

A07-2433

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Amy and Sarah Monson,

*Appellants,*

v.

Rochester Athletic Club and John D. Remick,

*Appellees.*

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BRIEF OF APPELLANTS

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## ISSUES PRESENTED

1. Were the Defendants entitled to summary judgment when, through counsel, they acknowledged that unmarried heterosexual couples could buy family memberships, whereas same-sex couples could not?

The District Court granted the Defendants' motion for summary judgment.

*State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990)  
*Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365 (Minn. 2005)  
*Kasson State Bank v. Haugen*, 410 N.W.2d 392 (Minn. App. 1987)

2. Does the Minnesota Human Rights Act (MHRA) provide for disparate-impact analysis in areas other than employment?

The District Court held that disparate-impact analysis may be applied only in employment cases.

*Khalifa v. State*, 397 N.W.2d 383 (Minn. App. 1986)  
*Paper v. Rent-a-Wreck*, 463 N.W.2d 298 (Minn. App. 1990), rev. denied (Minn. Jan. 14, 1991)  
*Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001)

3. Are the MHRA's public-accommodations and business-contracting provisions in conflict, or do they simply set different standards for different claims?

The district court held the provisions had to be "reconciled" by importing language from one section to the other.

Minn. Stat. § 363A.17 (2006) (business contracting)  
Minn. Stat. § 363A.11 (2006) (public accommodations)

4. Does the MHRA's "homosexual lifestyle" language bar the statute's application to discrimination complaints by same-sex couples?

The district court held that same-sex couples enjoy no protections under the MHRA.

Minn. Stat. § 363A.27 (2006)

*Hogue v. Hogue*, 2004 WL 578593 (Tenn. App. March 24, 2004)

*Lawrence v. Texas*, 539 U.S. 558 (2003)

## STATEMENT OF THE CASE

The present litigation commenced in February, 2007. The Appellants, Amy and Sarah Monson (“the Monsons”), charged that the Rochester Athletic RAC and its owner, John D. Remick (“RAC”) maintained a policy of selling family memberships only to heterosexuals, and that there was no possible way that gay or lesbian people could purchase a family membership. The Monsons charged that this represented sexual-orientation discrimination in violation of the Minnesota Human Rights Act (MHRA). In particular, the Monsons alleged that the RAC’s use of the existence or non-existence of a marriage to determine the availability of family memberships had a disparate impact on gays and lesbians, whom such a criterion would exclude altogether. Additionally, the Monsons alleged that because applying the RAC’s policy results not simply in a disproportionate exclusion, but in fact a complete exclusion, the policy operated in an identical fashion as would a policy of direct discrimination, and thus also violated the MHRA on a disparate-treatment theory. Finally, the Monsons alleged that the RAC’s owner, John Remick, exercised personal control over the RAC’s policies and, by directing his staff to persist in discriminatory treatment, aided and abetted discrimination also in violation of the MHRA.

The RAC denied that it discriminated on the basis of sexual orientation and moved for summary judgment. According to the RAC, the distinction it drew was allegedly based on the existence or non-existence of a marriage, and that the policy applied to heterosexuals and gays/lesbians equally, without regard to sexual orientation. The RAC denied responsibility for the effect of its policy, and directed the Monsons to the Legislature for a remedy. In any event, the RAC maintained that under the MHRA, the Monsons could not rely on a disparate-impact analysis in a claim involving something other than employment discrimination. The RAC also argued that disparate-treatment analysis required evidence of discriminatory intent, that that since, in its opinion, there was no such evidence, it could not be found to have violated the MHRA on such a theory. Finally, it argued that if the RAC did not discriminate, its owner, by definition, could not have aided or abetted discrimination.

At oral argument on the motion, the RAC conceded that, in fact, it did not enforce its policy against heterosexual couples, and that it was entirely possible that it had sold unmarried heterosexual couples family memberships. The RAC did not contest that gays and lesbians could not purchase such memberships.

On November 6, 2007, the District Court, the Hon. Kevin Lund presiding, granted the RAC's motion for summary judgment. The court ruled that there was no evidence that unmarried heterosexual couples could purchase family memberships and unmarried homosexual couples could not, despite the RAC's concessions to the contrary. Judge Lund also ruled that the MHRA only permits disparate-impact claims in employment, and that since this was not an employment case, the Monsons could not rely on disparate-impact analysis. Further, the court construed the MHRA to require the Monsons to demonstrate discriminatory intent to prevail on their claims, and concluded there was no such evidence, despite finding the RAC's actions to have been intentional. Finally, the District Court held that the MHRA reflected a legislative intent to disfavor the "homosexual lifestyle" and that therefore, same-sex couples, *as couples*, have no rights under the Act.

