UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 97-11-47

LOIS E. JENSON, PATRICIA S. KOSMACH AND KATHLEEN O'BRIEN ANDERSON, on behalf of themselves and all others similarly situated,

Plaintiffs/Appellants

vs.

EVELETH TACONITE COMPANY, EVELETH EXPANSION COMPANY, OGLEBAY NORTON COMPANY AND OGLEBAY NORTON TACONITE COMPANY, doing business as EVELETH MINES, AND THE UNITED STEEL WORKERS OF AMERICA, LOCAL 6860,

Defendants/Appellees

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF NOW LEGAL DEFENSE AND EDUCATION FUND, CALIFORNIA WOMEN LAWYERS, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC., JEWISH WOMEN INTERNATIONAL, NATIONAL WOMEN'S LAW CENTER, WOMEN EMPLOYED, WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL DEFENSE FUND, IN SUPPORT OF PLAINTIFFS/APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE CASES (cont'd)

DOCKETED CASES

OTHER AUTHORITIES

OTHER AUTHORITIES (cont'd)

OTHER AUTHORITIES (cont'd)

INTEREST OF AMICI CURIAE

Amici curiae, a group of women's rights and working women's organizations committed to eliminating sexual harassment in the workplace and gender bias in the courts, file this brief in support of Appellants. Statements of interest are included as an Appendix.

STATEMENT OF THE CASE

Amici adopt the facts as set forth in Appellants' Opening Brief, the District Court's opinion in the liability phase of this case, Jenson v. Eveleth Taconite Co., 824 F. Supp. 847 (D. Minn. 1993) [hereinafter Jenson I] and the District Court's opinion in the class certification decision, Jenson v. Eveleth Taconite Co. 139 F.R.D. 657 (D. Minn. 1991) [hereinafter Jenson F.R.D.].

SUMMARY OF ARGUMENT

Amici present an independent ground on which to reverse and remand the District Court's affirmance of the Special Master's Report: gender bias. Gender bias is a phenomenon courts must take into account, as recognized by judicially-sponsored special task forces, by caselaw and by amendments to the Code of Judicial Conduct. The Special Master's Report demonstrates that his judgment is pervaded with gender bias, leading to errors of law and devaluation and denial of Appellants' claims. Additionally, the exclusion of expert proof on psychological evidence of causation and prognosis contravenes established law, to the special detriment of women in sexual harassment cases. Even if the Master were correct in his legal analysis, which he is not, his approach toward evaluating

appellants' mental anguish claims is deeply biased. This Court held in Occhino v. United States, 686 F.2d 1302, 1305 (8th Cir. 1982), that it would disturb a trier-of-fact's damages award only in the rare case of "plain injustice." The Special Master's gender bias makes this such a case.

ARGUMENT

I. GENDER BIAS IS AN INDEPENDENT GROUND ON WHICH TO REVERSE THE DISTRICT COURT'S AFFIRMANCE OF THE SPECIAL MASTER'S REPORT

In addition to the errors of law presented by Appellants as grounds for reversal, this appeal presents the unusual instance in which the District Court's affirmance of the Special Master's Report should be reversed and remanded on another ground: gender bias.

This Court held in Occhino v. U.S. 686 F. 2d 1302 (1982) that a trial court's damages award cannot be overturned unless clearly erroneous, and that it would intervene to correct an inadequate award only "in those rare situations where we are pressed to conclude that there is 'plain injustice'. . . ." Id. at 1305. This Court declined to disturb the Occhino award because, it "reflect[ed] careful assessment of the distinctive features . . . of the case," id. at 1305, and "took into account such physical and emotional distress as was apparent on the record." Id. at 1306. While a 416 page Special Master's Report might suggest such care, a thorough reading reveals an assessment shaped by gender bias and a gender-biased standard of reasonableness. This is the "rare situation[s]" of "plain injustice" of which Occhino spoke, and the case should be reversed and remanded accordingly.

