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NO. A06-1693

State of Minnesota
In Supreme Court

Judy Frieler,

Appellant,

v.

Carlson Marketing Group, Inc.,

Respondent.

BRIEF OF EMPLOYERS ASSOCIATION, INC. AS *AMICUS CURIAE*

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STATEMENT OF THE *AMICUS CURIAE*

Employers Association, Inc.[1] is a Minnesota non-profit with approximately 1,500 members, including employers and organizations in a wide variety of industries such as manufacturing, retail, service, construction, agriculture, transportation, finance, insurance and government. Employers Association, Inc.'s diverse membership includes small family-owned businesses, as well as some of Minnesota's largest and most highly-regarded corporate citizens such as 3M Company, Medtronic, Honeywell, Marvin Windows, Minneapolis Institute of Arts, Greater Twin Cities United Way, and Macalester College.[2]

Employers Association, Inc. provides support, training and consulting services to its members related to human resources and employee relations. It also assists member-employers in the development of effective management practices and workplace policies. A key component of Employers Association, Inc.'s mission is to aid employers with regard to legal compliance in the workplace context.

In keeping with its mission, Employers Association, Inc. advocates sound public policy on workplace issues and takes a keen interest in the evolution of Minnesota employment law. In this case, the appellant advocates a dramatic change in the law that

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[1] Employers Association, Inc. 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 Employers Association, Inc., 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.

[2] Employers Association, Inc.'s membership also includes the respondent's parent company, Carlson Companies, Inc.

would negatively impact all Minnesota employers and argues for an extension of employer liability that goes far beyond what has been recognized by either the legislature or the courts of this state. Employer's Association, Inc. will address the broader policy implications of the legal issues before the Court in this case.

LEGAL ARGUMENT

Minnesota law has never imposed strict liability on employers for sexual harassment based on a hostile work environment. When the Minnesota legislature amended the Minnesota Human Rights Act ("MHRA") in 2001, it removed certain language from the definition of "sexual harassment." That revision does not impose automatic liability on employers. Nor does the amended language incorporate the so-called "federal standard" into the statutory definition of sexual harassment. Instead, the legislature articulated what conduct may create a hostile environment and left it to the courts to develop an appropriate liability framework for hostile environment cases.

This Court should adopt a standard that is consistent with the language of the amended statute and almost 30 years Minnesota case precedent. *See Cont'l Can Co. v. State*, 297 N.W.2d 241, 249 (Minn. 1980) (applying "knew or should have known" standard *before* the legislature included that language in a statutory definition). Minnesota employers should be able to avoid liability by taking prompt corrective action that is reasonably calculated to stop harassing conduct. Under such a "knowledge-and-response standard," the lower court's ruling in this case should be affirmed. *See Frieler v. Carlson Marketing Group, Inc.*, No. A06-1693, 2007 WL 2107300 (Minn. Ct. App. July 24, 2007).

I. THE 2001 AMENDMENT TO THE MHRA DID NOT MANDATE STRICT EMPLOYER LIABILITY.

In 2001, the Minnesota legislature amended the MHRA. The amendment modified the definition of "sexual harassment" by removing the following language from what is now Minn. Stat. § 363A.03:[3] "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 at 724; *see also* Minn. Stat. §363A.03(2006). The legislature did not change the other provisions of that definitional section.

There is nothing in the amended language to suggest that the legislature intended to impose strict liability on employers for sexual harassment based on a hostile work environment or to eliminate all legal defenses based on responsive conduct by employers. To interpret the revised statute in that way requires the addition of phantom language that the legislature did not include. "The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature." Minn. Stat. § 645.16 (2006).

As amended, the statute defines what workplace conduct may create a hostile environment based on sex but is silent as to the circumstances under which an employer may be liable for a hostile work environment. Had the legislature wished to impose strict liability, it could have done so by adding language to that effect. It did not.

The appellant explicitly urges the Court to adopt a strict liability standard. (Br. of Appellant at 23-26). The Minnesota Chapter of the National Employment Lawyers

[3] In 2003, the MHRA was reorganized and renumbered in Chapter 363A.

