

NO. A06-1693

State of Minnesota
In Supreme Court

Judy Frieler,

Appellant,

v.

Carlson Marketing Group, Inc.,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

1. Did appellant properly present for review by this Court the issue of whether Minnesota employers are strictly liable for workplace harassment, where she made no reference to strict liability in her petition for review, did not plead or advocate for strict liability below, and argued for a different liability standard, i.e., *Faragher/Ellerth*, which eschews strict employer liability?

The court of appeals did not address the issue.

APPOSITE AUTHORITIES:

George v. Estate of Baker,
724 N.W.2d 1 (Minn. 2006)

Peterson v. BASF Corp.,
711 N.W.2d 470 (Minn.), *cert. denied*, 127 S.Ct. 579 (2006)

In re GlaxoSmithKline PLC,
699 N.W.2d 749 (Minn. 2005)

Hapka v. Paquin Farms,
458 N.W.2d 683 (Minn. 1990)

Minn. R. Civ. App. P. 117

2. Did the 2001 amendment to the Minnesota Human Rights Act (MHRA) — deleting from the statutory definition of “sexual harassment” the words “the employer knows or should know of the harassment and fails to take timely and appropriate action” — create strict employer liability for workplace harassment in Minnesota, where strict liability is not specified in the MHRA text, was not advanced by the sponsors of the legislation, nor embraced by any controlling judicial or administrative interpretation of the MHRA, and would depart from long-standing principles of respondeat superior liability requiring proof of foreseeability?

The court of appeals did not reach the issue.

APPOSITE AUTHORITIES:

Harrison v. Harrison,
733 N.W.2d 451 (Minn. 2007)

Hagen v. Burmeister & Assocs., Inc.,
633 N.W.2d 497 (Minn. 2001)

Continental Can Co. v. State,
297 N.W.2d 241 (Minn. 1980)

Lange v. Nat'l Biscuit Co.,
211 N.W.2d 783 (Minn. 1973)

Act of May 24, 2001, Minn. Laws ch. 194, § 1,
codified at Minn. Stat. § 363A.03, subd. 43 (2006)

Minn. Stat. § 645.16 (2006)

3. Did the same amendment cause the federal *Faragher/Ellerth* standard to be incorporated into Minnesota law in cases alleging harassment by a supervisor of the plaintiff, where the federal standard was purposefully omitted from the MHRA text?

The court of appeals held that Minnesota has not adopted the supervisor/nonsupervisor distinction, or formally recognized the *Faragher/Ellerth* standard.

APPOSITE AUTHORITIES:

Reiter v. Kiffmeyer,
721 N.W.2d 908 (Minn. 2006)

Goins v. West Group,
635 N.W.2d 717 (Minn. 2001)

Metro. Sports Facilities Comm'r v. County of Hennepin,
561 N.W.2d 513 (Minn. 1997)

Cummings v. Koehnen,
568 N.W.2d 418 (Minn. 1997)

Act of May 24, 2001, 2001 Minn. Laws ch. 194, § 1,
codified at Minn. Stat. § 363A.03, subd. 43 (2006)

Minn. Stat. § 645.16 (2006)

4. Did appellant establish a genuine issue of material fact that the alleged perpetrator of harassment was her supervisor “with immediate (or successively higher) authority” over her, such that employer vicarious liability for sexual harassment and the accompanying affirmative defense enunciated in *Faragher* and *Ellerth* would apply, were those principles adopted under Minnesota law?

The court of appeals did not reach the issue, as the court held that Minnesota has not adopted the supervisor/nonsupervisor distinction, or formally recognized the *Faragher/Ellerth* standard. The district court held that appellant failed to carry her burden to establish a fact issue that the alleged harasser was her supervisor for purposes of applying principles of employer vicarious liability enunciated in *Faragher* and *Ellerth*.

APPOSITE AUTHORITIES:

Merritt v. Albemarle Corp.,
496 F.3d 880 (8th Cir. 2007)

Cheshewalla v. Rand & Son Constr. Co.,
415 F.3d 847 (8th Cir. 2005), *cert. denied*, 546 U.S. 1091 (2006)

Weyers v. Lear Operations Corp.,
359 F.3d 1049 (8th Cir. 2004)

Joens v. John Morrell & Co.,
354 F.3d 938 (8th Cir. 2004)

5. Did appellant establish a genuine issue of material fact that the alleged sexual assaults constituted conduct that is a well-known industry hazard and hence foreseeable for purposes of imposing vicarious liability on respondent for assault and battery?

The court of appeals held that Frieler failed to carry her burden to establish a fact issue that sexual assaults among employees are a well-known hazard within the industry in which appellant worked for purposes of imposing vicarious liability on respondent for assault and battery.

APPOSITE AUTHORITIES:

Hagen v. Burmeister & Assocs., Inc.,
633 N.W.2d 497 (Minn. 2001)

Fahrendorff v. N. Homes, Inc.,
587 N.W.2d 905 (Minn. 1999)

P.L. v. Aubert,
545 N.W.2d 666 (Minn. 1996)

Lange v. Nat'l Biscuit Co.,
211 N.W.2d 783 (Minn. 1973)

STATEMENT OF THE CASE

Judy Frieler sued her former employer, Carlson Marketing Group, Inc. (“CMG”), asserting claims of sexual harassment under the Minnesota Human Rights Act (MHRA), assault and battery, and negligence. The alleged assailant, Ed Janiak, worked in a department different than Frieler’s and had no supervisory authority over her.

Hennepin County District Court Judge John L. Holahan determined that Frieler had failed to establish a genuine issue of material fact that: (1) CMG knew or should have known of the unwitnessed, unreported sexual assaults she alleged; (2) Janiak was her supervisor for purposes of applying the *Faragher/Ellerth* standard; and (3) sexual assault among co-workers was a well-known hazard in the industry in which Frieler worked. Judge Holahan granted judgment to CMG on Frieler’s sexual harassment and assault and battery claims. Frieler voluntarily abandoned her claims of negligent retention and negligent supervision.

Frieler appealed from the district court judgment dismissing her sexual harassment and assault and battery claims. The court of appeals affirmed the district court judgment, holding, *inter alia*, that the supervisor/nonsupervisor distinction and the federal *Faragher/Ellerth* standard are not formally recognized in Minnesota.

This Court granted Frieler’s request for further review, which raised two issues: (1) whether the court of appeals erred when it refused to read into the MHRA the federal *Faragher/Ellerth* standard for imposing vicarious liability for harassment by a supervisor of the plaintiff, and (2) whether the court of appeals erred when it determined that Frieler had failed to show that sexual assault was a well-known workplace hazard. The Court

also granted CMG's conditional request for cross-review to address the issue of whether Frieler established a fact issue regarding whether Janiak was a supervisor with authority over her for purposes of applying *Faragher/Ellerth*.

ARGUMENT

Summary Of Argument

Frieler devotes a significant portion of her brief arguing that the Legislature intended the 2001 amendment to the MHRA to impose strict liability on Minnesota employers for workplace harassment. Yet, Frieler's petition for review contains no reference to strict employer liability. That issue is not properly before this Court.

In any event, workplace harassment — whether based on race, disability, sex, or any other protected class — has never been a strict liability offense for employers in Minnesota, and is not now. The MHRA is devoid of any reference to “automatic” or “strict” liability, or any similar phrase or concept. Automatic employer liability for hostile environment sexual harassment was rejected when this Court first recognized the cause of action in *Continental Can Co. v. State*, 297 N.W.2d 241 (Minn. 1980). Moreover, when it comes to intentional acts of employees, Minnesota common law requires some proof of foreseeability before liability is attached to the employer. To suggest that the “plain meaning” of the MHRA calls for strict employer liability defies not only the statutory text but the entirety of Minnesota law on the subject.

The legislative history surrounding the 2001 amendments to the MHRA makes clear that the legislation was not intended to impose a strict liability standard on employers for hostile environment harassment. Instead, the apparent goal of the 2001

amendment was to pave the way for judicial adoption in Minnesota of the federal *Faragher/Ellerth* standard and its accompanying affirmative defense. Whether the Legislature's act achieved that result perhaps is debatable. But to suggest that the Legislature intended to create strict liability for workplace harassment is simply wrong.

The court of appeals held that neither the Legislature nor this Court have formally recognized *Faragher/Ellerth*. That decision was correct. The 2001 amendment to the MHRA did not incorporate *Faragher/Ellerth* into Minnesota law because the text of the federal standard — consisting of a single paragraph, three sentences long, easily capable of being imported in its entirety — was purposefully omitted from the MHRA text.

Yet, whether or not Minnesota adopts the supervisor/nonsupervisor distinction, and formally recognizes *Faragher/Ellerth* in cases alleging harassment by a supervisor of the plaintiff, CMG is not liable to Frieler on the undisputed record of this case. CMG had a published antiharassment policy. Frieler understood her duty to report even *suspected* violations, no less repeated sexual battery, but she made no report. As soon as Frieler's allegations came to light (through a co-worker), CMG immediately investigated. Frieler was granted a paid leave. Janiak resigned his employment at CMG the next week. Frieler returned to her part-time job after Janiak's departure. She was offered and accepted the full-time job she had sought earlier. But Frieler abruptly quit before starting her new job. CMG offered Frieler a different job, in a different building, with new co-workers, at the same rate of pay. But she declined that offer, too.

As a matter of law, whether the traditional “knew or should have known” standard, the common law respondeat superior standard, or the federal *Faragher/Ellerth* standard is applied in this case, CMG cannot be liable to Frieler for sexual harassment.