A. Gender Bias is a Phenomenon That Courts Must Take Into Account, as Recognized by the Creation of Judicially-Sponsored Special Task Forces, by Caselaw and by Amendments to the Code of Judicial Conduct

Across the country, state courts and federal circuits are engaged in a searching examination of their own court systems in order to identify and eliminate gender and racial bias because these forms of discrimination are so pernicious to the fair administration of justice. See, Hon. Ruth Bader Ginsburg, Foreword to the Report of the Special Committee on Gender to the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias, 84 Geo. L.J. 1651, 1652 (1996).[1]

As the Minnesota Supreme Court Task Force for Gender Fairness in the Courts [hereinafter "Minn. T.F."] explained, gender bias "must be addressed in order to insure fairness in our judicial system." Minn. T.F. Final Report, 15 Wm. Mitchell L. Rev. 827, 840 (1989). The Nebraska Supreme Court Task Force on Gender Fairness in the Courts [hereinafter "Neb. T.F."] observed, "respect for the law is critical to the legitimacy of the court system. If people observe actions and decisions which do not adhere to the highest standards of fairness and impartiality, which stereotype people according to gender, or limit them because of their sex, then respect for the system can be lost. The entire system suffers

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[1] See also Barbara Allen Babcock, Introduction: Gender Bias in the Courts and Civic and Legal Education, 45 Stanford L. Rev. 2143 (1993); Federal Judicial Center, Studying the Role of Gender in the Federal Courts: A Research Guide (1995); Deborah R. Hensler, Studying Gender Bias in the Courts: Stories and Statistics 45 Stanford L. Rev. 2187 (1993); Judith Resnik, Gender Bias: From Classes to Courts, 45 Stanford L. Rev. 2195 (1993); Lynn Hecht Schafran, Gender Equality in the Courts: Still on the Judicial Agenda, 77 Judic. 110 (1993); Arline S. Tyler, State Panels Document Racial, Ethnic Bias in the Courts, 78 Judic. 154 (1994).

when gender bias occurs in any form within the judicial system." Neb. T.F. Final Report vi (1994). Similarly, Justice Sandra Day O'Connor stated in her remarks to the Ninth Circuit Judicial Conference upon the release of that Circuit's gender bias task force report, that "[w]hen people perceive gender bias in a legal system, whether they suffer from it or not, they lose respect for that system, as well as for the law." Hon. Sandra Day O'Connor, The Quality of Justice, 67 S. Cal. L. Rev. 759, 760 (1994).

At the same time that courts are engaging these issues at a systemic level by commissioning gender and race bias task forces, courts are also responding at a doctrinal level, as demonstrated by emerging caselaw. As the California Court of Appeal stated in reversing a judicial decision on the explicit ground of gender bias: "The day is long past when appellate courts can disregard judicial actions rooted in racial or sexual bias as harmless error." In re Marriage of Iverson, 15 Cal. Rptr. 2d 70, 73 (Cal. Ct. A.P. 1992) (citing Powers v. Ohio, 499 U.S. 400, 415 (1991)). When reversing a divorce decision that held against a wife, the Iverson court spoke of how the judge used language indicating gender bias and premised his judgment on gender-biased grounds. Iverson was followed in Catchpole v. Brannon, 42 Cal. Rptr. 2d 440 (Cal. Ct. A.P.. 1995), rev. denied, 1995 Cal. LEXIS 5807 (Cal. Sept. 14, 1995), a bench-tried sexual harassment case reversed and remanded also on the specific ground of gender bias.

In a third case, the South Carolina Supreme Court reversed a criminal conviction on the ground that the trial judge's gender-biased comments about a female attorney undermined

her credibility and thus her client's credibility as well. State v. Pace, 447 S.E. 2d 186 (S.C. 1994). Race bias has also been recognized as an independent ground for reversing decisions. E.g., Powell v. Allstate, 652 So. 2d 354 (Fla. 1995) and Wright v. CTL Distribution, Inc., 650 So. 2d 641 (Fla. Dist. Ct. App. 1995), both reversed and remanded for new trials because of race bias in the jury deliberations as to the amount they would award.[2]

