

CASE NO. A06-1693

State of Minnesota
In Supreme Court

Judy Frieler

Appellant,

vs.

Carlson Marketing Group, Inc.

Respondent.

APPELLANT'S BRIEF

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STATEMENT OF ISSUES

1. Whether 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?

Apposite Authority:

Burlington Industries Inc., v. Ellerth, 118 S.Ct. 2257, 524 U.S. 724 (1998)
City of Boca Raton v. Faragher, 118 S.Ct. 2275, 524 U.S. 775 (1998)
Gagliardi v. Ortho-Midwest Inc., 733 N.W.2d 171, 176 (Minn.App.2007)
Giuliani v. Stuart Corp., 512 N.W.2d 497 (Minn.2001)

2. Whether the Court of Appeals erred when it determined that foreseeability could only be established if Frieler showed that sexual harassment was a well-known workplace hazard within her industry and provided affidavit or expert testimony stating the same?

Apposite Authority:

Fahrendorf v. North Homes Inc., 597 N.W.2d 905 (Minn.1999)
Boykin v. Perkins Family Restaurant, 2002 WL 4548, C9-01-1100, (Minn. App., Jan. 2, 2002)

STATEMENT OF CASE

Appellant Judy Frieler (herein "Frieler") commenced this action on July 14, 2005, alleging violations of Minn. Stat. § 363A et seq, the Minnesota Human Rights Act (herein "MHRA") and assault and battery.¹ Frieler alleged that her supervisor sexually harassed and, on at least four occasions, assaulted her. Carlson Marketing Group (herein "CMG") moved for summary judgment on Frieler's claims.

On August 9, 2006, the District Court, the Honorable John L. Holahan presiding, granted CMG's motion. A.1-9. On September 7, 2006, Frieler appealed from the District Court's Order and Judgment to the Court of Appeals. A.10.

On July 24, 2007, the Court of Appeals affirmed the District Court's Order, but on different grounds. A.11-15. On August 22, 2007, pursuant to Rule of Appellate Procedure 117, Frieler filed a petition seeking review of the Court of Appeals decision. A.16-21. Review was granted and filed by this Court on October 16, 2007. A.22-23.

¹ Frieler voluntarily dismissed her claims of negligent supervision and retention.

STATEMENT OF FACTS

Judy Frieler ("Frieler") began her employment with Defendant Carlson Marketing Group ("CMG") on December 9, 1991, as a part-time Collation Clerk in the bindery department. A.54-55. During the last two years of her employment, Frieler made it known to her managers that she was interested in full time work with CMG. A.58.

A. The Job Application

During the second or third week of February 2005, Frieler's manager, David Weber, encouraged Frieler to apply for a full time position. Weber told her to talk with Ed Janiak (the supervisor hiring for the position) about a position open in his area. A.60. Janiak told her the position had been filled. Soon thereafter, Frieler was offered a full time job with another company and she told Weber that she wanted to try out the new job before she left CMG. A.58. Weber told her that the full time position at CMG was still open and that she should talk with Janiak about it again. A.58-59.

Frieler then talked with Janiak and this time he told her that he would consider her and that he was considering another woman for the job, as well. A.60. Janiak spoke with Frieler several times about the new job before she was interviewed for the position. A.88-90. Both Janiak and Weber were involved in hiring for the position and both participated in the interviews of Frieler. A.89, 120-121.

B. Sexual Assaults, Threats and Intimidations.

1. February 23, 2005 Assault One

On February 23, 2005, just days after Frieler spoke with Janiak, he physically and sexually assaulted her for the first of four times. A.57. In the morning hours, Janiak called Frieler into the Sales Room. A.63. Only Janiak and Weber-as supervisors- had keys to this room. Frieler was not typically permitted to be in the room. A.61, 63. Janiak opened the door with his key and locked it behind him. He told Frieler that he wanted to show her something that would be related to her new job – should she get the position. A.61-62.

Inside the locked room, Janiak grabbed Frieler into a bear hug, grabbed her buttocks while pressing his erect penis against her body. He pulled her into him and reached behind her, grabbing both sides of her buttocks with his hands and pressed his erect penis up against her stomach. A.62. Janiak held and groped Frieler for about 5-10 minutes while she tried to get out of his grip. A.62. He strained to kiss her on her lips while she struggled and turned her head in avoidance but his lips landed on her cheeks several times. A.63. As he did this, Janiak told Frieler that he thought she was a “sex pot” and that she had been “making this old man horny for years and years.” Frieler was shocked and tried to push him away, but Janiak forcefully persisted. A.62. She told him she had to go and get back to work. Janiak told Frieler that if she was going to work with him, she was going to “have to learn how to handle me.” As he held her, he kept telling her over and over “you got to take it,” “you got to handle it” and, “I am going to

be your boss.” A.63. Finally, after repeated pleas and struggling to get away, Frieler was released when she told Janiak that her co-workers would soon come looking for her as she had been gone for a very long time. A.63. Janiak told Frieler not to tell anyone especially her co-worker, and sister-in-law, Stephanie Limesand. A.64.

2. March 2, 2005 Assault Two

During the morning of March 2, Janiak pulled Frieler into the Sales Room for the second time. A.57. Again, Janiak told Frieler he needed to talk with her about a matter related to her new job. A.65. Once in the locked room, Janiak again grabbed Frieler around her waist and pulled her into his body and tried to kiss her. She moved her head from side to side and back as Janiak repeatedly tried to kiss her. A.66. Once again, Frieler could feel Janiak’s erect penis against her body. This assault lasted 4-5 minutes. A.66. Again, Janiak told Frieler that if she wanted to work for him, she would have to be able to “handle him.” He said that with him as her boss, she was going to have to learn to “handle him” – “you’ve got to take it” and “you’ve got to put up with stuff.” A.66. Frieler tried to get away and told him to stop, but he persisted. Finally, Janiak instructed Frieler to wait for a minute or so after he left the room before she left so no one would see that they were together in the locked room. Janiak released Frieler and told her not to tell anyone. A.67.

Frieler was terrified and did not know what to do. She wanted and needed the full time job with more pay and benefits, but she knew that she could not

tolerate Janiak's increasingly more violent assaults. She 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. Frieler knew that Janiak had been with the company for a long time and was friends with their manager, David Weber. As she later told HR Manager, Jackie Dahl and Director of Operations, Angela Krob, she felt she could not talk to Weber about Janiak's conduct because of the obvious friendship between the two men. A.68, 106. Frieler was also feeling conflicted because she knew Janiak's wife and had known Janiak for a very long time. While she knew she could not tolerate any more assaults, at the same time she did not want to make trouble for anyone else. A.68.

3. March 7, 2005 Assault Three

On March 7, Janiak assaulted Frieler a third time. A.57. This time, Janiak lured Frieler to a secure room located in the "Gold Bond Stamps" warehouse area. The room is situated in a remote area and requires a key for entry. A.69. A co-worker told Frieler that Janiak wanted her to go to the secure room. A.69.

When she entered, Janiak told Frieler he wanted to show her a code on a box and how to read stamps as it would be part of what she would need to know in her new job. Frieler was suspicious of Janiak and concerned for herself so she stood at a distance from him and did not close the door. Janiak beckoned her closer so he could show her the code on the box. A.69. Janiak grabbed her around her waist with his left hand and forced his right hand up her shirt and groped her left breast – he groped her both over and under her bra. He forced his erect penis

against her stomach and tried to kiss her while she struggled to get away and avoid his lips. A.70. He again told her that she should not tell anyone, specifically her sister-in-law who Janiak knew to be an employee who spoke her mind and would not tolerate such abuse. A.70. Frieler told Janiak that she had told her boyfriend about his attacks. Janiak responded, "Why did you tell him? What he didn't know wouldn't hurt him." Janiak threatened Frieler and told her that she had better not tell anyone else. A.71.

After this third assault, Frieler could not take it anymore and she knew she had to get help from someone so that the abuse would stop. She told her sister-in-law and the two decided that Frieler had to report to someone but they could not determine who they could tell without fear of losing their jobs. A.71. Limesand, suggested they tell Weber. Frieler was too afraid and intimidated by Janiak's threats and about the friendship between the men. She really needed the full time job that Janiak was dangling over her head. She thought that she could handle him and did not want to bring others into the situation. She decided she would try and stop it on her own. A.71.

4. March 9, 2005 Fourth Assault

On March 9, 2005, Frieler was assaulted by Janiak for the fourth and final time. A.51-52. This time, shortly after Frieler arrived at work, Janiak called to her and told her that he needed to talk with her about her new job. A.73-74. At the time of this assault, Frieler had not yet been told whether or not she would move to the full time position and she was afraid of Janiak. A.74. Janiak told

Frieler that he needed to show her something-- not just tell her. He told her to follow him into the Sales Room so he could show her "stuff related to her new job." A.74.