As to Frieler’s common law assault and battery claim, the record is devoid of evidence that sexual assault among co-workers was a well-known hazard in the industry in which Frieler worked. Without such evidence, there is no basis to attach vicarious liability to CMG for Janiak’s alleged intentional torts. The court of appeals noted that “affidavits and expert testimony” are “important considerations” on this issue, which is a fair statement of this Court’s precedent. But Frieler proffered no evidence, at all, expert or otherwise, to meet the standard. No clarification of that standard is needed, and application of that standard here requires affirmance.

Moreover, if the existence of an employer policy against sexual harassment *ipso facto* makes sexual assault or battery foreseeable as a well known hazard, as Frieler argues, then every public and private employer with such a policy (which is virtually every employer) would be made strictly liable. Frieler’s argument is a *non sequitur* and must be rejected.

I. STANDARD OF REVIEW

“On appeal from summary judgment,” this Court will “determine whether there are any genuine issues of material fact and whether the district court erred in applying the law.” *Lee v. Fresenius Medical Care, Inc.*, 741 N.W.2d 117, 122 (Minn. 2007). This Court views “the evidence in the light most favorable to the party against whom summary

judgment was granted.” *Id.* (interior quotation and citation omitted). Statutory construction is a legal issue reviewed *de novo*. *Id.*

Summary judgment is as equally available in employment discrimination cases as in other cases. *Dietrich v. Canadian Pac. Ltd.*, 536 N.W.2d 319, 326 n.9 (Minn. 1995) (“We take this opportunity to express our disapproval of the court of appeals’ sweeping statement that summary judgment is generally inappropriate in discrimination cases. . . . This is not the law in Minnesota.”), *overruling Johnson v. Canadian Pac. Ltd.*, 522 N.W.2d 386, 391 (Minn. Ct. App. 1994). Summary judgment was appropriate in this case.

Summary judgment is intended “to separate the wheat from the chaff and relieve the court system of the burden and expense of unfounded litigation.” *Cook v. Connolly*, 366 N.W.2d 287, 292 (Minn. 1985). Summary judgment “is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the [Rules of Civil Procedure] as a whole. . . .” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Neither a “metaphysical doubt” about a material fact nor a “scintilla” of evidence or “merely colorable evidence” are enough to raise a trial issue. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)).

To avoid summary judgment, the non-moving party must present affirmative, admissible evidence to support each necessary element of her claim. *Patton v. Newmar*

Corp., 538 N.W.2d 116, 119 (Minn. 1995). Conclusory allegations, without specific factual support, fail to meet this burden. *Id.*

II. THE RECORD IN THIS CASE IS FAR DIFFERENT FROM WHAT FRIELER PORTRAYS

Rule 128.02, subd. 1(c) requires facts to be stated “fairly, with complete candor, and as concisely as possible.” Because Frieler has failed to satisfy that standard, CMG submits its own statement of the facts actually contained in the record, pursuant to Rule 128.02, subd. 2.

A. No Evidence Of Any Prior Misconduct By Janiak

The court of appeals examined the record, but found no support for Frieler’s claims. (A.14). That determination is clearly correct. Frieler’s claims rest on misstatement of the record, hearsay, speculation and hyperbole, not facts.

Frieler worked for CMG on a part-time basis from 1991 to 2005. In early 2005, Frieler decided to look for full-time work outside CMG. When Frieler told her manager, David Weber, of her plan to change jobs, Weber told her that he may have an opening for a full-time shipping clerk position at CMG, reporting to Ed Janiak. (A.58-59). Frieler testified that she did not have any hesitation about working with Janiak at that time. (A.59).

Frieler had known Janiak in the workplace for 13 years. They worked in different departments in the same building. Frieler alleged that Janiak would make “comments” and “flirt around.” (RA.4-5; *see also* A.68). When asked at her deposition to support her claim, Frieler testified that Janiak sometimes would speak with her, and with other

female employees, and that she and other female employees would sometimes speak with Janiak, but Frieler could not provide a single example of Janiak flirting. (RA.5). She stated “It’s hard to remember. Just stuff like I don’t know what I’m doing on my job.” (RA.4-5). She could not recall any other comment. (*Id.*). Frieler also testified that she and Janiak shot rubber bands at one another from time-to-time. (*Id.*). They had no contact outside the workplace. (RA.5). She considered Janiak a friend. (*Id.*). Frieler is emphatic that Janiak *never* made a sexual advance to her before the first alleged sexual assault on February 23, 2005. (A.61). Frieler was “shocked” and “never thought he would do something like that.” (A.66).

Frieler asserts that “Janiak’s sexual advances, flirtations and comments were known within the workplace and nothing had ever been done to change his behavior” and that Janiak had a “long history of being known as a ‘pervert’ and ‘dirty old man’.” (App. Br. at 9, 12). Yet, there is no competent evidence in the record — none — of *any* report, by *any* person, of *any* inappropriate conduct by Ed Janiak over his 18 years of employment with CMG, other than the isolated incidents alleged by Frieler in this case. The only purported “evidence” Frieler cites is inadmissible hearsay, things Frieler claims other women at CMG allegedly told her, none of which is set forth in an affidavit or deposition by any of the alleged declarants (*see* App. Br. at 9). This is clearly inadequate to avoid summary judgment.

That evidentiary void was not lost on the court of appeals, which found that Frieler’s contentions were not supported in the record:

The record, which includes Jackie Dahl's investigation notes and several depositions of Frieler, Janiak, and employees of CMG, does not reveal a material fact dispute that CMG had any knowledge of the accusations.

* * *

Additionally, Janiak had no prior accusations or complaints against him in the 18 years of his employment at CMG that would have put the company on notice of possible future accusations. Although Frieler asserts that "Janiak's sexual advances, flirtations and comments were well known within the workplace and nothing had ever been done to change his behavior" and that he was known as a "pervert" and a "dirty old man," Frieler cites nothing in the record to support these allegations. Additionally, Frieler testified that she was shocked when Janiak made advances to her, because he had never done so before.

(A.14).

The court of appeals also noted that, during CMG's investigation of Frieler's allegations, the women with whom Janiak most closely worked expressly denied that Janiak made them feel uncomfortable, and expressed disbelief that Janiak could commit the acts Frieler alleged. (*Id.*; A.28-29) ("never felt uncomfortable working with Ed"; "never felt uncomfortable working here [for 11 years], and can't see Ed doing something like this"; "Tammy has worked with Ed 17 years, she has never felt uncomfortable around Ed, and doesn't believe Ed could do something like this.").

This is not a record of prior sexual misconduct by Janiak "known within the workplace," as Appellant's Brief states. (App. Br. at 9). The record shows precisely the opposite — alleged conduct which, if true, was uncharacteristic and unanticipated to all, conduct that Frieler herself admits took her completely by surprise. (A.66).

B. No Evidence Of Any Barrier To Reporting

As a subsidiary of Carlson Companies, CMG implemented the Carlson Companies Sexual Harassment Prevention Policy and its Discrimination and Harassment Policy. (See RA.24-27). “The Company has zero tolerance for discriminatory treatment (including harassment) of employment candidates [and] employees . . .” (RA.26-27). Frieler conceded that as early as March 1997 she participated in a seminar entitled “Preventing Sexual Harassment” and that she received a copy of the Sexual Harassment Prevention Policy. (RA.2). Moreover, Frieler conceded her responsibility to report sexual harassment, if not to her supervisor, then to human resources, the legal department, or the ethics hotline. (RA.2-3).¹

Despite CMG’s unequivocal “zero tolerance” policy against harassment, Appellant’s Brief further states, without record citation, that Frieler “believed that if she told anyone in management, she would not get the new job since Janiak was the hiring supervisor and that she might even lose her part time job.” (App. Br. at 6). Frieler testified, however, that she was unaware of anyone at CMG who reported harassment then lost their job. (A.71). Frieler also conceded she was never told that she would lose her part-time job for any reason. (A.68). Further, the record contains no evidence Janiak

¹ The policy provides, in part, that “Anyone who feels he/she is a victim of sexual harassment should contact either their immediate supervisor or a representative of the human resources department.” (*Id.*; RA.25). It also provides that employees should “[i]mmediately report discriminatory actions, harassment or *suspicion of such actions* (against an employee...) by contacting one or more of the following: His/her immediate supervisor, human resources department, legal department, ethics hotline.” (*Id.*; RA.26-27 (emphasis added)).

had authority or power to fire Frieler, or to hire her for the position she was seeking; the hiring decision was to be made by their common manager, David Weber. (A.89, 120-21).

Appellant's Brief states that "Frieler knew that Janiak had been with the company for a long time and was friends with their manager, David Weber," and thus "she felt she could not talk to Weber about Janiak's conduct because of the obvious friendship between the two men." (App. Br. at 6). Yet, Frieler had been with CMG a long time, too, over 13 years. Frieler conceded that Weber had "always" acted professionally towards her. (A.66). There is no evidence that Janiak and Weber had any relationship outside of the workplace. The record shows that Weber was no more a "friend" of Janiak than of Frieler.

Moreover, Frieler offered no explanation for failing to report the alleged assaults to Angela Krob, the manager above David Weber, or for failing to report the claimed incidents to human resources, the legal department, the ethics hotline, company security, or the police. Frieler makes the astonishing claim that she did not want Ed Janiak to get in trouble. (A.68). But the record shows Frieler knew she was obligated to report harassment, and there was no impediment to Frieler's use of CMG's preventive and corrective policies and the numerous access points available to her.