The standard for assessing judicial gender bias is grounded in the Code of Judicial Conduct. The Code of Conduct for United States Judges provides that a judge should "perform the duties of the office impartially and diligently" (Canon 3) and should "avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias towards another on the basis of . . . sex. . . ." (Canon 3A(3) Commentary). The specific provision on sex bias was modeled on language added in 1990 to the American Bar Association Model Code of Judicial Conduct in response to testimony about sex discrimination in the court system as documented by the task forces throughout the country. See, Lisa L. Milord, The Development of the ABA Judicial Code 18 (1992); Lynn Hecht Schafran, Testimony before the ABA Standing Committee on Ethics and Professional Responsibility, Judicial Code Subcommittee (Aug. 7, 1989). The Catchpole court, relying on similar language in the California Code of Judicial Conduct, adopted this standard and

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[2] Further, gender and race bias have been recognized as grounds for discipline of judges and attorneys. See, e.g., Lynn Hecht Schafran, Gender Bias in the Courts: An Emerging Focus for Judicial Reform, 21 Ariz. St. L.J. 237, 261-64 (1989) and citations therein; In Re Plaza Hotel Corp., 111 B.R. 882, 891-892 see also In re Goldfarb, 880 P.2d 620 (Ariz. 1994); (Bankr. E.D. Cal. 1990); In re Vicenti, 554 A.2d 470 (N.J. 1989).

also made clear that subjective malice on the part of the individual judge is not required. This Court should apply this standard to the Special Master's Report. Building on the emerging caselaw, the task force reports and the Code of Judicial Conduct, this Court should announce that in the Eighth Circuit, gender bias is an independent ground for reversal.

B. This Case is an Unusual Instance in Which the Report of the Special Master in Both its Factual Findings and Legal Conclusions is so Infused with Prejudice Against Women that this Court Should Recognize It as an Example of Impermissible Gender Bias and Reverse on that Ground.

The Report of the Special Master demonstrates that his judgment is pervaded with gender bias in a myriad of ways: expressed hostility to sexual harassment cases; mocking devaluation of incidents that terrified Appellants; adoption of a gender-biased standard of reasonableness; gratuitous invasions of Appellants' privacy; and ignoring precedents on virtually identical facts in order to find that no sexual harassment occurred. Before discussing these behaviors, we first describe Catchpole v. Brannon, 42 Cal. Rptr. 2d 440 (Cal. Ct. App. 1995), a case in which the trial court displayed behavior similar to that found in the Special Master's Report.

In Catchpole, the California Court of Appeal addressed "the unusual question whether the alleged gender bias[3] of the trial judge requires us to set aside his judgment," and

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[3] Catchpole adopted the definition of "gender bias" from the report of the California Judicial Council Advisory Committee on Gender Bias in the Courts which provides that "gender bias includes behavior or decision making of participants in the justice system which is based on or reveals (l) stereotypical attitudes about the nature and roles of women and men; (2) cultural

concluded that it did. Id. at 441. A young woman named Marie Catchpole worked at a Burger King in connection with a corporate college scholarship that required her employment there. She and other female employees testified to a hostile environment filled with sexual comments, sexual imagery, and inappropriate touching. One night Rudy Brannon, an assistant manager, insisted that Ms. Catchpole come to his home to discuss her work. There, he raped her. He admitted the rape in a police monitored call and did not deny it on the witness stand. Two expert witnesses testified that as a result of the rape Ms. Catchpole suffered from rape-related post-traumatic stress disorder and a severe disruption of her life. Following an eight-day bench trial in which the judge subjected Ms. Catchpole alone to a scathing interrogation and ridiculed one of her expert witnesses, the judge found her claim of rape unbelievable, faulted her for not resisting Brannon's attack, and suggested she sought and welcomed his attention. Id. at 258. The judge found that she failed to show that her damages were related to her claims because she had been molested as a child and he found it "impossible to separate her present condition from the past." Id. at 244.

In language appropriate to Jenson, the California Court of Appeal stated: "Appellant's

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perceptions of their relative worth; and (3) myths and misconceptions about the social and economic realities encountered by both sexes." Catchpole, 42 Cal.Rptr.2d at 443 n. 2.