This appeal followed.

### **STATEMENT OF THE FACTS**

The facts of this case are largely undisputed. Amy and Sarah Monson are two women in a long-term committed relationship, living in Rochester and raising a daughter who is now twelve. (A 13, 14) Sarah took Amy's last name pursuant to a legal name change during 2002. (A 14) Sarah and

Amy had a commitment ceremony which their family and friends attended. They jointly own their home, commingle their finances, and have undertaken estate planning and other legal action to protect one another in the event of crisis. The couple and their daughter live, worship, and travel together. (A 14) In short, they are by virtually any objective criteria a family; they hold themselves out as such and are viewed by others as such. (A 14) The court below had no difficulty seeing that the Monsons are a “loving family unit,” (A 10) They “are a family of affinity, which ought to be accorded respect.” *In re Guardianship of Kowalski*, 478 N.W.2d 790, 797 (Minn. App. 1991), rev. denied (Minn. Feb. 10, 1992). However, since they are a same-sex couple, the Monsons are not legally married. (A 14)

In 2006, the Monsons decided they wanted to join a health club and after comparing the costs, location, and services of area gyms, determined that the RAC would be their first choice. (A 14) They called the RAC to ask if they could purchase a family membership (which would save them approximately \$500 over the course of a year), and were initially told that this would be “no problem.” (A 15) However, upon further research, the Monsons discovered that the RAC’s website specified that family memberships were available solely to couples who were legally married. (A 15) Given the conflicting information, the Monsons emailed the RAC for

clarification. On March 1, 2006, RAC employee Barbara McGovern advised the Monsons that they could not purchase a family membership because they were not married and could not file their taxes jointly; there is no mention on the RAC's website of a tax filing status criterion. (A 15)

After various informal efforts to persuade the RAC and its owner, John Remick, to permit them to buy a family membership, Remick relented in part, agreeing to permit them to pay a cheaper, family-rate initiation fee, but that the monthly charges would have to be calculated on the more expensive basis of multiple memberships and not on the basis of a discounted family membership. (A 15) The Monsons decided that given the discriminatory and hostile treatment to which they had been subjected, they would not join RAC on terms that would require them to disavow their existence as a family. (A 16)

## **ARGUMENT**

### **I. The District Court Improvidently Granted RACs' Motion for Summary Judgment Where RAC Conceded Their Discrimination.**

#### **A. Standard for Review**

In granting the RACs' motion for summary judgment, the District Court cited the long-established standard for summary judgment:

“Judgment shall be rendered forthwith if the pleadings, depositions, answers

to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law.” (A 4, citing Minn. R. Civ. P. 56.03 (2007)). Further, the court noted that “when the resolution of a fact affects the outcome of the case, then the fact is material.” *Id.*, citing *Semanko v. Minnesota Mutual Life Insurance*, 168 F.Supp.2d 997, 999 (D. Minn. 2000). Finally, the court acknowledged that “a dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party.” (A 4)

On review of summary judgment, an appellate court will determine whether there are any genuine issues of material fact and whether the District Court erred in its application of the law. See *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn.1990). Critically, on review, an appellate court will “view the evidence in the light most favorable to the party against whom summary judgment was granted.” *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn.2005).

**B. RAC is a Place of Public Accommodation and the Monsons Rights Were Violated Under the MHRA**

There is no dispute that the RAC is a “place of public accommodation” as defined in the Minnesota Human Rights Act (MHRA).

(A 5, 6) Further, there is no question that the MHRA prohibits places of public accommodation from:

deny[ing] any person the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of public accommodation because of ... sexual orientation.

Minn. Stat. § 363A.11, subd.1(a) (2006). Unquestionably, membership in a health club is a good, service, privilege and advantage of that business.

