

CASE NO. A06-1693

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State of Minnesota  
**In Supreme Court**

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Judy Frieler

*Appellant,*

VS.

Carlson Marketing Group, Inc.

*Respondent*

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APPELLANT'S REPLY BRIEF

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## SUMMARY OF ARGUMENT

CMG, and some *amici*, predictably list a parade of horrors certain to occur with the imposition of strict or imputed liability for supervisor harassment. These arguments are nothing but empty rhetoric used to convince this Court that nothing good can come from such a standard. Such scare tactics should not prevent the Court from establishing a standard of liability that is fair and upholds Minnesota's history of protecting the rights and privileges of employees.

Strict or imputed liability is consistent with purpose of the MHRA and the principles set forth in appellate case law addressing supervisor harassment. The most effective means to meet the purpose of the MHRA, to protect citizens from, and rid the workplace of, harassment, is to impose liability directly with the master of the employment domain: the employer.

If, however, the Court adopts a standard similar to the federal standard, it should do so liberally. A liberal interpretation of "supervisor" combined with a requirement of strict proof for any defenses employers may be afforded, promotes the remedial purposes of the MHRA and public policy.

Finally, sexual harassment and sexual assaults are foreseeable in today's workplace – no matter what the nature of the business. An employee need not prove more. This is sound reasoning based upon reality, albeit unfortunate.

The Court of Appeals decision should be reversed and Frieler's case should be remanded to the District Court consistent with the arguments herein.

## ARGUMENT

### I. FRIELER'S SEXUAL HARASSMENT CLAIM

#### 1. CMG is Strictly Liable for Janiak's Sexual Harassment and Assaults

##### a. Strict or Imputed Liability for Supervisor Harassment is Consistent with the Overriding Intent of the MHRA

The overriding intent and purpose of the MHRA is to prevent and rid the workplace of harassment. Minn.Stat. § 363A.02 Subd.1(a); *Continental Can Co. v. State*, 297 N.W.2d 241, 248 (Minn.1980). The most effective way to meet this goal is to provide motivation and incentives to those who are in the best position to control and influence workplace environments: employers. The employer not only provides and controls the physical parameters of the workplace it also controls the nature and culture of the work environment. This is done primarily through supervisory personnel. They not only set the tone of the workplace, they are the eyes, ears and voice of enforcement for the employer. They are the tool and means by which employers monitor, maintain and control the work environment and culture. To hold employers to the highest standards regarding the acts and conduct of its supervisors will ensure that businesses will carefully select, train and monitor these employees. This, in turn, will ensure that supervisors will not engage in conduct that will breach the standard and reinforces an expectation of appropriate workplace conduct and intolerance for anything less.

This standard of liability is sound as a matter of general public policy. Employers are in complete control of choosing and bestowing supervisory

authority to its agents. Employees are not. The employer grants supervisors with unique influence and power that the employee is vulnerable and subject to without choice. See *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F.Supp.2d 1254, 1265-66 (M.D.Ala. 2003) (citations omitted) (“If the laborer does not work, she will not eat. Thus, by its very nature, a market regime involves submission and surrender by the laborer...”). The employer obtains most, if not all, of the benefits from the employee relationship. Concomitantly, the employer must also bear the costs or detriments of those relationships.

Minnesota has made clear that harassment is a significant threat to the institutions and foundations of democracy. See Minn.Stat. § 363A.02, Subd. 1(b). Accordingly, it is consistent, if not necessary, to impose the highest standards of liability to eliminate and rid workplaces of this destructive affliction.

But, CMG claims the Supreme Court rejected “automatic or vicarious liability” for sexual harassment in *Continental Can*. The holding in *Continental Can* only described the standards to be imposed for co-worker harassment and did not reject strict liability for purposes of supervisor harassment. Furthermore, Minnesota courts apply a standard to supervisor harassment that, for all and intents and purposes, acts like strict liability. Courts have held that an employer can only act through its agents and acts of supervisory agents are considered acts of the employer. *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 595 (Minn.App.1994); *Porazzo v. Nabisco Inc.*, 360 N.W.2d 662 (Minn.App.1985); (*App. Br. at pg. 30-32*). Naturally, then, when considering the acts of a supervisor, courts do not stop

to consider whether the employer had notice of those acts before imposing liability. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 75-76 (1988). Therefore, and employer may be directly liable for the supervisor's harassment-whether anyone else was aware of the harassment. See *Giuliani*, 512 N.W.2d at 595; *Heaser v. Lerch, Bates & Assoc., Inc.*, 467 N.W.2d 833 (Minn.App.1991) (*App.Br. at pg.28-32*).