Other task forces have used somewhat different formulations. For example, the Missouri Task Force wrote that it had most closely followed the definition presented by New York's chief judge in forming that state's task force: "decisions . . . made or actions taken because of weight given to preconceived notions of sexual roles, rather than upon a fair and unswayed appraisal of merit as to each person or situation; [and] a determination of whether there are statutes, rules, practices, or conduct that work unfairness or undue hardship on parties of one gender." Report of the Missouri Task Force on Gender and Justice 5 (1993).

claim of gender bias rests on the related contentions that the trial judge displayed a belief that sexual harassment cases are relatively unimportant and invoked sexual stereotypes in evaluating appellant's behavior and credibility. There is, unfortunately, substance to these claims . . . The judge's expressed hostility to sexual harassment cases and the stereotypical attitudes and misconceptions he adopted provide a reasonable person ample basis upon which to doubt whether appellant received a fair trial." Id. at 446.

Citing the reports of the California and Ninth Circuit gender bias task forces (see infra), Catchpole criticized the "uncommon degree of judicial hostility" that the trial court displayed to sex discrimination and sexual harassment cases. Id. at 446, n.5. The court wrote, "Gender bias must not be countenanced in any case, but if there is any type of proceeding that might call for more rigorous review it is precisely [cases related to sexual conduct and gender factors], because judicial gender bias appears most likely to arise in litigation in which gender is material, such as sexual harassment and discrimination cases." Id. at 446. The Special Master's Report is a profoundly disturbing instance of exactly this type of judicial gender bias.

1. The Special Master's Gender Bias is Apparent in His Expressed Hostility to Sexual Harassment Cases

The Special Master left no doubt about his hostility toward sexual harassment cases when he wrote, "Sexual discrimination claims are highly emotional, and experiences [sic] teaches that this characteristic is often manifested in exaggeration and histrionics by

claimants and counsel . . . " (Report of Patrick J. McNulty, Special Master, Jenson v. Eveleth Taconite Co., Civ. No. 5-88-163 at 9 [hereinafter "Report"].) The Special Master attempted to mitigate this revealing description by adding, "[a] court must be wary, but not generally skeptical or disbelieving." (Report at 9-10). However, he betrays himself in his repeated minimization and denial of Appellants' claims, as explained below.[4]

Judicial hostility toward sexual harassment cases is noted by several gender bias task forces as an area of particular concern. The Ninth Circuit Gender Bias Task Force found that "[i]n sexual harassment or discrimination cases before a male judge, plaintiffs' lawyers report a minimization of their client's trauma and 'an across the board lack of understanding' as to the female plaintiff's situation and point of view." Ninth Circuit Gender Bias Task Force, The Effects of Gender in the Federal Courts, 67 S. Cal. L. Rev. 745, 887 (1993). Similarly, the Minnesota task force stated in its findings on these types of cases that "[s]ome defense attorneys appeal to gender-based stereotypes, and a few judges openly express similar biases . . ." Minn. T.F., Final Report, 15 Wm. Mitchell L. Rev. at 921.

2. The Special Master Engaged in Mocking Devaluation of Incidents that Terrified Appellants and Adopted a Gender-Biased Standard of Reasonableness

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[4] Note that the examples explained below are illustrations of pervasive problems in this Report. *Amici* cannot in twenty pages "set forth all the comments made over the course of the . . . [Master's 416 page opinion] that collectively create the impression of judicial gender bias and cast doubt on the court's impartiality." Catchpole, 42 Cal. Rptr.2d at 249. We therefore present some of "the best illustrations of the trial court's reliance on gender-based preconceptions. . ." Id.

The "'lack of understanding' of the female plaintiff's situation and point of view" (described by the Ninth Circuit Task Force) is particularly apparent in the Special Master's mocking of Appellants' fears with respect to the several instances in which they testified to fear of rape. Here the Special Master's gender bias leads him into an error of law: a serious misapplication of the standard of reasonableness as established in caselaw and the Equal Employment Opportunity Commission Policy Guidelines.