As Janiak stood in front of the door to the Sales Room and Frieler approached him, he opened the door with his key and physically guided her into the room. A.74. He closed the door behind them and grabbed her immediately. This became the most aggressive of the four attacks. Janiak grabbed her hips from the front and thrust himself into her 3-4 times. He pushed his erect penis into her body. He tried to kiss her, and he caught her lips twice as she struggled to get away. A.74. Frieler kept telling Janiak that someone probably saw them go into the room and that he should let her go or else he would get in trouble. She told him that her co-workers would wonder where she was and might come looking for her. She told him her boyfriend was mad that he was doing this to her. Frieler was trying to say anything she could think of that might get Janiak off of her. A.75. Janiak continued to grope at her and put his hand under her shirt and touched her breasts. A.75. He told her that she should appreciate him because he was "going out on a limb for her -- pushing for her to get the full time job." He told her that she was a good person, that she was a "sex pot" and that she was very pretty. A.75.

Finally, Janiak was paged for a telephone call and released Frieler. He told her to sneak out of the room a few minutes after he left. Janiak crept out of the room after telling Frieler that she should NOT tell anyone. A.75. The assault

lasted about 10-15 minutes. A.75-76. Frieler left the room shaking and in tears and went to the bathroom and cried before returning to her work area. A.76.

C. Frieler is Offered the Job on March 9

Later that same day, Frieler was offered and accepted the full time job. She was to begin working full time starting March 28, 2005. A.51-52. At the same time Frieler was excited to finally have a full time job, she was terrified about the idea of having to work under Janiak. A.28, 120-121.

D. Evidence of Janiak's Inappropriate Behavior

Janiak's sexual advances, flirtations and comments were known within the workplace and nothing had ever been done to change his behavior. A.56, 77-80.

Frieler's co-worker told her that she had reported Janiak to HR back in 2004 for making sexual comments and that HR did nothing. A.56. People in the workplace joked that Janiak "liked Frieler" and was Frieler's "boyfriend." A.79-80. When Frieler told co-worker's that some "guy" won't leave her alone, they immediately guessed "it's Ed isn't it?" A.77. They knew Janiak would engage in this kind of behavior someday and they called him "a dirty old man." A.78.

E. The Reports and Investigation

The next day, March 10, Frieler went back to work. A.77. Frieler overheard a co-worker say that Janiak wanted Frieler to learn something for the new job. Frieler started to worry and asked Limesand what she should do. She didn't want to go near Janiak. She thought she should leave so that she could avoid any more interaction with him. She tried to keep working but became more and

more upset. Finally, another co-worker, Debbie Tobako asked Frieler what was bothering her. A.77. Frieler told Tobako that she was being harassed by a guy but did not want to talk about it. Debbie said, "It's Ed, isn't it?" Frieler was upset and couldn't talk about right then, but said they could talk over lunch. Frieler had lunch with Tobako, Vickie Streich and Limesand and told them about how Janiak had been assaulting her ever since she applied for the full time position. A.77. Streich was a group leader in the Department and had worked with Janiak for a long time. She told Frieler and the others that she knew that Janiak would do this to somebody someday. She said, "He's a pervert" and "a dirty old man." Streich told Frieler that they should meet with Weber and she arranged the meeting. A.78.

Frieler met with Weber, Krob and Dahl (HR) that same day. A.78. Krob observed that Frieler was jittery, frazzled and very upset when Weber brought her into the meeting. Frieler shook and cried intermittently throughout the meeting. Near the end of the meeting she became more distraught and weary. A.105, 108. Frieler tried to talk about the multiple assaults and was able to relay some of the details but became so upset that Dahl decided to get Limesand to join the meeting in effort to calm her down. A.106-108, 135. Frieler was extremely upset and fearful and kept repeating that she thought she could get Janiak to stop on her own. She finally became too upset to talk further. Krob and Dahl suggested they meet with Frieler the next day, off-premises. A.78, 136-137.

On March 10, Dahl and Krob understood that Frieler's reports were very serious and that she was alleging that Janiak had grabbed her and assaulted her in

various ways and times over the course of the previous three weeks. Dahl and Krob had many details relating to the assaults. They knew Janiak was involved in the process of hiring for the position and was reviewing Frieler for the position during the time period of the assaults. A.105, 133-134, 136-137.

Despite the details and the obvious severity of Frieler's report, Dahl and Krob did not even discuss removing Janiak from the workplace. A.138.

The next day, March 11, Frieler met with Krob and Dahl again. Frieler brought her friend, Laurie, to that meeting with Dahl's approval and consent. A.79. During the meeting, Frieler explained that Janiak had been verbally harassing her for several years and that several people in the workplace knew about his inappropriate conduct and comments. She told them that people teased her about Janiak and the fact that he had a crush on her and that he was her "boyfriend." She explained that she had been able to withstand the inappropriate remarks of Janiak and others (about Janiak), but that Janiak's conduct and comments had reached a violent and threatening point during the hiring process. A.79-80.

Frieler went on to provide Krob and Dahl with even more details of the assaults, her fears and reasons for not reporting the attacks, and her fear that she still would be a victim of retaliation for reporting Janiak. A.24-26, 31-36, 79. Dahl did not ask follow-up questions and did not make an effort to ensure that she was getting the entire story. A.143-144.

Dahl's thought Frieler's report and the information she provided was sequential and credible. A.141-142. At the end of the meeting, Frieler was placed on leave. A.80.

Krob and Dahl did not question Frieler's co-workers or any of Janiak's direct reports or co-workers about his conduct and comments in the workplace or his long history of being known as a "pervert" and "dirty old man." Instead, the questioning and investigation was limited to just a few of Frieler's co-workers. A.141-142. Krob and Dahl spent a considerable amount of time asking a few co-workers about Frieler's conduct and emotional stability rather than asking questions about Janiak. A.27-29, 41-45, 111, 146.

On March 11, Dahl and Krob met with Janiak. Dahl told Janiak that Frieler had made a complaint of sexual harassment against him, and she provided him with a few details of her complaint. According to Krob, Janiak did not really respond to the allegations – he remained quiet and didn't seem at all surprised with the allegations. A.110. Janiak admitted that he had met with Frieler four times over the course of the previous three weeks to discuss matters related to her new job. Janiak's description of the four meetings, paralleled Frieler's reports of the meetings as to date, time of day, pretext for the meeting, locations, the fact that doors were closed during the meetings and that specific individuals witnessed his request for the meetings with Frieler. A.95-96, 100, 145-146. Janiak denied assaulting Frieler when he was asked, "Did you do it?" Id. Janiak denied ever

saying anything inappropriate or sexual to Frieler or to anyone else in the workplace. A.98-99.

Janiak told Dahl and Krob that he believed Frieler used drugs and that Frieler made up the story about the assaults because she was using drugs. A.97-98. Janiak could not understand why Frieler made the report after she got the job he knew she needed and wanted. He also told them that he had always feared that a woman would make a report of sexual harassment against him – he told them that he believed a lot of people make up stories that are not true and are “sue happy.” A.96-98. Dahl and Krob’s interview of Janiak lasted 15-30 minutes. *Id.* Interestingly, Janiak told them that Frieler had told him repeatedly that she did not want to have to talk with anyone in HR about getting the full time job. He said she seemed to have a fear of going through HR. A.96-98.

F. Janiak Resigns and CMG Throws Him a Retirement Party

The next work day, Janiak resigned. A.123-124. Weber was not really surprised but found it to be “a bit odd” that Janiak would resign and give just a few days notice. A.123-124. Weber thought Janiak resigned because of health reasons and didn’t question the matter further. Dahl and Krob thought the resignation was odd as well given the timing of events and they asked Janiak if he resigned because of the allegations – Janiak said “no”. A.112, 147-149.

Janiak’s resignation was announced as his retirement and that he resigned “for personal reasons.” Weber, Dahl and Krob all told Janiak that they were sorry to see him leave. They told him he was a good and loyal employee and were

disappointed that he was leaving. They tried to convince him to stay. A.92-93. Weber attended the retirement party for Janiak. A.93-94. Krob respected the manner in which Janiak chose to leave his job and the reasons he gave for leaving. A.112.

During the next week of the investigation, Weber was asked to make a record of issues he had with Frieler including issues relating to her attendance. A.122.

During Frieler's leave, no one (other than her sister-in-law) from CMG had any contact with her. She had expected to hear from Krob or Dahl about their conversation with Janiak that Friday, March 11, but she heard nothing from them until the end of the following week. A.80-81. Frieler learned of Janiak's "retirement" and his party from her sister-in-law and felt betrayed once again. A.81. Frieler had put her trust in Krob and Dahl by telling them the intimate details of the assaults. Frieler expected that her reports would at least lead to an apology from Janiak and that perhaps he would receive sexual harassment training. Instead, Janiak was celebrated and walked away without incident. A.81-82.

G. Frieler Returns to Work- CMG Tells Frieler to Move On

Two weeks after the last assault and report, Frieler returned to work. Krob and Dahl told her that she was not to tell anyone what happened to her and that she should tell people that she had been off work due to a personal family matter. A.81. Frieler told them it was not fair or right that they were telling her to lie, that

people should at least be given training about sexual harassment, and, that if asked, she wanted to be able to tell people that she was off work because of harassment. A.81. Krob and Dahl told her that she needed to “forget about it now” because “it is over. CMG did what it needed to do.” A.82. They told her that had Janiak not resigned, she would be made to work with him and they would have had meetings together with HR so that they could work on building their “relationship.” A.46, 113-114.

