MINNESOTA STATE LAW LIBRARY

NO. A06-1693

State of Minnesota
In Supreme Court

Judy Frieler,

Appellant,

v.

Carlson Marketing Group, Inc.,

Respondent.

BRIEF OF AMICUS CURIAE MINNESOTA CHAMBER OF COMMERCE

HALUNEN & ASSOCIATES
Joni M. Thome (#232087)
Frances E. Baillon (#028435X)
220 South Sixth Street
Suite 2000
Minneapolis, MN 55402
(612) 605-4098

Attorneys for Appellant

BRIGGS AND MORGAN, P.A.
Eric J. Magnuson (#66412)
Gregory J. Stenmoe (#131155)
Steven W. Wilson (#179024)
2200 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 977-8400

Attorneys for Respondent

HALLELAND LEWIS NILAN & JOHNSON, P.A.
Joseph G. Schmitt (#231447)
Peter Gray (#25809X)
Megan J. Backer (#387141)
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402
(612) 338-1838

Attorneys for Minnesota Chamber of Commerce

(Additional Counsel for Amici listed on following page)

2007 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

LORI SWANSON
Attorney General, State of Minnesota
Kelly S. Kemp (#0220280)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 215-1561

Attorneys for Commissioner of the Minnesota Department of Human Rights

LITTLER MENDELSON, P.C.
Kerry L. Middleton (#26622X)
1300 IDS Center
80 South Eighth Street
Minneapolis, MN 55402-2136
(612) 630-1000

Attorneys for Employer's Association, Inc.

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

Attorneys for National Employment Lawyers Association

DORSEY & WHITNEY, LLP
Robert R. Reinhart (#90566)
Marilyn J. Clark (#0386615)
50 South Sixth Street, Suite 1500
Minneapolis, MN 55402-1498
(612) 340-2600

Attorneys for Minnesota Employment Law Council

MEAGHER & GEER, P.L.L.P.
John J. McDonald, Jr. (#136815)
Bradley J. Lindeman (#0298116)
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402-3788
(612) 338-0661

Attorneys for Minnesota Defense Lawyers Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

STATEMENT OF INTEREST 1

ARGUMENT 3

A. The Court Must Examine the Legislature's Intent Because the Statute is Ambiguous 3

B. The Legislative History of the 2001 Amendment Clearly Reflects the Legislature's Intent to Adopt Federal Law. 6

1. The Circumstances Preceding the 2001 Amendment Demonstrate that the Legislature Intended to Adopt the Standards Set Forth in *Faragher* and *Ellerth*. 6

2. The Contemporaneous Legislative History Demonstrates that the Legislature Intended to Adopt the Standards Set Forth in *Faragher* and *Ellerth*. 8

3. The Consequences of an Interpretation Imposing Strict Liability Would Be Absurd and Unreasonable. 12

C. The Court Should Affirm the Court of Appeals. 14

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Burkstrand v. Burkstrand, 632 N.W.2d 206 (Minn. 2001) 1, 4, 5, 12

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998) 1, 2, 7

Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs, 713 N.W.2d 817 (Minn. 2006) 5

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 1, 2, 7

Ferguson v. N. States Power Co., 239 N.W.2d 190 (Minn. 1976) 13

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

Hans Hagen Homes, Inc. v. City of Minnetrista, 728 N.W.2d 536 (Minn. 2007) 4

Hasnudeen v. Onan Corp., 552 N.W.2d 555 (Minn. 1996) 2

Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117 (Minn. 2007) 2

Mahowald v. Minn. Gas Co., 344 N.W.2d 856 (Minn. 1984) 13

Martens v. Minn. Min. & Mfg. Co., 616 N.W.2d 732 (Minn. 2000) 2

Phelps v. Commonwealth Land Title Ins. Co., 537 N.W.2d 271 (Minn. 1995) 2

Sachs v. Chiat, 162 N.W.2d 243 (Minn. 1968) 13

State v. Neisen, 415 N.W.2d 326 (Minn. 1987) 1, 4, 5

Todd v. Ortho Biotech, Inc., 175 F.3d 595 (8th Cir. 1999) 7

STATUTES

2001 Minn. Laws, ch. 194, § 1 3

Domestic Abuse Act, Minn. Stat. § 518B.01 (2000) 4

Minn. Stat. § 363.01 (2000) 3

Minn. Stat. § 363A.03, subd. 43 (2006) 1, 13

Minn. Stat. § 645.16 (2006) 1, 3, 4, 6, 13

Minn. Stat. § 645.17 (2006) 1, 4, 12

STATEMENT OF THE ISSUE

Does Section 363A.03, Subdivision 43, of the Minnesota Statutes, as amended in 2001, allow employers to establish the affirmative defense announced in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), to sexual harassment claims brought under the Minnesota Human Rights Act in light of clear legislative intent to adopt the federal *Faragher-Ellerth* standard?

