MINNESOTA STATE LAW LIBRARY

No. A06-1693

STATE OF MINNESOTA
IN SUPREME COURT

Judy Frieler,

Petitioner,

vs.

Carlson Marketing Group, Inc.,

Respondent.

BRIEF OF COMMISSIONER OF MINNESOTA DEPARTMENT OF HUMAN RIGHTS AS *AMICUS CURIAE*

JONI M. THOME (#232087)
FRANCES E. BAILLON (#028435X)
Halunen & Associates
220 South Sixth Street
Suite 2000
Minneapolis, MN 55402
(612) 605-4098

ATTORNEYS FOR APPELLANT

GREGORY J. STENMOE (#131155)
STEVEN W. WILSON (#179024)
Briggs and Morgan, P.A.
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

ATTORNEYS FOR RESPONDENT

LORI SWANSON
Attorney General
State of Minnesota

KELLY S. KEMP (#0220280)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 215-1561 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR COMMISSIONER OF THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

JOSEPH G. SCHMITT (#231447)
PETER GRAY (#25809X)
MEGAN J. BACKER (#387141)
Halleland Lewis Nilan & Johnson, P.A.
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
(612) 338-1838

ATTORNEYS FOR MINNESOTA CHAMBER OF COMMERCE

LESLIE L. LIENEMANN (#0230194)
Culberth & Lienemann, LLP
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101

ATTORNEYS FOR NATIONAL EMPLOYMENT LAWYERS ASSOCIATION

BRADLEY J. LINDEMAN (#0298116)
Meagher & Geer, P.L.L.P.
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402-3788
(612) 338-0661

ATTORNEYS FOR MINNESOTA DEFENSE LAWYERS ASSOCIATION

MARILYN J. CLARK (#0386615)
Dorsey & Whitney, LLP
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
(612) 340-2600

ATTORNEYS FOR MINNESOTA EMPLOYMENT LAW COUNCIL

KERRY L. MIDDLETON (#26622X)
Littler Mendelson, P.C.
1300 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2136
(612) 630-1000

ATTORNEYS FOR EMPLOYER'S ASSOCIATION, INC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

LEGAL ISSUES 1

STATEMENT OF INTEREST 2

ARGUMENT 3

THE DECISION OF THE COURT OF APPEALS INCORRECTLY APPLIED THE MHRA AND SHOULD BE REVERSED. 3

I. THE COURT OF APPEALS INCORRECTLY APPLIED THE CLEAR LANGUAGE OF THE MHRA. 3

II. THE COURT OF APPEALS INCORRECTLY INTERPRETED THE MHRA. 5

A. The 2001 Amendment's Deletion Of The Knowledge Requirement For Hostile Work Environment Claims Was A Legislative Reaction To A Change In United States Supreme Court Precedent. 6

B. The Legislative History Reflects The Legislature's Intention To Adopt The *Faragher/Ellerth* Standard In Hostile Work Environment Cases. 12

C. Other Canons Of Construction Weigh Against The Court Of Appeals' Interpretation Of the MHRA. 13

III. THIS COURT SHOULD ALLOW A CASE BY CASE DETERMINATION OF WHETHER THE HARASSER IS A SUPERVISOR. 14

CONCLUSION 16

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Burlington Industries, Inc. v. Ellerth,
524 U.S. 742 (1998) ..... passim

EEOC v. Commercial Office Products Co.,
486 U.S. 107 (1988) 13

Bush v. Penske Truck Leasing Co.,
2007 WL 1321852 (D. Minn. May 4, 2007) (unpublished) 11

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) ..... passim

Meritor Savings Bank v. Vinson,
477 U.S. 57 (1986) 6

Todd v. Ortho Biotech, Inc.,
175 F.3d 595 (8th Cir. 1999) 11

STATE CASES

Goins v. West Group,
635 N.W.2d 717 (Minn. 2001) 3, 4

Cummings v. Koehnen,
568 N.W.2d 418 (Minn. 1997) 1, 10, 13, 14

Frieler v. Carlson Marketing Group, Inc.,
2007 WL 2107300 (Minn. Ct. App. July 24, 2007) (unpublished) 3