Nonetheless, the District Court found, “Critically, neither of the Monsons, as individuals, was denied membership at the RAC because of their sexual orientation.” (A 9) The Monsons do not contest that they were offered separate memberships at the RAC, but it is undisputed the RAC imposed on each woman a higher membership price than either would have had to pay had they been able to purchase a family membership together. Charging the Monsons a higher rate to be members of the RAC clearly denies them the “full *and equal* enjoyment” of the RAC’s goods, services, privileges, and advantages because they are lesbian. This is in violation of their rights under the MHRA.

A central, material question in the District Court’s analysis was whether unmarried heterosexual couples were or were not able to purchase family memberships at the RAC. (A 9, 10) The court implicitly reasoned that if unmarried heterosexual couples could purchase family memberships,

but unmarried homosexual couples could not, this would represent discrimination between them on the basis of sexual orientation. The court erred by concluding that “for all practical purposes, heterosexual cohabiting couples are treated no differently than same-sex cohabiting couples. ...

There is no evidence before this court that unmarried, heterosexual couples have been granted family membership privileges at the RAC to which they were not entitled while the Monsons were denied such privileges. If such an assertion would have been supported by the submissions, the Monsons’ claims would survive the RAC and Mr. Remick’s motions for summary judgment.” (A 9) Clearly, in the District Court’s analysis, the question of whether unmarried heterosexual, but not unmarried homosexual, couples could purchase family memberships was a “fact [that] affects the outcome of the case” and thus is “material.”

The court’s finding on this point is clear error. The record shows that the RAC admitted, not once but twice, that it does not require heterosexual couples to satisfy its “must be married” policy at all. (A 40, 41- Transcript of Summary Judgment Hearing) In deciding motions for summary judgment, trial courts may consider oral testimony, facts subject to judicial notice, stipulations, concessions of counsel, and any other material that would be admissible in evidence or otherwise usable at trial. *See Lundgren*

*v. Eustermann*, 370 N.W.2d 877, 881 n.1 (Minn. 1985); *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 394 (Minn. App. 1987) (“Oral testimony and concessions of counsel may also be considered” in deciding summary judgment motions).

In response to a question from the court at the August 7, 2007 hearing on their motion for summary judgment, the RAC, through counsel, conceded:

I can't – I haven't deposed anybody and I don't know if they were even asked, but I think if you were going to tell me or ask the question, what's the difference between two – an unmarried man and woman coming in and two women coming in, it would be, well, if a man and woman would come in and they say, we're married, there is no policy that says we're going to ask for a marriage certificate of anything else. They take that at face value.

(A 29). Further, in an illuminating exchange between the court and RAC's counsel:

COUNSEL: ... I could have put together affidavits for you, and I expect that it would go something like this: We decided to choose the easiest way we could to make a determination as to who qualified. In other words, we don't want to decide if a man and woman are living together, if they qualify or not; we don't want to have to analyze whether someone is in committed relationships or not; we don't want to ask for marriage certificates; we don't want to ask for tax returns; we don't want to have someone fill out a form that promises we're really in a committed relationship, trust us, Judge, they decided they didn't want to do that, and the easiest way that they could analyze this is just to simply say, are you married?

THE COURT: And to they make any independent determination of that?

COUNSEL: No, they trust people.

THE COURT: Okay. So presumably ... they have got people that aren't married who claim to be married at the athletic RAC.

COUNSEL: That's possible. They're not policemen.

[...]

THE COURT: -- and you just roll in there, we're married, here are our kids, these are our last names; I suppose maybe they want a driver's license just for some sort of that background information, but it is as easy as that, right?

COUNSEL: That's right.

A 41, 42.

These statements explicitly illustrate that, in fact, the experiences of unmarried heterosexual couples and those of unmarried homosexual couples at the RAC are completely different. The RAC concedes that it does not enforce its "must be married" policy at all with respect to heterosexual couples, the only ones who could conceivably satisfy it by producing a marriage license – a document which the RAC explicitly forswears any interest in examining. And yet, there is simply no dispute that the RAC ruthlessly applied this same policy *against* same-sex couples: affidavits in the record from a different same-sex couple (who, ironically, having been legally married in Canada, could have produced a marriage license) reveal that after the RAC "erroneously" sold them a family membership, the RAC

retroactively rescinded that sale. (A 22-25) Moreover, the RAC admitted it did not want to ask for tax returns, yet when the Monsons inquired about a family membership, they were explicitly told in writing that to purchase a family membership, a couple must be legally married and be able to file their taxes jointly. *Id.* It is for this very reason that RAC has not contested the Monsons' assertion that the only people to whom the RAC would sell family memberships are heterosexual.

