No. A06-1693

STATE OF MINNESOTA
IN SUPREME COURT

JUDY FRIELER,

Petitioner,

v.

CARLSON MARKETING GROUP, INC.,

Respondent.

Appellate File No. A-06-1693

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STATEMENT OF THE *AMICUS CURIAE*[1]

As more fully elaborated in its request to participate in these proceedings as *amicus curiae*, the Minnesota Employment Law Council ("MELC") is a nonprofit association comprised of many of Minnesota's largest employers. MELC is organized to present a single, thoughtful voice expressing the employer viewpoint on matters of significant public importance relating to employment law policy in this State. Each of MELC's members contributes the perspective of many years of experience dealing practically, as well as theoretically, with legal issues that arise in the workplace. The interest of MELC in these proceedings is therefore public in nature, insofar as MELC speaks to the broad implications of the important issues raised in this appeal. While MELC is familiar with the facts of this case, MELC's focus will be on assisting the Court's understanding of the larger impact its decisions in this matter may have.

ARGUMENT

In its decision below, the Court of Appeals observed that Minnesota courts have not yet "formally recognized" the vicarious liability standard and related affirmative defense the United States Supreme Court established in *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). Departing from Minnesota's consistent judicial history of applying the principles derived

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[1] Rule 129.03 Certification: This brief is wholly authored by the undersigned counsel for the *amicus curiae* Minnesota Employment Law Council ("MELC"). No counsel for any party authored this brief, either in whole or in part. No person or entity, other than MELC, its members, or its counsel, have made any monetary contribution to the preparation or submission of this brief.

from federal Title VII case law to construction of the MHRA, the Court of Appeals expressed the view that this lack of formal recognition renders the *Faragher/Ellerth* standard inapplicable to sexual harassment claims arising under the MHRA.

This view disregards the Minnesota legislature's express intention that the very purpose of its 2001 amendment to the MHRA was to facilitate judicial adoption of the complex body of well-reasoned federal case law developed in *Faragher/ Ellerth* and their progeny. With the statute now more closely congruent with the language of the parallel federal statute, and in light of the express legislative invitation to do so, MELC respectfully urges this Court to apply the well reasoned federal *Faragher/Ellerth* standard to this appeal and to thereby assure clear consistent standards and incentives for employer and employee conduct carefully designed to most effectively protect against sexual harassment in employment. As the legislature recognized, the wisdom of applying this standard to MHRA sexual harassment claims is clear on a number of levels.

I. Minnesota Courts Generally Follow Principles Derived from Title VII.

Minnesota courts have long recognized and repeatedly emphasized that the principles derived from federal Title VII cases are both instructive and applicable in cases construing the MHRA. *See, e.g.*, *Turner v. IDS Fin. Servs.*, 471 N.W.2d 105, 107 (Minn. 1991); *Carlson v. Indep. Sch. Dist. No. 623*, 392 N.W.2d 216, 220 (Minn. 1986); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 719 (Minn. 1986); *Danz v. Jones*, 263 N.W.2d 395, 398-99 (Minn. 1978); *Meads v. Best Oil Co.*, 725 N.W.2d 538, 545-46 (Minn. Ct. App. 2006); *Costilla v. State*, 571 N.W.2d 587, 591 (Minn. Ct. App. 1997);

Cf. Ellerth, 524 U.S. at 754-55 (noting that "in many cases [state courts'] determinations of employer liability under state law rely in large part on federal-court decisions under Title VII"); *Rothmier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1338-39 (8th Cir. 1996) (observing that "[t]he Minnesota Supreme Court has held time and again that MHRA claims are to be construed in accordance with federal precedent" and thus declining to follow a decision of the Minnesota Court of Appeals to the extent in departed from Title VII precedent, concluding that, until the Minnesota Supreme Court decided otherwise, the issue in question would be analyzed under the relevant Title VII standards). In deciding the particular issue of when employers should be held liable for supervisors' harassing conduct under the MHRA, the merits of looking to the well developed body of federal case law resolving this issue under Title VII are particularly significant. The complexity of this issue historically has engendered a wide range of inconsistent approaches to resolving it, emphasizing the need for a uniform and predictable standard.

II. The Need for a Uniform and Predictable Standard Governing Employer Liability for Supervisor Harassment Warrants Applying Faragher/Ellerth to Claims Arising under the MHRA.

