina and St. Mary's owed her a duty, the majority directly contradicts our well-settled precedent that requires pleadings to provide fair notice of the theory upon which a claim for relief is based. *See N. States Power Co.*, 122 N.W.2d at 29.

The district court's decision supports this conclusion. The district court concluded that Abel was not an employee and therefore Allina did not owe her a duty of care. The court also determined that Allina did not owe her a duty of care as a client. And because the court concluded that the MHRA preempted Abel's negligence claim against St. Mary's, it did not determine whether St. Mary's owed Abel a duty because she was a student. The court did not consider whether the conduct of Allina or St. Mary's created a foreseeable risk for Abel.

Abel similarly did not raise this issue before the court of appeals. In her brief, Abel's only argument with respect to the duties of Allina and St. Mary's were that "her allegations are also sufficient to sustain negligence claims, at least under theories of negligent supervision and negligent retention." The court of appeals dismissed her negligence claims, determining that Abel "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." *Abel*, 2019 WL 4745372, at *7 ("With respect to St. Mary's, Abel is silent on the issue of duty."). The court of appeals further concluded that Abel forfeited the theories of negligent supervision and negligent retention because she did not raise those theories in her complaint nor did she argue those theories to the district court. *Id.* Because Abel did not argue that respondents' own conduct created a foreseeable risk of injury to her, the court of appeals did not consider that argument in its decision.[10]

[10] Even though Abel did not argue this theory in her brief or at oral argument, in his dissent, Judge Klaphake concluded that "Abel alleges facts that could support a duty under" the exception that "a party's own conduct create[d] a foreseeable risk of injury to a

Finally, Abel did not raise the foreseeable risk theory in her petition for review. *See McGuire v. Bowlin*, 932 N.W.2d 819, 829 (Minn. 2019) ("Failing to raise an issue both before the court of appeals and in a petition for review forfeits the issue."). In her petition, Abel argued that the court of appeals erred in dismissing her negligence claim because "assessing whether a duty is owed includes an analysis of whether a 'special relationship' existed between plaintiff and defendant." She asserted that she "pleaded extensively as to the relationship between herself and the institution hosting and supervising her practicum (Allina) and her school (St. Mary's)." Nowhere in her petition did Abel assert that Allina and St. Mary's owed her a duty under a foreseeable risk theory.

The record shows that Abel did not assert that the conduct of Allina and St. Mary's created a foreseeable risk of injury to her in her complaint, nor did she raise this issue to the district court, to the court of appeals, or in her petition for review. I would therefore conclude that Abel forfeited this argument. *See In re A.D.*, 883 N.W.2d 251, 261 (Minn. 2016) ("[W]e will not consider an issue not addressed below.").

B.

Even if Abel had not forfeited the argument that the conduct of Allina and St. Mary's created a foreseeable risk of injury to a foreseeable plaintiff, I would still conclude that her negligence claims against the respondents fail. I begin with the claim against St. Mary's.

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foreseeable plaintiff." *Abel*, 2019 WL 4745372, at *9 (Klaphake, J., dissenting). The majority, however, did not respond to this argument.

1.

In *Fenrich v. Blake School*, we explained that a school may owe a duty to a student if "(1) the school's own conduct, (2) created a foreseeable risk, (3) to a foreseeable plaintiff." 920 N.W.2d 195, 203 (Minn. 2018). In identifying the school's "own conduct," we distinguish between nonfeasance and misfeasance. *Doe 169*, 845 N.W.2d at 178 (citation omitted) (internal quotation marks omitted). Nonfeasance "is passive inaction or a failure to take steps to protect others from harm." *Id.* (alteration omitted) (citation omitted) (internal quotation marks omitted). Misfeasance, in contrast, is "active misconduct working positive injury to others." *Id.* (citation omitted) (internal quotation marks omitted). To meet the first element, the school's conduct must amount to misfeasance; nonfeasance "is not enough." *Id.*

The majority concludes that a reasonable factfinder could determine that the conduct of St. Mary's constitutes misfeasance. The basis for the majority's conclusion is that faculty members at St. Mary's encouraged Abel to complete a practicum at Allina, despite being aware that the supervisor of the practicum program, Dr. Gottlieb, had engaged in harassing and discriminatory behavior in the past. St. Mary's also did not warn Abel of Dr. Gottlieb's past behavior nor did it act when Abel brought her concerns about his behavior to the faculty at St. Mary's. I disagree with the majority's conclusion that this conduct amounts to misfeasance.