The court of appeals held in the negative, reasoning that the *Faragher-Ellerth* standard does not apply to sexual harassment claims brought under the Minnesota Human Rights Act. The supreme court should hold that the *Faragher-Ellerth* standard *does* apply.

Most apposite cases and statutory provisions:

State v. Neisen, 415 N.W.2d 326 (Minn. 1987)

Burkstrand v. Burkstrand, 632 N.W.2d 206 (Minn. 2001)

Minn. Stat. § 645.16 (2006)

Minn. Stat. § 645.17 (2006)

STATEMENT OF INTEREST

The Minnesota Chamber of Commerce ("the Chamber")[1] was granted leave to participate in this appeal as *amicus curiae* by this Court's Order of November 7,

[1] The Chamber hereby certifies that (1) this *amicus* brief was not authored in whole or in part by counsel for any party and (2) no person or entity other than the Chamber, its members, or its counsel has made a monetary contribution to the preparation and submission of this brief. *See* Minn. R. Civ. App. P. 129.03.

2007. The Chamber is Minnesota's largest business-advocacy organization. It represents more than 2,400 businesses of all types and sizes from across the state. Its members employ approximately 500,000 persons, which represents approximately 20 percent of the state's private-employer workforce.

The Chamber's primary mission is to advance public-policy and job-growth strategies that create an environment for businesses statewide to prosper. In furtherance of that mission, it is the Chamber's policy to request leave to participate as *amicus curiae* only in those cases that raise an issue of consequence to the general business community. The present matter presents precisely such an issue because it could significantly affect employers in Minnesota. The Chamber has, on numerous occasions, appeared as an *amicus* before this Court in cases presenting important issues of employment law.[2]

As directed by the Court in its November 7, 2007 Order, the Chamber has conferred with Respondent and with other *amici* to avoid the submission of redundant briefs. As a result, the Chamber will focus on the legislative intent behind the 2001 amendment to the Minnesota Human Rights Act, which was to adopt in Minnesota the standards set forth in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). The Chamber expects that *amicus curiae* Minnesota Employment Law Council

---

[2] *See Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117 (Minn. 2007); *Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001); *Martens v. Minn. Min. & Mfg. Co.*, 616 N.W.2d 732 (Minn. 2000); *Hasnudeen v. Onan Corp.*, 552 N.W.2d 555 (Minn. 1996); *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271 (Minn. 1995).

will argue that the Court should adopt the *Faragher-Ellerth* standard as a judicial construct, without regard for legislative intent.

ARGUMENT

Before 2001, the Minnesota Human Rights Act ("MHRA") stated that sexual harassment exists when:

> 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, educational, or housing environment; <u>and in the case of employment, if the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action</u>.

Minn. Stat. § 363.01, subd. 41 (2000) (emphasis added). During the 2001 session, the Legislature passed a bill that amended the definition of sexual harassment to remove the underlined text shown above, and the Governor signed it into law. *See* 2001 Minn. Laws, ch. 194, § 1. Although the legislative intent behind the amendment is quite clear, the statutory text that remains is ambiguous when applied to employment-based sexual harassment claims. Based on well-accepted principles of statutory construction, the Chamber urges this Court to interpret the amended statute to give effect to what the Legislature intended: conformity with federal law.

A. The Court Must Examine the Legislature's Intent Because the Statute is Ambiguous.

"The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2006). Although

courts look first to the plain language of a statute to ascertain the intent of the Legislature, the analysis stops there only "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity." *Id.* When the language of a statute is subject to more than one reasonable interpretation, the statute is ambiguous. *See Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536, 539 (Minn. 2007).