C. Despite Frieler's Failure To Report, When CMG Learned Of Her Allegations, It Acted Immediately And The Alleged Harassment Ended Permanently

Frieler testified about four discrete instances of claimed sexual misconduct by Janiak which allegedly took place on February 23 and March 2, 7 and 9, 2005. (A.61-65,

65-68, 68-71, 72-76). All of the claimed incidents occurred behind closed doors, and none were witnessed by any other person. (*Id.*) Frieler stated that, prior to that time, Janiak had never said or done anything similar to what she claimed. (A.62). Frieler stated that she was “shocked” by Janiak’s alleged conduct. (A.66). “I never thought he would do something like that.” (*Id.*) “I never thought that he would touch me ever.” (*Id.*) All of the alleged incidents occurred before Frieler accepted the full-time shipping clerk position; Frieler admits that Janiak never was her supervisor. (RA.6, 8).

Frieler testified that after each claimed incident she returned to her work duties and finished out the day, as well as her regularly scheduled days after each claimed incident. (A.65, 67, 72, 76; RA.7). Frieler testified that after each of the alleged incidents she did nothing to report the alleged assaults or seek assistance. (A.65, 67, 72, 76). She did not call a doctor or counselor, the police, company security, or human resources. (*Id.*) She did not tell her manager, David Weber, or any manager above him. (*Id.*) She did not tell anybody in the legal department, or call the ethics hotline. (*Id.*) She did not record what had happened. (*Id.*) Frieler testified that she “didn’t want to mess up his [Janiak’s] family life.” (*Id.*)²

² Frieler testified that she told only her 21-year-old son about the first claimed incident. (A.64). Frieler testified that after the second claimed incident, she told her son, her sister-in-law, and probably her sister. (A.67). After the third claimed incident, Frieler testified she included a female friend, as well. (A.72). After the last claimed incident, Frieler stated that she told her sister-in-law, ex-husband, and sons what she claimed happened, and they encouraged her to make a report. (A.76). But Frieler did not report any of the claimed incidents to the police or to CMG. None of Frieler’s family members or friends made a report to the police or any CMG official, either.

Frieler testified that on Thursday, March 10, 2005, the day after the fourth alleged incident, she snapped at a co-worker, Debbie Tabako. (A.77). Frieler claimed she then apologized to Tabako and told her “I have a lot going on and I can’t talk about it ... And I told her just some guy won’t leave me alone. And she guessed it, she said it’s Ed isn’t it, it’s Ed.”³ (*Id.*). Frieler claims she responded “yeah, it’s Ed, ... I’ll tell you at lunch.” (*Id.*).

Frieler testified that she went to lunch with her sister-in-law Stephanie Limesand, Tabako, and Vickie Streich, their group leader, where Tabako informed Streich what Frieler had told her. (A.77-78). Streich insisted that Frieler report Janiak to their manager David Weber, yet Frieler resisted. (A.78). (“I’ll deal with it, just let me handle it.”). Because Frieler herself never complied with CMG’s reporting and corrective action policies, Streich took the initiative. (*Id.*) (“Vickie grabbed me and said we’re going, we’re going now.”). Streich reported Frieler’s allegations to Weber, which was the first notice CMG management had of Frieler’s allegations against Janiak. (*Id.*).

CMG’s response was immediate. Streich told Weber what Frieler was alleging. Weber reported the information to his manager, Director of Merchandise Operations Angela Krob. Weber and Krob then consulted Human Resources Manager Jackie Dahl. Within an hour or so, Weber asked Frieler into a conference room and Krob and Dahl

³ Frieler did not provide to the district court any affidavit or deposition testimony from Tabako substantiating the comments that Frieler attributed to her; Tabako later told CMG human resources that she had never felt uncomfortable around Janiak, and did not believe Janiak could do what Frieler alleged. (A.28-29).

were there to meet with her. (A.78-79; A.120-121; RA.18-19; A.104; RA.12; RA.16-17; A.24-30).

At that time, Frieler “started breaking down” because she was “worried about Ed and his family” and she “didn’t want to cause any troubles with anybody or anything.” (A.78). Stephanie Limesand was asked to come in to sit with Frieler. (*Id.*). “But I couldn’t stop crying, so they told me to go home half the day. And then we would meet in the morning at Bakers Square, Maple Grove.” (*Id.*). “And they were telling me that it’s, you know, this isn’t right. He shouldn’t do this. It’s not – I don’t need to take this from him.” (*Id.*). Frieler told them that no one had witnessed the incidents. (A.79). She was given the balance of the day off, with pay. (*Id.*).

As arranged, Krob and Dahl met with Frieler the next day, Friday, March 11, at a Baker’s Square restaurant. (A.79). Frieler relayed her allegations to Krob and Dahl in more detail. (*Id.*; *see also* A.24-30). Frieler was given a paid administrative leave pending further investigation. (A.81).

Later that day, Friday, March 11, Krob and Dahl met with Janiak. He denied the allegations. (A.24-30). Krob and Dahl also interviewed Stephanie Limesand, Vicky Streich, Debbie Tabako, and Tammy Latzig. (*Id.*). None of them had witnessed any of the alleged sexual conduct. (*Id.*). Nor did any of them express that they had felt uncomfortable around Janiak. (*Id.*).

Streich offered that “Judy is very vulnerable right now. She might be saying this to get attention.” (*Id.*). Tabako offered “Judy can’t handle working here. ... She [Tabako] has worked here 11 years, and can’t see Ed doing something like this.” (*Id.*).

Likewise, Latzig offered that she “has worked with Ed 17 years, she has never felt uncomfortable around Ed, and doesn’t believe Ed could do something like this.” (*Id.*).

On Monday, March 14, Janiak submitted his resignation rather than contest Frieler’s claims. (RA.22-23; A.123-124; RA.13-14; A.112). He was “flabbergasted” when he read Frieler’s complaint; “[f]rustrated, angry. It’s unbelievable.” (A.98). He testified that he resigned rather than go through the stress of responding to Frieler’s allegations.⁴

Frieler found out about Janiak’s decision to resign from her sister-in-law Stephanie Limesand that same day, Monday, March 14. (A.81). Krob also attempted to contact Frieler to tell her about Janiak’s decision, but was not able to reach her. (RA.15). Janiak’s last day at CMG was Friday, March 18, and some of his co-workers had cake and coffee with him during a scheduled break to say goodbye after eighteen years of employment. (A.124; A.112). On Sunday, March 20, Krob called Frieler again. (RA.15). This time, Krob left a message for Frieler telling her that Janiak no longer worked at CMG, and that Frieler should come back to work. (*Id.*). Frieler called Krob back on Monday morning, March 21, stating that she could not come back until the next day. (*Id.*).

⁴ Janiak had a history of serious heart problems. (RA.20-21). He testified that he thought the stress of defending himself might kill him. “The two things I wanted to do – I decided I really wanted to do is live to see my granddaughter [who was born Saturday, March 12] grow up, and walk my youngest daughter down the aisle. ... [I]f I’d stayed at Carlson, I can honestly say I don’t think I would be alive because of the stress.” (RA.23).

Frieler returned to her part-time job in the bindery on Tuesday, March 22. (RA.7). She worked again on Thursday, March 24. (*Id.*). On that day, Frieler signed a formal acceptance of the full-time shipping and receiving clerk position she had been seeking. (A.85; A.51-52). With Janiak gone, she would have been reporting directly to David Weber, with whom she testified she had never had a problem or issue, stating that he “always” conducted himself professionally. (A.66). Frieler worked at her part-time position again on Friday, March 25. (RA.7; RA.10). By all accounts, Frieler was looking forward to starting her full-time job the next week. (RA.10).

Regarding Janiak’s resignation, Frieler testified “maybe I was relieved, but I heard Ed denied it all.” (A.81). Frieler testified that she wanted Janiak to admit her allegations; she was upset that he was given a going away party; she was upset that Krob and Dahl asked her and the other witnesses they interviewed to keep the matter confidential; and she was upset because sister-in-law Stephanie Limesand told her that there were rumors Frieler was in “drug rehab” and had “some family problems.” (A.81-82). Frieler claims that two employees in shipping, Judy Baker and Tammy Latzig, would not look at her anymore. (A.83). Baker told Frieler that she did not believe her. (*Id.*). Frieler never reported any of this to CMG human resources. (*Id.*).

D. Frieler Rejected Available Work

Frieler testified that she began looking for an attorney on Monday, March 28, and probably retained her lawyer that day. (RA.9; A.85). On March 28 Frieler called in sick. (*Id.*). On Tuesday, March 29, she did not come to work allegedly because of a sick child.

(A.83). On Wednesday, March 30, Frieler's lawyer faxed a letter to David Weber, which stated that Frieler was not able to return to work due to emotional stress. (RA.40-42).

In April 2005, CMG made another offer of full-time work to Frieler in the Call Center. (RA.11). The position was at the same or better rate of pay as the previous job she had been offered, and was in a different department in a different building, working with and reporting to different personnel. (*Id.*). Frieler's attorney rejected that offer, stating "Ms. Frieler cannot accept an offer of employment with the Company now and many not ever be able to return to any business owned or affiliated with Carlson." (RA.43-46). Frieler never contacted CMG to explore any other potential work arrangements. In July 2005, Frieler sued CMG.

III. SEXUAL HARASSMENT LAW IN MINNESOTA PRECLUDES LIABILITY AGAINST CMG

The overarching principle of statutory construction is to implement the Legislature's intent. Minn. Stat. § 645.16 (2006). The 2001 MHRA amendment did not expressly adopt a new standard of employer liability. At best, the Legislature's actions might be construed as giving the courts a chance to re-visit the employer liability standard in the face of Legislative silence. *See Continental Can*, 297 N.W.2d at 247-49. But it is not the function of the courts to legislate, and until such time as the Legislature speaks definitively, it is reasonable for the courts to conclude that "knew or should have known" remains the operative standard in all harassment cases, supervisor and nonsupervisor, as the court of appeals held. *Id.* at 249. (A.13).