Nevertheless, CMG and certain *amici*, list a "parade of horrors" that will occur if strict or imputed liability is imposed. For example, CMG and the Minnesota Defense Lawyers Association ("MDLA") argue that public policy militates against the imposition of strict liability because to do so would diminish incentives for employees to report harassment. Instead, strict liability would actually motivate employees to refrain from reporting harassment and encourage them to let the harassment persist to ensure a finding of severe or pervasive conduct and increase damages. (*Resp. Br. at Pg. 33; Employers Association, Inc. ("EAI") Br. at Pg. 8*) In fact, they argue that plaintiff's counsel would even encourage employees to do this. This argument is pure sophistry.

Putting aside the potential ethical implications and inhumane nature of such a recommendation, it defies common sense that an employee would be willing to subject themselves to sexual harassment and assaults just to make sure to meet some legal standard. It is fair to say that victims of assault and harassment in the workplace are not thinking about legal standards or what they mean, let alone contemplate and strategize how they are going to meet it as they are being

assaulted. Further, if an individual truly wanted to endure more abuse for the sake of increasing chances of liability and damages, he/she could do so already. The imposition of strict liability does not provide a plaintiff any more opportunity or incentive. Most people just want to work in comfortable work environments and plaintiffs counsel are not sadists.

MDLA also argues that if strict liability is imposed, employers will have a legal incentive to ignore the conduct, fail to investigate and deny that any conduct amounts to harassment under the law. That is, to avoid the implication that the employer viewed the conduct was illegal, counsel will advise employers to take an immediate position that the conduct does not constitute harassment. Such tactics imply that employers lack any sense of responsibility for the general welfare of their employees; this also makes no sense from a purely economic standpoint. Even if the standard is strict liability, an employer will still have an incentive to investigate and determine the character of the conduct. If an employer sticks its head in the sand, as MDLA suggests employers will be counseled to do, it will open itself to greater liability and money damages.

MDLA also argues that removing an employer's defenses will in turn leave the employer with the knowledge that evidence of its investigation would be subject to potential discovery. Such investigations are already subject to discovery. *Onwuka v. Federal Express Corp.*, 178 F.R.D. 508, 515 (D.Minn. 1997).

Not only do CMG's arguments against strict liability fail as a matter of public policy they are legally unpersuasive. For example, CMG argues that strict liability would defeat the "remedial purposes" of the MHRA. But, the ultimate remedial purpose of the MHRA as stated, is to rid the workplace, and secure citizens of this state freedom from, discrimination and harassment. Minn.Stat. § 363A.02 Subd.1(a); *Continental Can*, 297 N.W.2d at 248. As set forth above, this purpose is best served by imposing the highest standard of liability on employers.

At the end of the day, the "parade of horrors" are not horrible at all. Rather, the arguments only serve as rhetorical diversions aimed at distracting the Court from the reality that strict or imputed liability for supervisor harassment is based on sound public policy, consistent with the intent and spirit of the MHRA and common human experience.

**b. The Strict or Imputed Liability Argument is Properly Before the Court**

According to Minn.R.App.P. 103.04, "the appellate courts may reverse, affirm or modify a judgment or order appealed from or take any other action as the interest of justice may require." This Court may review issues not directly presented at the lower court in the interest of justice. See *Doncarlos v. Doncarlos*, 535 N.W.2d 819, 820 (Minn.Ct.App.1995) (reviewing non-jurisdictional matters in interest of justice.) Moreover, the Court may review issues that could be decisive of the entire controversy and that are "implicit in or closely akin to the arguments below and the issue is not dependent on any new or controverted facts."

*Watson v. United Services Automobile Association*, 566 N.W.2d 683, 688 (Minn.1997). These arguments have been thoroughly briefed by all parties, and all *amici*, and neither party has been advantaged or disadvantaged by not having had the court below rule on this theory of liability. *Watson*, 566 N.W.2d at 687. All these factors weigh in favor of review.

**2. CMG is Vicariously Liable for Janiak's Sexual Harassment and Assaults**

If this Court determines that a standard more similar to that set forth in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775(1998) applies, Frieler urges this Court to do so liberally. It should impose a broad and flexible standard for defining "supervisor". *Ellerth* and *Faragher* indicate that "supervisor" includes those individuals who have input into employment decisions and control over day-to-day activities; not just those who are ultimately responsible. Furthermore, under the *Ellerth/Faragher* analysis, tangible employment action includes any action that affects the terms and conditions of another's employment whether they are positive or negative. The facts of this case establish, or raise a question of fact regarding, each of these issues.