This Court has, on prior occasions, found ambiguity in a statute and, accordingly, examined legislative intent where a statute was silent on a key point and subject to different interpretations. A vivid example is *State v. Neisen*, 415 N.W.2d 326 (Minn. 1987), where this Court interpreted a statute that, on its face, appeared to impose strict liability for the crime of selling liquor to minors. *See id.* at 327-28. The Legislature had removed language that allowed a defendant to avoid liability by establishing that he or she had conducted a good-faith investigation of the purchaser's age. *See id.* The *Neisen* Court stated that "[t]he dispositive issue, as we see it, is one of statutory construction and legislative intent." *Id.* at 327. The Court identified various unresolved questions concerning the meaning of the statute, then stated, "We have, then, an ambiguity in the current statute." *Id.* at 329. The Court referred to the canons of statutory construction in Sections 645.16 and 645.17 and concluded, "With all these factors in mind, we conclude that the legislature . . . intended to preserve the carding defense." *Id.*

More recently, in *Burkstrand v. Burkstrand*, 632 N.W.2d 206 (Minn. 2001), this Court considered a provision in the Domestic Abuse Act, Minn. Stat.

§ 518B.01 (2000), that was ambiguous following a statutory amendment because it was silent as to the effect of a district court's failure to hold a hearing within the time frame provided by statute. *See id.* at 210. The Court recited the various, contradictory arguments about the meaning of the statute. *See id.* The Court reasoned, "Given this silence [in the statute as to subject matter jurisdiction] and the opposing interpretations of the statute, we conclude that the statute is ambiguous and look to other indicators of legislative intent, as well as the statutory language, to interpret the statute." *See id.* Among the materials reviewed by the Court were transcripts of legislative committee hearings, which contained statements by the chief sponsors of the legislation. *See id.* at 210 n.7.

In this case, as in *Neisen* and *Burkstrand*, the 2001 amendment leaves the MHRA silent on a key point—the standard to be applied to employers in hostile-work-environment cases. As illustrated by the various contentions in this appeal, the statute's silence allows for multiple reasonable interpretations of the statute, which renders it ambiguous. This ambiguity must be resolved by looking beyond the text to determine the Legislature's intent. *See Burkstrand*, 632 N.W.2d at 210 & n.7; *Neisen*, 415 N.W.2d at 327-29; *see also Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 828-29 (Minn. 2006) (concluding that statutory criteria are ambiguous and considering purpose and legislative history to determine legislative intent).

B. The Legislative History of the 2001 Amendment Clearly Reflects the Legislature's Intent to Adopt Federal Law.

If a statute is ambiguous, Minnesota courts should ascertain the intent of the Legislature by examining extrinsic factors, including:

(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 attained;

(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 interpretations of the statute.

Minn. Stat. § 645.16.

The application of these factors in this case leads to the conclusion that the Legislature intended to adopt the standards that apply under federal law.

1. The Circumstances Preceding the 2001 Amendment Demonstrate that the Legislature Intended to Adopt the Standards Set Forth In Faragher *and* Ellerth.

The legislative intent behind the 2001 amendment can be ascertained by examining the circumstances in which it was enacted, the occasion and necessity for the law, the mischief to be remedied, and the object to be attained. *See* Minn. Stat. § 645.16.

After the United States Supreme Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the standard of liability for sexual harassment codified in the MHRA differed from the standard that applies in federal law. In *Todd v. Ortho Biotech, Inc.*, 175 F.3d 595 (8th Cir. 1999), the United States Court of Appeals for the Eighth Circuit analyzed both a Title VII claim and an MHRA claim. The court held in favor of the plaintiff on the Title VII claim under *Faragher* and *Ellerth*, *see id.* at 597-99, but in favor of the defendant on the MHRA claim because the "knew or should have known" language in the MHRA, which still applied to state-law sexual harassment claims, demanded a different result, *see id.* at 599.