But even if the Court chooses to apply general respondeat superior principles to supervisor harassment cases, as suggested in *Continental Can, id.* at 249 & n. 5, or this Court concludes that the Legislature intended that *Faragher/Ellerth* and its related affirmative defense should be Minnesota law (and that the 2001 amendment effected that result), Frieler's sexual harassment claim still fails. Under any plausible employer liability standard, the judgment below in favor of CMG must be affirmed.

A. Hostile Environment Harassment As A Cause Of Action In Minnesota

1. Claim First Recognized By Judicial Construction

This Court first recognized hostile environment sexual harassment as actionable "sex discrimination" in *Continental Can Co. v. State*, 297 N.W.2d 241 (Minn. 1980). At that time, the MHRA made no reference to sexual harassment. *See id.* at 249 (citing prohibition against "sex discrimination" contained in Minn. Stat. § 363.03, subd. 1(2)(c) (1978)). The Court nonetheless recognized the cause of action by judicial construction of the MHRA, applying a common law standard for employer liability, as the MHRA text contained no liability standard. *See id.*

In determining the employer liability standard, the *Continental Can* court analyzed federal cases that had recognized racial and sexual harassment as an actionable form of discrimination under Title VII. *Id.* at 247-48. The weight of federal authority required some notice to the employer and evidence the employer failed to investigate or remedy the harassment before liability would be imposed on the employer, even when the alleged harasser was a supervisor. *Id.* (citing, e.g., *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568

F.2d 1044, 1048-49 (3d Cir. 1977)). The Court chose not to impose “automatic and vicarious liability” on employers. *Id.* at 247, 249. Instead, the Court adopted the now familiar “knew or should have known/failed to take timely and appropriate action” liability standard:

We hold that the prohibition against sex discrimination in Minn. Stat. § 363.03, subd. 1(2)(c) (1978) includes sexual harassment which impacts on the conditions of employment when the employer knew or should have known of the employees’ conduct alleged to constitute sexual harassment and fails to take timely and appropriate action.

Id. at 249.

The Court noted EEOC interim guidelines which called for “knew or should have known” as the liability standard when harassment was perpetrated by a non-supervisory co-employee but “respondeat superior” liability when harassment was perpetrated by agents of the employer or supervisory employees. *See id.* at 248 (citing 45 Fed. Reg. 25025 (1980)). But the Court held it did not need to determine whether a different liability standard was appropriate in a supervisor harassment case because the case at bar did not involve allegations that the plaintiff’s supervisor had engaged in harassing conduct. *See id.* at 249 n. 5 (“It is unnecessary in this case to decide what theory of liability is appropriate when the employer’s agents and supervisors are the source of conduct alleged to constitute sexual harassment.”).

2. The 1982 Law Did Not Address Any Distinction Between Supervisors And Nonsupervisors

In 1982, the Legislature incorporated the *Continental Can* holding into the text of the MHRA. *See* Act of March 23, 1982, 1982 Minn. Laws ch. 619, §§ 1-3. The 1982

law amended the unemployment compensation benefits statute to provide that an employee's voluntary leave "shall be for good cause attributable to the employer if it occurs as a consequence of sexual harassment," setting out a definition of "sexual harassment" that mirrors the holding in *Continental Can. Id.* at § 1. The 1982 law also changed the MHRA definition of "discriminate" to include specifically "sexual harassment" and added a definition of "sexual harassment." *Id.* at §§ 2, 3. The definition of "sexual harassment" restated the holding in *Continental Can* that actionable harassment occurs when "in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." *Id.* at § 3. The 1982 law made no distinction between supervisors and nonsupervisors. *See id.*

3. Later Cases Apply "Knew Or Should Have Known" To Supervisors

In *McNabb v. Cub Foods*, 352 N.W.2d 378 (Minn. 1984), this Court considered whether an employer had sufficient knowledge of harassing conduct by the plaintiff's co-workers to meet the definition of "sexual harassment" contained in the unemployment compensation benefits statute. *Id.* at 382-83. The Court held that a "meat manager" in a grocery store was a managerial employee. *Id.* at 383. Hence, the meat manager's knowledge that a male employee had "hit" on the plaintiff female co-worker, among other things, was sufficient to warrant investigation by the employer. *Id.* Since the employer did not disseminate an antiharassment policy or counsel or discipline the offending employees, *McNabb* determined that the female plaintiff had good cause

attributable to the employer to quit her employment, reversing the commissioner's denial of unemployment compensation benefits. *Id.* at 384. Like *Continental Can*, the *McNabb* case did not involve allegations that a supervisor or manager had engaged in harassing conduct.

Following *Continental Can* and *McNabb*, the court of appeals consistently has used the same "knew or should have known" employer liability standard in cases involving sexual harassment by a supervisor or nonsupervisory co-worker. See *Tretter v. Liquipak Int'l, Inc.*, 356 N.W.2d 713 (Minn. Ct. App. 1984); *Fore v. Health Dimensions, Inc.*, 509 N.W.2d 557, 561 (Minn. Ct. App. 1993). Where a supervisor was the alleged perpetrator of harassment, the court of appeals has held that an employer avoids liability by taking "strong, swift action to separate itself from the harassment of the offending supervisor":

An employer can avoid liability for harassment committed by its employees by taking timely, appropriate, remedial action. This may include dissemination of an antiharassment policy, transferring the employee to another shift, or taking or threatening disciplinary action against offending employees. *McNabb*, 352 N.W.2d at 384. An employer must take strong, swift action to separate itself from the harassment of the offending supervisor.

Tretter, 356 N.W.2d at 715-16.⁵

⁵ Where, as here, the employer's grievance procedures outline a complaint procedure, and the employee fails to follow it, the court of appeals consistently has held that liability cannot be imputed to the employer, even where the alleged harasser is the employee's supervisor. *Weaver v. Minnesota Valley Lab, Inc.*, 470 N.W. 2d 131, 135 (Minn. Ct. App. 1991); see also *Kay v. Peter Motor Co.*, 483 N.W. 2d 481, 484 (Minn. Ct. App. 1992). Any suggestion to the contrary in Appellant's Brief, see App. Br. at 30-31, is wrong. *Id.*

Moreover, in *Cummings v. Koehnen*, 568 N.W.2d 418 (Minn. 1997), a case alleging “same-sex” harassment perpetrated against a male plaintiff by his male direct supervisor, this Court applied the “knew or should have known” standard without any reference to possible alternative standards for supervisor harassment. *Id.* at 424 (citing Minn. Stat. § 363.01, subd. 41 (1996)). *Cummings* set out the necessary elements of an MHRA sexual harassment claim, stating “[i]n addition, to hold the employer liable, a plaintiff must show that ‘the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.’” *Id.* Hence, following *Continental Can* and legislative adoption of its holding, Minnesota did not recognize a distinction between supervisors and nonsupervisors in assessing employer liability for harassment. In each case, “knew or should have known” was the only standard applied.

4. *Faragher/Ellerth* Is Adopted Under Title VII

By 1998, the federal courts had developed vastly differing standards under Title VII to assess employer liability for harassment by supervisors. *See Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 749-51 (1998) (noting *en banc* court of appeals decision “produced eight separate opinions and no consensus for a controlling rationale. . . . The consensus disintegrated on the standard for an employer’s liability for such a claim.”) (collectively “*Faragher/Ellerth*”). The precise issue framed by the Court in *Ellerth* was “whether, under Title VII . . . , an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor’s

actions.” *Ellerth*, 524 U.S. at 746-47. The United States Supreme Court answered the question “no.”

After an extensive analysis of common law agency principles, *Faragher* and *Ellerth* set forth an employer liability standard and related affirmative defense:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; see also *Pa. State Police v. Suders*, 542 U.S. 129, 134 (2004) (no vicarious liability for alleged “constructive discharge” where supervisor takes no “employer-sanctioned adverse action officially changing her employment status or situation” against the employee).⁶

In *Faragher* and *Ellerth*, the Supreme Court also stressed the importance of an employer maintaining an “antiharassment policy with complaint procedures” to establish the first part of the defense, and approved proof of the employee’s “unreasonable failure

⁶ *Faragher/Ellerth* abrogated the concept of “quid pro quo” sexual harassment. *Ellerth*, 524 U.S. 751 (term is “of limited utility.”). Following *Faragher/Ellerth*, the operative test under Title VII asks whether the supervisor’s harassment culminated in the supervisor taking an adverse official act against the plaintiff. *Id.* at 765. References to “quid pro quo” harassment contained in the Appellant’s Brief are, if anything, merely of historical interest. (See App. Br. at 24-25).

to use any complaint procedure provided by the employer” as to the second element of the defense:

While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense.

Faragher, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765.

The Court explained that the defense is not available where the supervisor ends up taking an adverse, tangible action against the employee: “No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”

Faragher, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765.

B. The 2001 MHRA Amendment Provides No Liability Standard

The 2001 amendment deleted “knew or should have known” and “failed to take timely and appropriate action” from the MHRA definition of “sexual harassment.” Act of May 24, 2001, 2001 Minn. Laws ch. 194, § 1 (A.150). But the 2001 law went no further. It did not expressly incorporate the *Faragher/Ellerth* standard and affirmative defense, did not make any distinction between supervisors and nonsupervisors, and did not specify any liability standard. *Id.*

1. The Amendment Merely Conformed MHRA Definitions, None Of Which Contain A Liability Standard

On its face, the 2001 amendment did not change the legal landscape for harassment claims in Minnesota. The amendment merely conformed the “sexual harassment” definition to other definitions set out in the MHRA — such as the definitions of “disability,” “familial status,” “national origin,” and others — which likewise contain no liability standard. *See, e.g.*, Minn. Stat. §§ 363A.03, subds. 12, 18, 25 (2006); *see also Wenigar v. Johnson*, 712 N.W.2d 190 (Minn. Ct. App. 2006) (adopting cause of action for disability harassment under MHRA in case involving harassment by direct supervisor and co-workers, applying “knew or should have known” standard without making a supervisor/nonsupervisor distinction).