Prior to the United States Supreme Court's decisions in *Faragher* and *Ellerth*, there was a lengthy period of discord among the federal courts regarding the circumstances under which employers may be held liable for the harassing conduct of supervisory personnel. *See Continental Can Co. v. State*, 297 N.W.2d 241 (Minn. 1980). For many years, some courts imposed automatic and vicarious liability, while others opined that before an employer may be held accountable for supervisory misconduct, it

must at least receive some form of notice and subsequently fail to take appropriate remedial action. *See, e.g.*, *id.* (discussing *Tomkins v. Pub. Serv. Electric & Gas Co.*, 568 F.2d 1044, 1048-49 (3d Cir. 1977); *Barnes v. Costle*, 561 F.2d 983, 933 (D.C. Cir. 1977); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977); *Miller v. Bank of Am.*, 600 F.2d 211, 213 (9th Cir. 1979).

In 1986, the Supreme Court determined in *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986), that Title VII does not impose "automatic" liability on employers for employees' harassing conduct. *See id.* at 70-72. The *Meritor* Court did not, however, offer much guidance regarding when such liability *should* be imposed, simply admonishing that traditional agency principles were relevant to the inquiry. While following this admonition, the Courts of Appeals again reached a variety of disparate conclusions in resolving the issue, with some determining that supervisors' harassment fell outside the scope of the employment relationship altogether and others concluding that such harassment was a foreseeable consequence of doing business for which employers should generally be held liable. *See Faragher*, 524 U.S. at 786. To resolve this split among the federal courts, in tandem decisions issued on June 26, 1998, the Court engaged in a thorough analysis of the fundamental purpose of Title VII and how, in light of this purpose, agency principles should apply in defining the scope of employer liability.

Building upon *Meritor*'s foundation, the Court noted that while basic agency principles might justify the conclusion that employers reasonably can anticipate supervisor harassment in the workplace and should therefore bear related costs, a

contrary conclusion was warranted for two reasons. *See id.* at 797-98. First, agency "frolic and detour" principles generally placed such acts outside the scope of employment, and second, the general unanimity among the lower courts that co-worker harassment should be treated as conduct falling outside the scope of the employment relationship would be rendered obsolete if supervisor harassment were treated otherwise. *See id.* at 798-99.

The Court ultimately opined that, where the harasser is a supervisor, it makes sense to hold employers liable under the "aided-by-agency-relation" principle set forth in the Restatement of Agency § 219(2)(d). *See Faragher*, 524 U.S. at 802; *accord Ellerth*, 524 U.S. at 759-60. Section 219(2)(d) provides that an employer "is not subject to liability for the torts of his servants acting outside the scope of their employment unless ... the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation." The Court stated that, at the outset, it could "identify a class of cases where, beyond question, ... the employment relation aids in the commission of the harassment: when a supervisor takes a tangible employment action against the subordinate." *Ellerth*, 524 U.S. at 760. Accordingly, the Court concluded that in such cases, employers should be liable for a supervisor's actionable harassment. *See id.* at 762-63.

In so ruling, the Supreme Court noted that, in some sense, harassing supervisors are always aided in their misconduct by dint of the supervisory authority afforded in the agency relation. *See Faragher*, 524 U.S. at 802. In deriving the appropriate liability

standard to be applied in cases involving supervisory harassment, however, the Court emphasized that any such standard ultimately must be squared with *Meritor*'s rejection of strict employer liability. *See Faragher*, 524 U.S. at 804; *accord Ellerth*, 524 U.S. at 763-64. Accordingly, the Court considered two alternatives that countered the risk of imposing liability on employers in virtually every instance of supervisory harassment. First, some proof that the supervisor actually invoked supervisory authority in perpetrating the harassment could be required before employers are held liable. *See Faragher*, 524 U.S. at 804. The Court rejected this approach, recognizing that under such a rule "judgment calls would often be close, the results would often seem disparate even if not contradictory, and the temptation to litigate would be hard to resist." *See id.* at 805. The second alternative, the Court opined, was to recognize an affirmative defense to liability that provides employers with an incentive to prevent and eliminate harassment and imposes a coordinate duty on employees to take advantage of the employer's safeguards and to otherwise partner with their employers to prevent harms they are able to avoid. *See id.* The Court concluded that such a composite defense would sensibly serve the fundamental purposes of Title VII. *See id.*