First, Appellant Marilyn Greiner testified to years of relentless harassment by foreman Louis Horoshak. (Trial Tr. II at 69-82). The information provided was not rebutted. Ms. Greiner explained that Horoshak called her at home for years, telling her that he was going to "get her" at work. (Id. at 70-73.) He told her to come to his hunting shack and talked about sex. (Id. at 74.) He so terrified her that years after this harassment she had a severe anxiety attack at the sight of the name Horoshak on Mr. Horoshak's son's helmet. (Trial Tr. XXIV at 81). One night Mr. Horoshak called Ms. Greiner at home and told her that he was going to "screw" her the next day. At work the next day, Mr. Horoshak and another foreman drove Ms. Greiner and Appellant Shirley Burton out to the woods near a vacant barge where they demanded that the women get out of the truck and "service" them. Appellants testified that they were terrified that if they left the truck they would be raped. (Id. at 75-81.) They were trapped in the truck for hours in a psychological state that other courts have recognized as "frozen fright." E.g. , Catchpole , 42 Cal.Rptr.2d at 452-453; People v. Iniguez, 30 Cal. Rptr. 2d 258 (Cal. 1994); People v. Barnes, 220 Cal. Rptr. 228

(Cal. 1986). As a result of this incident these already terrified women became even more so and began carrying knives to work for protection. (Trial Tr. II at 27-28, 82.)

The Special Master reduced this appalling story of abduction and terror to "[the women were] transported to a remote location and propositioned." (Report at 175.) He mocked Appellants' fears when he wrote that "neither gave a particularly persuasive reason for not simply driving away"[5] and minimized the damage to them by adding dismissively, "but regardless of details, some mental anguish resulted." (Report at 179.)

Appellant Judith Jarvela testified about a co-worker named Gene New whom she feared because he repeatedly propositioned her. (Trial Tr. III at 43-45.) Ms. Jarvela testified that on one occasion she sensed something behind her and turned just in time to scream as Mr. New was lunging toward her with his arms wide open. (Id. at 45.) She feared that he was going to rape her, a fear the Special Master dismissed by stating that it was just as likely that New "merely intended to say 'boo.'" (Report at 220 n.223.)

Appellant Joan Hunholz testified that she was so afraid of the men at work that she carried a knife. (Trial Tr. XIV at 111.) She testified that a male co-worker exposed himself to her and several years later terrorized her by circling his loader around the small building in which she worked. (Id. at 95-99.) Once again the Special Master dismissed this woman's fears, stating: "This court has difficulty understanding why the appearance of a suspected

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[5] This is like the trial judge in Catchpole asking the rape victim why she did not run into the street without her clothes. Catchpole 42 Cal. Rptr. 2d at 257.

flasher outside the building in which she was working some seven or eight years after a flasher incident would create great fear -- of something -- in a reasonable woman." (Report at 201 n.202.)

In all these examples, the Special Master exhibited what Catchpole called a "gender-biased standard of reasonableness." Catchpole, at 452. Under Harris v. Forklift Systems, 510 U.S. 17 (1993), the test for what constitutes sexual harassment is what a "reasonable person" would find hostile, abusive or intimidating. The EEOC advises that "[t]his objective standard should not be applied in a vacuum, however. Consideration should be given to the context in which the alleged harassment took place. As the Sixth Circuit has stated, the trier of fact must 'adopt the perspective of a reasonable person's reaction to a similar environment under similar or like circumstances.'" EEOC Policy Guidance on Current Issues of Sexual Harassment, Notice 915-0501, (Mar. 19, 1990) (quoting Highlander v. K.F.C. National Management Co., 805 F.2d 644, 650 (6th Cir. 1986).).

For women, fear of the possibility of rape is a constant, in every environment, shaping their daily decisions about where to walk, park, shop, study and work. M.T. Gordon & Stephanie Riger, The Female Fear (1984). Lynn Hecht Schafran, Contexual Credibility and Rape: An Update in Credibility in the Courts: Why is there a Gender Gap? 34 Judges J. 5, 40 (1995). Rape is a crime women fear more than murder. The Female Fear, supra. For women at the Eveleth mine, there was nothing abstract about their fears. Appellants worked in an environment so hostile that they were perpetually terrified of sexual violence from their