**a. Full-time Position Offered on March 9, 2005**

CMG argues Janiak was not *yet* Frieler's supervisor and therefore not subject to supervisor liability. CMG argues Frieler was not offered the job until after Janiak left. CMG's own evidence establishes that the job was offered to

Frieler on March 9, 2005. Janiak told investigators that the offer was made on March 9, 2005. (A.26) Angela Krob testified the offer was made on the 9<sup>th</sup>. (Krob Dep. at 51 and 75). Yet, CMG argues the only evidence of the offer is the March 23, 2005 memo. The memo actually “confirms” the offer was made and Frieler accepted. (A.51-52.) CMG argues there is no evidence Frieler accepted the job but CMG’s own investigation notes indicate otherwise. (A.25.) CMG’s evidence belies any legitimacy it pretends to afford this assertion.

**b. Janiak Was Frieler’s “Supervisor”**

Janiak and Weber each testified Janiak had authority and input on the hiring decision. (A.103) Weber directed Frieler to Janiak and Janiak participated in interviewing Frieler. (A.58-59) Janiak told investigators that he met with Frieler at least four times to discuss the job – including on March 9<sup>th</sup> when he asked her whether she still wanted the job and mentioned that her missing work does not present the right “business frame.” (A.26) Even under a narrow definition of “supervisor” there is a question of fact about Janiak’s status.

**1. Definition of “Supervisor” Must be Broad**

*Ellerth* and *Faragher* applied a flexible and liberal definition of supervisor. The Court recognized that a determination of what constitutes a “supervisor” does not lend itself to a “mechanical application of indefinite and malleable factors set forth in agency law...” *Faragher*, 524 U.S. at 797. While the Court did not provide a definition of “supervisor”, the facts of both cases and the legal foundations upon which they are based, indicate that a supervisor includes

individuals with the ability to take (although not necessarily exercise) tangible employment action, those who have input to make those decisions and individuals who control the day-to-day activities of employees. *Ellerth*, 524 U.S. at 747; *Faragher* 524 U.S. at 780-782; *see also Meritor*, 477 U.S. at 76 (Marshall, J., concurring); EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, (June 21, 999). This is consistent with Minnesota law. *McNabb v. Cub Foods*, 352 N.W.2d 378, 383 (Minn.1984) The facts and legal principals of *Ellerth* and *Faragher* not only support a flexible definition but also a broad or liberal application. This is appropriate to affect the remedial purposes of the MHRA, but also to affect sound public policy and recognize workplace realities.

A broad and liberal definition ensures that *all* employees in Minnesota are afforded the same protections. As the Attorney General explains, employers in Minnesota vary in size, sophistication and structure. (*Attorney General Br. at pg. 15-16*) Some of the worst offenders have no structure at all. (*Id.*) A narrow and stringent interpretation may permit disorganized or informal entities to evade liability. Accordingly, the inquiry cannot stop at an individual's title or place within the company chain of command. Often, even when an individual is not identified in a direct chain of authority, they still have the ability to exercise power and affect the harassed employee's employment. (*Attorney General Br. at pg. 16*) The practical reality of the workplace requires an analysis that considers all supervisors- direct and indirect. Departments within corporations rarely exist in

complete autonomy or isolation; power and authority of those in charge does not stop at the door of a department or at any office door. All those with supervisory authority have authority and influence over all employees. Therefore, the focus should be on “whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.” *Mack v. Otis Elevator Company*, 326 F.3d 116, 126-27 (2<sup>nd</sup> Cir. 2003).

CMG and some *amici* advocate for a narrower interpretation akin to some Eighth Circuit cases where only individuals who actually have power to affect tangible employment action are “supervisors”. These cases are distinguishable.<sup>1</sup> These cases are not binding on this Court and are in disagreement with other federal courts. See, *Jin v. Metropolitan Life Insurance*, 310 F.3d 84 (2<sup>nd</sup> Cir. 2002); *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F.Supp.2d 1254 (M.D.Ala.2001); *Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F.Supp.2d 953, 972 (D.Minn.1998).

This interpretation also puts formality ahead of reality. In most companies, employment decisions occur with input and influence from many individuals and some are subject to approval, although the ultimate decision may be made by one

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<sup>1</sup>*Joens v. John Morrell & Co.*, 354 F.3d 938 (8<sup>th</sup> Cir. 2004) (individual not “supervisor” where harassment was no different than a customer); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8<sup>th</sup> Cir.2004) (team lead no authority to hire or fire in own department; may have consulted on employment decisions); *Cheshewalla v. Rand & Son Constr. Co.*, 415 F.3d 857 (8<sup>th</sup> Cir.2005)(similar).

person. Therefore, to limit liability only to those who ultimately “pull the trigger” fails to recognize workplace realities.

This strict application may also encourage employers to afford only a few removed individuals “authority” to make decisions, offering employers an unintended citadel against liability. See *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498, 509 (7<sup>th</sup> Cir.2003)(Rovner, concurring). Ultimately, whether the offending supervisor’s power is plenary or advisory, he/she, unlike a co-worker, is still able to bring to bear the official power of the enterprise to change the employee’s status. See *Ellerth*, at 762. Therefore, a broad definition of “supervisor” should apply.