In reaching this conclusion, the Supreme Court noted that "[a]lthough Title VII seeks to make persons whole for injuries suffered on account of unlawful discrimination, its primary objective, like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *See Faragher*, 524 U.S. at 805-06 (internal quotations and citations omitted). The Court emphasized that "as long ago as 1980, the EEOC ... adopted regulations advising employers to 'take all steps necessary to prevent

sexual harassment from occurring, such as ... informing employees of their right to raise and how to raise the issue of harassment.'" *See id.* at 806 (quoting 29 C.F.R. § 1604.1(f) (1997)); *accord Ellerth*, 524 U.S. at 764. Accordingly, the Court concluded that any standard of employer liability should "recognize the employer's affirmative obligation to prevent violations and give credit ... to employers who make reasonable efforts to discharge their duty," stating, "[A] theory of vicarious liability for misuse of supervisory power would be at odds with [Title VII's] policy if it failed to provide employers with some such incentive." *See Faragher*, 524 U.S. at 806.

The Court emphasized that the requirement of showing the employee breached a coordinate duty to take advantage of such employer safeguards reflects the "equally obvious policy" that victims generally have a duty reasonably to mitigate their damages. *See id.* The Court reasoned, "If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could have been reasonably mitigated no award against a liable employer should reward a plaintiff for what her own efforts should have avoided." *See id.* at 806-07.

Accordingly, "to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees," the Supreme Court adopted in *Faragher* and *Ellerth* the following standard: An employer is vicariously liable to an employee who is the victim of harassment perpetrated by a supervisor with immediate (or successively higher) authority over the employee. Where no tangible employment action has been taken against the employee, the employer may

raise an affirmative defense to liability or damages by showing (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of ay preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Id.* at 807. The Court emphasized that, while not dispositive, whether the employer had promulgated an anti-harassment policy incorporating a complaint procedure is relevant to the first element of this defense and, where the employer has promulgated such a policy, proof that the employee unreasonably failed to use any such complaint procedure "will normally suffice to satisfy the employer's burden" under the second element. *See id.* at 807-08; *accord Ellerth*, 524 U.S. at 764-65.

III. The Reasoning underlying the Faragher/Ellerth Standard Accords with Minnesota Precedent Regarding Employer Liability for Supervisor Harassment.

The wisdom of applying the principles developed in these thorough, well-reasoned decisions and their progeny to cases arising under the MHRA is multifaceted. As indicated above, the need for a uniform and predictable standard in this complex area of the law generally warrants a consistent approach to the issue of employer liability in cases arising under Title VII and in those arising under its state-law analogues. *Cf. Meads*, 725 N.W.2d at 546 ("Certainly there is an advantage to consistency between the application of state and local government anti-discrimination laws and their federal counterparts."). Furthermore, the extension of *Faragher* and *Ellerth* to cases arising under Minnesota's statute is particularly appropriate, as the Supreme Court's reasoning in

these cases comports with deep existing Minnesota precedent addressing the scope of employer liability for supervisory conduct under the MHRA.

At the outset, it is worth noting that the central notion underlying the *Faragher/ Ellerth* standard – namely, that traditional agency principles should define the scope of employer liability for employees' wrongful conduct – is in full accord with Minnesota precedent. *See Semrad v. Edina Realty, Inc.*, 470 N.W.2d 135, 146 (Minn. Ct. App. 1991), *rev'd in part on other grounds*, 493 N.W.2d 528 (Minn. 1992) (noting that "both parties agree with the trial court that respondents' duty to supervise Marsh was governed by ... the Restatement (Second) of Agency § 213," observing that Section 213 of the Restatement (Second) of Agency has "effectively become part of respondeat superior liability in Minnesota"); *Ponticas v. K.M.S. Investment*, 331 N.W.2d 907, 910-11 (Minn. 1983) (adopting the Restatement of Agency § 213 and holding that an employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public).