Adding to the mix, this Court issued *Goins v. West Group* after the August 1, 2001 effective date of the 2001 MHRA amendment, on November 29, 2001. *See Goins v. West Group*, 635 N.W.2d 717, 717 (Minn. 2001) (decided Nov. 29, 2001, rehearing denied Dec. 31, 2001). But *Goins* did not signal this Court’s intention to adopt the *Faragher/Ellerth* paradigm, even though the opinion cites *Faragher*. *Id.* at 725. *Goins* applied the “knew or should have known” standard without distinguishing between supervisor and co-worker harassment, even though the plaintiff alleged that his supervisors had harassed him on account of his sexual orientation. *Id.*

The court of appeals construed *Goins* as having retained “knew or should have known” as the employer liability standard for all Minnesota sexual harassment cases, despite the 2001 change to the statutory definition. (A.13). That holding is consistent

with other cases which rely on *Goins* for the appropriate liability standard, rather than the MHRA itself, which contains no liability standard. See *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 176 (Minn. Ct. App. 2007) (citing *Goins*); *Wenigar*, 712 N.W.2d at 206-07 (citing *Goins*); *Schramm v. Village Chevrolet Co.*, No. C9-02-1107, 2003 WL 1874753, at *4 (Minn. Ct. App. Apr. 15, 2003) (unpublished opinion) (RA.54-57) (citing *Goins*) (affirming judgment for employer where plaintiff “never told anyone about [alleged discriminatory] comments made by her lead manager and the other managers.”), *pet. rev. denied* (Minn. June 17, 2003); see also *Continental Can*, 297 N.W.2d at 247-48 (recognizing federal cases adopting the “knew or should have known” standard for supervisor harassment).

2. No “Plain Meaning” Derives From The 2001 MHRA Amendment

Frieler argues that the court of appeals erred because it applied the wrong liability standard in light of the 2001 amendment to the MHRA. Frieler proposes two possible interpretations of the amendment. First, despite the complete absence of any basis in the statutory text, Frieler argues that the “plain language” of the amendment created strict employer liability in all harassment cases, regardless of whether the alleged perpetrator was a mere co-worker of the plaintiff or the plaintiff’s supervisor. (App. Br. at 22, 23-26). Second, relying on comments made during the legislative committee process, Frieler argues that the amendment called for application of *Faragher/Ellerth*, and that Janiak

was her “hiring supervisor”⁷ to whom the federal standard should apply. (App. Br. at 22, 26-35). The court of appeals suggested a third possible interpretation, i.e., that the 2001 amendment effected no change in the liability standard, that the standard remains “knew or should have known” for all cases. (A.13). *Continental Can* suggests yet a fourth possible interpretation, that common law respondeat superior principles govern employer liability for supervisor or agent harassment. 297 N.W.2d at 249 & n. 5.

Given various interpretations, no singular “plain meaning” can be derived from the 2001 amendment. Minn. Stat. § 645.16 (2006); see *Harrison v. Harrison*, 733 N.W.2d 451, 453 (Minn. 2007) (“Statutory interpretation begins with an inquiry into whether the law is ambiguous; that is, whether it is subject to more than one plausible interpretation.”). If there is any basis to infer legislative intent in this case, the most plausible inference is that the Legislature intended to leave to the courts a decision on the liability standard. (See A.154-59).

C. Strict Liability For Harassment Is Not Properly Before This Court And Is Not Minnesota Law

One interpretation of the statutory change that is not reasonable, or even plausible, is that the amendment created automatic employer liability for workplace harassment, in all cases, supervisor and co-worker, with no defense. Proof of sexual harassment has

⁷ Janiak never supervised Frieler, and it is undisputed that he did not have hiring authority or power for the new position she was seeking, he merely had “input” into a decision to be made by David Weber. (RA.6; A.89, 121). As is set forth more fully *infra* at 39-43, having mere input into a potential tangible employment action to be taken by another with official power is insufficient, as a matter of law, to create *Faragher/ Ellerth* supervisor status.

never subjected employers to “automatic” liability in Minnesota. *See Continental Can*, 297 N.W.2d at 249. But the Court need not address the issue because Frieler did not seek review on that question.

1. The Issue Was Not Raised Below Or Properly Presented To This Court

A legal issue not referenced in a petition for review need not be reviewed by this Court. *See Hapka v. Paquin Farms*, 458 N.W.2d 683, 686 (Minn. 1990). “The court will generally not address issues that were not specifically raised in the petition for review.” *George v. Estate of Baker*, 724 N.W.2d 1, 7 (Minn. 2006); *In re GlaxoSmithKline PLC*, 699 N.W.2d 749, 757 (Minn. 2005). That prohibition derives from appellate Rule 117, which requires “a statement of the legal issues sought to be reviewed,” among other things. *Id.* And, while this Court might decide to grant review of issues that were at least implicitly included in the lower court proceedings, *George*, 724 N.W.2d at 7-8, that is not the case here.

Nowhere in Frieler’s complaint does she allege that CMG is strictly liable. (RA.28-39). Frieler mentioned strict liability only in passing in a footnote in her briefing to the court of appeals. (App. Br., Court of Appeals, at 25 n.2). She did not argue that CMG should be held strictly liable. Frieler instead argued for application of *Faragher/Ellerth*. (*Id.* at 25-35). As the court of appeals noted, the federal *Faragher/Ellerth* standard and affirmative defense were “extensively briefed by both parties.” (A.13). But neither opinion below makes any reference to a purported strict liability standard. (A.1-9; A.11-15).

Frieler's petition for review makes no reference to strict liability, either. (See A.16-21). Instead, Frieler's petition stated as the issue for review: "the Court of Appeals erred when it failed to recognize that Minnesota adopted, by amendment to the Minnesota Human Rights Act ('MHRA'), the federal standard for imposing vicarious liability for harassment by a supervisor." (A.17). The federal standard is *Faragher/Ellerth*, not automatic liability. Since this Court is presented with the issue for the first time in Frieler's brief, it need not entertain it. *GlaxoSmithKline*, 699 N.W.2d at 757 (where it is unclear whether parties would have argued merits of position more extensively had issue been raised earlier, review denied). The argument has been waived. *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn.), *cert. denied*, 127 S. Ct. 579 (2006).

2. There Is No Basis For Imposing Strict Liability

Putting aside whether Frieler has properly preserved the issue, this Court specifically considered and rejected "[a]utomatic or vicarious liability" for sexual harassment in *Continental Can.* 297 N.W.2d at 247, 249. *Continental Can* left open the possibility that a "respondeat superior" liability standard might be appropriate in cases alleging harassment by a supervisor of the plaintiff, or by the employer's agent. *Id.* at 249 & n. 5. But in applying respondeat superior, Minnesota has never held an employer strictly liable for the intentional torts of its employees.

Instead, this Court historically employed the "motivation" test in the respondeat superior context to determine employer liability. That test asks whether the tortfeasor was motivated to commit the tort to serve his employer's interests, or instead was engaged in a "personal frolic," in which case the employer would not be vicariously

liable. See *Lange v. Nat'l Biscuit Co.*, 211 N.W.2d 783, 784-85 (Minn. 1973) (discussing historical “motivation” test); *Reinhard v. Universal Film Exch.*, 267 N.W. 223, 225-26 (1936) (discussing “personal frolic”). Following *Lange*, Minnesota embraced the “scope of employment” test, one element of which requires proof that the tort is legally foreseeable. *Lange*, 211 N.W.2d at 786. That test asks whether the tortious conduct was a “well known industry hazard,” such that liability is properly allocated to the employer as a cost of doing business. *Hagen v. Burmeister & Assocs., Inc.*, 633 N.W.2d 497, 505 (Minn. 2001). The 2001 MHRA amendment did not overrule this common law precedent.

To suggest that the 2001 MHRA amendment created automatic employer liability for workplace harassment, in contravention of the common law rule, raises an inference from legislative silence to an untenable height. As this Court stated recently, in discussing the Legislature’s silence in a different statute:

If the legislature intended to modify the common law rule . . . , it would have used language that clearly expressed its intent to do so. See *Schermer v. State Farm Fire & Cas. Co.*, 721 N.W.2d 307, 324 (Minn. 2006) (stating that the court presumes that statutes do not alter the common law unless they expressly so provide). We do not believe the legislature intended to modify such a well-recognized common law rule in such an offhand manner. See *Gonzales v. Oregon*, 546 U.S. 243, 267, 126 S.Ct. 904, 163 L.Ed.2d 748 (2006) (noting that it should not be assumed that the legislature intends to “hide elephants in mouseholes”) (quoting *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001)).

Harrison, 733 N.W.2d at 456. Frieler’s effort to hide the elephant of strict employer liability in the mousehole of legislative silence must be rejected. See also *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 377-78 (Minn. 1990) (“If statutory enactment is to

abrogate common law, the abrogation must be by express wording or necessary implication.”).

The MHRA contains elements which are penal in nature, and a penal statute must be construed narrowly.⁸ As discussed in *Ellerth*, strict employer liability for harassment would tend to defeat the remedial purposes of the legislation, 524 U.S. at 764, leaving only its punitive features. There is no basis to interpret the 2001 MHRA amendment as imposing strict liability and concomitant penalties on employers, where the statute itself does not specify strict liability.