Furthermore, to hold those like Janiak are not “supervisors”, would be irresponsible from a public policy standpoint. Such a holding would permit supervisors, clothed with supervisory privilege and authority to exert supervisory power to gain access to and enable them to sexually assault and batter subordinate employees without consequence. Equally, if not more, important is such a holding would permit employers to obtain enumerable benefits from its supervisors without also being accountable for the costs of its supervisor’s actions. The entire burden will be placed on the employee. This cannot be.

The foundation for appropriate analysis for supervisor liability should be based on determining whether the harasser is in a position to affect or influence the employee’s employment. To that end, the analysis should include

consideration of all facts and circumstances and avoid the use of absolutes or inflexible parameters.<sup>2</sup>

## 2. Apparent Authority Applies to the “Supervisor” Analysis

*Ellerth* and *Faragher* recognize that individuals may be a “supervisor” when they have or exercise apparent authority. Citing *Weyers*, 359 F.3d at 1057, CMG argues that an employee’s mistaken belief that someone is a supervisor (apparent authority) is not enough. This principal in *Weyers* is based on the earlier decision of *Todd v. Ortho Biotech*, 175 F.3d 595, 598 (8<sup>th</sup> Cir.1999). In *Todd*, the court found error with a jury instruction that explained the employer could be vicariously liable for the conduct of a supervisor with actual or apparent authority. The Court found error based on language in *Ellerth* that the: “[a]pparent authority analysis \* \* \* is inappropriate in this context.” *Todd*, 175 F.3d at 598 (citing *Ellerth*, 118 S.Ct. at 2268). *Todd* incorrectly states the law. The citation from *Ellerth* it relies on is incomplete and out of context. Indeed, it is clear that the Supreme Court included the application of apparent authority to the determination of supervisory status. *Ellerth*, 524 U.S. at 759 (“If, in the unusual case, it is alleged there is a false impression that the actor was a supervisor, when he in fact was not, the victim’s mistaken conclusion must be a reasonable one.”) MDLA even recognizes the apparent authority analysis. (See *MDLA Br. at Pg. 16*)

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<sup>2</sup>This Court should not adopt a standard, more stringent than the *Ellerth* and *Faragher* standard. (See *MELC Br. at pg. 16*) (“supervisor” is only “immediate” supervisor.)

The supervisor analysis should consider both actual and apparent authority. If a fact finder determined Janiak was not Frieler's actual supervisor, evidence shows Frieler reasonably believed he was. Weber told Frieler to speak with Janiak about the job; Janiak told her he was going out on a limb for her to get the job; Janiak told Frieler he was her boss. (A.66-67) Krob testified Weber and Janiak were involved in hiring. (A.105) Weber equivocated about his authority stating he "probably" was the person who made hiring decision. (A.121)

**c. Janiak and CMG Took Tangible Employment Action**

**1. Hiring is Tangible Employment Action**

In *Ellerth* and *Faragher* the Supreme Court provided a non-exhaustive list of tangible employment actions, "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. Frieler was applying for and was then offered a fulltime position working for Janiak- he was intimately involved with the decision and he is the man who sexually assaulted her repeatedly. Janiak told Frieler, as he sexually assaulted her, if she wanted the job she would have to "handle him"; she would have to "take it"; and "put up with stuff"; and told her not to tell anyone. (See A. 64, 66.) Frieler didn't tell anyone and she was hired. The offer of a job contingent on an employee's acceptance of sexual assaults constitutes sexual harassment and adverse action. See Minn. Stat. § 363A.01, Subd. 43(1) and (2); *EEOC Enforcement Guidance*, Section IV (B), pg. 7.

Nevertheless, CMG argues that *Ellerth* and *Faragher* speak only in terms of “adverse” tangible actions. Since a job offer is not adverse, no tangible employment action occurred. This is a superficial and inaccurate reading of the case law which defies CMG’s own policy. Whether the action is positive or negative, the focus of the inquiry is simply on whether it affects the terms or conditions of employment. See *Ellerth*, 524 U.S. at 761-62. Indeed, CMG’s own policy doesn’t distinguish between positive and negative employment actions.

*(RA. 36 defining “Quid Pro Quo harassment”)*

The Minnesota Employment Law Counsel (“MELC”) presents a similar argument. While it appears to recognize that offering a job contingent on submission to sexual conduct is adverse, it argues that this case is different since Frieler did not submit but “resisted” the conduct. It is true Frieler tried to stop Janiak from having his way with her but, that fact is not determinative of CMG’s liability. Janiak told Frieler she would have to put up with and keep quiet about his conduct if she wanted the job. She put up with his conduct; kept quiet and she got the job. This is adverse action. To hold otherwise would permit employers to evade liability by simply promoting harassment victims or by giving them raises.

