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NO. A06-1693

State of Minnesota
In Supreme Court

Judy Frieler,

Appellant,

v.

Carlson Marketing Group, Inc.,

Respondent.

BRIEF OF THE MINNESOTA DEFENSE LAWYERS ASSOCIATION AS *AMICUS CURIAE*

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LEGAL ISSUES

I. Should employer liability for hostile work environment sexual harassment under the Minnesota Human Rights Act be based on whether the employer knows or should have known of the existence of harassment and failed to take appropriate remedial action, or should the Court adopt a different standard of liability based on vicarious liability for sexual harassment?

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

Apposite Authority:

Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997)
Continental Can Co. v. Minnesota, 297 N.W.2d 241 (Minn. 1980)
Lange v. National Biscuit Co., 211 N.W.2d 783 (Minn. 1973)
Minn. Stat. § 363A.03, subd. 43 (2006)
Minn. Stat. § 645.16 (2006)
Minn. Stat. § 645.17 (2006)

STATEMENT OF INTEREST[1]

The Minnesota Defense Lawyers Association (MDLA) is a non-profit Minnesota corporation, founded in 1963, whose members are trial lawyers representing defendants in civil litigation. MDLA has grown to include representatives from over 180 law firms across Minnesota, with 743 individual members.

The MDLA is actively involved in the protection of the rights of civil litigants, the promotion of high standards of professional ethics and competence, and the improvement of many areas of law in which its members regularly practice. The MDLA's interest in this case is primarily a public one: to promote clarity of the law and uniform application of important legal principles at issue in civil litigation in Minnesota. However, to the extent that the case involves the potential modification of defenses available under Minnesota's anti-discrimination law, MDLA members have a private interest in the case as well.

The undersigned are current members of the Amicus Curiae Minnesota Defense Lawyers Association (MDLA) and are qualified to brief this court on the legal and policy issues presented by this appeal. The position that the MDLA takes in this brief has not been drafted, approved or financed by respondent or respondent's counsel. Any duplication of MDLA's analysis and the respondent's is purely coincidental. The MDLA thanks the Minnesota Supreme Court for permitting it to represent its interest in this case.

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[1] Rule 129.03 Certification: This brief was wholly authored by the undersigned counsel for the *amicus curiae* Minnesota Defense Lawyers Association. No counsel for any party authored this brief in whole or in part. No person or entity, other than the Minnesota Defense Lawyers Association, its members and/or its counsel, has made any monetary contributions to the preparation of submission of this brief.

INTRODUCTION

This case requires the Court to determine the appropriate standard for employer liability to be applied in cases of hostile work environment sexual harassment. In 2001 the Minnesota Legislature amended Minn. Stat. § 363A.03, subd. 43, the statute defining "sexual harassment," by deleting the following language from the third section which describes hostile work environment harassment: "*and in the case of employment, the employer knows or should have known of the existence of the harassment and fails to take timely and appropriate actions.*" 2001 Minn. Laws c. 194 § 1 (herein "knows or should have known"). Following the amendment, the Minnesota Human Rights Act's (MHRA) definition of sexual harassment was silent as to the standard to be applied for employer liability. Presumably, the legislature intended that the appropriate standard would be developed judicially.

Three positions have emerged with regard to employer liability for hostile work environment sexual harassment under the MHRA: (1) strict liability for all employee harassment; (2) vicarious employer liability for a supervisor's harassment subject to affirmative defenses as defined by federal law, the so-called *Faragher/Ellerth* defenses[2]; and (3) the "knows or should have known" negligence standard for all employee harassment. The MDLA urges the Court to affirm the court of appeal's decision to continue to apply the "knows or should have known" standard because it is the one best-suited to fulfill the public policy goals of the MHRA.

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[2] *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998); *Burlington Industries, Inc., v. Ellerth,* 524 U.S. 742 (1998).