Association ("NELA"), as *amicus*, urges the Court to adopt strict liability disguised as "imputed liability." (Br. of NELA as *Amicus Curiae* at 5-17.) Under Minnesota law, strict liability standards impose liability without regard to fault or negligence. *See, e.g.*, *Seim v. Garavalia*, 306 N.W.2d 806, 810 (Minn. 1981). By suggesting that an employer should be automatically liable for any and all conduct that occurs in the workplace without regard to any act or omission by the employer, NELA argues for strict liability, semantics notwithstanding. Regardless, the argument for strict liability advanced by the appellant and by NELA finds no support in the language of the amended statute or the legislative history. Notably, the Minnesota Human Rights Commissioner, as *amicus*, does not concur with that position and does not interpret the amended language to impose strict employer liability. (*See* Br. of Comm'r of Minn. Dep't of Human Rights as *Amicus Curiae.*)

The amended statute simply does not contain any language that can reasonably be interpreted to mandate automatic liability for sexual harassment without regard to any fault of the employer. Nor does it eliminate all defenses based on corrective action. The 2001 amendment to the MHRA does not impose strict employer liability.

II. THE 2001 AMENDMENT WAS NOT A LEGISLATIVE ADOPTION OF THE FEDERAL STANDARD FOR SEXUAL HARASSMENT.

When considering the 2001 amendment, the Minnesota legislature may have initially intended to adopt a definition of sexual harassment that mirrors federal law, but it is clear from the revised statutory language that the federal standard was not incorporated into the MHRA. Sexual harassment is a form of gender discrimination

under Title VII of the Civil Rights Act of 1964. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67, 106 S. Ct. 2399, 2405-06 (1986). Unlike the MHRA, Title VII does not define actionable conduct.

In the well known *Faragher*[4] and *Ellerth*[5] cases, the United States Supreme Court analyzed employer liability for sexual harassment by supervisors under Title VII. The Court ruled that an employer is vicariously liable for a hostile work environment created by a supervisor. However, in the absence of some tangible employment action (*e.g.*, termination, discharge, undesirable reassignment), the employer may avoid liability by satisfying the elements of an affirmative defense. "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2298 (1998). That liability framework -- the *Faragher/Ellerth* framework -- is the so-called "federal standard" for sexual harassment.

The federal standard provides for vicarious liability for supervisor harassment, as well as an affirmative defense. It does not impose strict liability. In addition, the federal standard is grounded in a distinction between harassment by supervisors and harassment by non-supervisors. The MHRA makes no such distinction. Nor does the amended definition in the MHRA make any reference to liability, vicarious or otherwise.

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[4] *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275 (1998).

[5] *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257 (1998).

Instead of incorporating the *Faragher/Ellerth* framework, the legislature deferred to the courts for the creation of an appropriate liability standard under the MHRA. That deference clearly resulted from the legislature's recognition of the fact that the judicial branch is better equipped to formulate a liability analysis, especially in an area of the law as complex as sexual harassment. Accordingly, this Court should interpret the 2001 amendment to the MHRA in a manner that is consistent with good public policy.

III. SOUND PUBLIC POLICY REQUIRES THAT EMPLOYERS BE ABLE TO AVOID SEXUAL HARASSMENT LIABILITY BY TAKING PROMPT CORRECTIVE ACTION.

This Court must consider public policy interests and adopt a liability standard under the MHRA that encourages employers to take prompt remedial action in response to inappropriate conduct in the workplace. The Court can meet that objective by keeping a knowledge-and-response element in the liability analysis. Before the 2001 amendment to the MHRA the knowledge-and-response element was part of the plaintiff's *prima facie* case. In light of the amendment, that element can reasonably be said to now take the form of an affirmative defense. *See Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 176 (Minn. Ct. App. 2007). Regardless of which party has the burden of persuasion, the legal effect is the same – employers that take prompt corrective action are not liable for hostile environment harassment under the MHRA.

A knowledge-and-response requirement most effectively serves the public interest for at least two reasons. First, it does not unfairly punish employers that take reasonable steps to prevent and correct workplace harassment. Second, it encourages employers to take prompt, appropriate action when they have reason to believe that harassment is

occurring in the workplace. Both reasons make for good public policy and serve the statutory purpose.

A. Imposing liability when the employer is not aware of offensive workplace conduct would unfairly punish employers that take reasonable steps to prevent and correct sexual harassment.