In response to the perceived inequities arising from the *Todd* decision, the Minnesota Department of Human Rights ("MDHR") proposed legislation that would make state law conform with federal law. The MDHR drafted and requested two bills, S.F. 1215 and H.F. 767, which were passed by the Senate and the House of Representatives, respectively. The MDHR described its legislative efforts in its quarterly newsletter, noting the Supreme Court's decisions in *Faragher* and *Ellerth* and stating, "At MDHR's request, the Minnesota Legislature amended the MHRA to help bring state law into conformance with federal law on this point." *See* MDHR, *Minnesota Human Rights Act Changes: Definition of Sexual Harassment*, The Rights Stuff, Fall 2001, at 12, *reprinted at* Chamber App. 11-13. The chief sponsor of the Senate bill, Sen. Richard J. Cohen, expressly referred to the MDHR's request and its goals when urging his colleagues to

approve the bill. *See An Act Relating to Human Rights, S.F. 1215: Hearing Before Minn. Senate Judiciary Comm.*, 82d Sess. (Apr. 3, 2001) (audiotape on file with undersigned counsel), *reprinted at* Chamber App. 1 (statement of Sen. Cohen). Thus, the circumstances of the 2001 amendment show that the Legislature intended to make state law conform with federal law.

2. *The Contemporaneous Legislative History Demonstrates that the Legislature Intended to Adopt the Standards Set Forth In* Faragher *and* Ellerth.

The legislative history of the 2001 amendment clearly demonstrates the intent of the Legislature to impose the *Faragher-Ellerth* standard in Minnesota.

At a February 26, 2001 hearing of the House of Representatives Civil Law Committee, the Commissioner of the MDHR at that time, Janeen Rosas, explained the proposed amendment and assured the committee that the MDHR did not intend to impose strict liability on employers. Rather, the Commissioner explained, the amendment was designed to adopt federal law:

> COMMISSIONER ROSAS: *The reason for this proposal is to have state law conform with federal law.* There were some U.S. Supreme Court decisions recently in the area of hostile environment sexual harassment—and let me point out that we are not proposing any change whatsoever in *quid pro quo* situations, where an employee is requested or required to provide sexual favors in exchange for some job benefit. That is absolutely illegal and there is no defense to that and we are not proposing any change to that. What we are proposing is in the area of hostile environment, where a supervisor is harassing an employee and creating a hostile work environment for her or him, *the standard would be the same as it is in federal law: that the employer is liable unless the employer can show that he or she took reasonable actions to prevent the harassment and correct it when it came to the employer's attention.* We would delete this phrase "know or should have known." This

> "know or should have known" standard is ambiguous and we believe that this amendment serves both the charging party/plaintiff community as well as the respondent community. As far as the charging party community goes, it eliminates one more thing that the plaintiff needs to prove in order to establish sexual harassment. In the case of the respondent community, it standardizes the requirement so that respondents know what the standard is going to be. They don't need to wonder, "Am I going to be sued in state court or federal court and what is going to be the standard?" . . . We think that it helps both sides in this kind of dispute to remove this section and bring state law into parallel with federal law.
>
> REPRESENATIVE LIPMAN: I am wondering on page 2 if lines 21-23 would make an employer strictly liable for the harassment or misconduct undertaken by its employees regardless of their facilitating or coddling or acquiescing in that conduct or even knowing about that conduct. If an employee engages in misconduct, does this strikeout make employers strictly liable regardless of fault?
>
> THE CHAIR: Commissioner Rosas, do you have an opinion on that question?
>
> COMMISSIONER ROSAS: Yes, thank you. Mr. Chair, Mr. Lipman, both state and federal sexual harassment statutes are extensively discussed in case law, and in both state and federal law the courts look at whether the employer took reasonable actions to prevent and address the alleged harassment. *So, there would not be strict liability* except for the *quid pro quo* situations that I discussed earlier.

H.F. 767: Hearing Before Minn. House Civil Law Comm., 82d Sess. (Feb. 26, 2001) (emphasis added), *quoted in* Sheila Engelmeier & Jonathan Hegre, *(A)Mending Their Act?*, Hennepin Lawyer, Jan. 2002, at 18, *reprinted at* Chamber App. 14-19.

The Senate Judiciary Committee also held a hearing, on April 3, 2001, at which the then-current Commissioner explained MDHR's purpose. The colloquy between the Commissioner and two Senators is most revealing:

COMMISSIONER ROSAS: Thank you, Mr. Chair. I am Janeen Rosas, Commissioner of the Minnesota Human Rights Department. The bill before you has four sections. The first one modifies the definition of sexual harassment *to bring it into conformance with federal law based on recent U.S. Supreme Court cases.*

. . . .