male co-workers, and with good reason. The District Courts found that sexually explicit graffiti and posters were everywhere. Jenson, F.R.D. at 653; Jenson I at 880. The women were touched, kissed, pinched and grabbed. Id. They were presented with dildos. Jenson I at 880. Appellants testified - - *without rebuttal* - - that their male co-workers stalked them (e.g. Trial Tr. XV at 182-186; Trial Tr. II at 70-73); spiked their tires (Trial Tr. II at 40) exposed themselves (e.g., Trial Tr. I at 20-26, XIV at 137; XXXII at 161); and threatened them with rape (Trial Tr. I at 20-26; II at 87-90). Appellant Shirley Barton's supervisor threatened her life in the workplace when she refused to continue a personal relationship. (Trial Tr. at 50-51)[6] A male co-worker slit the pants leg of Appellant Audrey Daniels from hip to knee with a knife and drew blood. (Trial Tr. IX at 53-55.)[7] On three occasions a male co-worker masturbated on the clothing in Appellant Jarvela's locker. (Trial Tr. III at 33-36.)[8]

In the Eveleth mine environment, it was entirely reasonable for Appellants to fear that their male co-workers' hostility could escalate to rape. When Appellants Greiner and Burton

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[6] The Special Master refused to find this actionable sexual harassment on the ground that this episode "was more private than work-related." (Report at 142 n.161). This is similar to the view espoused in an old line of Title VII cases, now rejected, that sexual harassment is a private matter because it serves no employment policy, e.g. Corne v. Bausch & Lomb, Inc. 390 F. Supp. 161 (D. Ariz. 1975), vacated without opinion on procedural grounds, 562 F.2d 55 (9th Cir. 1977).

[7] The Special Master describes this as "an ill-conceived prank rather than a violent assault." (Report at 169.)

[8] The focus on these incidents in the Special Master's Report is not Ms. Jarvela's testimony about how profoundly they disturbed her, but on his skepticism as to her identification of the perpetrator. (Report at 217-218.)

were abducted, taunted with demands to "service" their foremen, and too frozen with fright to drive away, more resulted than "some mental anguish" (as the Special Master put it). Rather, as Catchpole stated with respect to that trial judge's insistence that the rape victim should have resisted more aggressively, "[t]he immobilizing fear a physically powerful and sexually driven man may understandably inspire in a woman and the possibility resistance might exacerbate the danger may not be obvious to some men, but it cannot be fairly ignored by the trier of fact in a sexual harassment case." Catchpole 42 Cal.Rptr. at 452.

Consider also Appellant Hunholz. It was entirely reasonable for her to fear an escalation of sexual violence when a man who had once exposed himself to her suddenly intruded on her again and drove in circles around her isolated building. Similarly, in the virulently hostile environment of Eveleth mine, and given her co-worker's prior sexual demands, Appellant Jarvela's fear of the co-worker who lunged at her was equally reasonable. As the Ninth Circuit has observed, "because women are disproportionally victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to sexual assault." Ellison v. Brady , 924 F.2d 872, 879 (9th Cir. 1991).

In the shockingly hostile environment of the Eveleth mine, Appellants' fears of rape were entirely reasonable and the substantial injury Appellants sustained as a result of these incidents should have been fully acknowledged. The Special Master's dismissal of Ms.

Jarvela's and Ms. Hunholz's claims as unreasonable and his treatment of Ms. Greiner's and Ms. Burton's mental anguish as de minimis are evidence of his gender bias - - in particular his hostility toward women who are sexual harassment complainants.

C. The Special Master Ignored Precedents in This and Other Circuits on Virtually Identical Facts in Order to Find That No Sexual Harassment Occurred

The Special Master's gender bias also led him to ignore precedents, including precedent from this Court, to find that no sexual harassment occurred.