Our case law is instructive of what conduct constitutes misfeasance. In *Fenrich*, a 16-year-old high-school student caused a fatal car accident while driving his teammates and a volunteer coach to an athletic event in South Dakota. 920 N.W.2d at 198. The

student crashed into another car, killing the car's driver and severely injuring the driver's wife. *Id.* The wife sued, asserting that the high school owed a duty of care to members of the general public because the school's own conduct created a foreseeable risk of injury to a foreseeable plaintiff. *See id.*

In determining whether a reasonable factfinder could conclude that a high school's own conduct was misfeasant, we considered several facts. *See id.* at 204. The head coach strongly encouraged team members to participate in the athletic event. *Id.* at 204. Another coach paid the bulk registration fee, attended a practice leading up to the event, and recruited the volunteer coach to run practices for the event. *Id.* That coach also took responsibility for coordinating transportation and approved the plan for the 16-year-old student—who had received his license less than 6 months prior—to drive himself, his teammates, and the volunteer coach to the event. *Id.* at 199, 204. Because these facts showed that the school had "assum[ed] supervision and control over its athletic team's trip" to a postseason athletic event, we held that a reasonable factfinder could conclude that the school's conduct was misfeasant. *Id.* at 203–04.

We also considered whether a defendant's conduct constituted misfeasance in *Domagala*, 805 N.W.2d 14. There, the plaintiff, Domagala, engaged the defendant, Rolland, to perform landscaping services on Domagala's yard. *Id.* at 19. Rolland used a skid loader to perform the work, and when debris jammed the levers on the skid loader, Rolland shook the attachment that was connected to the skid loader to dislodge the debris. *Id.* Domagala was injured while attempting to remove a rock that was jammed in the skid

loader. *Id.* at 19–20. Domagala sued Rolland, asserting that Rolland breached his duty of care to Domagala. *Id.* at 20.

In determining whether Rolland owed a duty of care to Domagala, we considered whether Rolland's conduct was misfeasant. *Id.* at 22–23, 26–27. We determined that "forcefully shaking a bucket attachment that was hanging vertically from a skid loader by one pin could cause injury to those in proximity to the skid loader." *Id.* at 27. Accordingly, we concluded that Rolland owed Domagala a duty to act with reasonable care. *Id.* at 27–28.

These cases support my conclusion that the conduct of St. Mary's—failing to warn Abel of Dr. Gottlieb's past behavior and failing to take action when Abel raised concerns—did not amount to misfeasance. Unlike the high school in *Fenrich*, St. Mary's did not take affirmative steps to assume supervision and control over Abel's practicum. *See* 920 N.W.2d at 203–04. Abel concedes that her work during the practicum "was at the total control and discretion of Allina." And St. Mary's, unlike the defendant in *Domagala* who "forcefully sh[ook] a bucket attachment," 805 N.W.2d at 27, did not take an affirmative step to work "positive injury to others," *Doe 169*, 845 N.W.2d at 178 (citation omitted) (internal quotation marks omitted). Rather, Abel herself asserts that St. Mary's "failed to correct" the discrimination. The failure of St. Mary's to warn Abel of Dr. Gottlieb's past conduct, and to act when Abel raised concerns, easily meets the definition of nonfeasance: "passive inaction or a failure to take steps to protect others from harm." *Doe 169*, 845 N.W.2d at 178 (alteration omitted) (citation omitted) (internal quotation marks

omitted). Because Abel alleged only nonfeasance, and nonfeasance does not equate to misfeasance, I would conclude that St. Mary's did not owe a duty to Abel.

2.

For similar reasons, I would conclude that the conduct of Allina also does not constitute misfeasance. Because Abel did not argue that Allina was responsible for Dr. Gottlieb's misconduct under a theory of respondeat superior, the question is whether Allina—not Dr. Gottlieb—engaged in "active misconduct working positive injury to others," *Doe 169*, 845 N.W.2d at 178 (citation omitted) (internal quotation marks omitted).

Abel alleged the following facts in her complaint about Allina's conduct. Allina failed to provide written policies about supervising practicum students, and Dr. Gottlieb took advantage of this lack of guidance. Abel brought her concerns about Dr. Gottlieb's behavior to Allina staff yet "Allina[] fail[ed] to appropriately intervene." When staff at Allina finally met with Abel as part of "an 'internal investigation' of Dr. Gottlieb," they asked her "a series of 'yes' or 'no' questions and prevented [her] from providing an additional response." Allina failed to remove Dr. Gottlieb as a training director after first learning that he had engaged in discriminatory and harassing behavior toward Abel. After Abel filed a formal complaint, Allina staff "failed to ask any questions about [her] experiences or to provide her an opportunity to discuss Dr. Gottlieb's misconduct." And in her brief, Abel argues that "Allina's failure to stop ongoing discrimination was an act of discrimination."