Public policy also militates against strict liability. As recognized in *Ellerth*, it is sound public policy to have an employer liability standard that encourages employees to come forward with workplace issues, and encourages employers to intervene promptly and take corrective action to avoid harm. 524 U.S. at 764. Strict liability would diminish incentives for employees to report harassment. Instead, an automatic employer liability standard would motivate employees to refrain from reporting so that harassing events would be compiled, a finding of “severe or pervasive” conduct would be made more likely, and potential damages would be compounded.⁹ If harassment goes unreported,

⁸ The MHRA provides for civil penalties, punitive damages, trebling of compensatory damages, attorneys’ fees, costs, and injunctive relief. Minn. Stat. §§363A.29, subds. 4, 11; 363A.33, subd. 7 (2006). “[S]tatutes that are penal in nature are construed narrowly against the penalty.” *Hans Hagen Homes, Inc. v. City of Minnerista*, 728 N.W.2d 536, 543 (Minn. 2007); *Brekke v. THM Biomedical, Inc.*, 683 N.W.2d 771, 774 (Minn. 2004) (“Statutory provisions that provide for a penalty are strictly construed.”).

⁹ Understandably, the Attorney General does not argue for strict employer liability on this appeal. The Attorney General instead promotes judicial adoption of *Faragher/Ellerth*, as

employers are denied the opportunity to prevent further harm to the affected employee, and potentially to others who might be exposed to the harmful conduct. That would defeat the law's purpose to promote avoidance of harm. *See Ellerth*, 524 U.S. at 764 (“To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.”); *McCurdy v. Ark. State Police*, 375 F.3d 762, 771 (8th Cir. 2004) (summary judgment affirmed, employer must be given chance to “nip it in the bud”).

Frieler’s claim for strict liability must be rejected. Not only did she fail to properly raise the issue below and before this Court, there is no basis in the language of the statutory amendment or any reasonable discernment of legislative intent to adopt such a radical change in the law.

did the Human Rights Commissioner before the 2001 Legislature. The State, through its Department of Human Rights, advocates nondiscriminatory employment practices. But the State and its subdivisions also employ nearly 600,000 Minnesotans. Minnesota Dep’t of Economic Development, Current Employment Statistics (Oct. 2007), <http://www.deed.state.mn.us/tools/ces/results.aspx>. (RA.46-49).

Hence, were strict employer liability for harassment the standard in Minnesota, then the State as employer would have no defense to the intentional, harassing acts of a rogue State employee. Nothing in the MHRA text or its legislative history remotely hints that the Legislature intended to place that burden on Minnesota taxpayers, or on private employers, either. The purpose of the MHRA is to prevent and stop harassment in the workplace. The MHRA was not intended to make employers — including the State of Minnesota — “insurers” against offensive workplace conduct.

D. This Court's Jurisprudence Suggests That "Knew or Should Have Known" Or Respondeat Superior, Rather Than *Faragher/Ellerth*, Should Govern Supervisor Harassment Cases Until The Legislature Expresses A Different Intent In The Statute

This Court adopted "knew or should have known" as the employer liability standard for sexual harassment in the face of legislative silence, reviewing cases in which federal courts had adopted and applied "knew or should have known" in instances involving harassing conduct by supervisors of the plaintiff. *Continental Can*, 297 N.W.2d at 247-49. This Court cited *Tomkins v. Public Service Electric & Gas Co.* in support of its decision:

Title VII is violated when a supervisor, with the actual or constructive knowledge of the employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status evaluation, continued employment, promotion, or other aspects of career development on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge.

Id. (quoting 568 F.2d at 1048-49). This Court also cited racial harassment cases, and noted "that an employer may be held liable only where the employer knows or should know of the condition and permits it to continue without attempting to 'discourage' it." *Id.* at 247-48 (citing *Friend v. Leidinger*, 446 F. Supp. 361, 384 (E.D. Va. 1977), *aff'd*, 588 F.2d 61 (4th Cir. 1978)).

The 2001 amendment simply returned silence to the statute as to what liability standard should be applied, leaving it for this Court to fill the gap, as it did in *Continental Can*. That silence, though, did not make *Faragher/Ellerth* Minnesota law. This Court has stated that it will not mandate what the Legislature deliberately refuses to do: "We

will not supply that which the legislature purposefully omits or inadvertently overlooks.” *Green Giant Co. v. Comm’r of Revenue*, 534 N.W.2d 710, 712 (Minn. 1995); *Wallace v. Commissioner of Taxation*, 184 N.W.2d 588, 594 (Minn. 1971). Where the Legislature could have expressed itself on a particular matter in statutory text, but did not, this Court has declined to supply the missing language. See *Metropolitan Sports Facilities Comm’r v. County of Hennepin*, 561 N.W.2d 513, 516-17 (Minn. 1997) (“it could have said so. It did not.”). This Court “will not read into a statute a provision that the legislature has omitted, either purposely or inadvertently.” *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 911 (Minn. 2006). But that is precisely what Frieler and some amici are asking the Court to do vis-à-vis their requests that this Court adopt *Faragher/Ellerth*.

The Legislature did not import *Faragher/Ellerth* into the MHRA in the 2001 amendment, although it clearly could have. Strident assertions that *Faragher/Ellerth* ought to be Minnesota law do not change this reality. As established *infra* at 39-48, CMG prevails under *Faragher/Ellerth*, in any event. But it would be entirely appropriate, in keeping with this Court’s expressed refusal to create new law where the Legislature has refused to act, to reject the requests of Frieler and some amici to read *Faragher/Ellerth* into the statute. In light of *Continental Can*, that would leave either “knew or should have known” or respondeat superior as the employer liability standard in supervisor harassment cases. Again, under either of those standards, CMG likewise prevails, as established *infra* at 37-39 and 48-50.

E. CMG Is Entitled To Judgment Under Any Plausible Liability Standard.

Three reasonable options have been suggested to decide the effect of the 2001 MHRA amendment: (1) maintain “knew or should have known” for all cases; (2) apply respondeat superior principles; or (3) adopt *Faragher/Ellerth*. In each instance, the judgment below must be affirmed.

1. CMG Prevails Under “Knew Or Should Have Known”

The district court and court of appeals held that Frieler failed to establish a fact issue that CMG knew or should have known of Janiak’s alleged sexual assaults, or that CMG failed to take timely and appropriate corrective action once those allegations came to light, precluding CMG’s liability to Frieler for sexual harassment. (A.5, A.14). *See Goins*, 635 N.W.2d at 725 (Minn. 2001) (five elements of harassment claim under MHRA). Frieler did not seek review of that holding. (A.17).

The “knew or should have known” standard imposes liability on an employer for employee sexual harassment based on the direct fault of the employer — if the employer has actual knowledge or reason to know of harassment and fails to prevent or remedy the misconduct, it bears legal responsibility for its own fault. *See id.* This is a sound legal principle that has served Minnesota well for 27 years. There is no evidence that this standard has failed to accomplish the MHRA’s purposes. This liability standard encourages employees to report workplace harassment, not only for their protection, but also for the protection of their co-workers. It encourages employers to take prompt and remedial action to stop harassment. This is sound public policy.

This is a case in point. The record contains no evidence that CMG knew or should have known that Janiak had, or would likely in the future, engage in any harassing behavior. Frieler never reported any of the claimed incidents to CMG. In so doing, she willfully violated CMG's antiharassment policy. If Frieler's allegations are true, it was her inaction, not anything CMG did, that allowed that conduct to be repeated. When a co-worker brought Frieler's allegations to CMG's attention, an investigation immediately ensued, and the harassment permanently ended because Janiak resigned. The "knew or should have known" standard offered substantial justice in this case.

The lower courts correctly held that Frieler failed to sustain her burden under the "knew or should have known" test, and Frieler did not seek review of that decision in this Court. In the context of this case, and others, the "knew or should have known" test provides a workable and effective standard for assessing employer liability. Judgment should be affirmed on that basis.

2. CMG Prevails Under Respondeat Superior

An alternative basis for employer liability in supervisor harassment cases might be found in the common law rules of vicarious liability, or respondeat superior, a possibility this Court held out in *Continental Can*, 297 N.W.2d at 249 & n. 5. "Respondeat superior or vicarious liability is a principle whereby responsibility is imposed on the master who is not directly at fault." *Lange*, 211 N.W.2d at 785. As discussed below with respect to Frieler's assault and battery claim, however, the plaintiff must prove that the intentional tort was legally foreseeable, *i.e.*, was a "well known industry hazard," before liability may be imposed on the employer. *Hagen*, 633 N.W.2d at 505.

The Court might fill the statutory void created by the 2001 amendment to the MHRA by adopting respondeat superior principles to determine employer liability, as suggested in *Continental Can*. If the Court chooses that option, then the analysis for employer liability for supervisor harassment under the MHRA is the same as that for employer liability for other intentional torts committed by employees. As Frieler presented no evidence that sexual assault was a common workplace hazard in her line of work, CMG prevails under that test. *See id; infra* 48-50.