Geo A. Hormel & Co. v. Asper,
428 N.W.2d 47 (Minn. 1988) 13

Continental Can Co. v. State, by McClure,
297 N.W.2d 241 (Minn. 1980) 10

Ponticas v. K.M.S. Investments,
331 N.W.2d 907 (Minn. 1983) 7

Schwingler v. Doebel,
309 N.W.2d 760 (Minn. 1981) 7

STATE STATUTES

Minn. Stat. § 363.01 ..... 10, 11

Minn. Stat. ch. 363A 2

Minn. Stat. § 363A.03 ..... passim

Minn. Stat § 363A.04 13

Minn. Stat. § 363A.06 2

Minn. Stat. § 363A.08 ..... 2, 13, 14

Minn. Stat. § 645.16 ..... passim

1982 Minn. Laws c. 619 10

2001 Minn. Laws ch. 194 11

FEDERAL REGULATIONS

29 CFR § 1604.11 ..... 8, 9, 10

64 Fed. Reg. 58 ..... 8, 9

OTHER AUTHORITIES

Senate File 1215 12

EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) 9, 14

Restatement (Second) of Agency 6, 7

LEGAL ISSUES

Whether a plaintiff employee must prove that her employer knew or should have known of the existence of harassment and failed to take appropriate action as part of her prima facie case regarding her claim that her supervisor created a hostile work environment under the Minnesota Human Rights Act despite the Minnesota Legislature's removal of that language from the Act in 2001?

The district court and the court of appeals ruled in the affirmative.

Apposite authorities:

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998)
Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997)
Minn. Stat. § 363A.03, subds. 41 and 43 (2006)
Minn. Stat. § 645.16 (2006)

STATEMENT OF INTEREST

The Commissioner of the Minnesota Department of Human Rights is charged by the Minnesota Legislature with developing policies and programs to effectuate the purposes of the Minnesota Human Rights Act, Minn. Stat. ch. 363A ("MHRA"); investigating charges of discrimination and issuing complaints; and using the educational powers provided by the MHRA to eliminate illegal discrimination in Minnesota. *See* Minn. Stat. § 363A.06 (2006). One type of discrimination prohibited by the MHRA is sexual harassment. *See* Minn. Stat. §§ 363A.08 and 363A.03, subds. 13 and 43 (2006).

This case concerns the application of the MHRA's prohibition against sexual harassment when the plaintiff victim alleges that the perpetrator is the victim's supervisor at the victim's place of employment. Charges containing such allegations are often filed with the Minnesota Department of Human Rights. The Department also reviews companies' employment policies regarding the reporting of sexual harassment as part of the Commissioner's enforcement and education functions. The opinion of the Minnesota Court of Appeals in the instant case is at odds with the language of the MHRA and the Commissioner's interpretation of it. An informed and correct analysis of the application of the MHRA to cases involving supervisors who sexually harass employees is important to the Department and to the citizens of the State. The Commissioner therefore offers her views to this Court.[1]

---

[1] No portion of this Brief was prepared by counsel for a party and no monetary contribution was received. *See* Minn. R. Civ. App. P. 129.03.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS INCORRECTLY APPLIED THE MHRA AND SHOULD BE REVERSED.

I. THE COURT OF APPEALS INCORRECTLY APPLIED THE CLEAR LANGUAGE OF THE MHRA.

The Minnesota Court of Appeals ruled in this matter that a 2001 legislative amendment to the MHRA's definition of "sexual harassment" had no effect upon the prima facie requirements that must be satisfied by a plaintiff employee who is suing her employer because of sexual harassment by a supervisor. *Frieler v. Carlson Marketing Group, Inc.*, 2007 WL 2107300, *4 (Minn. Ct. App. July 24, 2007) (unpublished). The court of appeals decided that the prima facie case for a hostile work environment claim requires the harassed employee to establish that the employer knew or should have known about the harassment before she reported it, even though that requirement was entirely removed from the MHRA. *Id.* The decision is incorrect because it violates the plain wording of the MHRA.