Although these facts show that Allina's response to learning about Dr. Gottlieb's discriminatory behavior was disappointing, they do not support the conclusion that Allina

engaged in active misconduct that worked positive injury to Abel. *See Doe 169*, 845 N.W.2d at 178. Rather, they show that Allina's conduct was passive inaction: Allina failed to provide written policies, failed to respond to or investigate Abel's concerns, and failed to remove Dr. Gottlieb as the training director upon first learning that he engaged in discriminatory and harassing behavior toward Abel. Because a defendant does not owe a duty of care to the plaintiff when the defendant's own conduct is "mere nonfeasance," I would hold that Allina owed no duty to Abel. *See Fenrich*, 920 N.W.2d at 203.

C.

As explained above, Abel argues that her negligence claims were improperly dismissed under two theories. Because Abel forfeited the argument that the conduct of Allina and St. Mary's created a foreseeable risk of harm—the first theory—I have to consider Abel's second theory: whether Allina and St. Mary's owed her a duty because a special relationship existed between her and each entity. A defendant may owe a duty of care to a plaintiff "when there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable." *Doe 169*, 845 N.W.2d at 178. In her complaint, Abel asserted that Allina owed her a duty as an employee and that St. Mary's owed her a duty as a student.[11]

We have recognized that a special relationship may exist under three scenarios: (1) "the status of the parties, such as parents and children, masters and servants, possessors

[11] Abel also alleged in her complaint that Allina owed her a duty as a client. The district court, however, determined that Allina did not owe Abel a duty as a client and Abel did not renew this argument on appeal.

of land and licensees, and common carriers and their customers"; (2) "when an individual . . . has custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection"; and (3) "when an individual assumes responsibility for a duty that is owed by another individual to a third party." *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007) (alteration omitted) (citation omitted) (internal quotation marks omitted).

Abel's claim that Allina owed her a duty falls under the first scenario because she asserts that she was Allina's employee. But as explained above, Abel was not Allina's employee because she received no salary, wages, or employee benefits for her work. *See Graves*, 907 F.2d at 73 (explaining that compensation is an essential requirement of an employer-employee relationship). And because Abel was not an employee, Allina did not owe her a duty. I would therefore conclude that Abel's negligence claim against Allina fails because she has not alleged sufficient facts to maintain that Allina owed her a duty.

Abel also claims that St. Mary's owed her a duty because a special relationship exists between a school and its students. It is true that schools owe a duty of reasonable care to their students in certain circumstances. *See, e.g.*, *Fallin v. Maplewood-North St. Paul Dist. No. 622*, 362 N.W.2d 318, 321 (Minn. 1985) (woodworking class); *Verhel ex rel. Verhel v. Indep. Sch. Dist. No. 709*, 359 N.W.2d 579, 586, 588–89 (Minn. 1984) (off-campus cheerleading activity); *Tiemann v. Indep. Sch. Dist. # 740*, 331 N.W.2d 250, 251 (Minn. 1983) (physical education class). We have held that a school owes a duty of reasonable care to a student in a woodworking class. *Fallin*, 362 N.W.2d at 321 (Minn. 1985). We have also concluded that a school district has a duty " 'to protect its students

from injury resulting from the conduct of other students[.]' " *Verhel*, 359 N.W.2d at 586 (quoting *Sheehan v. St. Peter's Catholic Sch.*, 188 N.W.2d 868, 870 (Minn. 1971)). And we have held that "a school owes a duty to its students to use reasonable care to inspect and maintain its premises and equipment and to protect its students from an unreasonable risk of harm[.]" *Tiemann*, 331 N.W.2d at 251 (alteration omitted) (citation omitted) (internal quotation marks omitted). This case law is consistent with the principle that a special relationship typically arises when a plaintiff has "some degree of dependence" on the defendant. *H.B. ex rel. Clark v. Whittemore*, 552 N.W.2d 705, 708 (Minn. 1996).

We have not recognized that a school owes a duty to protect a graduate student from off-site harms inflicted by third parties and I would decline to do so in this case. A school's oversight and control over its own classes, programs, and students is markedly different from its oversight and control over a graduate student's off-site practicum. Abel herself acknowledged in her complaint that her "work was at the total control and discretion of Allina." And Abel asserts that it was the employee of Allina—not an employee of St. Mary's—who harassed her. Imposing a duty on a school to protect a graduate student from off-site harms inflicted by a third party would expand the potential liability of schools for conduct outside of their control. *See Fenrich*, 920 N.W.2d at 210 (Anderson, J., dissenting) (explaining that we have long viewed the legal issue of duty as a matter of public policy for the court). I would therefore conclude that St. Mary's did not owe Abel a duty to protect her from harm inflicted by a third party at her off-site practicum.

Because the district court and the court of appeals properly dismissed Abel's employment discrimination and common-law negligence claims, I would affirm the court of appeals.

ANDERSON, Justice (dissenting).

I join in the dissent of Chief Justice Gildea.