SENATOR NEUVILLE: I do have a couple short questions. On Section 1, you're saying that there's a Supreme Court case that makes an employer responsible for sexual harassment even if they don't know about it . . . that it's strict liability?

COMMISSIONER ROSAS: Mr. Chair, Senator Neuville, the U.S. Supreme Court in the case of *Faragher versus City of Boca Raton* and also *Burlington Industries versus Ellerth*—1998 cases—and we can provide you with those citations if you're interested—clarified the law across all the circuits because there was a great deal of confusion, and there were different standards in different circuits. They said that there is strict liability for supervisory harassment, but there are affirmative defenses. The first is, did the employer act reasonably? And the way that you would evaluate that is, did the employer have a policy in place prohibiting discrimination or harassment? Was that policy disseminated through the workforce? Did both the supervisors know about their duties, and did the employees know about their opportunities to complain if they felt they were victimized?

The second affirmative defense is, did the employee act reasonably, given that there was a policy in place and it had been publicized and people had been trained so that the employee reasonably should have followed it? Did the employee follow the procedure internally? Both of those are affirmative defenses that exist for employers in federal law now.

SENATOR NEUVILLE: So, Mr. Chair, are we incorporating those affirmative defenses in our statute now that we're deleting this other language?

COMMISSIONER ROSAS: Mr. Chair, Senator Neuville, it is customary for state courts to look to federal civil rights law to interpret state statutes if there is not a reason—if the state statute does not prohibit that on its face. *If this amendment passes, the*

Human Rights Department will immediately begin interpreting our statute in accordance with federal law. Presumably there will be an appellate court decision that will do that.

SENATOR NEUVILLE: Mr. Chair, Commissioner, why should we just assume that the courts are going to do it? If we're deleting this language in response to a court case, why don't we specifically—sometimes cases are brought just under the state statute. Why don't we incorporate the affirmative defenses as well? What would be the harm in that?

COMMISSIONER ROSAS: Mr. Chair, Senator Neuville, in both federal and state law, much of sexual harassment law is established by case law as opposed to statute, and we feel that the case law that exists in federal law will immediately be applied in state court making amendment of the statute unnecessary. It's a complicated—as you know, a very complicated area of law, and with all the nuances in various cases, better addressed to case law as opposed to statute.

. . .

SENATOR COHEN: If I might, Senator Neuville, I would also expect that if you place affirmative defenses—a couple of affirmative defenses in the statute, even if you have limiting language, you run the risk, I would assume, of having a trial court infer from that that, possibly, those are the only affirmative defenses that could be argued. You know it's possible that a court from this language could look at some type of—other type of defense, maybe something imputed within the course of conduct. And if you put language in that's limiting, I think you'd be self-defeating.

SENATOR NEUVILLE: *Mr. Chair, maybe it's enough as long as the record clearly reflects that the deletion of this language is not intended to eliminate any affirmative defenses that an employer might have.* Am I at least correct in saying that?

SENATOR COHEN: Mr. Chairman and Senator Neuville, I think that's clear.

. . .

> COMMISSIONER ROSAS: Mr. Chair, Senator Neuville, yes, that is the Department's intent.

An Act Relating to Human Rights, S.F. 1215: Hearing Before Minn. Senate Judiciary Comm., 82d Sess. (Apr. 3, 2001) (emphasis added) (audiotape on file with the undersigned counsel), *reprinted at* Chamber App. 1-10.

Thus, the legislative history demonstrates a clear legislative intent to adopt the federal *Faragher-Ellerth* standard and apply it to hostile-work-environment claims under the MHRA. *See Burkstrand*, 632 N.W.2d at 210 n.7 (discerning legislative intent from statements by sponsoring legislators during committee hearings).[3]

3. The Consequences of an Interpretation Imposing Strict Liability Would Be Absurd and Unreasonable.

As a general matter, when determining legislative intent, this Court may presume that the Legislature did not intend to create an unreasonable or absurd result. *See* Minn. Stat. § 645.17. Imposing strict liability on employers for hostile-environment harassment regardless of employer fault would be both unreasonable and absurd. A strict-liability approach would unfairly impose

---

[3] *Amicus curiae* National Employment Lawyers Association argues that the lack of any further action by the Legislature after the 2001 amendment indicates that "[t]he Minnesota legislature has chosen to continue with its public policy of applying the same standard" to sexual harassment cases arising from "employment, education, public services or housing." (NELA Br. at 12-13.) There is no legal authority for this means of statutory construction, either in Chapter 645 or in the case law. Furthermore, there is no factual basis for this argument because NELA has not cited any statement by a legislator concerning the reasons why no further action was taken after 2001.

liability on employers that made reasonable efforts to prevent inappropriate conduct or were unaware of such conduct.