Upon her return to the workplace Frieler endured comments from her co-workers about how they could not believe that she had done such a thing to Janiak and that they did not believe her. Another employee under Janiak, asked Frieler, “Why did you do this to Ed?” Frieler’s co-workers ostracized her from the work group. She could not respond and defend herself because she had been instructed to not talk about the incidents. A.82-84.

Frieler tried to work and wanted to start her fulltime job as planned but the stress of the assaults and the environment were too great. A.83-84. On March 30, Weber told Frieler that things with her new job were “not starting off very well.”

Ultimately, Frieler’s psychologist recommended she not return to work at Carlson at all. A. 48-50. Frieler was diagnosed with Post Traumatic Stress Disorder (acute) and Major Depression Single Episode. A. 48-50. Frieler was experiencing a multitude of stress symptoms and depression. All of this intensified with the just the thought of going back to work at CMG, and Frieler heeded the advice of her psychologist.

H. CMG Training and Policies

HR Director Jackie Dahl had no training in conducting investigations into complaints for many years. A.127. Krob never had training in conducting investigations and had not had training in sexual harassment for many years. A.102, 104. Dahl and Krob did not know of any mechanism in place to ensure that employees and managers received appropriate trainings and updates related to sexual harassment, violence and/or discrimination in the workplace. A.104, 128. Employees were advised of policies and procedures once, at the time of hire and then policies are available online through the "Carlson U." A.104, 130-131. Weber could not recall any training specific to sexual harassment for line workers or for Janiak. A.117-118. Weber had very little knowledge about the policy on sexual harassment, the reporting procedure or the investigation process. A.119.

Neither Weber nor Krob can recall the last time they reviewed the policy on sexual harassment but Weber thought he had not seen the policy since at least 1999. A. 103-104, 119-120. Dahl does not remember consulting the policy during her investigation. A.138-139. Krob did not consult the policy during the investigation. A.112.

Dahl asserts that she was responsible for taking reports of sexual harassment in the workplace but that the only way line staff would know her would be through her attendance at staff meetings. A.129-130. Janiak testified that he had seen Dahl around only infrequently and that she did not attend staff meetings. A.94. Dahl testified that she and other HR managers and

representatives met on a regular basis, but they did not discuss complaints even in a generic sense. A.139-141. Dahl told each person she interviewed, including Janiak, that it was Frieler who had complained about the assaults. A.24, 136, 140-141, 144.

SUMMARY OF ARGUMENT

Appellant was sexually assaulted by her supervisor four times. While this conduct is astonishing, the principles this Court is asked to recognize are not. To the contrary, the principles this Court is asked to adopt are a part of the laws and policies of this State and its long tradition of protecting the rights and privileges of employees. The Court of Appeals decision, however, runs afoul of these laws and policies.

The Court of Appeals erred when it determined that a plaintiff alleging sex harassment under the MHRA is still required to show the employer knew or should have known of the harassment. This contradicts the plain language of the Act, its intent and the case law construing it. Since the amendment to the MHRA, employers are now strictly or, at a minimum, vicariously liable for the hostile environment harassment perpetrated by a supervisor.

The Court of Appeals also erred when it held expert testimony is necessary to establish that sex harassment is a well known hazard in a particular industry. Sex harassment and related assaults between employees are an unfortunate but obvious and well known hazard in any workplace.

This Court now has the opportunity to clarify the law and reinforce the policy of this State to protect employees from sexual harassment and assaults in the workplace.

ARGUMENT

I. STANDARD OF REVIEW

In this appeal from summary judgment, this Court must examine whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law. *Cummings v. Koehnen*, 568 N.W. 2d 418 (Minn. 1997). The role of the court is not to weigh the evidence but to determine whether, as a matter of law, a genuine factual conflict exists. *Agristor Leasing v. Farrow*, 826 F.2d 732, 733 (8th Cir. 1987). The Court must “view the evidence in the light most favorable to the party against whom judgment was granted. *Fabio v. Bellomo*, 504 N.W. 2d 2, 4 (Minn. 1990). The construction of a statute is a question of law and is fully reviewable by this Court. *Cummings*, 568 N.W.2d at 421.

II. THE COURT OF APPEALS ERRED WHEN IT APPLIED THE “KNOWS OR SHOULD KNOW” STANDARD

To establish her hostile environment sex harassment claim, the Court of Appeals held that Frieler would have to show that CMG knew or should have known about Janiak’s sexual harassment. A. 13. In so holding, the Court improperly applied the MHRA and this Court’s decision in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

A. The Minnesota Legislature Amended the MHRA’s Definition of “Sex Harassment”

In 2001, the Minnesota legislature amended the definition of ‘sex harassment’ by removing the following language: “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.” 2001 Minn.Laws, ch. 194 § 1 at 724² (herein “knows or should know”). This Court has not addressed the issue of hostile environment harassment since the amendment or the effect the 2001 amendment has on employer liability for hostile environment harassment created by a supervisor.

The Court of Appeals in this case, however, disagreed and found that this Court has addressed the issue since the amendment. The Court of Appeals determined that in *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001), this Court essentially held that “knows or should know” is still the standard in hostile environment harassment claims under the MHRA. A. 13.

B. The Court of Appeals Reliance on *Goins v. West Group* Was Erroneous

In this case, the Court of Appeals determined that “knows or should know” remains an element of a plaintiff’s prima facie case for hostile environment sex harassment under the MHRA. The Court’s decision was based primarily on the fact that this Court cited and relied on “knows or should know” in *Goins v. West Group*, 635 N.W.2d 717 (Minn.2001). That is, while the amendment became effective August 1, 2001, this Court continued to apply “knows or should know” in *Goins*, which was decided in November 2001 *after* the amendment. A. 13. The Court also relied on *Gagliardi v. Ortho-Midwest Inc.*, 733 N.W.2d 171, 176

² A.150.

(Minn.App.2007) because it too cited *Goins* and the “knows or should know” test.

A. 13.³ The Court of Appeals decision is erroneous for several reasons.

First, *Goins* did not involve supervisor liability. *Goins* is about sexual orientation discrimination and hostile environment. Hostile environment claims are analyzed the same way no matter what protected group the hostility is directed at.⁴ Second, the 2001 amendment did not become effective until August 1, 2001. Minn.Stat. § 645.31, Subd. 1 (stating new provisions construed as effective from date amendment became effective.) This was long after the conduct in *Goins* occurred. *Goins*, 635 N.W.2d at 721-722. *Goins* was, therefore, subject to the analysis effective at that time (i.e. “knows or should know”.) Minn.Stat. § 363.01, Subd. 41(3) (1998). The legislature did not state an intention to apply the amendment retroactively. Minn.Stat. § 645.21 (“No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature.”). Accordingly, in *Goins*, this Court had no reason to consider the 2001 amendment. Third, the Court of Appeals interpretation of the amendment defies the plain

³ *Gagliardi* was decided on June 19, 2007, after Frieler’s case was argued but before the decision was issued.

⁴ Hostile environment claims appear to apply the same factors. *Minneapolis Police Dep’t v. Minneapolis Comm’n on Civil Rights*, 402 N.W.2d 125 (Minn.App.1987)(race); *Murnane v. Aitkin County*, No. C2-01-354, 2001 WL 910293 (Minn.App. Aug.14, 2001). Therefore, this Court’s decision, will arguably apply to all hostile environment claims. This makes sense because there can be no “principled reason to distinguish between types of discriminatory harassment in determining the liability of an employer for a supervisor’s conduct.” *Stoglin v. Wal-Mart Stores, Inc.*, No. Civ. 398 CV 30089, 2000 WL 333620001 *3 n. 3 (S.D. IA, Sept. 11, 2000) (applying *Ellerth/Faragher* standard to race claim.).

language of the Act.⁵ Fourth, the Court's reliance on *Gagliardi* is misplaced. Factually, the case is distinct because it involved harassment by a non-employee. The Court recognized this distinction. *Gagliardi*, 733 N.W.2d at 176. But, it also stated that the amendment appeared to eliminate "knows or should know" from the plaintiff's prima facie case. *Gagliardi*, at 176. The Court of Appeals reliance on *Goins*, and *Gagliardi*, was erroneous.

C. The Court of Appeals Should Have Held CMG to Strict or Vicarious Liability

Based on the plain language of the MHRA, the Court should have held CMG to a strict liability standard for supervisor harassment. Or, consistent with the principles set forth in *Burlington Industries Inc., v. Ellerth*, 118 S.Ct. 2257, 524 U.S. 724 (1998) and *City of Boca Raton v. Faragher*, 118 S.Ct. 2275, 524 U.S. 775 (1998), the Court should have held CMG to the standard of vicarious liability for Janiak's harassment. In *Ellerth* and *Faragher*, the U.S. Supreme Court held that 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." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-808. If no tangible employment action is taken, the employer may raise an affirmative defense: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing

⁵Furthermore, if this Court decides that it must consider the intent behind the amendment, the Court of Appeals decision contradicts the legislative intent to eliminate "knows or should know" as the standard to bring state law in conformance with *Faragher* and *Ellerth*.

behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* No defense and is available when tangible employment action is taken. *Id.*

This Court has a long history of referring to federal authority when interpreting and deciding cases under the MHRA. *Hubbard v. United Press Intern., Inc.* 330 N.W.2d 428, 441 (Minn.1983). Nevertheless, the Court of Appeals in this case refused to consider *Ellerth* and *Faragher* because “Frieler brought her claim under the MHRA, and Minnesota has not adopted the supervisor/non-supervisor distinction, or formally recognized the *Faragher/Ellerth* standard.”⁶ A. 13. The appellate court got it wrong. Minnesota courts have and do recognize a distinction between supervisor and non-supervisor harassment and Minnesota courts have recognized and applied the *Ellerth/Faragher* standard. See *Supra* Section, IV(B)(1)(a-c).