In applying these agency principles to define the scope of employer liability for supervisory misconduct under the MHRA, Minnesota courts essentially have presaged the reasoning in *Faragher/Ellerth*. As an initial matter, Minnesota courts consistently have rejected strict liability theories when considering the scope of employer accountability under the MHRA. *See Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997) (noting that under the MHRA, employers are not held strictly liable for harassment perpetrated by supervisory personnel); *Anderson v. Roseville VFW Post 7555*, Nos. C6-95-413, C4-95-765, 1995 Minn. App. LEXIS 1423, at *11 (Minn. Ct. App. Nov.

21, 1995) ("An employer is not strictly liable for the acts of harassment perpetrated by one of its supervisors."); *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 595 (Minn. Ct. App. 1994) (same); *Fore v. Health Dimensions, Inc.*, 509 N.W.2d 557, 559-60 (Minn. Ct. App. 1993).

Significantly, in *Fore v. Health Dimensions, Inc.*, the Court reasoned that, in light of the Supreme Court's *Meritor* decision rejecting strict employer liability for supervisors' harassing conduct under Title VII, any such theory of strict liability should likewise fail under the MHRA. *See* 509 N.W.2d at 559-60 (citing *Meritor*, 477 U.S. at 71); *see also Jenson v. Eveleth Taconite Co.*, 824 F. Supp. 847, 886 n.92 (D. Minn. 1993) (recognizing that "*Meritor* rejected the notion that an employer could be strictly liable for acts of sexual harassment by its employees"). The Court emphasized that its history of looking to Title VII cases for guidance in analyzing claims under the MHRA warranted following the Supreme Court's reasoning on this issue. *See id.* The Supreme Court's recognition in *Faragher* and *Ellerth* that *Meritor*'s long-standing rejection of strict liability remains the standard in harassment cases under Title VII ultimately accords with, and in fact reinforces, the holding in *Fore* – to wit, *Meritor*'s reasoning should remain viable in cases construing the MHRA.[2] *Cf. McCurdy v. Arkansas State Police*, 375 F3d

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[2] *See, also, Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 176 (Minn. Ct. App. 2007) (noting the plaintiff's implication that, in light of the 2001 amendment, her employer should be held strictly liable for alleged harassment and observing, "It appears that the amendment merely moves the knowledge-and-response element from a plaintiff's prima facie case to an employer's affirmative defense, tracking developments in federal discrimination law."). Any argument that the legislature's 2001 amendment to the MHRA's definition of "sexual harassment" was intended to alter Minnesota's long-standing precedent regarding strict liability is belied by the

762, 771-72 (8th Cir. 2004) ("The Court's most recent discussions [in *Faragher/Ellerth*] of employer liability for supervisor harassment reaffirmed *Meritor*'s no strict liability standard, except in cases where an employee can show she suffered a tangible employment action.").

Beyond the issue of strict liability, the Court's reasoning in *Faragher* and *Ellerth* ultimately parallels the basic principles Minnesota courts repeatedly have relied upon in resolving the larger issue of when liability should be imposed upon employers for the harassing conduct of supervisory personnel. In addressing this issue, courts in this State have widely recognized the significance of employer efforts reasonably to prevent and promptly remedy harassing conduct and the related import of employee failures to take advantage of such safeguards. In particular – just as the Supreme Court ultimately advised in *Faragher* and *Ellerth* – Minnesota courts have afforded great weight to factors such as whether employers have promulgated effective anti-harassment policies and taken prompt and effective remedial action when notified of harassment.

In *Giuliani v. Stuart Corp.*, for example, the court determined the employer should be held liable for a manager's harassing conduct where it had no anti-harassment policy in place and where the employee eventually reported the conduct to her supervisor, yet no remedial action was taken until nearly two years later, when the employee made a second

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amendment's legislative history, which makes clear the legislature's purpose in implementing this definitional change was to clear a pathway for judicial adoption of the *Faragher/Ellerth* standards. Pursuant to the Court's request that *amici curiae* avoid redundancy in their briefs, the significance of the amendment's legislative history will not be expounded upon here. This issue is taken up more fully in the *amicus curiae* brief of the Chamber of Commerce.

report. *See* 512 N.W.2d at 591-92, 595. In reaching this conclusion, the Court rejected any notion that employers should be held strictly liable for the acts of supervisory personnel, noting that Minnesota courts – as in *Faragher* and *Ellerth* – instead have imputed knowledge of supervisor harassment to employers under certain circumstances based on agency principles. *See id.* at 595. The Court emphasized that whether the employer adopted an effective anti-harassment policy was integral to the employer's liability. *See id.* at 595; *see also Weaver v. Minn. Valley Labs., Inc.*, 470 N.W.2d 131, 134-35 (Minn. Ct. App. 1991); *Anderson*, 1995 Minn. App. LEXIS 1423, at *11-12.