ARGUMENT

THE COURT OF APPEALS CORRECTLY INTERPRETED THE MHRA AND THE DECISION SHOULD BE AFFIRMED.

I. PUBLIC POLICY FAVORS A "KNOWS OR SHOULD HAVE KNOWN" STANDARD WITH REGARD TO EMPLOYER LIABILITY FOR HOSTILE WORK ENVIRONMENT SEXUAL HARASSMENT UNDER THE MHRA.

A. THE MHRA, AS AMENDED, IS AMBIGUOUS WITH REGARD TO EMPLOYER LIABILITY.

This case represents the Court's first opportunity to interpret the 2001 amendment to the MHRA. When the Court interprets a statute, it must ascertain and effectuate the intentions of the Legislature. Minn. Stat. § 645.16 (2006). The Court should not presume that the legislature intended an unreasonable result. Minn. Stat. § 645.17. When the statute is ambiguous, the intention of the legislature may be ascertained by considering, among other things, the legislative history, the occasion and necessity for the law, the mischief to be remedied, and the consequences of a particular interpretation. Minn. Stat. § 645.16.

The legislative history indicates that the Minnesota Department of Human Rights requested that the Minnesota legislature amend the MHRA's definition of hostile work environment harassment in response to the *Faragher/Ellerth* Supreme Court decisions which define employer liability for sexual harassment by a supervisor under Title VII. STATE OF MINNESOTA SENATE JUDICIARY COMMITTEE (April 3, 2001). The Commissioner of the Minnesota Department of Human Rights explained that it was customary for state courts to look to federal civil rights laws to interpret state statutes

where they are not inconsistent. *Id.* However, the Commissioner testified that it was not desirable to include liability standards within the text of the statute, explaining that because sexual harassment is so complex, it would not be appropriate to legislatively define the appropriate standard. *See id.* Instead, the Commissioner testified that she expected that federal law will immediately be applied in state court. *See id.*

Thus, the legislative history does reveal that the motivation for the amendment was to modify the definition of sexual harassment to make it consistent with federal law. However, it is the MDLA's understanding that other amici will be briefing the issue of whether the federal case law should be adopted. Therefore, in the interest of not repeating those arguments, the MDLA offers an alternative interpretation. This interpretation suggests that for the purposes of determining the liability standard to be applied for conduct falling within the definition of sexual harassment, the Minnesota legislature sought to allow the courts freedom to judicially develop an appropriate standard in light of the developing case law. *See e.g., Todd v. Ortho Biotech, Inc.*, 175 F.3d 595, 599 (8th Cir. 1999) (holding that because the MHRA contained the "knows or should have known" language, the Minnesota Supreme Court would be unable to apply the contrary standard from *Faragher* and *Ellerth*).

Notably, by removing the statutorily defined standard, the legislature has not precluded the Court from adopting the same or similar standard. Rather, the statute as amended contains no standard for employer liability; therefore, it is the Court's responsibility to adopt one that is consistent with the goals of the MHRA. Indeed, by not explicitly adopting the *Faragher/Ellerth* defenses, the legislature intended to allow the

Court to consider which formulation of employer liability will best serve the numerous public policy interests at stake.

Following the 2001 amendment, the Minnesota Court of Appeals continued to apply the "knows or should have known" standard. *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 176-77 (Minn. Ct. App. 2007). The Minnesota Court of Appeals again ratified the "knows or should have known" standard in the present case holding that Minnesota "has not adopted the supervisor/non-supervisor distinction, or formally recognized the *Faragher/Ellerth* standard." *Frieler v. Carlson Marketing Group, Inc.*, 27-CV-05-011378 at 7 (Minn. Ct. App. July 24, 2007). In these decisions the court of appeals did not misinterpret the amendment. Rather, the court adopted a standard of liability that reflects the intent of the MHRA as a whole.