Appellant Lois Jenson testified that she was frightened and sickened by the obsessive attentions of her supervisor, which included his sending her eight long, intimate letters. (I Rosenbaum Hearing 180-193; Trial Tr. XV, 189-200, Trial Tr. XVII, 144-45.) In yet another example of his gender-biased standard of reasonableness, the Special Master held that the letters "cannot be interpreted . . . as threatening, intimidating, coercive or presenting a source of fear." (Report at 244). This ruling ignored plainly relevant caselaw. Indeed, in an almost identical Ninth Circuit case, a female employee was frightened by obsessive love letters from a male co-worker and sued for hostile environment sexual harassment. Ellison v. Brady, 924 F.2d at 872. The trial judge awarded summary judgment to defendants, describing the letters as "isolated and genuinely trivial." Id. at 876. The appellate court reversed, holding that the trial judge failed to understand that these letters could create a hostile environment because, "[m]en, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence a woman

may perceive." Id. at 879.

The Special Master's gender bias leads him into a second error of law with respect to Appellant Michele Mesich. For years Appellant Mesich was called vile, sexually demeaning names on a weekly basis as well as being subjected to sexual propositions, pornography, sexual comments about other women, and targeted and non-targeted graffiti. She was also given dildos three times. She was told that she was taking a man's job. (Trial Tr. XIV at 168-202.) The Special Master held that these events could not have caused her "appreciable mental anguish" because she used profanity herself. (Report at 312.)

This ruling contravenes several circuit court decisions, including one from this Circuit, holding that the fact that a woman who works in a hostile environment suffused with profanity also swears does not make her male coworkers' harassment "welcome" under the law. The female employee's "words and conduct cannot be compared to those of the men and used to justify their conduct and exonerate their employer." Carr v. Allison Gas Turbine Div., 32 F.3d 1007, 1011 (7th Cir. 1994) (citing Karibian v. Columbia Univ., 14 F.3d 773, 778 (2d Cir. 1994); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 962 (8th Cir. 1993) [McGregor II]; and Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987).

Further, this point was made explicitly by the District Court in Jenson I: "women's 'use of foul language or sexual innuendo in a consensual setting does not waive their legal protections against unwelcome sexual harassment.'" Id. at 104 (quoting McGregor II, 989 F.2d at 963). Thus, in direct contravention of the law of the case, the Special Master relied

on Appellant's behavior to discount the harm caused by Appellees.

D. The Special Master's Hostility Toward Sexual Harassment Cases is Apparent in His Gratuitous Invasion of Appellants' Privacy

To qualify for damages under Title VII, a claimant need not establish that she or he has suffered psychological injury. Nonetheless the Special Master, in his zeal to portray Appellants as so disabled that they cannot claim psychological injury consequent to the sexual harassment at the mine, engaged in gratuitous invasions of their privacy. He spread across the public record the most intimate and irrelevant details of their lives, as well as those of their parents, siblings, spouses and children. These aspects of Appellants' histories have no relevance to the mental anguish they suffered as the result of being harassed at the mine and serve only to humiliate them. While only a complete reading of the Report conveys the gravity of the Special Master's abuse of Appellants and of their families, several typical examples provide a flavor of the punitive attitude expressed toward these women. Moreover, it is noteworthy that the Special Master went into great detail about this irrelevant material yet compressed critical incidents relevant to damages, such as the abduction of Ms. Greiner and Ms. Burton, described supra.

The Special Master stated:

- One appellant's mother had extra-marital affairs, described in language appropriate to a farm animal ("Her mother was not fully domesticated...") (Report at 143.)
- The husband of another Appellant had "erectile failure." (Report at 88.)

- As a child, a third Appellant considered herself "the fattest kid in her class." (Report at 302.)
- Twenty years ago, a fourth Appellant had a ruptured ovarian cyst. (Report at 83.)
- A fifth Appellant was "a bit rebellious" as a teenager and married a man with a vasectomy. (Report at 337.)
- With respect to a sixth Appellant who had two children, "[f]urther reproduction was foreclosed by a hysterectomy performed in 1959." (Report at 292.)

Although the Special Master is correct that plaintiffs who seek damages for psychological injury expose themselves to scrutiny of their life histories (Report at 284), the court is expected to control this invasion of privacy, not compound it. Bottomly v. Leucadia Nat'l, 163 F.R.D. 617, 620 (D. Utah 1995) ("A clinical whole person approach is not especially functional in the legal context of the case and is unjustifiably intrusive.")