In *Fore*, the Court similarly rejected the plaintiff's proffered theory of strict liability, emphasizing that Minnesota's statutory scheme does not impose a duty upon employers to "maintain a pristine work environment." *See* 509 N.W.2d at 560-61 (citing *Continental Can Co. v. State*, *supra*, at 249). The Court opined, however, that employers have a duty to take prompt and appropriate action when they learn of harassing conduct and ultimately may escape liability for a supervisor's acts of sexual harassment where they do so. *See id.* at 561 (opining that "appropriate remedial actions include enacting an anti-harassment policy or … threatening to take or taking disciplinary action," ultimately finding that the alleged harasser's forced resignation within days of the employee's report was "among the strongest disciplinary action that could be taken" and concluding that, since this supervisor was the only source of harassment, the wrongful conduct was effectively remedied and, in turn, the employer should not be held liable for the supervisor's acts); *see also Anderson*, *supra*, (refusing to impose strict liability on the employer for a supervisor's harassing conduct and upholding the trial court's decision

that the employer should not be liable for such conduct where it took action within days of the employees' report and the harassing conduct ceased, noting "it is proper for a trial court to focus on whether remedial action did any good").

Along with the foregoing factors, as in *Faragher* and *Ellerth*, Minnesota precedent also recognizes that equally significant to the issue of employer liability is whether employees reasonably have availed themselves of employer safeguards when harassing conduct occurs. For example, in *Gilbert v. IMI Cornelius, Inc.*, the Court refused to hold the employer liable for a supervisor's harassing conduct where the employer had promulgated an anti-discrimination policy that defined effective reporting procedures in the event of supervisory harassment, but the plaintiff failed to make a timely harassment report. *See* No. C3-99-104, 1999 Minn. App. LEXIS 605, at *3-4 (Minn. Ct. App. June 1, 1999). Indeed, this Court has long recognized the principle that once the employer has provided the employee with an expectation of assistance, the burden is on the employee to apprise the employer of on-going harassment. *See Larson v. Dep't of Econ. Sec.*, 281 N.W.2d 667, 669 (Minn. 1979).

In sum, the reasoning underlying the standard established in *Faragher* and *Ellerth* and developed in their progeny is in full accord with the basic principles by which Minnesota courts historically have resolved the issue of employer liability for supervisory harassment. That standard rejects strict liability in favor of established agency principles, considering the interrelated factors of whether employers have implemented effective harassment policies and responded appropriately to complaints and, in turn, whether

employees have reasonably availed themselves of such policies when harassment occurs.[3]

IV. Public Policy Considerations Further Warrant Adopting the Faragher / Ellerth Standard.

In addition to the foregoing reasons for adopting the *Faragher/Ellerth* standard, as the Court's reasoning in developing this standard makes clear, such a standard simply makes good sense from a public policy perspective. While anti-discrimination statutes such as Title VII and the MHRA do serve a remedial function, they should be construed in such a way that ultimately accomplishes the broader goal of encouraging proactive measures to avoid harm, both on the part of employers and employees. The *Faragher/Ellerth* standard achieves this dual goal of encouraging forethought by employers and saving action by victimized employees. By limiting liability where employers have taken reasonable measures to implement and promulgate effective anti-harassment policies and to otherwise prevent and remedy harassing conduct, the standard creates a strong economic incentive for employers to devote significant time and resources to taking such preventative and remedial measures. By imposing a coordinate duty on employees reasonably to avail themselves of such measures when harassment

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[3] Indeed, since the *Faragher* and *Ellerth* decisions came down, Minnesota courts have relied upon them as support for the proposition that these are the relevant factors to consider in assessing whether employer liability for supervisory harassment is warranted. *See Gilbert*, 1999 Minn. App. LEXIS 605, at *3-4 (citing and applying *Ellerth*); *cf. Dauer v. ELO Eng'g, Inc.*, No. C5-98-1857, 1999 Minn. App. LEXIS 554, at *4-5 & n.2 (Minn. Ct. App. 1999) (noting that *Faragher* and *Ellerth* "provide a new standard for an employer's liability for sexual harassment" and denying unemployment benefits where the employee had failed to reasonably apprise her employer of ongoing harassment after the employer appropriately responded to her initial complaint).

occurs, the standard encourages employees promptly to report discriminatory conduct before it has permanently damaged the individual employment relationship or more broadly infected the workplace. The standard thus ultimately promotes conciliation over litigation, another well recognized statutory and administrative objective, carrying far-reaching societal benefits.