B. THE "KNOWS OR SHOULD HAVE KNOWN" STANDARD IS BEST-SUITED TO ACCOMPLISH THE PUBLIC POLICY GOALS OF THE MHRA.

One of the purposes of the MHRA is to rid the workplace of disparate treatment of employees on the basis of sex, including the elimination of hostile work environment sexual harassment. *See Continental Can Co. v. Minnesota,* 297 N.W.2d 241, 248 (Minn. 1980) (recognizing and defining hostile work environment harassment by co-employees under the MHRA). The Act does not impose a duty on the employer to maintain a pristine work environment. *Id.* at 249. Rather, to achieve the goal of ending harassment in the workplace, the law must create a system that encourages employers and employees to take affirmative steps to recognize and eliminate harassment. To fulfill these purposes, the MHRA imposes a duty on the employer to take prompt and appropriate action when it

knows or should know of conduct in the workplace rising to the level of actionable sexual harassment. *Id.*

By applying the "knows or should have known" standard, liability is imposed only on those employers who are negligent with regard to their duty under the MHRA. *Id.* (co-employee harassment); *Fore v. Health Dimensions, Inc.,* 509 N.W.2d 557, 560 (Minn. Ct. App. 1993) (supervisor harassment); *Johnson v. Ramsey County.,* 424 N.W.2d 800, 808 (Minn. Ct. App. 1988), *pet. for rev. denied* (Minn. Aug. 24, 1988); *Klink v. Ramsey County,* 397 N.W.2d 894, 901 (Minn. Ct. App. 1986), *rev. denied* (Minn. Feb. 13, 1987). By requiring that an employer knows or should have known of unlawful harassment yet failed to remedy the conduct, public policy is furthered because employers have a legal incentive to train employees to recognize unlawful conduct, to report unlawful conduct, and to respond when unlawful conduct is reported. In essence, application of this standard credits an employer who engages in reasonable efforts to discharge its lawful duty, regardless of whether the harasser is a supervisor, subordinate, or peer.

Moreover, application of the "knows or should have known" standard creates a legal incentive to discipline the perpetrator of the unlawful act. By requiring the failure of appropriate remedial measures as an element of the prima facie case, an employer complying with the MHRA avoids liability by appropriately disciplining the offending employee. Application of a strict liability standard to supervisor conduct removes the legal incentive for employers to discipline employees engaged in unlawful conduct, and

allows the offending employee the ability to escape repercussions for his or her conduct by passing liability to the employer.

In essence, the "knows or should have known standard" credits employers who implement best practices, who actively seek out and investigate complaints of harassment, and who effectively discipline and mediate work place harassment. This standard also recognizes that when an employer acts reasonably and responsibly it should not have to answer for conduct that it is unaware of and had no chance to remedy. *See e.g., Weaver v. Minnesota Valley Labs. Inc.,* 470 N.W.2d 131, 134-35 (Minn. Ct. App. 1991) (refusing to impute knowledge of sexual harassment where employer had sexual harassment policy in place).

Likewise, the "knows or should have known" standard provides an incentive for employees to report harassing behavior to their employer. The public interest of putting an end to workplace harassment is not served if an employee is allowed to keep harassment secret and allow damages to accrue until a charge is filed and the employer is sued. Rather, the public policy of ending workplace sexual harassment is best served by a system that encourages employees who witness or who are the victim of harassment to report the conduct. By providing notice to the employer of the harassing conduct, the employee satisfies the "knows or should have known" standard by providing actual notice to the employer.

The "knows or should have known" standard does not leave an employee who did not report conduct without redress. For example, in situations where the employee can show that there was no one other than the harasser to report to or where the harassment

was inordinately extreme and pervasive, knowledge of the harassment can be imputed to the employer under the "knows or should have known" standard. *See e.g., McNabb v. Cub Foods,* 352 N.W.2d 378, 383 (Minn. 1984) (manager's knowledge that an employee was being harassed by a co-employee was imputed to the employer); *Giuliani v. Stuart Corp.,* 512 N.W.2d 589 (Minn. Ct. App. 1994); *Heaser v. Lerch, Bates & Associates Inc.,* 467 N.W.2d 833, 835 (Minn. Ct. App. 1991) (knowledge of harassment imputed to the employer in an unemployment compensation appeal, where employee worked alone with her harasser in a distant regional office and did not report the supervisor's harassment).