At the outset, it should be noted that this case raises an issue of first impression before this Court. Respondent argued to the court of appeals that this Court's opinion in *Goins v. West Group*, was published after the 2001 amendment took effect, the court of appeals did treat *Goins* as precedent in the instant case. But the *Goins* Court did not decide the issue currently before this Court. The *Goins* Court did not reject the 2001 statutory change in applying its prior test. Rather, the *Goins* Court appropriately relied upon an earlier version of the MHRA in analyzing the employee's hostile work

environment claim because the facts giving rise to the employee's claim in *Goins* occurred in 1997. 635 N.W.2d 717, 720 & 725 (Minn. 2001) (citing the 2000 version of Minn. Stat. § 363.03). The instant case arose after the 2001 legislative amendment, and thus the amendment cannot be ignored.

The issue before the court of appeals was primarily one of statutory construction. The object of statutory construction is to ascertain and effectuate the intention of the Legislature. *See* Minn. Stat. § 645.16 (2006). When the words of a statute are unambiguous, those words must be followed. *Id.* Only when the words of a law are not explicit may a court consider other matters in order to ascertain the intention of the Legislature. *Id.* As shown below, the language of the MHRA is clear and free from ambiguity and no longer requires an employee to establish the employer's knowledge.

The decision of the court of appeals rests upon three provisions of the MHRA. First, Section 363A.03, subd. 43, defines sexual harassment:

> "Sexual harassment" includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an

> intimidating, hostile, or offensive employment, public accommodations, public services, education, or housing environment.

Furthermore, the MHRA defines discrimination based on sex in Section 363A.03, subd. 13, to include sexual harassment. Finally, the MHRA prohibits discrimination based on sex in Section 363A.08, subd 2.[2] The court of appeals incorrectly altered the requirements of the MHRA by adding an additional term to it–a term that the Legislature explicitly deleted in 2001.

II. THE COURT OF APPEALS INCORRECTLY INTERPRETED THE MHRA.

Even if the language of the MHRA is unclear or ambiguous, the court of appeals should not have simply added a term based upon prior case law interpreting a prior version of the MHRA. Instead, the court should have utilized the construction of laws provision in Minnesota Statutes. "The object of all interpretation and construction of laws is to ascertain the intention of the legislature." Minn. Stat. § 645.16 (2006). When the words of a law are not explicit, the intention of the legislature may be ascertained by considering, among other matters:

(1) The occasion and necessity for the law;
(2) The circumstances under which it was enacted;
(3) The mischief to be remedied;
(4) The object to be obtained;

---

[2] Section 363A.08, subd. 2 provides, in relevant part:

> Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer, because of . . . sex . . . to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

(5) The former law, if any, including other laws upon the same or similar subjects;
(6) The consequences of a particular interpretation;
(7) The contemporaneous legislative history; and
(8) Legislative and administrative interpretation of the statute.

Minn. Stat. § 645.16 (2006).

A. The 2001 Amendment's Deletion Of The Knowledge Requirement For Hostile Work Environment Claims Was A Legislative Reaction To A Change In United States Supreme Court Precedent.

It is appropriate for this Court to consider the occasion and necessity for the 2001 amendment in determining its effect. *See* Minn. Stat. § 645.16(1). The 2001 amendment's deletion of the knowledge requirement from hostile work environment claims was a legislative reaction to then-recent United States Supreme Court cases.

The United States Supreme Court has addressed the issue of whether an employer is vicariously liable when one employee sexually harasses another on several occasions. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Court deemed it appropriate to apply common law agency principles because Title VII's definition of employer includes agents. The *Meritor* Court discussed a number of concepts but ultimately refused to establish a definitive standard for future cases regarding an employer's vicarious liability, and rather awaited a case with a better record. *Id.* at 72.