The concessions before the District Court establish clearly that from the RAC's standpoint, the only relevant question with regard to selling family memberships is whether the couple requesting to purchase one is heterosexual. In fact, there is no requirement that they be married. The only effect of the RAC's "must be married" policy is to exclude same-sex couples from the benefits and privileges of family membership.

At minimum, as the court below concluded, when the record is viewed in its entirety, there is a genuine issue of fact regarding whether unmarried heterosexual couples can or cannot purchase family memberships. As such, summary judgment was inappropriate. Indeed, RAC itself created the dispute regarding that fact by contradicting itself by stating in its memorandum on its motion for summary judgment that RAC sells family

memberships only to legally-married couples and then stating otherwise at the hearing on summary judgment. See, Def. S.J. Memo at 2.

Viewing the record in the light most favorable to the Monsons, the court below erred by concluding that “for all practical purposes, heterosexual cohabiting couples are treated no differently than same-sex cohabiting couples.” (A 9) Heterosexual cohabiting couples are able to purchase family memberships, whereas same-sex cohabiting couples are not. The RAC’s concessions in the record establish beyond dispute that its policies directly discriminate against couples on the basis of their sexual orientation. Having admitted a policy of disparate treatment under the MHRA, RAC was not entitled to summary judgment. The District Court did not properly consider the evidence in the light most favorable to the non-moving party. The District Court therefore erred in its analysis and improvidently granted summary judgment. This Court must reverse that judgment.

**II. The District Court Failed to Apply Controlling Decisions of this Court When it Did Not Apply the Disparate-Impact Analysis.**

In bringing this case, the Monsons relied primarily, though not exclusively, on a disparate-impact analysis. (A 7, 8) The court below, however, held that the Minnesota Human Rights Act only permits disparate-

impact analysis in employment matters. (A 8) As a question of statutory construction, this Court reviews the issue *de novo*.

**A. This Court has Already Held that Disparate-Impact Analysis is not Restricted to Employment Matters.**

Disparate-impact is a claim of “indirect discrimination:” the defendant in such a claim allegedly uses a criterion, neutral on its face with respect to the enumerated protected characteristics in a non-discrimination law, which, when applied, has a disparate impact on a group that law protects. See generally, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (seminal case establishing disparate-impact analysis). In the typical disparate-impact case, the defendant must show that despite the disparate impact of its criterion, it has a legitimate need to use the criterion. A plaintiff may yet prevail by showing that there is an effective alternative that has less, or no, disparate impact on a protected group. *Id.*

This basic approach to disparate-impact analysis is specifically provided for in the Minnesota Human Rights Act:

If the complaining party has met its burden of showing that an employment practice is responsible for a statistically significant adverse impact on a particular class of persons protected by section 363A.08, subdivision 2, an employer must justify that practice by demonstrating that the practice is manifestly related to the job or significantly furthers an important business purpose. Upon establishment of this justification, the charging party may prevail upon demonstration of the existence of a comparably effective

practice that the court finds would cause a significantly lesser adverse impact on the identified protected class.

Minn. Stat. § 363A.28, subd.10 (2006).

The District Court, pointing to the language above, held that it “*implies* that a disparate impact analysis only relates to employment claims brought under MHRA.” (A 8) (emphasis added). It is true, but immaterial, that the only specific mention of disparate-impact analysis in the MHRA relates to employment matters. The MHRA’s disparate-impact language does not even appear within the statute’s employment section; see Minn. Stat. § 363A.08 (2006).

This Court has already rejected the narrowing “implication” the District Court read into the MHRA. Over twenty years ago, this Court held that an individual alleging he was denied a public contract because of race discrimination, and premising his claim on a disparate-impact theory, had articulated an MHRA claim of “public services” discrimination. *Khalifa v. State*, 397 N.W.2d 383, 388 (Minn. App. 1986). *Khalifa* remains good law in Minnesota. Since the disparate-impact analysis has been applied in non-employment contexts, the court below simply had no basis for concluding that disparate-impact analysis is limited to employment matters.