While the negligence standard makes a plaintiff responsible for showing that the employer acted unreasonably, the federal *Faragher/Ellerth* creates vicarious liability subject to affirmative defenses. In terms of practical results, both standards are substantially the same. However, from a public policy standpoint the "knows or should have known" standard is preferable because by keeping the burden on the plaintiff to show employer negligence, it recognizes the plaintiff's important role in identifying and stopping harassment and encourages employees to try to resolve their complaints with the employer before resorting to litigation. Therefore, the "knows or should have known" standard is best-suited to fulfill the goals of ending work place sexual harassment by providing incentives for employers to proactively respond to sexual harassment, encouraging employees to do their part to end harassment, and avoiding litigation because more complaints will be resolved using internal grievance procedures.

C. A STRICT LIABILITY STANDARD IS COUNTER-PRODUCTIVE TO THE GOALS OF THE MHRA.

Both the Appellant and amicus, National Employment Lawyers Association (NELA) argue that the statute's silence with regard to a standard for employer liability indicates an intent to make an employer strictly liability for harassment caused by any employee. (Appellant Br. at 23-26; NELA Br. at 7-10.) Such a result would be extreme. By applying a strict liability standard, an employer would be denied legal defenses when that employer has taken reasonable steps to prevent and learn of harassing conduct, and where the employer's response to harassing conduct once discovered, has been appropriate.

Such an interpretation of employer liability is unprecedented in Minnesota. *See Lange v. National Biscuit Co.,* 211 N.W.2d 783, 784 (Minn. 1973) (explaining that an employer is only liable for the torts of its employees conducted within the scope of the employment); *see also, Faragher,* 524 U.S. at 757 ("[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment."). Further, strict employer liability has never been a feature of the MHRA. *See Cummings v. Koehnen,* 568 N.W.2d 418, 424 (Minn. 1997); *Fore,* 509 N.W.2d at 559 (holding that the employer had no duty to prevent harassment by a supervisor where it had no prior knowledge of other harassment). There is simply no evidence that the legislature intended to make such sweeping changes to sexual harassment law under the MHRA.

Moreover, strict employer liability for hostile work environment cases is counter-productive to the goals of the MHRA. First, by applying a strict liability standard

plaintiffs would not be expected to report harassing conduct before filing a charge. As a result, a plaintiff with no duty to show that the employer was at fault may have more to gain by commencing litigation and seeking a settlement then by invoking the employer's internal grievance procedures. Although strict liability lowers the hurdle for individual plaintiffs, the result is at odds with the public policy goal of identifying and ending workplace harassment. *See Ellerth,* 524 U.S. at 764 ("[t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose").

The rationale advanced by the Appellant and NELA in favor of adopting a strict liability standard is that the employer should consider the harm caused by an employee as a cost of doing business. *See Lange v. National Biscuit Co.,* 211 N.W.2d at 403. However, the statutory scheme is not preventative, but is remedial in nature. *Fore,* 509 N.W.2d at 561. Thus, it is not the intent of the MHRA to impose this degree of liability on employers. Yet, under a system of strict liability for sexual harassment, employers would be forced to take extra measures beyond policies, training and discipline to insure against the risk of a sexual harassment suit. This will result in less employee privacy and freedom. *See e.g., Ellerth,* 524 U.S. at 770 (Thomas, J., dissenting) ("[s]exual harassment is simply not something that employers can wholly prevent without taking extraordinary measures – constant video and audio surveillance, for example – that would revolutionize the workplace in a manner incompatible with a free society"). In addition, employers might be forced to avoid employing individuals who pose a risk because they have been charged with or accused of any number of behaviors, whether those behaviors

are unlawful or substantiated. Instead, the law should encourage training, conciliation and reform over intense employer scrutiny of work-place conduct.