Employers have the ability to create a culture that does not tolerate workplace harassment. They can, for example, implement anti-harassment policies, train their supervisors and other employees about appropriate conduct, and create open-door procedures that encourage employees to report harassment without fear of reprisal. In addition, employers can promptly address inappropriate workplace conduct by isolating or separating the harasser and by disciplining the harasser as appropriate.

The reasonableness and responsiveness of the employer's conduct must be a consideration for liability purposes. No employer, large or small, can be aware of all of the behavior of every supervisor at all times in the workplace. In some cases, a manager with no history of inappropriate workplace conduct is accused of harassment or unwelcome sexual advances. Inappropriate conduct may take place in secret with no witnesses. If the conduct is not reported to someone within the company with authority to take appropriate action, then the employer has no way of knowing about or addressing the situation. That is true even if the employer has done everything in its power to create a harassment-free workplace.

The facts involved in this case provide an excellent illustration of why a knowledge-and-response standard is imperative. According to the record, the alleged harassment occurred in a private room with no other persons present. The appellant did

not report the first three alleged incidents to anyone at the company. After the fourth incident, she told some co-workers. The company's human resources department immediately started an investigation, and the appellant had no further contact with the alleged harasser. The employer had no way of knowing about the alleged harassment until the appellant reported it. Her report to a co-worker resulted in an immediate investigation, which prevented any further contact with the alleged harasser. The employer in this case should not be held liable for what it could not have known, especially when it reacted immediately upon learning of the alleged harassment.

Moreover, when an employer implements and publishes a reasonable reporting procedure, employees should be expected to utilize it. Under those circumstances, employees must bear some responsibility for ending offensive conduct. Otherwise, employees can sit on their rights (perhaps on the advice of legal counsel), allow potential damages to accrue, and even hinder the employer's ability to protect them.

Some hypothetical concern about retaliation should not relieve employees of an obligation to take advantage of the employer's reporting procedure. To be sure, retaliation is an unfortunate reality in some cases. However, the MHRA provides a legal remedy for those cases. See Minn. Stat. § 363A.15 (2006). Accordingly, the liability framework should not only include a knowledge-and-response element, it should also require employees to avail themselves of protective measures provided by the employer.

B. A knowledge-and-response requirement would best serve the spirit of the MHRA.

The general purpose of the MHRA is to "place individuals discriminated against in the same position they would have been in had no discrimination occurred." *Bhd. of Ry. & S.S. Clerks, Freight Handlers, Express & Station Employees, Lodge 364*, 229 N.W.2d 3, 13 (Minn. 1975). The first step to achieving this purpose is for employers to promptly respond to workplace harassment complaints and eliminate inappropriate behavior. As such, the Court should adopt a standard that would most effectively achieve those results by creating a very powerful incentive – an employer that adequately responds to workplace harassment avoids liability. A strict liability standard would carry little incentive for employers to promptly and adequately respond because it would hold them liable no matter how, or even if, they remedy the harassment. Thus, the Court should adopt a standard that recognizes and encourages employers' reasonable good-faith efforts to create a harassment-free work environment.

As a matter of public policy, this Court should not depart from almost three decades of thoughtful, reasoned case law. Under the MHRA, an employer should be able to avoid liability for sexual harassment by demonstrating that it took prompt corrective action to stop the alleged harassment, or by showing that the plaintiff unreasonably failed to take advantage of protective measures implemented by the employer, which may include an internal reporting procedure. This standard necessarily requires knowledge of the alleged harassment on the part of the employer. In light of the 2001 amendment, an employer's knowledge-and-response should be a complete defense to hostile

environment claims under the MHRA.

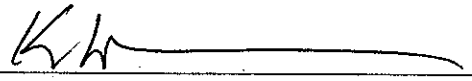
CONCLUSION

By amending the MHRA in 2001, the Minnesota legislature did not create a new strict liability standard for sexual harassment based on a hostile work environment. Nor did it incorporate the U.S. Supreme Court's *Faragher/Ellerth* analysis. Instead, the legislature deliberately provided Minnesota courts with a blank palette to develop a liability standard that is based on sound public policy and consistent with the spirit and purpose of the MHRA. Accordingly, Employers Association, Inc. respectfully requests that the Court adopt a standard that holds employers accountable only for workplace harassment of which they have knowledge but fail to address. Under such a standard, the lower court's decision in this case should be affirmed.

Respectfully submitted,

Date: December 20, 2007

LITTLER MENDELSON, P.C.



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