In two decisions from 1998, the Court built upon the *Meritor* opinion, but this time set a standard for federal courts to follow in hostile work environment cases. Again, the Court relied upon common law agency principles. In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the Court noted that it was not transplanting the Restatement

(Second) of Agency onto Title VII, but rather adapting agency principles to the practical objectives of Title VII.[3] *Id.* at 802 n.3.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), a female employee alleged that she had been sexually harassed by a supervisor to whom she did not directly report. The alleged harasser was a mid-level manager, who could hire and fire employees only with the approval of his superiors. The Court began by noting that the case was a hostile work environment case because the plaintiff employee's claim involved unfulfilled threats to alter the employee's terms of employment. *Id.* at 754. The Court recognized that it is easier to find vicarious liability in quid pro quo cases because the injury (for example termination of employment or failure to obtain a promotion) could not be inflicted without the agency relationship between the harasser and the employer. *Id.* at 761-62. The Court noted that it was more difficult to evaluate and create a rule for hostile work environment claims, but the Court recognized that a harasser's threats to alter another employee's term of employment on the basis of sex are more threatening if the harasser is a supervisor who has the ability to carry out the threat–i.e., if the harasser is clothed in the employer's authority. *Id.* at 762.

---

[3] This Court has also referenced the Restatement (Second) of Agency when it does not conflict with explicit statutory language. *See, e.g., Schwingler v. Doebel*, 309 N.W.2d 760, 762 (Minn. 1981) (citing the Restatement's vicarious liability provision regarding master and servant relationships); *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 911 (Minn. 1983) (quoting the Restatement's vicarious liability regarding master and servant relationships).

To address these issues, the Supreme Court announced a standard for evaluating an employer's vicarious liability in hostile work environment claims. *Faragher* and *Ellerth* held that an employer is subject to vicarious liability to employee victims of a hostile work environment created by a supervisor with immediate or higher authority over the employee. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764-65. The Court did not base its decision on a "knew or should have known" standard. The Court held that if a tangible employment action such as discharge or undesirable reassignment was taken (what are commonly known as quid pro quo cases), then no affirmative defense is available. *Faragher*, 524 U.S. at 808; *Ellerth*, 524 U.S. at 765. The Court also held that, when no tangible employment action is taken, the employer has an affirmative defense in which it must prove by a preponderance of the evidence (1) that the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior and (2) that the plaintiff employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer or to otherwise avoid harm. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. The Court did not address the standard for a non-supervisory, co-employee harasser.

In 1999, as a result of *Faragher* and *Ellerth*, the Equal Employment Opportunity Commission (EEOC) amended its definition of sexual harassment. 64 Fed. Reg. 58,334 (Oct. 29, 1999) (amending 29 CFR § 1604.11). While Title VII contains no definition of sexual harassment, the EEOC had defined sexual harassment at 29 C.F.R. § 1604.11. The EEOC's definition established different standards for an employer's vicarious liability

based upon whether the harasser was a supervisor or a co-employee. Prior to *Faragher* and *Ellerth*, the EEOC's CFR arguably proposed a strict liability standard for employers with harassing supervisors, whereas the EEOC only deemed the employer to be responsible for conduct between coemployees if the employer, its agents, or its supervisory employees knew or should have known of the conduct and failed to take corrective action.[4] 29 CFR § 1604.11(c) and (d) (1999). After *Faragher* and *Ellerth*, the EEOC deleted its provision regarding vicarious liability for supervisors so that its CFR would not conflict with the new governing case law.[5] 64 Fed. Reg. 58,334 (October 29, 1999); 29 CFR § 1604.11, App. A (2007).

---

[4] 29 CFR § 1604.11 (1999) provided in part:

> (c) [A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.
>
> (d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

[5] As a result of *Faragher* and *Ellreth*, the EEOC also issued its new guidelines for determining an employer's vicarious liability in sexual harassment cases. *See* EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) available at www.eeoc.gov/policy/docs/harassment.html. The new guidelines provide assistance in determining whether a harasser qualifies as a

(Footnote Continued On Next Page.)