Finally, CMG claims that the job offer was not adverse since Janiak didn’t hire her and he was gone when the offer was made. As discussed above, the evidence is that the offer was made before Janiak left and Janiak hired Frieler and/or was intimately involved with the decision to do so.

## 2. Constructive Discharge is Tangible Employment Action

Constructive discharge constitutes adverse action. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 124 S.Ct. 2342 (2004). The evidence is that Frieler was sexually assaulted and harassed by her hiring supervisor. CMG is vicariously (or strictly) liable for Janiak's conduct. (*Supra Section I(1) and(2)*). Therefore, it is CMG who created the intolerable work situation leading to Frieler's emotional and medical inability to return to that workplace. Weber admitted it is reasonable to foresee that a person would not be able to return to work in an environment in which she was harassed and assaulted to the severe and outrageous degree to which Frieler was subjected. (*A.125*) Therefore, CMG's assertion that Janiak took no official acts against Frieler leading to her discharge rings hollow.

CMG argues that Frieler failed to give it a chance to address her perceived concerns and that her subjective feeling that her co-workers did not support her, do not create intolerable working conditions. First, there was nothing "subjective" about Frieler's feelings. Several employees snidely commented to her that they couldn't believe she "did this" to Ed. Frieler presented evidence of numerous actions taken by CMG that created intolerable conditions leading directly to constructive discharge. CMG could have addressed Frieler's complaints but it failed and punished and ostracized her instead. Certainly, a finder of fact could determine based on all the facts and circumstances (as Frieler's psychologist did) that Frieler could not return to the company.

**d. The Ellerth/Faragher Affirmative Defenses are not Supported by the Evidence**

**1. CMG did not Take Reasonable Steps to Prevent and Correct the Harassment**

While the existence of a Defendant's policy is compelling evidence that it took reasonable care to prevent harassment, it is not dispositive. See *Kay v. Peter Motor Company, Inc.*, 483 N.W.2d 481, 484 and n.1 (Minn.App.1992)(noting employer showed no policy demonstrating a "sincere desire" to address sexual harassment); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4<sup>th</sup> Cir. 2001). The Court of Appeals found, and CMG argues, that the sexual harassment stopped once Frieler reported to HR and CMG implemented its policy. (A.14.)<sup>3</sup> Therefore, it has demonstrated that it took reasonable care to prevent harassment and escapes liability. An employer must do more than just *have* a policy, it must take *reasonable care* to implement it and prevent harassment. See *Kay*, 483 N.W.2d at 484. A fact finder may conclude, based on all of the circumstances, that CMG did not reasonably implement its policy or that its conduct was reasonably calculated to lead to harassment prevention. Frieler set forth evidence to show that access to the policies and procedures were inadequate, managers and HR personnel were not adequately trained, and Krob's involvement in the

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<sup>3</sup>For the reasons set forth supra, Section I(1)(b), and for the reasons enunciated in *George v. Estate of Baker*, 724 N.W.2d 1, 8 (Minn.2006), the issue of whether the Court of Appeals erroneously found that CMG's conduct was prompt and remedial is before this Court. It is evident, from the procedural history and briefing of this case, this issue was raised. And, the facts and evidence relied on by the Court of Appeals in making its finding have been argued extensively by both parties for purposes of this and the "knows or should have known" analysis.

investigation only served as intimidation. Perhaps most telling, is the fact that Dahl testified she could not even remember the last time she consulted the policy on harassment and violence in the workplace. So, the existence of a “zero tolerance” policy is meaningless if it is ineffective and not reasonably implemented.<sup>4</sup>

The fact that CMG conducted an investigation and spoke with Frieler and other employees but found no evidence confirming her allegations is also not dispositive. (*A. 14*). CMG did not reasonably implement its policy and harassment of Frieler did not stop once HR received the information. Frieler’s reports were minimized by the manner in which CMG treated the harasser. No reasonable person could conclude that throwing a party for the retirement of the person who sexually assaulted an employee four times while threatening her is action calculated to effectively and fairly implement any policy. Frieler’s report was called in to question by the inquiries made during the investigation and then again by her co-workers upon her return to work.

**2. Frieler did not Unreasonably Fail to Take Advantage of Preventative and Corrective Opportunities**

CMG must prove that Frieler “unreasonably failed to take advantage of any preventative or corrective opportunities provided” by the CMG. *Faragher*, 524 U.S. at 807. There was nothing unreasonable about Frieler’s alleged failure to use CMG’s policy. Not only was she aware that another employee complained to HR,

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<sup>4</sup> CMG’s own policy claims that employees will be immediately terminated for the type of conduct Janiak engaged in. (*RA. 36*)

and it did nothing, but her hiring supervisor told her she wouldn't get the job unless she put up with his sexual assaults and would not get the job if she told anyone else.