III. THE AMENDMENT CREATES STRICT LIABILITY

Based on the plain language of the MHRA, a prima facie case for hostile environment sex harassment under the MHRA requires the employee (1) be a member of a protected group, (2) was subjected to unwelcome harassment, (3) the harassment was based upon sex, (4) the harassment affected a term, condition, or

⁶In support of this argument, the Court of Appeals also cited *Gagliardi* because it applied *Goins* and failed to address the amendment. A. 13. But, *Gagliardi* specifically recognized the amendment as an attempt to bring Minnesota law in line with the *Ellerth/Faragher*. *Gagliardi*, 733 N.W.2d at 176.

privilege of employment. The plaintiff's prima facie case no longer requires proof that the employer "knows or should know of the harassment and failed to take timely and appropriate action". According to rules of statutory construction, "when the plain language of the statute is clear. . .the letter of the law shall not be disregarded under the pretext of pursuing the spirit." Minn.Stat. § 645.16.

Therefore, where statutory language is clear, there is no room for interpretation.

State ex rel Bergin v. Washburn, 224 Minn. 269, 28 N.W.2d 652 (Minn.1947).

Based on the plain language of the MHRA, "knows or should know" is no longer a consideration in determining an employer's liability. Instead, an employer is strictly liable for sex harassment of any employee. Although such a reading may create a harsh result for employers, the language of the statute is clear. *See First Trust Co. of St. Paul v. Reynolds*, 46 F.Supp. 497 (D.Minn.1942) ("There should be no deviation from the plain language of statute to escape an undesirable result or a hard case.").

Imposing strict liability on employer's for sexual harassment is not foreign to Minnesota courts. Strict liability is imposed in quid pro quo cases.

TeBockhorst v. Bank United of Texas, No. C6-97-206, 1997 WL 471320

(Minn.App. Aug. 19, 1997) (citing *Cram v. Lamson & Sessions Co.*, 49 F.3d 466,

473 (8th Cir. 1995) (listing elements of quid pro quo case which contains no

"notice" requirement.); *Hearing of Minn. H. Civil Law Comm.* HF 0767⁷; Minn.

⁷ A.155.

Dept. Human Rts., Minnesota Human Rights Act Changes, *The Rights Stuff*, Fall 2001, at 12.⁸

Strict liability is also consistent with the explicit public policy and the stated intent behind the MHRA: “It is the public policy of this state to secure for persons in this state, freedom from discrimination...in employment...” Minn.Stat. § 363A.02, Subd. 1(a)(1). The MHRA condemns discrimination because it “[t]hreatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.” Minn.Stat. § 363A.02 Subd. 1(b). The best way to affect the legislature’s intent and ensure the elimination of discrimination is through strict liability.

The fact that this standard may be higher than federal standards is not dispositive. The MHRA has a long history of providing stronger and broader protections than federal law. *Carlson v. Independent School District No.*, 623, 392 N.W.2d 216, 221 (Minn. 1986) (citing *United States Jaycees v. McClure*, 205 N.W.2d 764, 766-68 (Minn.1981)). This Court recognizes that the scope of discrimination liability, and its consequences, is more onerous under our state laws than federal laws. *Carlson*, 392 N.W.2d at 221. The MHRA expressly extends coverage to prohibit discrimination for more groups of people (e.g. age, sex orientation and marital status). *See generally* Minn.Stat. § 363A.03; *Carlson*, at 221. And, MHRA claimants are entitled to more damages, including trebled

⁸ A.171.

damages for wage loss, mental anguish and punitive damages. *Id.* at 221; *See* Minn.Stat. § 363A.29 Subd. 4 (a) and (b).

Consistent with all these principles, Minnesota courts have interpreted the amendment to impose strict liability. *Perrizo v. Merry Maids, L.P.*, C1-07-7415 (June 26, 2007).⁹

If this Court finds that strict liability is the appropriate standard to be applied in hostile environment cases, the decisions of the lower courts must be reversed and Frieler's case remanded consistent with this Court's decision.

The Court may determine that the plain language of the Act, which creates strict liability, produces a result inconsistent with purpose of the Act or leads to an unreasonable result. *See* Minn.Stat. § 645.17 (presuming legislature does not intend absurd result.) If this is the case, the Court may examine the legislative intent. *Anker v. Little*, 541 N.W.2d 333, 336 (Minn.App.1995). Considering the intent behind the amendment provides more reason for this Court to find error.

IV. THE INTENT OF THE AMENDMENT - VICARIOUS LIABILITY

A. Legislative History and Intent of the Amendment

When determining the intent of the legislature, the Court may consider: the circumstances under which it was enacted; the mischief to be remedied; the object to be attained; the former law; consequences of a particular interpretation; contemporaneous legislative history (including tapes of proceedings) and legislative interpretations of the statute. Minn.Stat. § 645.16 (1)-(8); *Stearns-*

⁹ A.182-184.

Hotzfield v. Farmers Ins. Exchange, 360 N.W.2d 384, 389 (Minn.App. 1985) (citing *Reserve Mining Co. v. State*, 310 N.W.2d 487, 491 (Minn.1981)).

The Minnesota Department of Human Rights sponsored the 2001 amendment. Commissioner Rosas spoke on the Departments behalf and explained that the purpose of the amendment was to have state law conform to federal law as recently announced in *Ellerth* and *Faragher*. A.155, 157-158. The amendment was designed to serve employees by removing the “ambiguous” “knows or should know” standard from the plaintiff’s prima facie case. A.155. The amendment would also prevent employers from avoiding liability for supervisor harassment. A.155. (“[i]t’s conceivable that an employer could have a supervisor in a remote location that’s harassing an employee. Management knows nothing about it, has had no reason to know anything about it and so could use this language [knows or should know] to get off the hook for some egregious harassment that took place against an employee by a supervisor.”) The amendment was also intended to provide Minnesota employers with certainty and predictability regarding the standard of liability imposed. A.155.

Commissioner Rosas stated that the Department would immediately begin interpreting the MHRA in accordance with federal law. A.158. She further explained that the affirmative defenses, set forth in *Ellerth* and *Faragher*, were not included in the amendment because much of state and federal harassment law is established by case law. A.158-159. She assumed that a state appellate decision

would immediately apply the new standard negating the need to include the defenses. A.158-159.

The legislative intent makes clear that “knows or should know” is no longer a part of a plaintiff’s prima facie case at least for purposes of supervisor hostile environment sex harassment. Not only does the legislative intent make this clear, but it is consistent with the state and federal case law.

B. History and Development of State and Federal Standards for Supervisor Harassment

1. The Minnesota Human Rights Act

Minnesota courts, including this Court, recognize a distinction between supervisor and non-supervisor harassment. In *Continental Can Co., Inc. v. State of Minnesota*, 297 N.W.2d 241 (Minn.1980) (overruled on other grounds), this Court was addressed with a case of first impression involving co-worker sex harassment under the MHRA. At the time, the MHRA did not specifically define or prohibit sex harassment. Therefore, the Court consulted other state and federal case law regarding what constitutes sex harassment. Ultimately, the Court held the MHRA’s prohibition against “sex discrimination” included “sex harassment”:

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.

Continental Can Co, 297 N.W.2d at 249.

Two years after *Continental Can* was decided, the MHRA was amended to define and specifically prohibit sex harassment. *See* Minn.Stat. § 363.01, Subd 10a (3) (1982). This definition of “sex harassment” closely parallels the standard set forth in *Continental Can*. Significantly, in its analysis, the Court recognized the difference in liability for co-worker and supervisor harassment and noted that respondeat superior liability is imposed where a supervisor is the harasser. *Continental Can.*, at 248. However, because it was addressed with a case of co-worker harassment, the Court determined it did not have to decide what theory of liability is appropriate when a supervisor is the harasser. *Continental Can.*, at 249 n. 5. From this, it would appear that the Court did not believe or intend for the “knows or should know” standard to apply to harassment committed by supervisors. This is consistent with Minnesota courts that have repeatedly recognized a distinction in the standard of liability imposed for co-worker versus supervisor harassment. This is apparent in cases involving sex harassment under the unemployment insurance statute or MHRA.

a. Unemployment Insurance Cases

The standards in unemployment insurance laws are very similar to those of the MHRA. An employee will receive benefits if their quitting resulted from “sexual harassment the employer was aware, or should have been aware, and the employer failed to take timely and appropriate action.” Minn.Stat. § 268.095, Subd. 3(f). Therefore, cases construing this portion of the unemployment insurance statute are instructive.