The Minnesota Legislature copied much of 29 C.F.R. § 1604.11 when it added a definition of "sexual harassment" to the MHRA in 1982, but the Legislature extended its application beyond employment, to also cover sexual harassment in other contexts including housing and education. 1982 Minn Laws ch. 619, sec. 3. Whereas sexual harassment was not explicitly prohibited in federal law by Title VII, in Minnesota it was explicitly prohibited by Minnesota Statutes. *See Cummings v. Koehnen*, 568 N.W.2d 418, 422 n.5 (Minn. 1997). In explicitly prohibiting sexual harassment, the Legislature did not go quite as far as the EEOC's rules in defining an employer's vicarious liability. The Legislature adopted the EEOC's definition of sexual harassment, but it did not adopt the EEOC's vicarious liability provisions contained in 29 C.F.R. § 1604.11(c) and (d). Rather, the Legislature added a requirement to the MHRA's definition of a hostile work environment claim that "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."[6] 1982 Minn. ch. 619, sec. 3 (codified at Minn. Stat. § 363.01, subd. 41). This requirement was only added to Minn. Stat. § 363.01, subd. 41(3) and not to subdivisions 41 (1) or (2),

---

plaintiff employee's supervisor under *Faragher* and *Ellerth*. The EEOC's position is that the harasser should be deemed to be the plaintiff employee's supervisor if the harasser has authority to undertake or recommend tangible employment decisions affecting the plaintiff employee (such as whether she will be promoted or reassigned) or if the harasser has authority to direct the plaintiff employee's daily work activities. *See id.* at III.A.

[6] In 1980, before the MHRA denied sexual harassment, but after the EEOC drafted its CFR, this Court adopted the "knew or should have known" standard for cases involving harassment by a co-employee. *Continental Can Co. v. State, by McClure*, 297 N.W.2d 241, 249 & n.5 (Minn. 1980) (noting that the Court was not deciding what standard to apply to supervisors).

so it pertained to hostile work environment claims but not to other sexual harassment in employment cases, including the quid pro quo cases.[7] Thus, prior to the 2001 amendment, the MHRA prohibited a broader range of sexually-harassing conduct, but arguably it was more difficult to prove that the employer was vicariously liable for a supervisor's harassing conduct in a hostile work environment case.

After the *Faragher* and *Ellerth* cases, Minnesota employees had less protection under the MHRA than under Title VII—something that would be at odds with the MHRA's history and intent.[8] This was corrected by the 2001 amendment. The amendment deleted the "knows or should know" language from Minn. Stat. § 363.01, subd. 41. 2001 Minn. Laws ch. 194, sec. 1. This was not part of a larger redrafting of the MHRA, and there were few other changes to the MHRA that legislative session. The circumstances under which the change was enacted demonstrate the Legislature's intent for the amendment to have meaning, even without considering the contemporaneous legislative history.

---

[7] The MHRA was later renumbered so that sexual harassment is now defined at Minn. Stat. § 363A.03, subd. 43 (2006).

[8] *Compare Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (holding that because the MHRA contained the "knows or should know" language, the Minnesota Supreme Court would be unable to apply the contrary standard from *Faragher* and *Ellerth*) *with Bush v. Penske Truck Leasing Co.*, 2007 WL 1321852 *3 (D. Minn. May 4, 2007) (unpublished) (noting that *Todd* is no longer applicable because the Minnesota Legislature amended the MHRA so that the definition of sexual harassment is nearly identical to the CFR and thus Minnesota courts would apply *Faragher* and *Ellerth*). The *Todd* case may have been an impetus for the amendment of the MHRA that deleted the "knows or should know" requirement.

B. The Legislative History Reflects The Legislature's Intention To Adopt The *Faragher/Ellerth* Standard In Hostile Work Environment Cases.