CMG argues, however, that Frieler failed to report out of subjective fears of retaliation, thereby failing to provide CMG the opportunity to "nip it in the bud." Frieler's fear of retaliation was not subjective- it was all but a certainty. In addition, the evidence is clear that CMG didn't do any of the things it was supposed to do to calm her legitimate fears of retaliation even after it learned of the conduct. Indeed, it actually took actions to stoke her fears by making inquiries aimed at discrediting her, demonstrating support for the perpetrator and by telling her to move on and lie about why she had been out of work. Frieler's psychologist advised that Frieler could no longer trust the employer who treated her as it did – this opinion came from a review of not just Janiak's treatment of Frieler, but HR and management's treatment of her.

CMG argues that any evidence of retaliatory intent is muffled by the fact that CMG offered Frieler a job in another department. CMG did not offer any consolation until *after* Frieler's counsel contacted the company and advised it of her claims and inability to return to work because of the retaliation. Until that time, Weber thought Frieler would not be able to make it in her new job since she was having "attendance problems" and he told her so.

Finally, an employer must be denied the protection of this defense when the employee is subject to a single act of egregious conduct that creates a hostile work environment. (*App. Br. at pg. 49*)

Accordingly, if this Court determines that a standard like *Ellerth/Faragher* is preferable, Frieler respectfully requests that the Court set forth the following:

- 1) a broad and flexible definition of “supervisor”, including individuals who have input and influence on tangible employment decisions and the day-to-day activities of employees;
- (2) if tangible employment action is required to impute liability; it includes actions that have both negative or positive terms or conditions;
- (3) if defenses are available for the employer the employer must be held to strict proof;
- (4) the existence of a harassment policy alone is not sufficient to establish appropriate corrective action; the employer must also establish that it exercised reasonable care to apply the policy, prevent harassment and address it reasonably after the fact;
- (5) an employee does not unreasonably fail to avail themselves of corrective measures when the employee has reason to believe the corrective measures are ineffective or has a reasonable fear of retaliation;

Once this standard is applied to the facts of this case, Frieler must prevail as she presented overwhelming evidence to establish each element and defeating any defense CMG may allege. At a minimum, fact issues exist as to the nature of

Janiak's supervisory authority and/or whether CMG was reasonable in its efforts and whether Frieler was reasonable in her belief that the corrective measures would not work.

**3. The "Knows or Should Know" Standard does not Apply**

CMG and *amici* MDLA and EAI argue for the application of the "knows or should know" standard or a "knowledge and response" standard. Neither standard properly enforces the purpose of the MHRA, public policy or recognize workplace realities.

CMG bases much of its argument, that "knows or should know" remains the standard, on *Continental Can* and *Goins v. West Group*, 635 N.W.2d 717 (Minn.2001).<sup>5</sup> According to CMG, the 2001 amendment to the MHRA simply returned the MHRA to being silent as to the liability standard for harassment and the Court must fill the gap as it did in *Continental Can*. CMG argues it is reasonable for this Court to conclude that "knew or should know" (or respondeat superior)<sup>6</sup> is the appropriate standard for all harassment cases- including supervisor liability. (*Resp. Br. at pg. 19, 36*).

CMG's argument is an attempt to determine the standard of liability within a vacuum. The court in *Continental Can* did refer to federal case law that applied respondeat superior principles for establishing liability. But, that was 1982. Twenty five years later, the legal landscape has changed and our present day

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<sup>5</sup>(*See App. Br. At pg., 19*)

<sup>6</sup>For reasons set forth by Frieler in this and in her principle brief, the adoption of respondent superior standard is erroneous.

federal case law instructs us that the standard for supervisor liability is vicarious liability.

CMG also offers that “knows or should know” remains the standard because it was applied in cases involving supervisor harassment after *Continental Can* and the 2001 amendment. (*Resp. Br. at pg. 23-24.*) First, since the amendment, courts have applied or contemplated strict liability or *Ellerth/Faragher*. *Perrizo v. Merry Maids, L.P.*, C1-07-7415 (June 26, 2007)(A. 180-185); *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171, 176 (Minn.Ct.App.2007). Second, even if “knows or should know” was or is the standard, courts still treat supervisor and non-supervisor liability differently with respect to the means by which the employee meets the knowledge element. Third, the cases cited by CMG are not persuasive.

In *Gagliardi*, 733 N.W.2d at 176, the court specifically noted that it interpreted the amendment to mean the *Ellerth/Faragher* standard applied. While the Court did not address the amendment relative to the supervisor/owner’s harassment, it did note it as a “unique” circumstance, one in which the court may infer the employer knew or should have known. *Gagliardi*, 733 N.W.2d at 179. In both *Wenigar v. Johnson*, 712 N.W.2d 206, 207 (Minn.App.2006) and *Schramm v. Village Chevrolet Co.*, No. C9-02-1107, 2003 WL 1874753 (Minn.App. April 15, 2003) (RA. 54-57) the court simply cites to *Goins* without any analysis or recognition of the amendment.