In *McNabb v. Cub Foods*, 352 N.W.2d 378 (Minn.1984), a manager's knowledge of co-worker sex harassment was imputed to the employer. The plaintiff in *McNabb* complained to her department manager about co-worker sex harassment. Although her department manager could not take disciplinary action against employees without his supervisor's involvement, the court held the department manager's knowledge of the harassment was sufficient to impute knowledge to the employer:

It seems to be a clear legal conclusion that the meat department manager's knowledge should be imputed to Cub Foods. The meat department manager is given a management title and clothed with supervisory and managerial authority over subordinates in the meat department.

McNabb, 352 N.W.2d at 383.

After *McNabb*, appellate decisions in unemployment cases found the employer was aware or should have been aware of the harassment because the supervisor was the harasser. *Tretter v. Liquipak International*, 356 N.W.2d 713, 715 (Minn.App.1984). In *Porrazzo v. Nabisco Inc.*, 360 N.W.2d 662 (Minn.App. 1985), the Court imputed knowledge of harassment to the employer where the plaintiff's supervisor was the harasser: "the employer, through [the harassing] supervisor, must be deemed to have had knowledge of Porrazzo's continuing problems." *Porrazzo*, 360 N.W.2d at 664. Other courts made similar holdings. See *Clark v. K-Mart Store #3059*, 372 N.W.2d 847 (Minn.App.1985); *Tru-Stone Corp. v. Gutzkow*, 400 N.W.2d 836, 839 (Minn.App. 1987); *Nagel v. Stone Container Corp.*, 1990 WL 77068 * 2, No. C7-90-126, (Minn.App., June 12,

1990); *Heaser v. Lerch, Bates & Assoc. Inc.*, 467 N.W.2d 833, 835 (1991); *Prescott v. Moorhead State University*, 457 N.W.2d 270, 272 (Minn.App.1990); *Compare Weaver v. Minnesota Valley Laboratories, Inc.*, 470 N.W.2d 131, 135 n.1 (Minn.App.1991)(finding “brightline” rule of imposing liability when harasser is supervisor inappropriate but recognizing issue must be decided on case-by case basis).

b. MHRA Cases

Similarly, cases examining liability pursuant to the “knows or should know” standard of the MHRA impose liability to an employer based on supervisor harassment. Like this Court did in *McNabb*, other Courts have recognized a distinction between supervisors and nonsupervisors for purposes of imposing liability to an employer.

In *Giuliani v. Stuart Corp.*, 512 N.W.2d 589 (Minn.App. 1994), the Court of Appeals held the employer liable for a supervisors harassment. While the harassing supervisor may have been the only employee who knew about his conduct, the Court followed the principles set forth in *McNabb* and *Tretter* and found it reasonable to impose liability to the employer:

Victims of sexual harassment by managers are more likely to remain silent for fear of jeopardizing their employment. Moreover, an employer, by selecting its supervisors, agrees that these persons will act as its agents. Sexual harassment of an employee by a supervisor is thus directly connected with the employer’s action.

Giuliani, 512 N.W.2d at 595.

See also Fore v. Health Dimensions, Inc., 509 N.W.2d 557, 560 (Minn.App.1993) (citing *McNabb*, court recognized supervisor harassment may be imputed to employer; decision to be made on “case by case basis.”); *Kay v. Peter Motor Co. Inc.*, 483 N.W.2d 481, 484 n.1 (Minn.App.1992) (requiring employee to complain to supervisor when supervisor is harasser is unnecessary); *Bersie v. Zycad Corp.*, 417 N.W.2d 288, 294 (Minn.App.1988) (Lansing, J. dissenting) (“Where acts of harassment are perpetrated by supervisory agents of an employer in the context of the work environment, the fact that no formal complaint was made to Bersie’s immediate supervisor should not insulate the employer. . .”) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 2408 (1986)).

c. Majority of Cases Interpret the MHRA as Consistent with Federal Standards for Supervisor Liability

Consistent with the principles set forth above, most courts have applied the *Ellerth/Faragher* standard since the 2001 amendment. *Bush v. Penske Truck Leasing Co., LP*, Civ.No. 06-1110, 2007 WL 1321853 *3 (D.Minn. May 4, 2007) (noting 2001 amendment made MHRA nearly identical to Title VII; applied *Ellerth/Faragher*); *Anderson v. Crossroads Capital Partners, L.L.C.*, No.Civ. 01-2000, 2004 WL 256512 * 4 (D.Minn. Feb. 10, 2004); *Gagliardi v. Ortho Midwest*, 733 N.W.2d 171, 176-77 (Minn.App.2007)(stating 2001 amendment was attempt to make MHRA consistent with *Ellerth/Faragher*); *see also, Dauer v. Elo Engineering, Inc.*, No.C5-98-1857, 1999 WL 319087 *2 (Minn.App., May 18, 1999) (citing *McNabb* as consistent with *Ellerth/Faragher*).

Accordingly, the principles in *Ellerth* and *Faragher* imposing liability on an employer for the acts or knowledge of its supervisor is consistent with Minnesota case law.

2. The U.S. Supreme Court Addresses Employer Liability for Supervisor Harassment

Like Minnesota courts, Federal district and appellate courts also grappled with the issue of employer liability for supervisor harassment. The development of federal case law on this issue provides further support for the principles and standards Frieler urges this Court to adopt.

a. *Meritor Savings Bank v. Vinson*

In *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399, 477 U.S. 57 (1986) the U.S. Supreme Court addressed the issue of liability for supervisor harassment. The Supreme Court disagreed with the lower court's holding of absolute liability. Instead it emphasized that there should be "an examination of the circumstances of the particular employment relationship and the job [f]unctions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity." *Meritor*, 477 U.S. at 71 (citing *EEOC Guidelines*, 29 CFR 1604.11(c)(1985))

Ultimately, due to the "state of the record", the Court declined to make a definitive rule but it did "agree with the EEOC that Congress wanted courts to look to agency principles for guidance in this area." *Meritor*, at 72.

Justice Marshall, writing for the concurring opinion, joined by Justices Brennan, Blackmun and Stevens, wrote that employer's should be liable for a supervisor's sex harassment since an employer can act only through individual supervisors and employees. *Meritor*, at 75. Consistent with the findings of the EEOC and federal court decisions, acts of supervisory employees or agent are imputed to the employer. *Id.* When a supervisor discriminatorily hires, fires or promotes an employee based on a particular protected status, that act is considered the act of the employer. *Id.* There is no inquiry as to whether or not the employer had notice of the action. *Id.* Similarly, there should be no additional "notice" requirement in sex harassment cases because: "in both cases it is the authority vested in the supervisor by the employer that enables him to commit the wrong: it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Id.*, at 76-77.

Finally, in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Raton*, the Supreme Court addressed the issue the majority in *Meritor* would not: the standard of liability for supervisor hostile environment/harassment.

b. *Ellerth* and *Faragher* Set the Liability Standard for Supervisor Harassment

Like the Court in *Meritor*, the Court in *Ellerth* and *Faragher* applied agency principles to determine that an employer may be held vicariously liable for the sex harassment of a supervisor. *See Infra* Section II. Specifically, the Court

held an employer would be vicariously liable where the supervisor has apparent authority or where he was aided in accomplishing the tort by the existence of the agency relation. *Faragher*, 524 U.S. at 802 (citing Restatement of Agency 219 (d)). Regarding the “aided in the agency” theory, misconduct by a supervisor could arguably always be aided by the supervisory relationship. But the ability to take tangible employment action is a hallmark of supervisor authority that is truly aided by the agency relation: “Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.” *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808. Therefore, consistent with the Concurrence in *Meritor*, the Court recognized that acts of supervisors are acts of the employer creating absolute liability.

In response to the *Ellerth/Faragher* decisions, the Minnesota legislature amended the MHRA’s definition of “sex harassment.” The intent and history behind the amendment is clear: the “knows or should know” standard is no longer an element of a plaintiff’s prima facie case and employer’s are to be held vicariously liable for supervisor harassment.¹⁰

¹⁰ Frieler anticipates that CMG will argue Janiak was not Frieler’s supervisor, but a co-worker and therefore she must show CMG knew or should have known about the harassment and failed to take appropriate action. Frieler recognizes that “knows or should know” remains the standard for co-worker harassment, but this analysis is unnecessary because Janiak is a supervisor. Frieler reserves her response to this argument for her reply brief.

V. CMG IS VICARIOUSLY LIABLE FOR JANIAC'S SEX HARASSMENT

Applying the principles in *Ellerth* and *Faragher*, CMG is vicariously liable for the acts of Janiak because he was (1) a supervisor and (2) took tangible employment action against Frieler. Because the Court of Appeals determined that “knows or should know” was the standard, it did not address these issues. The District Court, however, did. It held Janiak was not a “supervisor” because “Janiak was not Plaintiff’s direct supervisor.” A.5-6. The Court reasoned, and CMG argued, that since Janiak was not a direct “supervisor” Frieler could not impute knowledge to CMG through him. Instead she would have to show evidence that CMG should have known of Janiak’s actions by prior knowledge.