D. LITIGATION STRATEGY IN RESPONSE TO A STRICT LIABILITY STANDARD WOULD INHIBIT THE GOALS OF THE MHRA.

Members of the MDLA are often asked to advise employers who are facing complaints of potential sexual harassment. In advising these employers, it is important for the lawyers to consider the impact of potential future litigation. Consequently, a system of strict liability for hostile work environment sexual harassment will compel employers to adopt litigation strategies that are inconsistent with the purposes and goals of the MHRA.

Under either the "knows or should have known" standard or the *Faragher/Ellerth* analysis, lawyers advise employers that litigation may be defended on the basis that an employer took prompt and appropriate remedial action when faced with knowledge of potentially harassing conduct. For example, when an employer receives an employee complaint involving borderline harassing conduct or inappropriate, but non-sexually harassing conduct, the employer will have a legal incentive to investigate the complaint and discipline the offending employee. This legal incentive is created because the employer will want to preserve an alternate defense should a court or fact-finder determine that the complained-of conduct was sufficient to rise to the level of legally prohibited conduct. Therefore, under either the "knows or should have known" standard or the *Faragher/Ellerth* analysis the employer will be advised to respond to every complaint, regardless of the likelihood that the complaint would give rise to liability

under the MHRA. As a result, the employer's response is more comprehensive because it will react to a greater scope of employee conduct, including conduct which may or may not be legally actionable harassment. In addition, when employers are encouraged to be more proactive, work place harassment is more likely to be discouraged.

In contrast, application of a strict liability standard would strip employers of the legal defense that their response to the potentially harassing conduct was appropriate. Without this legal incentive to respond, counsel for employers will be less likely to advise their client to engage in the investigation of borderline conduct or conduct unlikely to implicate the MHRA's prohibition of sexual harassment. Rather, when faced with a complaint of harassment under a strict liability system, while there is no legal incentive for the employer to investigate and respond to the complaint, there is a legal incentive to deny that the conduct amounts to harassment. As a result, to avoid the implication that the employer viewed the conduct at issue as prohibited by law, counsel will be more likely to advise the employer to take an immediate position that the complained-of conduct is non-actionable.

Further, by applying a strict liability standard and removing the employer's defense, any investigation will be conducted with knowledge that the contents of the investigation will be subject to potential discovery. Therefore, while the employer's efforts would be fruitless in developing a defense, an investigation could lead to the discovery of evidence that would be potentially harmful in future litigation, particularly if developed through the employer's own efforts. However, this risk is outweighed when applying a "knows or should have known" standard or the *Faragher/Ellerth* analysis

because the investigation and discipline is carried out with any eye toward developing the defense that the employer's response was appropriate regardless of the nature of the conduct. There, the employer may investigate without fear of developing evidence against it in future litigation.

Employers in Minnesota must operate in a business environment as well as a legal environment. Thus, providing a defense based on an appropriate response encourages employers to utilize best practices with regard to employee complaints of potentially harassing conduct and is the best system to further the employee's interest in having a workplace free of discrimination, the MHRA's interest in eliminating discrimination, and the employer's interest in defending against potential litigation.

II. IF THE COURT ADOPTS THE FEDERAL *FARAGHER/ELLERTH* DEFENSES, THE DEFINITION OF "SUPERVISOR" SHOULD BE LIMITED.

In *Faragher* and *Ellerth*, the Supreme Court held that under Title VII an employer is subject to vicarious liability for unlawful harassment if the harassment was committed by a "supervisor with immediate (or successively higher) authority over the employee." *Faragher,* 524 U.S. at 807; *Ellerth,* 524 U.S. at 765. Should the Court determine that the *Faragher/Ellerth* affirmative defenses are applicable to an analysis of hostile work environment claims based on sex pursuant to the MHRA, a determination of whether the alleged harasser is a supervisor will have a potentially critical impact on the analysis of employer liability. An analysis of the case law and public policy rationale supports adopting a definition of supervisor that is limited to "individuals with the power to take tangible employment action."