3. CMG Prevails Under *Faragher/Ellerth*

If the Court decides to adopt the *Faragher/Ellerth* standard employed in Title VII cases, CMG still prevails. Janiak was not Frieler's "supervisor" to whom *Faragher/Ellerth* would apply. Further, even if Janiak were deemed Frieler's supervisor for the sake of argument, the record establishes the affirmative defense afforded to an employer under *Faragher/Ellerth*.

a. Janiak Was Not A Supervisor With Authority Over Frieler To Whom *Faragher/Ellerth* Would Apply

To suggest from the record here that Janiak was Frieler's supervisor with "immediate (or successively higher) authority" over her elevates fiction over fact. *See Ellerth*, 524 U.S. at 765. The record shows that in February 2005 David Weber, not Janiak, first suggested to Frieler that she consider a full-time shipping department position, rather than go to work for another company. (A.58-59). Frieler does not suggest that Janiak could hire or fire anybody independently of Weber, nor does the record suggest that Janiak had such authority, or authority to take any tangible

employment action regarding Frieler. (A.89, 120-21). Although Janiak may have had “input” about whether Frieler might be hired in the shipping department, the record reveals that Weber had the power to hire, and Janiak did not. (*Id.*). Furthermore, Frieler engages in wishful thinking by calling Janiak her “hiring supervisor” because Janiak was no longer at CMG when the shipping department offer was made on March 23.¹⁰ Dahl and Weber made the offer to Frieler. (A.51-52).

The Attorney General suggests that federal courts have not developed a consistent standard for determining who is a “supervisor” within the meaning of *Faragher/Ellerth*.¹¹ (State Br. at 14). That assertion is not correct. The Eighth Circuit has developed a clear standard, and Janiak clearly is not a “supervisor” under that test: “to be considered a supervisor, ‘the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote, or reassign to significantly different duties.’” *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004) (quoting *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004)); *see also Merritt v. Albemarle Corp.*, 496 F.3d 880 (8th Cir. 2007) (same); *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 857 (8th Cir. 2005) (same), *cert. denied*, 546 U.S. 1091 (2006).

¹⁰ The only record evidence of an employment offer is the offer made in writing on March 23, 2005, by Jackie Dahl, after Janiak was gone. (App. Br. at 9, citing A.51-52). There is no record support for Frieler’s claim that she “accepted” an offer for the new position on March 9, 2005. (App. Br. at 9).

¹¹ The State encourages an unspecified “case-by-case” approach to the question, without any guidance to lower courts.

Frieler cites no case holding that the *Faragher/Ellerth* standard applies to alleged harassment by a supervisor in another department of the employer to which the plaintiff employee might be transferred, *before* the supervisor has official authority over the plaintiff, and never actually supervises the plaintiff, as here. Janiak was gone by the time Frieler was offered the full-time shipping department job. Additionally, she never started in that job. Janiak was never in a position to take “an official act of the enterprise” concerning Frieler because he resigned before that possibility could have arisen. *See id.* (lack of power to take official act defeats claim of supervisor status). The record indisputably shows that Janiak only had “input” into a possible hiring decision that was to be made by David Weber; Janiak had no official authority or power to hire or fire. (A.89, 120-21). Mere “input” or even “apparent authority” is, as a matter of law, insufficient to create *Faragher/Ellerth* supervisor status. *Weyers*, 359 F.3d at 1057.

In *Joens*, the plaintiff argued for reversal of summary judgment for an employer on the issue of whether a “foreman,” in a department other than the plaintiff’s, was a supervisor of the plaintiff. 354 F.3d at 940. The plaintiff in *Joens* proffered evidence that the foreman had some supervisory authority over the plaintiff, such as being able to write her up for violations of company policy and ability to assign additional work to her. *Id.* The Eighth Circuit affirmed summary judgment, however, holding that the foreman was not a “supervisor” of the plaintiff within the meaning of *Faragher/Ellerth* because, although he had input into decisions, he had no official power to take adverse action against the plaintiff. *Id.*

In *Weyers*, the Eighth Circuit similarly determined that an alleged harasser, was not a supervisor of the plaintiff, reversing the court below. 359 F.3d at 1057. There, the alleged perpetrator “had the authority as team leader to assign employees to particular tasks, [but] could not reassign them to significantly different duties.” *Id.* The alleged harasser had signed at least three of the plaintiff’s performance evaluations, and the manager who terminated the plaintiff’s employment “acknowledged that he had based his decision to terminate [plaintiff] at least in part on [plaintiff’s] job evaluation scores.” *Id.* But the court held that having mere “input” into a tangible employment action is insufficient, as a matter of law, to establish supervisor status. *See id.* Moreover, merely being “viewed by the employees as supervisors” is insufficient; “apparent authority would be an insufficient basis to support a finding of supervisor status.” *Id.* at 1057 n. 7 (citing *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 598 (8th Cir. 1999)); *see also Merritt*, 496 F.3d at 883-84 (authority to assign plaintiff to work with allegedly unsafe co-worker does not create supervisor status); *Cheshewalla*, 415 F.3d at 851 (“foreman” who was only supervisory employee at employment site not supervisor where offsite manager possessed power to take tangible employment actions).

The court in *Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953 (D. Minn. 1998), upon which Frieler relies, did not have the benefit of *Joens*, *Weyers*, *Cheshewalla*, and *Merritt*. To the extent that *Grozdanich* applies a standard for determining *Faragher/Ellerth* supervisor status that is different than that later enunciated by the Eighth Circuit, it is not good law. Moreover, unlike the present case, the alleged perpetrator in *Grozdanich* in fact “was the Plaintiff’s first line supervisor, while she

worked in his Unit, and he maintained the authority to control her daily activities, as well as to recommend that she be subject to a full range of employee discipline.” 25 F. Supp. 2d at 973.

In summary, Janiak was never Frieler’s supervisor. Frieler never worked in his department. Janiak never maintained authority to control Frieler’s daily activity, or to recommend that she be subject to discipline. Janiak’s input into Frieler’s possible hiring into another position did not vest Janiak with “power” to take an official act. *See Weyers*, 359 F.3d at 1057. If the supervisory employees in *Joens*, *Weyers*, *Cheshewalla* and *Merritt* were not “supervisors” for purposes of applying *Faragher/Ellerth*, Janiak certainly was not. The district court correctly concluded that Janiak was not Frieler’s supervisor. In fact, he never was, and that determination should be affirmed.

**b. The *Faragher/Ellerth* Defense Compels
Summary Judgment For CMG In Any Event**

Frieler can point to no adverse tangible act taken against her, by Janiak or anyone else at CMG, that would make CMG vicariously liable under *Faragher/Ellerth*. *See Ellerth*, 524 U.S. at 748 (“no adverse tangible job consequences”). For that reason, even if *Faragher/Ellerth* applies under the MHRA, and even if Janiak were plaintiff’s supervisor, which he was not, CMG would be entitled to the *Faragher/Ellerth* defense. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; *Suders*, 542 U.S. at 148-49 (“when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer.”). And that defense indisputably is established on the record of this case: (a) CMG had an

unequivocal, “zero tolerance” antiharassment policy that required Frieler to report her allegations and (b) Frieler unreasonably chose to disregard that policy and otherwise take preventive and corrective steps to avoid the alleged harm. *Ellerth*, 529 U.S. at 765.

(i) Janiak Took No Adverse Tangible Employment Action Against Frieler

Faragher and *Ellerth* speak in terms of “adverse, tangible job consequences” as creating potential vicarious liability. *Ellerth*, 524 U.S. at 747 (“suffers no adverse tangible job consequences”); *id.* at 761 (“materially adverse change”) (citation and quotation omitted); *Faragher*, 524 U.S. at 808 (no affirmative defense where “supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.”); *see also Suders*, 524 U.S. at 134 (requiring “employer-sanctioned adverse action officially changing her employment, status or situation”). No adversity arises in Frieler being offered full-time work she sought, especially after Janiak was gone. Being hired into a job for which one applies, as Frieler would have been with respect to the full-time shipping department position, had she taken it, is hardly an adverse employment action. Frieler’s alleged “hiring” cannot constitute a “tangible employment action” leading to vicarious employer liability as a matter of law. Moreover, Janiak certainly did not hire Frieler. Dahl and Weber made the offer, after Janiak had left. (A.51-52).

Likewise, Janiak took no official act against Frieler culminating in her “constructive discharge.” *Suders*, 524 U.S. at 148-49. Janiak never had official authority over Frieler, and he took no official act against her. Frieler’s alleged reasons for quitting

— essentially, that her co-workers did not believe her allegations and she felt powerless to change their minds — do not implicate “official acts” by anyone. No “official act of the enterprise” led Frieler to quit. *Suders*, 542 U.S. at 148 (quoting *Ellerth*, 524 U.S. at 762) (interior quote omitted). Hence, her alleged “constructive discharge” cannot be used to invoke *Faragher/Ellerth* liability. *Id.*

Moreover, Frieler cannot establish a “constructive discharge” as a matter of law. Frieler cannot show that CMG acted with the intention of forcing her to quit; the evidence all points the other way (e.g., CMG offered her a job at another location). *See Navarre v. S. Washington County Sch.*, 652 N.W.2d 9, 32 (Minn. 2002) (no constructive discharge where evidence showed employer “was attempting to work with, rather than against” employee); *Diez v. Minn. Mining & Mfg.*, 564 N.W.2d 575, 579 (Minn. Ct. App.), *pet. rev. denied* (Minn. Aug. 21, 1997); *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412 (Minn. Ct. App. 1995). *See also Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981). Frieler quit without giving CMG a reasonable opportunity to address her perceived concerns. *See Tork v. St. Luke’s Hosp.*, 181 F.3d 918, 919-20 (8th Cir. 1999); *Coffman v. Tracker Marine, L.P.*, 141 F.3d 1241, 1247 (8th Cir. 1998); *Hanenburg v. Principal Mut. Life Ins. Co.*, 118 F.3d 570, 575 (8th Cir. 1997); *Tidwell v. Meyer’s Bakeries, Inc.*, 93 F.3d 490, 494 (8th Cir. 1996). Furthermore, Frieler’s subjective feelings that her co-workers did not believe her allegations against Janiak do not create objectively “intolerable working conditions” as a matter of law. *See Howard v. Burns Bros., Inc.*, 149 F.3d 835, 841-42 (8th Cir. 1998);

Hanenburg, 118 F.3d at 575 (8th Cir. 1997); *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 890 (8th Cir. 1998). These factors are fatal to Frieler's constructive discharge claim.