A.6. This reasoning is factually and legally infirm.

A. Janiak Is a Supervisor

Although the Supreme Court did not specifically define “supervisor”, a close reading of the Court’s decisions makes clear that it viewed the “term “supervisor” expansively. *See Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F.Supp.2d 953, 972 (D.Minn.1998) (finding term to be read “more expansive than as merely including those employees whose opinions are dispositive on hiring and firing, and promotion.”). The determination of whether or not an individual qualifies as a “supervisor” does not call for a “mechanical application of indefinite and malleable factors set forth in agency law. . . but rather an inquiry into the reasons that would support a conclusion that harassing behavior ought to be held

within the scope of a supervisor's employment." *Faragher*, 524 U.S. at 797.

These concepts must also meet the objectives of the anti-discrimination statutes.

Id. at 803 n.3. Generally, it is the ability to exercise power or take tangible employment action over the plaintiff that is the best indicator as to whether or not a person is a "supervisor." Tangible employment actions fall within the special providence of the supervisor. *Faragher*, at 763.

However, this does not mean that to be a "supervisor" the person has to have the ultimate power to exercise or take tangible employment action. In *Ellerth* and *Faragher* the supervisors did not have the ability to make hiring, promotion or firing decision without approval from higher management but they were still considered supervisors for purposes of the liability analysis. *Ellerth*, 524 U.S. at 747; *Faragher*, at 780-782. The supervisor in *Ellerth* was not within the "decision making or policy making" hierarchy, was not the plaintiff's immediate supervisor and wasn't even located at her facility. *Ellerth*, at 747. Ultimately the issue of a person's status as a supervisor is a question of fact. *See Grozdanich*, 25 F.Supp.2d at 970.

The record in this case is undisputed: As Janiak and Weber each testified, Janiak had authority and input on the hiring decision. On two different occasions, Weber told Frieler to speak with Janiak about the position. Janiak participated in interviewing Frieler and engaged with Weber and Frieler about the hiring decision. According to Janiak, he had a say in the matter and even told Weber about his concerns with Frieler getting the job. Janiak told Frieler that he was "really going

to the mat for her” so that she would get the job. Indeed, Janiak used and asserted this supervisory authority to gain access to and assault Frieler. Janiak used his authority to get Frieler where he wanted her.

After using this authority to gain access to and assault Frieler he also used it to intimidate and threaten her into keeping silent about it. He told her that he was “going out on a limb for her—pushing for her to get the full time job.” If that were not enough, Janiak told Frieler several times she had better not tell anyone and that “I am going to be you boss”, you have got to “learn how to handle me,” and “take it.” The fact that Janiak was not only a decision maker in Frieler’s hiring but that he used his power, authority and position unique to him as a supervisor in order to harass and sexually assault Frieler leaves little doubt he was considered a “supervisor.” *See Grozdanich*, at 973 (finding harasser a “supervisor” where he “used his supervisory status to harass Plaintiff by sending her to the resident’s room, so as to be isolated from others, in order that he might physically assault her there.”) Janiak’s supervisory status and his hiring authority were the means by which he gained access to Frieler to assault her and to keep her quiet. Janiak’s harassment and resulting tangible employment action were uniquely supervisory. A co-worker could not have done the same.

B. Janiak Exercised Apparent Authority

Even if this Court determines that Janiak was not Frieler’s actual “supervisor”, Frieler has presented evidence to show that Janiak and Weber made Frieler believe he was her supervisor with influence and authority over her. The

same principles of supervisor liability are imposed even if Janiak had apparent supervisory authority. *See Ellerth*, 524 U.S. at 759 (recognizing liability where “there is a false impression that the actor was a supervisor, when he in fact was not” but victim’s belief must be reasonable.); EEOC *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, Section III (B), pg. 7 (June 28, 1999) (herein, “EEOC *Enforcement Guidance*”) (“employer may be liable if employee reasonably believed harasser had such power.”); *Todd v. Ortho Biotech*, 175 F.3d 595 (8th Cir.1999) (Arnold, S.J., Concurring in judgment) (recognizing apparent authority may fairly impose liability even through supervisor not in direct chain of command; plaintiff must have reasonably believed he had power over her.) There can be no doubt that given Janiak’s words, actions and position in the company, it was reasonable for Frieler to believe he had power over her. And, he did. At a minimum, this is a question of fact for a jury to decide.

Nevertheless, the District Court reasoned that to find that Janiak was Frieler’s supervisor and impute knowledge to CMG “would subject employers to liability on the mere basis of a person’s title, not based on whether [CMG] knew or should have known about the actions and failed to adequately respond.” A.6. The District Court, not Frieler, considered mere “titles” rather than the actual facts and circumstances when making its determination. The evidence is that not only did Janiak have the title of “supervisor,” he was cloaked with the authority and power as Frieler’s “supervisor.” Unlike a co-worker, Janiak had the power to hire

Frieler for the position for which she was applying. This power was uniquely within his province as her supervisor and it provided him with the unique power and ability to assault her. *See Grozdanich*, 25 F.3d at 973 (individual a “supervisor” where he used his position to gain access to and assault victim.); *Ellerth*, 524 U.S. at 763 (recognizing difference between acts of harassment that only supervisor may engage and those where supervisor status “makes little difference.”)

The District Court misapplied the law and improperly weighed facts in CMG’s favor. This resulted in its erroneous determination that Janiak was not Frieler’s supervisor and therefore CMG was not vicariously liable for his conduct.

C. Janiak Undertook Tangible Employment Action

Janiak was Frieler’s supervisor. Therefore, if Janiak exercised tangible employment action then CMG is vicariously liable; if no tangible employment action was taken CMG may assert the affirmative defenses. Due to the District Court and the Court of Appeals findings, neither court addressed the issue of tangible employment action. The evidence in this case clearly establishes tangible employment action.

1. Hiring Is a Tangible Employment Action

Hiring is a tangible employment action. *See Ellerth*, 524 U.S. at 761.

Janiak took tangible employment action-hiring- in response to Frieler’s silence to his sexual demands. Therefore, CMG is liable and cannot raise the affirmative defenses. CMG will argue, however, that Frieler received a “benefit” when she

was hired for the full time job. As the EEOC explained, if the supervisor takes tangible employment action in response to his demands, whether that action results in a “benefit” makes no difference:

The result is the same whether the employee rejects the demands and is subjected to an adverse tangible employment action or submits to the demands and consequently obtains a tangible job benefit. Such harassment previously would have been characterized as ‘quid pro quo.’ It would be a perverse result if the employer is foreclosed from raising the affirmative defense if its supervisor denies a tangible job benefit based on an employees’ rejection of unwelcome sexual demands but can raise the defense if its supervisor grants a tangible job benefit based on submission to such demands.

EEOC Enforcement Guidance: *Vicarious Employer Liability for Unlawful Harassment by Supervisors*, Section IV (B), pg. 7 (June 28, 1999) (emphasis added)¹¹.

Accordingly, CMG’s argument that Frieler received a job benefit fails as a matter of law and public policy. To characterize the offer and granting of a promotion to an employee based on their submission to sexual harassment and assaults is certainly not a benefit. Such a holding would encourage employers to simply promote those employees subjected to harassment in order to evade liability. Janiak told Frieler after every assault not to tell anyone and that she would be required to “handle” him and his assaults as part of her job. Frieler did not say anything out of fear for her job. Not surprisingly, because she submitted to Janiak’s threats, she was offered the position. This is tangible employment action.

¹¹ Consideration of EEOC Guidelines is proper for both litigants and the courts. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142, 97 S.Ct. 401, 410-411 (1976) (citations omitted).

2. Constructive Discharge Is a Tangible Employment Action

The U.S. Supreme Court held that constructive discharge is tangible employment action when an official act precipitates the constructive discharge. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S. Ct. 2342, 159 L.Ed.2d 204 (2004). The Court held that to establish “constructive discharge”, the plaintiff must show that the abusive working environment became so intolerable that her resignation was a fitting response. The Court explained that quitting is a reasonable response to employer-sanctioned adverse action when it officially changes her employment status, including transfer to a position in which she would face unbearable working conditions. The Court noted that “in so ruling today, we follow the path marked by our 1998 decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 141 L. Ed. 2d 633, 118 S. Ct. 2257, and *Faragher v. Boca Raton*, 524 U.S. 775, 141 L. Ed. 2d 662, 118 S. Ct. 2275.” *Suders*, 542 U.S. at 134.

The Court concluded that an employer may not assert the affirmative defenses when a supervisor's official act precipitates the constructive discharge. *Id.* Although the District Court failed to address Frieler's constructive discharge claim, Frieler raises the claim for purposes of this appeal and for purposes of establishing that a “supervisor's official act precipitated the constructive discharge.”