It might be argued that responsible employers simply ought to "do the right thing," regardless of legal consequences. Surely, many would. But the sexual harassment provisions of the MHRA were not promulgated on the premise that all would or will. Moreover, even highly ethical, well intentioned employers can not be unmindful of the sobering inevitable ramifications of taking bold initiatives to dramatically raise sensitivity to the nuances of sexual harassment and invite such claims. Explicit policies, thorough training and readily accessible internal complaint procedures do not come without significantly elevated exposure to serious costs and economic consequences. One need only look to the uniform self-protective practices of very limited responses to employment reference requests to see the foreseeable consequences of abandoning the disciplined parameters of the *Faragher/Ellerth* affirmative defense. Moreover, as the arguments of the parties and other amici here about foreseeability more than demonstrate, without the law's endorsement and support, constructive protective measures undertaken by employers will be recast as self-impeaching admissions; as the employer's recognition of a propensity for wrongdoing rather than the constructive protective measures they truly are. Finally, sexual harassment law is so complex that the value of consistency can hardly be exaggerated.

As the United States Supreme Court has wisely elaborated, a structured, closely disciplined set of incentives for employers and employees to act reasonably is the best weapon against the evil of sexual harassment in the workplace.

V. The Standards Derived in the Faragher/Ellerth Line of Cases Should Govern the Resolution of this Case.

MELC offers no argument as to whether CMG ultimately should be held vicariously liable for the alleged harassing conduct at issue in this case. MELC does appreciate the opportunity to comment on the importance of careful application of the appropriate legal standards to the facts of this appeal, given the wider legal ramifications.

A. "Supervisor" for Purposes of Imputing Liability

Under *Faragher*, an employer is vicariously liable to an employee who is the victim of harassment perpetrated by "a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807. Accordingly, as a threshold matter, employers should not be held vicariously liable for supervisory harassment absent proof that the supervisor in question qualifies as her "immediate" supervisor. Federal courts generally agree that a co-employee who has authority to take tangible employment actions against the plaintiff employee satisfies this definition. *See, e.g.*, *Lissau v. Southern Food Serv., Inc.*, 159 F.3d 177, 179 (4th Cir. 1998); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 593 (5th Cir. 1998), *implied overruling on other grounds recognized by Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 270 (5th Cir. 2000); *DiLaurenzio v. Atlantic Paratrans., Inc.*, 926 F. Supp. 310, 315

(E.D.N.Y. 1996); *Saurs v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993).

The mere fact that a co-employee has a higher rank than the plaintiff employee should not render the co-employee a "supervisor" for purposes of imputing liability to the employer under Title VII. In *Bouton v. BMW of North America*, 29 F.3d 103 (3d Cir. 1994), for example, the court applied agency principles in declining to find the employer liable for the harassing conduct of a high-level executive who was not the victim's supervisor. *See id.* at 109 (noting that the plaintiff knew sexual harassment was strictly prohibited by the employer's anti-harassment policy and that she could have complained to the executive's boss or to the company president); *see also Johnson v. West*, 218 F.3d 725, 730-31 (7th Cir. 2000) (finding that a low-level manager did not qualify as a "supervisor" for the purposes of imputing liability where his only authority over the plaintiff was to sign off on her performance appraisals and where there were at least two other supervisors to whom the plaintiff directly reported); *Durkin v. City of Chicago*, 199 F. Supp. 2d 836, 847-48 (N.D. Ill 2002) (finding the fact that one employee outranks another does not render the higher ranking employee a "supervisor" under Title VII; opining that even if the higher ranking employee could oversee or discipline the victim, marginal discretion in these areas was not sufficient to warrant imposing vicarious liability on the employer); *Mosakowski v. PSS World Medical, Inc.*, 329 F. Supp. 2d 1112, 1123-24 (D. Ariz. 2003) (finding co-employee was not a "supervisor" for purposes of imputing Title VII liability where, even though the employee was a manager with a higher rank than the plaintiff, he did not have the requisite immediate authority over her).