This Court has also applied the MHRA’s disparate-impact analysis in the public accommodations context. See *Paper v. Rent-a-Wreck*, 463

N.W.2d 298 (Minn. App. 1990), rev. denied (Minn. Jan. 14, 1991) (involving Minneapolis Civil Rights Ordinance). Although *Paper* involved a claim arising under a municipal ordinance and not the MHRA, this Court explicitly noted that “providers of public accommodations must carefully craft the terms and conditions of accommodation availability to avoid *discriminatory impact* against groups protected by this ordinance *or similar laws.*” *Id.* at 300 (emphasis added). This Court specifically applied MHRA disparate-impact analysis to the public accommodations claim at issue, *see id.*, citing *Schlemmer v. Farmers Union Cent. Exch., Inc.*, 397 N.W.2d 903, 908 (Minn. App. 1986), thereby acknowledging the existence of disparate-impact analysis for non-employment claims. It would also be nonsensical for this Court to apply the MHRA disparate-impact standard to a public accommodations claim arising under ordinances similar to the MHRA but not for claims arising under the MHRA itself.

The court below found that “adoption of the disparate impact theory to [non-employment] cases under the MHRA would expose businesses to new liability and potential court regulation of their day-to-day practices in a manner that does not appear to have been intended by the legislature.” (A 8) This Court’s holding in *Paper*, however, put providers of public accommodation on specific notice nearly two decades ago that they need to

assure that their policies do not have a disparate impact on groups the MHRA protects; this is by no means “new liability.” Moreover, the District Court did not explain how court decisions ruling that discriminatory business practices are impermissible under the MHRA constitutes “court regulation of their day-to-day practices in a manner [not] intended by the legislature.” If the Legislature did not anticipate that courts would on occasion rule in favor of those bringing discrimination claims, how did the Legislature imagine the MHRA would be enforced?

At oral argument below, RAC raised the unpublished decision in *Babcock v. BBY Chestnut Limited Partnership*, 2003 WL 21743771 (Minn. App. July 29, 2003). In *Babcock*, this Court held that “the MHRA recognizes ‘disparate impact’ discrimination only with respect to discrimination in employment,” *Id.* at \* 2. This holding clearly conflicts with *Khalifa* and *Paper*, both published, controlling opinions. As an unpublished opinion, *Babcock*, which does not actually cite any authority for this proposition, is “not precedential.” Minn. Stat. § 480A.08, subd. 3 (2006). This Court has held that “[a]t best, these opinions can be of persuasive value. ... It is, however, improper to rely on unpublished opinions as binding precedent. ... We remind the bench and bar firmly that neither the trial courts nor practitioners are to rely on unpublished opinions

as binding precedent.” *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993). This instruction is particularly relevant where, as here, an unpublished opinion directly conflicts with published decisions which *are* binding precedent. *Khalifa* and *Paper* unequivocally establish that the MHRA permits disparate-impact analysis in contexts other than employment.

The Monsons presented both *Khalifa* and *Paper* to the court below and demonstrated that each either explicitly or implicitly rejected the RACs’ notion that disparate-impact analysis applies only to employment claims. (A 35-36) The Monsons pointed the District Court to this Court’s ruling in *Dynamic Air*, *supra*, affirming that it would be error for the court to rely on the RACs’ proffered, unpublished *Babcock* decision. (A 35-37) In its ruling, however, the court below was completely silent regarding the existence of *Khalifa*, *Paper*, or even *Babcock*. In wholly failing to acknowledge, apply, or distinguish this Court’s published, and therefore controlling, precedents (particularly *Khalifa*) applying disparate-impact analysis beyond the employment realm, the court below committed fundamental legal error. Its conclusion, supported by no citations to case law, that disparate-impact analysis applies only to employment cases flatly

contradicts this Court's controlling rulings – rulings which the Legislature has left undisturbed for years – and must be rejected.

**B. As a Matter of Public Policy, this Court's Holdings in *Khalifa and Paper* are Worthy of Affirmation.**

In enacting the MHRA, the Legislature made clear that “discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.” Minn. Stat. § 363A.02, subd. 1(b) (2006). The Legislature did not restrict this finding only to acts of “direct” discrimination (disparate treatment). Discrimination, by itself, threatens and menaces society, whether direct or indirect. To effectively eradicate discrimination, the Legislature further directed that “[t]he provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.” Minn. Stat. § 363A.04 (2006). It is inconceivable that the Legislature, having declared that discrimination “menaces the institutions and foundations of democracy,” and having given Minnesota's residents and courts a powerful, liberally-construed tool to eradicate it, would nonetheless permit discrimination to occur provided that it is accomplished indirectly. By applying disparate-impact analysis broadly to combat discrimination, this Court has followed the Legislature's express instruction to construe the MHRA liberally to accomplish its purposes.