Constructive discharge is a companion tort frequently used in the context of discrimination claims arising under the MHRA. *See, e.g., Huyen v. Driscoll*, 479

N.W.2d 76, 81 (Minn.App.1991), *review denied* (Minn. Feb. 10, 1992). An employer constructively discharges an employee only if, with the intention of forcing the employee to resign or with knowledge that resignation was a reasonably foreseeable consequence of its actions, the employer creates an objectively intolerable work environment that forces the employee to resign. A plaintiff can prove the intent by showing that her resignation was a reasonably foreseeable consequence of her employer's discrimination. *Pribil v. Archdiocese of St. Paul & Minneapolis*, 533 N.W.2d 410, 412 (Minn.App.1995). In the end, whether employment conditions are in fact intolerable is a question of fact judged by a reasonable-person standard. *Pribil*, 533 N.W.2d at 412.

a. Foreseeability

The evidence is that Frieler was sexually assaulted and harassed by her hiring supervisor. CMG is vicariously liable for the tortuous conduct of Janiak (*See Supra* Section VI) and for Janiak's sexually harassing conduct. As such, it is CMG who created the intolerable work situation which led to Frieler's emotional and medical inability to return to that workplace. Certainly, as Weber testified, it is reasonable to foresee that a person would not be able to return to work in an environment in which she was harassed and assaulted to the severe and outrageous degree to which Frieler was subjected. A.125. Frieler's therapist provided Frieler and her employer with notice that any exposure to CMG would likely result in an exacerbation of her symptoms of depression and PTSD. CMG forced Frieler to

have to choose between her emotional and medical well-being and her need for a full-time job.

As noted in *Boykin v. Perkins Family Restaurant*, 2002 WL 4548, C9-01-1100, (Minn.App., Jan. 2, 2002), knowledge that sexual harassment is a foreseeable risk of a business is evidenced by the fact that new employees are required to go through an orientation procedure that includes a review of sexual harassment policies and reporting procedures. In this case, CMG had a policy and provided information about reporting options and potential training was available to employees via the online “Carlson U.”

These facts, coupled with the severity of the conduct and the manner in which CMG managed and failed to manage the complaint, investigation and the outcome of the investigation, certainly make it foreseeable that Frieler would have to leave her job.

At a minimum, there are fact questions about the foreseeability of Frieler’s inability to return to work that should be left for a jury to decide.

b. Intolerable Working Conditions

Frieler presented overwhelming evidence to show that the environment in which she worked was abusive and intolerable – so much that she became ill enough for her psychologist to instruct her not go back to work at any place within CMG.

First, Frieler was told by her hiring supervisor that she had to be able to endure his assaults and harassment in order to get the new job. Then, she was told

that she would have to continue to endure the same treatment after hire since he had “gone to the mat for her.”

Next, after Frieler reported the assaults, she was placed on leave while the perpetrator was allowed to continue to work as if nothing happened. Indeed, the managers and director did not even consider placing him on leave. As for the “investigation”, it was conducted by untrained individuals who focused more on possible “bad behavior” of Frieler and reasons that Frieler would lie rather than the conduct Frieler reported. Weber was told to document all of the problems he had with Frieler and to be sure to include issues related to her attendance. Janiak admitted to being with Frieler in closed door meetings at the same times, dates and places as described by Frieler. Janiak resigned the very next work day after he was confronted with the reports (albeit he was only questioned for a very short time). Despite the highly suspect nature of Janiak’s admissions – including the fact that he feared allegations – CMG’s managers and the director tried to talk him into staying on the job.

CMG stated that it tried to contact Frieler early in the week of her leave to let her know that Janiak had resigned. Frieler did not receive such a call and only learned about the resignation from her sister-in-law. Frieler learned of the goodbye party and the fact that co-workers were treating Janiak positively and wishing him well in his “retirement.” Frieler, understandably, felt betrayed.

Once Frieler returned to work, she was told that her allegations were not substantiated and that she needed to return to work and tell people she was off

work due to a personal family matter. Frieler, again understandably, became upset with the suggestion and told them that she should not have to lie. She was told to forget about it and move on. She was told that if Janiak had not resigned, she would have been made to go through counseling with him so that they could work together and “build their relationship.”

Frieler was then subjected to her co-workers making the same comments to her that they had made to Janiak. They told her that they could not believe what she had done to Ed. Her co-workers ostracized her and she was made to feel very uncomfortable.

Finally, she was not able to return to work because of the stress of the assaults, the environment and because of the betrayal.

At a minimum, Frieler presented fact questions as to whether or not CMG’s official acts precipitated the constructive discharge and summary judgment should not have been granted.

D. CMG Cannot Establish the Affirmative Defenses

Pursuant to *Ellerth/Faragher*, the affirmative defenses are not available when tangible employment action is taken. As previously argued, *Supra* Section V (C), tangible employment action was taken against Frieler and therefore examination of the affirmative defenses is unnecessary. In the event the Court determines the defenses are available, CMG still cannot escape liability.

1. CMG Did Not Exercise Reasonable Care to Prevent and Promptly Correct Harassment

The evidence is that CMG did not have an effective policy and procedure for reporting and resolving complaints. First, employees only get training in sexual harassment and violence in the workplace at the time of hire. No witnesses knew of any tracking mechanism to ensure that employees, supervisors and managers received updates in training. Dahl, Weber and Krob had not had any training since the early to mid-nineties. Weber did not know anything about the reporting process or procedure beyond telling someone in HR. Neither Dahl nor Krob had training specific to investigating reports. Beyond the initial training, employees have access to policies only through the online system. Employees are very rarely even exposed to HR representatives or policies. Managers and supervisors are exposed only when they might receive a revised policy via email.

Dahl claimed to be responsible for taking reports and conducting investigations, yet she could not remember the last time she even consulted the policy on discrimination and harassment. She believed that violence in the workplace would be covered in the sexual harassment policy but she was not sure. Dahl could not explain why she involved Krob in the investigation and had not even considered that Frieler and other witnesses may have felt intimidated by having a Director present during their interviews. Dahl repeatedly breached the confidentiality of Frieler, witnesses interviewed and even of the alleged

perpetrator, Janiak. Dahl was not effective in her job and CMG's policies proved meaningless. As such, CMG is not entitled to the affirmative defense.

2. Frieler Did Not Unreasonably Fail to Take Advantage of Any Preventive or Corrective Opportunities Provided By CMG

Frieler did not unreasonably fail to take advantage of CMG's policies. As the court in *Faragher* made clear, in order for the defense to apply, Frieler must have *unreasonably* failed to avail herself of "a proven effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." *Faragher*, 524 U.S. at 806. An employee's delay or failure in using the employer's complaint policy may be reasonable when the employee had reason to believe that using it would result in retaliation. EEOC *Enforcement Guidance*, § V (D)(1), pg. 17-18. To ensure that the employee's fear of retaliation is quelled, employers are encouraged to make it clear both in its policy and during the investigation that retaliation will not occur. CMG couldn't have done much more to make Frieler feel uncomfortable and concerned about retaliation. She was removed from the workplace; wasn't told what was going on; was then told to lie or keep quiet about what happened while other employees were permitted to question her about what "she did to Ed."

Any delay in Frieler's reporting was reasonable as she had reason to believe CMG didn't have an effective mechanism to address the situations. Frieler was told by another co-worker who had complained about Janiak that HR did nothing. Her delay in reporting was also reasonable in light of her fear of retaliation, her

need to have the full time job that Janiak was dangling in front of her and her inability to identify a person to whom she should report. Given CMG's lack of attention to its policies and procedures and Dahl's apparent inability to address the situation appropriately, it is no wonder Frieler was fearful and unsure about what to do.

Finally, an employee cannot be found to have unreasonably failed to take advantage of an employer's policy when the employee has been subjected to frequent egregious conduct and promptly complains. While corrective action by the employer could work to prevent further harm, it might not correct the actionable harm the employee already suffered. EEOC, *Enforcement Guidance*, § V (B), pg. 9. This is what happened to Frieler. Even if CMG could prove it exercised reasonable care to prevent and correct sexually harassing behavior it cannot establish the Frieler unreasonably failed to take advantage of any preventative opportunities. See *McCurdy v. Arkansas State Police*, 375 F.3d 762 (8th Cir. 2004)(Melloy, M. J. dissenting)(single severe incident of harassment may operate to eliminate application of affirmative defenses); *Todd v. Ortho-Biotech, Inc.*, 175 F.3d 595, 599-00 (8th Cir. 1998)(Arnold, Richard S., concurring) (similar). While such a result may seem "harsh to a law abiding employer, it is consistent with liability standards under the anti discrimination statutes which generally make employers responsible for the discriminatory acts of their supervisors." EEOC *Enforcement Guidance*, Section V (B), pg. 9. Additionally,

this approach is consistent with the more stringent standard of vicarious liability applied to an employer. *Id.*

Accordingly, CMG is vicariously liable for Janiak's harassment and assaults. He was a supervisor and took tangible employment action. Even if this Court finds that he did not take tangible employment action, it cannot establish either defense.

VI. THE COURT OF APPEALS ERRED BY AFFIRMING DISMISSAL OF FRIELER'S ASSAULT/BATTERY CLAIM

A. Respondeat Superior Liability - Employer Liable for Assault and Battery of an Employee

Frieler also alleged claims of assault and battery. Employers are vicariously liable for the torts of employees committed within the course and scope of employment. Such liability stems not from any fault of the employer, but from a public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in that business. *Fahrendorf v. North Homes Inc.*, 597 N.W.2d 905, 910 (Minn.1999) (citing *Lange v. National Biscuit Co.*, 297 Minn. 399, 403, 211 N.W.2d 783, 785 (1973)). According to this Court, this doctrine means, an employer may be held liable for even the intentional misconduct of its employees when: (1) the source of the attack is related to the duties of the employee and (2) the assault occurs within work related limits of time and place." *Fahrendorf*, 597 N.W.2d at 910 (citing *Lange*, 211 N.W.2 at 786.)