B. Tangible Employment Action

Even if the plaintiff establishes a prima facie claim that her immediate supervisor engaged in actionable harassment, where no tangible employment action has been taken against the plaintiff, the employer should be in position to, and under *Faragher* principles may, ultimately raise an affirmative defense to liability or damages. *Faragher*, 524 U.S. at 807. "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. While *Ellerth* held that even a beneficial action, such as a promotion, could meet the "tangible employment action" test, this holding rested on the critical premise that the beneficial action was conditioned on the employee's submission to the harassment, not merely on the fact that beneficial action followed sexual misconduct which was resisted.

The "tangible action" test also is not, under federal precedent, and should not be met merely by recasting the alleged harassment itself as a constructive discharge. Such an argument is essentially circular, since any hostile environment claim of sexual harassment must meet the "severe and pervasive" test which is also the necessary predicate to constructive discharge. Courts have established that "[p]art of an employee's obligation to be reasonable is an obligation not to assume the worst and not to jump to conclusions too fast." *Thompson v. Bi-State Development Agency*, 463 F.3d 821, 825 (8th Cir. 2006) (internal quotations and citation omitted); *accord Skare v. Extendicare Health Serv., Inc.*, 431 F. Supp. 2d 969, 976 (D. Minn. 2006). The Supreme Court seemingly endorsed this view in *Suders*. *See* 542 U.S. at 151 n.10 (citing *Jaros v.*

LodgeNet Entertainment Corp., 294 F.3d 960, 965 (8th Cir. 2002)). Thus, where an employee quits without first offering the employer a reasonable opportunity to address the employee's concerns, or quits only after the only alleged wrongdoer has exited the company, there is no constructive discharge as a matter of law; certainly no tangible adverse action consistent with the principles governing access to the affirmative defense. *See Thompson*, 463 F.3d at 825; *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 498 (8th Cir. 1995).

C. Affirmative Defense

This Court should affirm that an employer establishes an affirmative defense by showing (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of ay preventative or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher*, 524 U.S. at 807. As discussed above, while not dispositive, whether the employer had implemented and promulgated an anti-harassment policy incorporating an effective complaint procedure is relevant to the first element of this defense. *See id.* Where the employer has promulgated such a policy, and where it is undisputed that the employee unreasonably failed to use any such complaint procedure should establish the second element. *See id.* at 807-08; *see also Gawley v. Indiana Univ.*, 276 F.3d 301, 312 (7th Cir. 2001); *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1289-91 (11th Cir. 2003).

The foregoing standards, while by no means exhaustive, set forth the basic

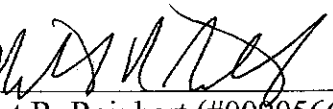
parameters developed in the *Faragher/Ellerth* line of cases for imposing vicarious liability on employers for the harassing conduct of their supervisory personnel. As the Court is aware, the District Court resolved this case in favor of CMG on the threshold issue of whether the harasser in question qualified as a "supervisor" for purposes of imposing Title VII liability. The affirmance of this ruling is of less concern to MELC than the overriding import of clarifying the general standards under which this case, and all other sexual harassment claims arising under the MHRA, are to be resolved and the related wisdom of adopting the foregoing well reasoned standards carefully developed in the *Faragher/Ellerth* line.

CONCLUSION

This Court should embrace this State's long-standing judicial history of applying the principles derived from federal cases to construction of the MHRA. The Court would thereby respect the Minnesota legislature's express intention by adopting the carefully reasoned body of federal case law developed in *Faragher* and *Ellerth* and their progeny. The *Faragher/Ellerth* line of cases should be followed, as the legislature has suggested, not only for their wisdom but also to assure clear, consistent application of a uniform standard in this complex area of the law. By so deciding, this Court will promote the goals of the MHRA by recognizing that the most effective realistic means of minimizing sexual harassment in the workplace is to encourage employers and employees to join together reasonably to proactively prevent and promptly eradicate this blight.

Dated: December 26, 2007

DORSEY & WHITNEY LLP

By 

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