In adopting the *Faragher/Ellerth* affirmative defenses, the Supreme Court explained that vicarious liability is appropriate only for supervisors because supervisors are aided in such misconduct by the authority that the employers delegated to them. *Faragher,* 524 U.S. at 802-03; *Ellerth,* 524 U.S. at 763. Under this reasoning, the individual's authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment. *See* EEOC Compliance Manual, Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 18, 1999), *available at* http://www.eeoc.gov/policy/docs/harassment.html. The determination as to whether a harasser has such authority should be based on his or her job function rather than job title and must be based on specific facts. *Id.*

Although the Supreme Court did not discuss who is and is not a supervisor, the Eighth Circuit has sought to define the scope of "supervisor." In *Joens v. John Morrell & Co.,* the Eighth Circuit adopted the view that to be a supervisor, "the alleged harasser must have had the power (not necessarily exercised) to take tangible employment action against the victim, such as the authority to hire, fire, promote or reassign to significantly different duties." 354 F.3d 938, 940 (8th Cir. 2004). There, the court explained that although the foreman had the power to "write up" the employee, he was not a supervisor because he did not have direct authority to control the work of the employee and because the ultimate decision to discipline lay with the human resource department. *Id.* at 940-41.

In *Weyers v. Lear Operations Corp.,* the court found that the team leader who is responsible for assigning tasks on the assembly line and for ensuring that the line ran according to schedule was not a supervisor even though the team leader's signed

performance evaluation was at least partially relied on in making the decision to terminate the plaintiff. 359 F.3d 1049, 1057 (8th Cir. 2004). There, the court explained that the team leader did not have the authority to take tangible employment actions and he could not reassign employees to significantly different duties. *Id.* Interestingly, the night shift superintendent who did make the decision to terminate the plaintiff testified that team leaders were viewed by the employees as supervisors. *Id.* at n. 7. However, the court found that the team leader's apparent authority would be an insufficient basis to support a finding of supervisor status. *Id.* (*citing Todd v. Ortho Biotech, Inc.,* 175 F.3d 595, 598 (8th Cir. 1999)).

The Eighth Circuit has correctly defined the proper scope of "supervisor" for purposes of applying vicarious employer liability under the *Faragher/Ellerth* standard. If a supervisor is outside the chain of command of the plaintiff and has no actual supervisory control, it follows that that supervisor cannot adversely affect the terms of the plaintiff's employment. In these cases, harassment by a supervisor outside the chain of command should be analyzed as co-employee harassment.

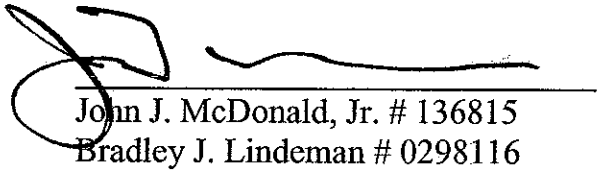
In addition, in the unusual case where the employee is mistaken about the actor's authority, perhaps because the chains of command are unclear, the employee's mistaken conclusion must be a reasonable one to impute liability to the employer. *See Ellerth,* 524 U.S. at 759.

CONCLUSION

For the reasons stated above, the MDLA asks the court to affirm the Minnesota Court of Appeals decision to continue to apply the "knows or should have known" standard for employer liability in cases of hostile work environment sexual harassment under the MHRA. In the alternative, if the Court should adopt the federal *Faragher/Ellerth* standard, the MDLA asks the court to adopt the Eighth Circuit Court of Appeals' definition of "supervisor" for purposes of imposing vicarious employer liability.

Respectfully submitted,

Dated: December 21, 2007



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