It is appropriate for this Court to consider the legislative history of the 2001 amendment in interpreting the MHRA. *See* Minn. Stat. § 645.16 (7). Senate File 1215 led to the 2001 amendment of Minn. Stat. § 363A.03, subd. 43. The Commissioner of the Minnesota Human Rights Department requested the amendment. During the April 3, 2001 Senate Judiciary Committee Hearing, Senator Cohen, the bill's sponsor, indicated that the purpose of the bill was to make clarifications in the MRHA because of changes in the definition of sexual harassment. Commissioner Janeen Rosas testified that the purpose of the amendment was to modify the definition of sexual harassment to bring it into conformance with federal law based upon the recent Supreme Court cases of *Faragher* and *Ellerth*. STATE OF MINNESOTA SENATE JUDICIARY COMMITTEE (April 3, 2001). Commissioner Rosas explained to the committee that it is customary for state courts to look to federal civil rights laws to interpret state statutes where that is not inconsistent with the language of the Minnesota Statutes. *Id.* She testified that "if this amendment passes, the Human Rights Department will immediately begin interpreting our statute in accordance with federal law."[9] *Id.* Commissioner Rosas asked that the

[9] A court interpreting the MHRA must give weight to the interpretation of the MHRA by the Department of Human Rights, the agency with the statutory authority and duty to enforce the Act. As stated by Commissioner Rosas in her testimony in support of the 2001 amendment, the Department interprets the 2001 amendment as bringing the MRHA in line with the *Faragher* and *Ellerth* opinions regarding the vicarious liability of supervisors. This interpretation is entitled to great weight, absent a finding that it is in conflict with the express purpose of the statute and the intention of the Legislature.
(Footnote Continued On Next Page.)

MRHA not be amended to include specific language concerning the test established in *Faragher* and *Ellerth* because, in her opinion as Commissioner, sexual harassment is a complicated area of law and the cases should be decided based upon their factual nuances. *Id.*

The legislative history reflects an intent to apply the vicarious liability principles regarding hostile work environment claims from *Faragher* and *Ellerth* to the MHRA. There has been no allegation that the Commissioner has failed to abide by her predecessor's representation to the Minnesota Senate that the Department would apply the *Faragher/Ellerth* standard.

C. Other Canons Of Construction Weigh Against The Court Of Appeals' Interpretation Of the MHRA.

The MHRA should be construed liberally for the accomplishment of its purposes. *See* Minn. Stat § 363A.04 (2006); *Cummings*, 568 N.W.2d at 422; *Continental Can*, 297 N.W.2d at 248. Those purposes include the protection of Minnesota employees from sexual harassment. *See* Minn. Stat. §§ 363A.08, subd. 2, and 363A.03, subds. 13 and 43. The court of appeals failed to liberally construe the MRHA so that sexual harassment, as defined by the Legislature in its 2001 amendment, will be eliminated from Minnesota workplaces. If this Court were to create a higher standard for employees who are sexually harassed by their supervisor, it would frustrate the accomplishment of the

---

See Geo A. Hormel & Co. v. Asper, 428 N.W.2d 47, 50 (Minn. 1988); *see also Cummings*, 568 N.W.2d at 424; *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988) (EEOC's reasonable interpretation of Title VII is entitled to deference).

MRHA's goal of eliminating sexual harassment and conflict with both the Legislature's intent and clear statutory language.

It is reasonable to allow the Department to apply the standard from *Faragher* and *Ellerth* in its consideration of hostile work environment claims. It would be contrary to the history of the MHRA and the Legislature's intent to provide less protection to victims of sexual harassment under the MRHA than under Title VII. In fact, this Court has held that the MHRA has different and broader coverage than the sex discrimination provision in Title VII. *See Cummings*, 568 N.W.2d at 422 n.5.