Since Frieler can point to no adverse tangible employment action taken against her by Janiak, CMG cannot be vicariously liable for Janiak's alleged wrongful conduct, even if Janiak were deemed Frieler's supervisor. For that reason, CMG would be entitled to the *Faragher/Ellerth* defense, the elements of which are clearly established on the record, as set forth *infra* at 46-48.

**(ii) CMG Took Reasonable Steps To Prevent
And Correct Harassment**

CMG had a robust, "zero tolerance" antiharassment policy. That policy specified numerous reporting outlets for aggrieved employees. Once Frieler's allegations were made known, CMG followed its policy immediately and effectively to stop further harassment. That result is precisely what antiharassment law is intended to achieve. *See Ellerth*, 524 U.S. at 764 (discussing public policy reasons against strict employer liability).

As in *Williams*, CMG maintained a "zero tolerance" policy against harassment with a clearly defined reporting procedure. *Williams v. Mo. Dep't of Mental Health*, 407 F.3d 972, 976 (8th Cir. 2005). An employer's promulgation of an "anti-harassment policy with complaint procedure" is proper evidence to establish the employer's exercise of reasonable care to prevent harassment, meeting the first element of the *Faragher/Ellerth* defense. *Faragher*, 524 U.S. at 807-08. That element is indisputably

established on the record here. (RA.26-27). *See Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1195 (8th Cir. 2006).

(iii) Frieler Unreasonably Failed To Take Advantage Of Preventive And Corrective Opportunities

It is also indisputable that Frieler unreasonably failed to take advantage of opportunities to avoid harm. CMG's anti-harassment policy required Frieler to immediately report any suspected sexual harassment to her supervisors, human resources, the legal department, and/or the ethics hotline. (*Id.*) One might reasonably expect Frieler's sexual assault allegations against Janiak to be reported to the police, no less to an employer. But Frieler did not report the first alleged incident, or the second, third, or fourth. She testified she did not report Janiak because she wanted to stop Janiak on her own and she did not want to get Janiak in trouble. That is a legally insufficient basis to refrain from making a report. *Williams*, 407 F.3d at 977.

“While a victim of sexual harassment may legitimately feel uncomfortable discussing the harassment with an employer, that inevitable unpleasantness cannot excuse the employee from using the company's complaint mechanisms.” *Id.* (quoting *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999)) (interior quotation omitted). “An employee has a duty under *Ellerth* to alert the employer to any allegedly hostile environment.” *Id.* Clearly, “an employee's subjective fears of confrontation, unpleasantness, or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment.” *Id.* (citing *Shaw*, 180 F.3d at 813). As a matter of law, plaintiffs' failure to report was unreasonable, and would preclude

liability against CMG for Janiak's alleged sexual harassment even if the *Faragher/Ellerth* standard were adopted under the MHRA and even if Janiak were plaintiff's supervisor.

In sum, Frieler never gave CMG an opportunity to "nip it in the bud," and as a result, CMG cannot be held liable under *Faragher/Ellerth*. See, e.g., *McCurdy*, 375 F.3d at 772-73 (interpreting *Faragher/Ellerth* to permit an employer to avoid liability if it takes prompt remedial action to "nip it in the bud"). Janiak was not a *Faragher/Ellerth* "supervisor," and were *Faragher/Ellerth* Minnesota law the judgment below should be affirmed on that basis. The record also shows indisputably that (i) Janiak took no official adverse action against Frieler, (ii) CMG acted reasonably to prevent harassment, and (iii) Frieler unreasonably failed to avail herself of protective or corrective opportunities in order to avoid the alleged harm, precluding employer liability under *Faragher/Ellerth*.

Frieler has no sexual harassment claim against CMG under any plausible liability standard, and the judgment below must be affirmed.

IV. FRIELER'S ASSAULT AND BATTERY CLAIM AGAINST CMG FAILS FOR LACK OF COMPETENT EVIDENCE OF FORESEEABILITY

Frieler's assault and battery claim is analyzed under the common law of respondeat superior. See *Fahrendorff v. N. Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999). Under respondeat superior, "an employer is vicariously liable for the torts of an employee committed within the course and scope of employment." *Id.* at 910 (interior quotation and citation omitted). "Pursuant to that test, an employer is vicariously liable for an employee's intentional tortious acts when: (1) the tort is related to the employee's duties; and (2) the tort occurs within work-related limits of time and place." *Hagen v.*

Burmeister & Assocs., Inc., 633 N.W.2d 497, 504 (Minn. 2001) (citing *id.*). Here, as in *Hagen*, the alleged assaults took place within work-related limits of time and place. The question is whether the alleged incidents were related to Janiak's duties. *See id.*

"[A]n important consideration in determining whether an act is related to the duties of employment is whether the act was foreseeable." *Id.* To meet that test, the plaintiff must establish that "the type of tortious conduct involved is a well-known industry hazard." *Id.* at 505. A teacher's sexual abuse of a student has been held unusual, startling and not standard, and thus not foreseeable. *P.L. v. Aubert*, 545 N.W.2d 666 (Minn. 1996); *see also Doe v. Centennial Indep. Sch. Dist. No. 12*, No. A04-413, 2004 WL 2939861, at *2-3 (Minn. Ct. App. Dec. 21, 2004) (unpublished opinion) (RA.50-53) (teacher-student sexual assault not a "well-known hazard"). Likewise, an assault committed by a delivery person in a road-rage incident while driving a company truck, although "the employee's conduct may have been imaginable," could not have been expected and is not "a well-known hazard in the delivery business." *Wilson v. Stock Lumber, Inc.*, No. C3-01-623, 2001 WL 1182796, at *5 (Minn. Ct. App. Oct. 9, 2001) (unpublished opinion) (RA. 58-64).

Frieler presented no evidence, from an expert or otherwise, to show that sexual assault among co-workers is a "well-known hazard" in the warehouse/bindery industry, or any other industry in which Frieler might identify herself. Frieler made no showing — none — that such conduct is so common in the industry in which she worked as to expect an employer to factor in sexual assaults among its co-workers as a cost of doing business. *See Hagen*, 633 N.W.2d at 505 (describing standard in those terms). If sexual

relationships between teachers and students are not sufficiently foreseeable to impose vicarious liability on a school, as in *P.L. v. Aubert*, then sexual assaults by one adult warehouse worker against another are not sufficient, either.

Frieler takes a distorted view of the court of appeals opinion, suggesting that the court of appeals required her to present expert testimony. The court of appeals opinion actually states that “affidavits and expert testimony are important considerations . . . and are necessary to present a material fact dispute.” (A.15). The point being, some competent evidence on the issue is required. Frieler offered no evidence, she presented only a legal argument: that the existence of an antiharassment policy equates with a well-known hazard. The court of appeals properly rejected that reasoning. (*Id.*).

There are laws against criminal assault. Minn. Stat. §§ 609.221-224 (2006). But criminal assault is not *ipso facto* a well known hazard in every workplace in which Chapter 609 applies, i.e., every workplace in Minnesota. Likewise, merely having a policy against sexual harassment does not make sexual assault a well known industry hazard. Virtually every employer in the United States has a sexual harassment policy. As a practical matter, *Faragher* and *Ellerth* mandated that result. If the existence of an antiharassment policy made sexual assault a well known hazard, employers would be strictly liable for every sexual assault that occurs in the workplace. Clearly, that is not the law.

As a matter of law, Janiak’s alleged assault and battery claim cannot be deemed foreseeable for purposes of imposing vicarious liability on CMG. The court of appeals did not err in so holding.

CONCLUSION

The “knew or should have known” standard for employer liability has been a workable and effective test in all MHRA sexual harassment cases for 27 years following this Court’s decision in *Continental Can*. That test was fashioned by the Court to fill a statutory void. That test was incorporated *verbatim* into the statute in 1982. In 2001, the Legislature decided to remove from the statute the “knew or should have known” language. But the Legislature did nothing to replace the language it removed.

Finding itself now in the same position it occupied immediately following *Continental Can*, this Court is faced with three alternatives: (1) to continue to apply the “knew or should have known” standard in all cases; (2) to apply respondeat superior principles for cases involving supervisor harassment; or (3) to adopt the federal test and affirmative defense set out in *Faragher/Ellerth*. Under any of those tests, CMG is entitled to judgment, and the lower courts must be affirmed.

What the Court should not do, with due respect, either as a matter of procedure or on the merits, is adopt a rule of strict employer liability. Even if the issue were properly before the Court, which it is not, there is no basis to infer from the Legislature’s silence that it intended such a dramatic alteration of the law.

Finally, Frieler failed her burden to establish a genuine issue of material fact on her claim that CMG is vicariously liable for the assault and battery which she claims Janiak perpetrated.

The judgments of the lower courts should be affirmed.

BRIGGS AND MORGAN, P.A.

Dated: Dec. 17, 2007

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WORD COUNT CERTIFICATE

The undersigned hereby certifies pursuant to Rule 132.01, subd. 3(a) of the Rules of Civil Appellate Procedure that this brief was prepared using Microsoft Word, version 2003 word processing software, that the typeface used in this brief is Times New Roman font (a proportional font) in 13-point font size, and that this brief (exclusive of the cover and the pages containing the table of contents and table of authorities and this certificate) contains 13,823 words according to the word count feature of the word-processing software used to prepare the brief.



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