Appropriate application of the principles of statutory and case law interpretation and construction makes clear that “knows or should know” is not the standard.

**a. The “Knows or Should Know” Standard Violates the Purpose of MHRA and Public Policy**

The MHRA specifically states that it should be construed liberally for the accomplishment of its purposes including protecting employees from, and ridding the workplace of, harassment. Minn.Stat. § 363A.02 Subd. 1; Minn.Stat. § 363A.04. These policies and principles are not best served by the implementation of the “knows or should know” standard. This standard requires additional notice to the employer, even when the supervisor is the harasser. This standard also advocates that liability would be eliminated if the employer has a handbook or policy in place. This standard provides less protection than traditionally provided by Minnesota State and federal courts.

Minnesota courts have held that requiring additional notice to an employer to impose liability fails to recognize agency principles and the workplace dynamics between employees and supervisors. *Giuliani* 512 N.W.2d at 595. *Ellerth* and *Faragher* also made clear, the existence of a policy does not eliminate liability. See *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4<sup>th</sup> Cir. 2001)(policy not dispositive).

Similarly erroneous is MDLA’s argument that the “knows or should know” standard provides an employee who did not report with redress *only* when 1) there

was no one else to report to or 2) where the harassment was inordinately extreme and pervasive. Neither “exception” is consistent with Minnesota appellate jurisprudence. First, courts don’t focus on the fact that there is no one else to report to because, even if there are several other people to report to, in the case of supervisor harassment, the employee generally does not feel comfortable reporting to *anyone* out of fear of losing their job. See *Giuliani*, 512 N.W.2d 595. Second, there is also no support for MDLA’s claim that the harassment must be *inordinately* extreme and pervasive. The conduct must either be severe *or* pervasive - not “inordinate” or “extreme”. See *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 36 (1993); *Gagliardi*, 733 N.W.2d at 176.

MDLA also argues from a public policy standpoint the standard is preferable because it keeps the burden on the plaintiff to show employer negligence thus recognizing the plaintiff’s important role in identifying and stopping harassment. But, to place the burden entirely on the employee, especially when the harasser is a supervisor, is not sound public policy. It fails to recognize the reality that victims of harassment are more likely to remain silent for fear of jeopardizing their job. *Giuliani*, 512 N.W.2d at 595. It also unfairly places the burden on the party who did not select or train the supervisor and does not reap any benefits from the supervisor’s acts. And, it is hardly fair to require the plaintiff/employee to establish the elements of a defendant’s defense. Even the federal standard transfers the burden of proof regarding employer negligence to the employer in cases of supervisor harassment.

**b. The “Knowledge and Response” Defense is not Appropriate.**

EAI argues for a “knowledge and response” standard which seems to combine elements of *Ellerth/Faragher* with the “knows or should know” standard. (*EAI Br. at pg. 9*) This standard provides employee’s less protection than the federal standard and permits employer’s through supervisor’s, to create hostile work environments even if they take tangible employment action. Unlike the federal standard, it permits the employer to escape liability by establishing *either* defense, not both. It also asserts that an employee’s concern about retaliation is not enough to relieve an employee of the obligation to take advantage of the employer’s reporting procedure. (*EAI Br. at pg. 8.*) The Court in *Giuliani* indicated just the opposite. *Giuliani*, 512 N.W.2d 595. Accordingly, this standard should not be adopted.

**II. THE COURT OF APPEALS ERRONEOUSLY DISMISSED FRIELER’S SEXUAL ASSAULT CLAIM**

Sexual harassment, in all its forms, is foreseeable. This is evidenced by the vast number of cases on any court docket, commentators, policies insuring against such conduct and employer policies and training. But foreseeability is not the only consideration when determining whether an employer is vicariously liable for an employee’s intentional acts.

**1. Supervisor Sexual Harassment and Assaults are Related to Supervisor's Duties**

An employer is vicariously liable for the intentional acts of its employee if the acts are taken within the scope of employment. *Lange v. National Biscuit Company*, 211 N.W.2d 783, 786 (Minn.1973). *Lange* is the foundation upon which most relevant case law on this issue is based. The two part test for determining whether an act was taken in the scope of employment announced in *Lange* requires evidence to establish that: (1) the source of the attack is related to the duties of the employee and (2) the assault occurred within work-related limits of time and place. *Lange*, 211 N.W.2d at 786. Over time, as different fact scenarios emerged, courts considered and applied varying criteria to determine when conduct was "related to" a supervisor's duties. Foreseeability was one factor afforded consideration. *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905 (Minn.1999). However, it was and is not the only consideration.