III. THIS COURT SHOULD ALLOW A CASE BY CASE DETERMINATION OF WHETHER THE HARASSER IS A SUPERVISOR.

Although the United States Supreme Court established the standard regarding an employer's vicarious liability for its supervisors' conduct, the Court did not define "supervisor." The state and federal courts have not developed one consistent standard. The EEOC did issue guidelines after *Faragher* and *Ellerth*. *See* EEOC, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999) available at www.eeoc.gov/policy/docs/harassment.html. The EEOC deems the harasser to be the plaintiff employee's supervisor if the harasser has authority to undertake or recommend tangible employment decisions affecting the plaintiff employee (such as whether the employee will be promoted or reassigned) *or* if the harasser has authority to direct the employee's daily work activities. *See id.* at III.A (emphasis added).

The parties in the instant case may propose a test for this Court to announce. The Department has not participated in the instant case below and the Department will not

address the ultimate merits of the parties' claims. But because the Department regularly investigates complaints of sexual harassment, it has a strong interest in preserving a scheme that allows the Department and the courts some flexibility in applying sexual harassment law to a variety of fact scenarios.

When Commissioner Rosas testified before the Minnesota Senate to request the amendment of the MHRA, she recommended that the Legislature not promulgate a specific test for sexual harassment claims. The Legislature followed the Commissioner's recommendation. The recommendation of Commissioner Rosas was supported by good reasons that continue to exist today.

As Commissioner Rosas testified, sexual harassment law is complicated, and cases should be evaluated based upon their factual nuances. The Department investigates employers that use various business models and some have no discernable business model at all. Many of the employers the Department investigates are not large corporations. Many have no formal hierarchy. Some are mom and pop operations. Some of the worst human rights offenders lack a formal business structure and may attempt to use that to block the Department's enforcement of the MHRA. For instance, a Department investigation might reveal that an individual within an organization has no formal title or job responsibilities but in fact makes important hiring decisions or reassigns employees within the organization, and is known by other employees to do so. Such an individual is clothed in the authority of the employer even if the individual's actual role is not clear on an organizational chart.

Even when there is a clear hierarchy, there are circumstances when a supervisor outside the harassed employee's immediate chain of command could be in a position to affect the harassed employee's employment. For instance, a supervisor in a safety unit might be responsible for certifying employees before they are reassigned or promoted. An employee who is sexually harassed by that supervisor could reasonably fear that the supervisor would carry out a threat to refuse to certify the employee even though the supervisor was not in the employee's immediate chain of command. The focus should be on whether the harasser has the ability, or is reasonably perceived to have the ability, to alter the terms or conditions of the harassed employee's employment.

The Department respectfully requests that this Court avoid fashioning a hard and fast definition of "supervisor" at this time that would apply to all future cases. Rather, future cases should be decided on a case by case basis, after evaluation of all the surrounding facts and circumstances, to allow application of the MHRA to a wide variety of employment situations. The Department also requests that if the Court is inclined to adopt a test, the test focus on whether the harasser was in a position to affect the harassed person's employment.

CONCLUSION

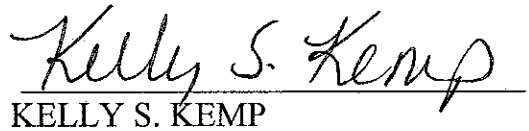
As explained above, the Commissioner's interpretation of the MHRA is consistent with the explicit wording of the relevant statutory provisions and furthers the MRHA's purpose of eliminating sexual harassment, as broadly defined by Minn. Stat. § 363A.03, subd. 43, from the Minnesota workplace. This Court should therefore reverse the

decision of the court of appeals, which incorrectly ruled that a plaintiff bringing a claim against her employer as a result of a supervisor's sexual harassment has to prove an element that is not present in the statute, was not intended by the Legislature, and is inconsistent with the purposes of the MRHA.

Dated: 11-26-07

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota



KELLY S. KEMP
Assistant Attorney General
Atty. Reg. No. 0220280

445 Minnesota Street, Suite 900
St. Paul, Minnesota 55101-2127
(651) 297-4139 (Voice)
(651) 296-1410 (TTY)

ATTORNEYS FOR THE
COMMISSIONER OF THE MINNESOTA
DEPARTMENT OF HUMAN RIGHTS

AG: #1904743-v1