Further, it is well-accepted that interpretations of the Minnesota Human Rights Act will be guided by interpretations of federal non-discrimination law where their provisions parallel one another. See *Goins v. West Group*, 635 N.W.2d 717, 726 n.6 (Minn. 2001) (“The MHRA is to be construed liberally, however, with reference to federal law.”) As with the MHRA, the federal Civil Rights Act of 1964 also only specifically mentions disparate-impact analysis in connection with employment matters. See 42 U.S.C. § 2000-e2(k). Nonetheless, federal courts have applied disparate-impact analysis in non-employment cases. See, e.g., *Robinson v. Power Pizza*, 993 F.Supp. 1462, 1464-65 (M.D. Fla. 1998) (Title II public accommodations claim).

Accordingly, there is ample authority for applying disparate-impact analysis to the instant case. The trial court’s conflicting ruling is not consistent with controlling law and must be reversed.

**C. Appellants Have Satisfied all Elements of a Disparate-Impact Claim.**

According to *Paper v. Rent-a-Wreck*, 463 N.W.2d 298 (Minn. App. 1990), rev. denied (Minn. Jan. 14, 1991), the first element of a disparate impact analysis is to determine whether “the claimant demonstrate[d] that a facially-neutral ... practice actually operates to exclude ... a disproportionate number of members of the protected class.” *Id.* at 300

(internal quotation marks omitted). Next, the Court must examine whether RAC had a “legitimate interest” in implementing the policy at hand. *Id.* Because of the specific facts and holdings in *Paper*, the Court’s instruction for the analysis stopped at this point.

This analysis is similar to, but somewhat distinct from, the disparate-impact analysis the Legislature included in the MHRA itself. The MHRA provides that when a plaintiff demonstrates that a practice “is responsible for a statistically significant adverse impact on a particular class of persons,” the defendant may respond by showing that the practice “significantly furthers an important business purpose.” Minn. Stat. § 363A.28, subd. 10 (2006). “Upon establishment of this justification, the charging party may prevail upon demonstration of the existence of a comparably effective practice that the court finds would cause a significantly lesser adverse impact on the identified protected class.” *Id.* Accordingly, the third inquiry for disparate-impact analysis is to determine whether a less-discriminatory alternatives existed.

The Monsons have presented sufficient evidence to satisfy disparate-impact analysis. The disproportionate impact of RAC’s policies on gay and lesbian people is manifest: by selling family memberships only to married people, when only heterosexual couples may marry, it necessarily follows

that only heterosexuals may purchase the RAC's family memberships. The Monsons have repeatedly asserted that gay and lesbian people may not purchase family memberships at RAC's facility, and the RAC has never asserted otherwise. Therefore by completely excluding gays and lesbians enjoying all of the privileges of this place of public accommodation, the RAC's policies have a disparate impact on this group in violation of their rights under the Act.

Next, the MHRA requires the RAC to establish a "legitimate interest" or "essential business purpose." The court below phrased it slightly differently, asking the RAC whether they had a "legitimate non-discriminatory reason" for its policies (A 40) The RAC's primary response was simply to deny the applicability of disparate-impact analysis at all, but eventually explained to the court that "this is just a business that made an election to address an issue in the most efficient way they could." (A 42) Tellingly, neither the District Court nor the RAC offered any authority for the proposition that administrative "efficiency" is a sufficient justification for having a policy in place that has a disparate impact on a group protected under the MHRA. While the RAC claims they don't want to be "policemen" when it comes to heterosexual relationships, they willingly act as border guards when it comes to same-sex relationships. Even if it were

more “efficient” to simply sell family memberships to heterosexuals only, it is also discriminatory. RAC’s “election” to discriminate because they find it easy to do so is not a “legitimate interest” or an “essential business purpose.” The Monsons are entitled to judgment in their favor on their disparate-impact claim.