Furthermore, workplace harassment based on sex simply is not the type of risk that warrants the blunt, draconian consequences of strict liability. As a tort-law concept, strict liability generally is applied to abnormally dangerous activities—activities that cannot be made safer through the exercise of reasonable care associated with a negligence standard of liability but that are nonetheless valuable to society. For example, in *Sachs v. Chiat*, 162 N.W.2d 243 (Minn. 1968), this Court imposed strict liability for pile driving due to its ultrahazardous and inherently dangerous nature. *See id.* at 246. On the other hand, in *Ferguson v. Northern States Power Co.*, 239 N.W.2d 190 (Minn. 1976), this Court considered extending the doctrine of strict liability to the maintenance of an uninsulated, high-voltage transmission line but declined to do so because any inherent risk did not justify the economic consequences that would accompany a strict-liability standard. *See id.* at 194; *see also Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 860-62 (Minn. 1984) (declining to impose strict liability for leaks in gas lines located in public streets). Employment simply is not inherently dangerous and, thus, workplace harassment based on sex should not give rise to strict liability.

Therefore, the relevant factors in Section 645.16 should persuade this Court to interpret Section 363A.03, Subdivision 43, to impose the *Faragher-Ellerth* standard to sexual harassment claims brought under the MHRA.

C. The Court Should Affirm the Court of Appeals.

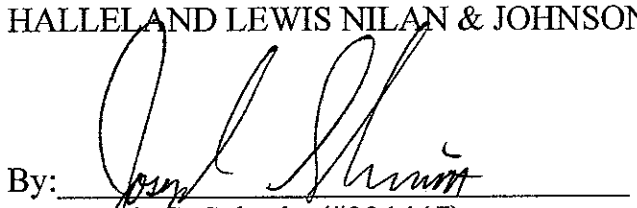
Applying the *Faragher-Ellerth* standard to the facts of this case, the Court should affirm the judgment of the court of appeals for the reasons stated at pages 39-48 of Respondent's Brief.

CONCLUSION

The Minnesota Chamber of Commerce respectfully requests that the Court interpret the 2001 amendment to the MHRA to apply the *Faragher-Ellerth* standard to claims of sexual harassment in the workplace. Doing so will fulfill the Legislature's intent when amending the MHRA in 2001, will provide sufficient protection from sexual harassment to Minnesota employees, and will avoid the imposition of strict liability on employers that are not at fault.

DATE: December 21, 2007

HALLELAND LEWIS NILAN & JOHNSON, P.A.



By: _____

Joseph G. Schmitt (#231447)
Peter Gray (#25809X)
Megan J. Backer (#387141)
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4501
(612) 338-1838

ATTORNEYS FOR *AMICUS CURIAE*
MINNESOTA CHAMBER OF COMMERCE

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01, subd. 3(c)(1) of the Minnesota Rules of Civil Appellate Procedure, counsel for *amicus curiae* Minnesota Chamber of Commerce hereby certify that this brief complies with the word count limitation set forth in the Rule. This brief was prepared using Microsoft Word 2002 word processing software. All typed material, including all headings and footnotes, appear in at least 13-point Times New Roman font, which complies with the typeface requirements of the Rule. According to the automatic word-count feature of the software, this brief, exclusive of pages containing the Table of Contents, Table of Authorities, and this Certificate, contains 3,504 words.

DATE: December 21, 2007

HALLELAND LEWIS NILAN & JOHNSON, P.A.

By: _____

Joseph G. Schmitt (#231447)
Peter D. Gray (#25809X)
Megan J. Backer (#387141)
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4501
(612) 338-1838

ATTORNEYS FOR *AMICUS CURIAE*
MINNESOTA CHAMBER OF COMMERCE