1. The Assault Occurred Within Work Related Limits of Time and Place

The District Court held that the facts are undisputed that the assaults occurred in work related limits of time and place. A.7. Accordingly, the Court of Appeals concentrated on the issue of whether or not the “source of the attack is related to the duties of the employee.” A.15.

2. The Source of the Attack is Related to the Duties of the Employee

In determining whether an act is related to the duties of employment the court determines whether the act was foreseeable. *Hagen v. Burmeister & Assoc., Inc.*, 633 N.W.2d 497, 504 (Minn.2001) (citations omitted.) This court has described the meaning of foreseeability as follows:

‘[f]oreseeability’ as a test for respondeat superior merely means that in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include that loss resulting from it among other costs of the employer’s business.

Fahrendorf, at 912 (quoting *Rodgers v. Kemper Constr. Co.*, 50 Cal.App.3d 608, 124 Cal.Rptr. 143, 148-149 (Ct.App.1975).

Whether an employee’s acts were foreseeable within the context of respondeat superior is a question of fact. *Fahrendorf*, at 910. A question of fact is raised on foreseeability when a party establishes that the type of tortuous conduct involved is a well-known industry hazard. *Id.* at 911.

In this case, the Court of Appeals held that Frieler had to present expert testimony in order to establish a question of fact regarding foreseeability- i.e. whether sexual assaults are a well known hazard in the marketing or bindery

industry. Despite the fact that sex harassment and assaults in the workplace are undeniably well-known hazards in the workplace, the appellate court looked at case law for guidance. Not surprisingly, the court found little case law on the issue. And, what case law it did find is distinguishable. All the cases relied on by the Court of Appeals address whether an employee's sexual assault of a third party is foreseeable.¹² None of the cases analyze the issue raised in this case: whether an employee's (supervisor's) sexual assault of another employee is foreseeable. Nevertheless, relying on this case law, the Court concluded that a proper foreseeability analysis requires the Court to determine "whether the 'overall nature' of the employer's business and the employee's duties are such that, as a policy matter, vicarious liability for intentional tort is a 'foreseeable cost of doing business.'" A.15. Expert testimony, according the Court of Appeals, is "essential" to make this determination. A.15.

a. Expert Testimony Not the Exclusive Means to Establish Foreseeability

In *Boykin v. Perkins Family Restaurant*, 2002 WL 4548, C9-01-1100, (Minn.App., Jan. 2, 2002), the employee was sexually assaulted by a co-worker. The plaintiff in *Boykin* provided no expert affidavit or testimony. Nevertheless, the court held that Perkins had knowledge that sexual harassment was a

¹²*Longen v. Federal Express Corp.*, 113 F.Supp.2d 1367 (D.Minn.2000)(delivery person sexually assaults customer); *Fahrendorf* (half way house "parent" sexual assaults resident); *Marston v Minneapolis Clinic of Psychiatry & Neurology, Ltd.*, 329 N.W.2d 306 (Minn.1982) (therapist sexual assaults patient); *P.L. v. Aubert*, 545 N.W.2d 666 (Minn.1996) (teacher sexual assaults student).

foreseeable risk of its business since it required each new employee to go through an orientation procedure, which included sexual harassment policy and reporting information. *Boykin*, at *4. The court recognized fact issues had been raised on the issue of foreseeability and denied defendant's summary judgment motion. Accordingly, contrary to the Court of Appeals holding in this case, expert testimony is not the exclusive means to establish foreseeability.

CMG, like *Boykin*, had knowledge that sexual harassment, which may include assaults, were a foreseeable risk. New employees go through orientation procedures that include sexual harassment policies, inclusive of assaults and violence in the workplace, a review of the reporting procedures, information about the telephone line to report harassment, and had training available to employees via the online "Carlson U."

Further, when conduct becomes well known, expert testimony is no longer needed. For example, relying on a U.S. Supreme Court case, this Court indicated that expert testimony may no longer be necessary in cases of sexual harassment between students and teachers:

Our decision in *Aubert* was based solely on the lack of evidence presented in that case showing that sexual assaults of student by teachers were a well known hazard. We note that subsequent to our decision in *Aubert*, the United States Supreme Court in a Title IX case that "[t]he number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292, 118 S.Ct. 1989, 2000, 141 L.Ed.2d 277 (1998)

Farhendorf, at 911 n.1.

Courts and commentators have made similar statements to the comments in *Gebser* regarding sexual harassment in the workplace. *Faragher*, 524 U.S. at 798 (“It is now well recognized that hostile environment sexual harassment by supervisors (and for that matter, co-employees) is a persistent problem in the workplace.”); *Burlington Industries, Inc. v. Ellerth*, 123 F.3d 490, 511 (7th Cir.1997)(Posner, C.J. concurring and dissenting) (“Everyone knows by now that sexual harassment is a common problem in the American workplace.”); B.Lindemann & D. Kaude, *Sexual Harassment in Employment Law* 175(4-5)(1992) (similar). There can be little doubt that sexual harassment cases persist in the court and administrative system-cases are filed daily. Sexual harassment in the workplace has become so commonplace it is a part of our mainstream entertainment- recently the subject of a major motion picture, *North Country*. The inquiry of whether or not something is well known or common place is not complicated. The inquiry should not be made in a vacuum but should be based in reality. When this is done, there can be little doubt that sexual harassment and assaults in the workplace are well-known, if not obvious, hazards.

b. An Industry Specific Inquiry Is Improper

The Court erred by narrowing its analysis to consider foreseeability only within a particular industry-the bindery industry. A.15. The Court held that testimony is required to determine whether the overall nature of the employer’s business and the employee’s duties are such that, as a policy matter, vicarious liability is a foreseeable cost of doing business. A.15. Sexual harassment and

related assaults are not confined to certain workplaces. They make no distinction between industries or professions. They are equal opportunity evils. The ubiquity of sexual harassment and assaults in the workplace renders the inquiry regarding the nature of a business and the nature of an employee's duties meaningless in the foreseeability analysis. Unfortunately, sexual harassment is a foreseeable cost of conducting and working in any business.

Indeed, to hold otherwise will invite a long line of cases attempting to determine just where or when sexual assaults could happen. Large companies such as CMG, its related businesses and its parent corporation would be required to have different policies and procedures for each of its multiple and various facets of its businesses. CMG would have no real guidance from the law in making these determinations.

CMG, like all other employers, expects and requires minimum standards of conduct and behavior from all its employees. There is no evidence in the record that it trains or takes different precautions for bindery department employees working in the marketing business as compared to its employees who work in its travel, hotel, restaurant or cruise business. There is no evidence that CMG treats or expects anything different from its bindery employees than its other employees for purposes of educating and training about sexual harassment. CMG knows that there is no reason to treat bindery employees-or any department employees for that matter- differently for purposes of liability. It is the appellate court's misreading of this Court's respondeat superior jurisprudence that has led to this unworkable

and nonsensical result. The proper inquiry is simple: Is sex harassment a well known hazard in the workplace? The undisputed answer is: Yes.

B. Public Policy

Ultimately, respondeat superior liability stems from public policy determinations that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in that business.

Fahrendorf, at 910 (citing *Lange*, 211 N.W.2d at 785.)

Public policy is best served when practices match the desired result. Here, the desired result is to provide workplaces without sexual violence and to impose reasonable expectations on employers in working toward that end. The employer is in the best position to prevent harassment and assaults from occurring in the workplace. Employers have the power to select and train employees, including supervisors. Employees have no choice in the matter. The employer receives incalculable benefits from its employees and with those benefits come responsibility and accountability.

Public policy will certainly not be served by requiring employee's to spend thousands of dollars to obtain expert testimony regarding something that is already well known: harassment and related assaults occur in every workplace.¹³ Simply put, imposing such a costly burden on an employee to establish a violation of his or her rights is unrealistic and unfair.

¹³ The existence and/or potential qualifications of such an expert is questionable at best.

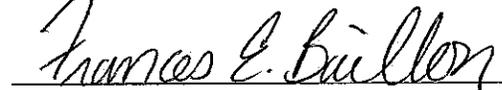
CONCLUSION

For all of the above-stated reasons, Frieler respectfully requests that this Court reverse the decision of the Court of Appeals and the District Court as to all issues and remand her case.

Respectfully Submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

Case No. A06-1693

Judy Frieler,

Appellant,

v.

**CERTIFICATE OF WORD COUNT
COMPLIANCE**

Carlson Marketing Group, Inc.,

Respondent

I, Frances Baillon, one of the counsel for Appellant, hereby certify that the word count of the herewith-filed Appellant's Brief complies with the Minnesota Rules of Appellate Procedure. I certify that Microsoft Word 2003 word count function was applied and that the Memorandum contains 13, 999 words.

Dated this 15th day of November 2007.

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