In *Lange*, the Supreme Court explained the focus of the inquiry is whether the source of the attack was *related to* the duties of the employee. *Lange*, at 785-786. The analysis did not consider foreseeability. Instead, the Court considered an act to be "related to" the employee's duties when the act which on its own would not be imputable but which is so connected with and grows out of another act of the servant, it is imputable. *Lange*, at 785-786.

Applying those principles here, the conclusion is ineluctable: supervisor harassment is related to the supervisor's job duties. A supervisor's status presents

him/her with a special degree of authority, power and influence over subordinate employees and this, in turn, provides them with the unique ability to exact harassment and assaults. *Faragher*, 524 U.S. at 805; *Giuliani*, 512 N.W. 2d at 595. Employers know this and benefit from it. Supervisors are the means by which employers maintain its workforce and the conduit through which information travels up or down the chain of command. *McNabb*, 352 N.W.2d at 383. At a minimum, in a case such as this, when the supervisor used his power and authority to isolate, sexually assault and then silence a subordinate employee, his acts were related to and grew out of his duties.

But, if this Court determines that foreseeability is the only way to examine whether acts are related to the job, the Court must reverse the erroneous holding below. That is, no employee should have to provide evidence to show that sexual assault is a well known workplace hazard in a particular employment context. Indeed, sexual harassment, in all its forms – including the assaults that come with harassment, must be found to be foreseeable as a matter of law.

## **2. Supervisor Sexual Harassment and Assaults are Foreseeable**

The Court of Appeals has recognized that sexual harassment by a supervisor is foreseeable. *Oslin v. State*, 543 N.W.2d 408, (Minn.App.1996).<sup>7</sup> Sexual harassment is well recognized in general. *Faragher*, 524 U.S. at 798 (“It is

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<sup>7</sup> In *Oslin*, the Court noted that evidence of other complaints about the offending supervisor had been made, but that evidence was not dispositive. *Oslin*, 543 N.W.2d at 408.

now well recognized that hostile environment sexual harassment by supervisors (and for that matter, co-employees) is a persistent problem in the workplace.”); *Burlington Industries, Inc. v. Ellerth*, 123 F.3d 490, 511 (7<sup>th</sup> Cir.1997)(Posner, C.J. concurring and dissenting) (“Everyone knows by now that sexual harassment is a common problem in the American workplace.”); B.Lindemann & D. Kaude, *Sexual Harassment in Employment Law* 175(4-5)(1992).

Any industry analysis is unnecessary because, unlike criminal or intentional acts that may be particular to a certain industry, like the conduct in *Hagen v. Burmeister & Associates*, 633 N.W.2d 497, 504 (Minn.2001), Janiak’s conduct is not unique – the risk is inherent in every workplace. Frierer is not required to show that the exact tortuous conduct was foreseeable but that the conduct is not a surprise. *Farhrendorff v. Northern Homes, Inc.*, 597 N.W.2d 905, 912 (Minn.1999). CMG was not surprised, its own policy contemplates and anticipates the exact conduct that occurred in this case. (RA. 25)(sexual harassment includes “physical contact of a sexual nature” “unnecessary touching” and “demanding sexual favors”) Any argument that a harassment policy cannot be considered in the foreseeability analysis, or that expert testimony is the only way to establish foreseeability, directly contradicts the holding in *Boykin v. Perkins*, 2002 WL 4548, C9-01-1100 (Minn.App. May 18, 1999) (A.210-215) and is not sound policy. To exclude consideration of a policy will enable employers to have it both ways. In defense of sexual harassment, employers will tout policies as proof of prompt remedial action and, if CMG has its way, they will use the mere

existence of a policy to eliminate liability. When faced with assault claims, they will turn around and plead ignorance and surprise of the conduct contemplated by its policy.

To hold that supervisor harassment and assaults are foreseeable as a matter of law is based on sound legal reasoning, reality and the true "sense of justice" behind respondeat superior liability. *Lange*, 211 N.W.2d at 785.

### CONCLUSION

For all of the above-stated reasons, Frieler respectfully requests that this Court reverse the decision of the Court of Appeals and the District Court as to all issues and remand her case.

Respectfully Submitted,

January 7, 2008

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STATE OF MINNESOTA

IN SUPREME COURT

Case No. A06-1693

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Judy Frieler,

Appellant,

v.

**CERTIFICATE OF WORD COUNT  
COMPLIANCE**

Carlson Marketing Group, Inc.,

Respondent

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I, Frances Baillon, one of the counsel for Appellant, hereby certify that the word count of the herewith-filed Appellant's Reply Brief complies with the Minnesota Rules of Appellate Procedure. I certify that Microsoft Word 2003 word count function was applied and that the Memorandum contains 6,916 words.

Dated this 7th day of January 2008.

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