It is important that this Court reverse and remand the District Court's decision not only because of the errors of law in the Special Master's Report, but on the explicit ground of gender bias as well. Only by making clear that this kind of bias will not be countenanced can the judicial community make good on the promise of fairness that is the foundation of our justice system. In the words of the Judicial Conference of the United States: "Since both intentional bias and the appearance of bias impede the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness and its perception in federal courts." Judicial Conference of the United

States, Long Range Plan for the Federal Courts 112 (December 1995).

II. EXCLUDING EXPERT WITNESS TESTIMONY ON PSYCHOLOGICAL EVIDENCE OF CAUSATION AND PROGNOSIS CONTRAVENES ESTABLISHED LAW TO THE SPECIAL DETRIMENT OF WOMEN IN SEXUAL HARASSMENT CASES.

Appellants' brief explains why the District Court erred in sustaining the Special Master's categorical exclusion of expert proof on causation of mental harm and prognosis. Opening Brief for Appellants at 22-28, Jenson v. Eveleth (8th Cir. 1997) No.97-11-47. Unless reversed by this Court, the erroneous rules of law adopted by the Special Master will work to the special detriment of women in sexual harassment cases.

Numerous psychological studies document that women experience depression at rates substantially higher than men. See, e.g., American Psychological Association National Task Force on Women and Depression Women and Depression: Risk Factors and Treatment Issues 1 (Ellen McGrath et al., eds., 1990). This disparity is due in large part to the radically higher incidence of child sexual abuse, rape, sexual assault, domestic violence and sexual harassment in the lives of women. Id. at 28-32.

Retrospective studies of adults in the general population reveal that 25-30% of American women compared to 5-10% of American men experienced some form of child sexual abuse before age eighteen. David Finkelhor, Current Information on the Scope and Nature of Child Sexual Abuse, in The Future of Children: Sexual Abuse of Children 31 (1994). In 1992-93, 500,200 women compared to 48,500 men were victims of rape or sexual

assault. Ronet Bachman & Linda Saltzman, U.S. Dep't of Justice, Bureau of Justice Statistics, Special Report, National Crime Victimization Survey - Violence against Women: Estimates from the Redesigned Survey 2 (August 1995). From 1987-91 annually, women experienced l0 times as many incidents of assault by an intimate partner as men. U.S. Dep't of Justice, Bureau of Justice Statistics, Selected Findings, Domestic Violence: Violence Between Intimates 2 (November 1994). A 1995 study of sexual harassment in the federal labor force found that 44% of women compared to 19% of men reported some form of unwanted sexual attention or contact at work within the prior two years. U.S. Merit Systems Protection Board, Sexual Harassment in the Federal Workplace: Trends, Progress and Continuing Challenges viii (1995). The uniquely high incidence of sexual and domestic violence in women's lives means that women seeking psychological injury damages are more likely than their male counterparts to have a history of psychological injury.

Title VII does not include an exclusion clause or provide a lesser remedy for individuals who have previously suffered psychological injury. Moreover, the psychological literature documents that individuals previously victimized often have severe responses to a new traumatic event. Ann Burgess & Linda Holstrom, Rape: Sexual Disruption and Recovery, 49 Am. J. of Orthopsychology 64 (1979); Mary Koss, Violence Against Women in the Community, in No Safe Haven 12 (1993). Those subjected to chronic revictimization and trauma suffer most of all. Judith Lewis Herman, Trauma and Recovery 86 (1992). If this Court affirms the exclusion of expert proof respecting causation and prognosis of

psychological injury, revictimized victims will be inadequately compensated, if at all, for their injuries. Such a ruling would run counter to the widely established law in this area and have the perverse effect of insulating precisely those harassers, abusers, batterers and rapists who do the most damage to their victims, the vast majority of whom are women.

CONCLUSION

The Report of the Special Master resulted in a "plain injustice" because it is riddled with gender bias, and because it excluded expert psychological evidence on causation and prognosis. This Court should reverse the District Court's affirmance of that Report and remand it to have damages redetermined in accordance with the correct legal standard.

Respectfully submitted,

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March 10, 1997