Even if RAC could articulate some legitimate purpose or interest for its discriminatory actions, the Monsons can show that alternative, accessible practices exist that have little or no disparate impact. At oral argument, RAC conceded that “there is no question there is [sic] different models,” themselves pointing to the example of practices at Mayo, a leading employer in RAC’s community. (A 17) Additionally, the court below, characterizing the RAC’s policy as “morally and legally defensible yet unrealistically narrow,” pointed out that “other, arguably more enlightened organizations, such as the Rochester Area Family Y, have chosen not to reduce the definition of a family in such an anachronistic fashion.” (A 10) Clearly, alternative practices exist which have little or no discriminatory impact. Neither the District Court nor RAC have articulated any reason whatsoever as to why the RAC, alone, is incapable of employing those same practices or, for that matter, why they would be excused from doing so. The record establishes that the RAC is completely capable of changing or waiving its

policies – when pressed, RAC agreed to charge the Monsons a family-rate “joining fee,” but not sell them a family membership. There is nothing inherent in the operation of a health club, or more particularly of this health club, that requires that family memberships be offered only to married people, let alone to those who can file their taxes together. It is equally evident that the only barrier to RAC’s implementation of an alternative, non-discriminatory policy is its “election” not to do so.

The RAC’s policies have a disparate impact on gays and lesbians. The RAC has articulated no “essential business purpose” or “legitimate interest” in implementing a policy with such an impact, other than their mere “election” to do so. Finally, the RAC acknowledges there are readily-available alternative policies that reduce or eliminate this impact. The Monsons, accordingly, submit that the record establishes sufficient evidence to show that under a disparate-impact analysis, their rights (and the rights of other gays and lesbians) have been violated.

**D. The RAC’s Legal Arguments in Opposition to the Monsons’ Disparate-Impact Claims are Without Merit.**

Although the Monsons have satisfied each requirement of the standard disparate-impact analysis, the RAC argued nonetheless that their claim is precluded. Because the court below agreed with the RAC that the Monsons could not pursue a disparate-impact claim in a public accommodations

context, the court did not actually examine the RAC's arguments. These arguments are without merit and must be rejected.

RAC argued that *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990) stands for the proposition that the Minnesota Human Rights Act's prohibition on marital-status discrimination does not require unmarried couples to be treated the same way as married couples. *French* simply has no application to the current case, because the Monsons do not allege marital-status discrimination. Moreover, *French* was decided three years before the Legislature added "sexual orientation" to the MHRA; at the time of *French*, a same-sex couple could not have brought a claim resembling that case, or the instant case, at all. The Monsons are not asking to be treated like married couples: they're asking to be treated like heterosexuals, and it is undisputed that the RACs offer heterosexuals (alone) the opportunity to purchase family memberships. RAC has chosen a criterion that has no apparent effect other than to weed out gays and lesbians. This the MHRA does not permit.

RAC also relies on *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. App. 1995), but *Lilly* actually provides more support for the Monsons' case than for RAC's case. *Lilly*, which examined the City of Minneapolis' decision to offer dependent benefits to its employees' domestic

partners, is fundamentally a case about the relationship between home-rule cities and the State. *Id.* at 109-10. In its summary of the decision, the Court of Appeals did not even mention the MHRA. *Id.* at 113. Though the Court did discuss the MHRA in the text of the opinion, the Court did so in order to answer a specific question: whether, by adding “sexual orientation” to the MHRA, the Legislature intended to expand the scope of Minn. Stat. §471.61, which governs employee benefits for local-government employees. *Id.* at 112. That question has no bearing on the issues at hand. Moreover, *Lilly* actually represents one of the limited instances where consideration of whether a legal marriage exists is actually relevant: *because there is a controlling law requiring such consideration.* In the instant matter, there is nothing, anywhere, requiring the RAC to link family memberships to marriage in the way that Minn. Stat. § 471.61 requires local governments to link dependent benefits to marriage.

The RAC’s arguments are flawed, because they are based ultimately on an analysis that treats unmarried heterosexual couples and unmarried homosexual couples as identical, with no acknowledgment that the former, but not the latter, are able to change their marital status at will. The correct comparison is simply between heterosexuals and gays/lesbians. In *Alaska Civil Liberties Union v. State of Alaska*, 122 P.3d 781 (Alaska 2005), the

Alaska Supreme Court recognized this, and held that the state constitution required the extension of dependent benefits to public employees' domestic partners. The Court stated:

By restricting the availability of benefits to "spouses," the benefits programs "by [their] own terms classif[y]" same-sex couples "for different treatment." Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, because of the legal definition of "marriage," the partner of a homosexual employee can never be legally considered as that employee's "spouse" and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are *facially discriminatory*. *Id.* at 789 (emphasis added)

Similarly, in a case whose facts are barely distinguishable from those in the present case, New York's high court held in *Levin v. Yeshiva Univ.*, 96 N.Y.2d 484, 754 N.E.2d 1099 (N.Y. 2002), that a lesbian couple articulated a sexual-orientation discrimination complaint against a university that provided preferential housing opportunities to students who were married. Being a lesbian couple, clearly they could not marry under New York law. The plaintiffs' complaint had been dismissed by both the trial and appeals courts, which ruled that "there was no discrimination or disparate impact on homosexuals, since defendant's policy 'had the same impact on non-married, heterosexual medical students as it had on non-married homosexual medical students.'" *Id.*, 96 N.Y.2d at 490. This is precisely the RAC's argument in the present case. But the New York Court of Appeals rejected

this reasoning in its entirety. *Id.* at 493. The analytical problem, the court held, was that the District Courts looked at the impact only on unmarried students, not on heterosexual students versus gay/lesbian students. *Id.*

Defendant's position here essentially distills to the proposition that [the school's] policy must be viewed as distinguishing between two nonsimilarly-situated groups: married students on the one hand who, by law, do not include homosexuals, and non-married students on the other. In short, [the school's] premise is that the comparison groups must be separated along the facially neutral lines drawn by its policy. *Id.* at 495.

The court referred to this analysis (identical to that of the RAC), as flawed, and pointed out it had been repudiated by Congress. *Id.* In order to measure the discriminatory effect, if any, of the housing policy, the court held that "there must be a comparison that includes consideration of the full composition of the class actually benefited under the challenged policy." *Id.* at 496.

Applied to the instant case, this approach would require consideration of the sexual orientation of both those who *may* purchase family memberships at RAC, and those who *may not*. Doing so demonstrates the sexual orientation-based skew: gay and lesbian people are barred from buying those memberships. See *id.* at 495 (a "policy could not be facially discriminatory on the basis of sexual orientation if the criterion used to determine whether housing was awarded operated to exclude *both*

heterosexual and homosexual students while, at the same time, conferred housing to a distinct group, *also* comprised of both homosexual and heterosexual students” (emphasis added)). As Chief Judge Kaye explained in a concurring opinion:

Here, [the school’s] policy of providing partner housing to married students is facially neutral with respect to sexual orientation. That policy, however, has a disparate impact on homosexual students, who cannot marry and thus cannot live with their partners in student housing. By contrast, heterosexual students have the option of marrying their life partners. *Id.* at 503 (Kaye, C.J., concurring in part and dissenting in part).

Chief Judge Kaye distinguished clearly between the purposes of New York City’s anti-discrimination law and that of New York state’s marriage law. The court’s analysis is instructive here as the MHRA, like the New York anti-discrimination law are similar:

It is immaterial that State law permits only heterosexual marriage. The City Human Rights Law specifically bans housing discrimination on the basis of sexual orientation. The State marriage law merely defines who can and cannot marry; it was not intended to permit landlords to violate New York City’s laws against housing discrimination. *Id.*

It is equally true, and equally immaterial, that Minnesota law does not permit the Monsons to marry. Minnesota law nonetheless forbids providers of public accommodations and business-contractors from discriminating in violation of the Minnesota Human Rights Act. The RAC has argued that *Levin* offers no insights because New York law, unlike the MHRA, provides

for disparate-impact claims in a public-accommodations context. However, as established *supra*, the MHRA does permit such an analysis. *Levin*, therefore, exemplifies the analysis that is proper here: the RAC provides heterosexuals with the opportunity to enjoy a family discount, but refuses to provide gays and lesbians with any such opportunity at all. The RAC is not responsible for the fact that the Monsons may not marry, but they are entirely responsible for having consciously chosen a criterion that has the effect of completely excluding gays and lesbians like the Monsons from this particular privilege it provides to all others.

The unmistakable import of these decisions is clear: the correct comparison to make in a sexual-orientation discrimination claim is between heterosexuals and gays/lesbians. Put simply heterosexuals, only, may purchase the RACs' family memberships; gays and lesbians, in contrast, may not. This is not the product of the Legislature's decisions regarding who may or may not marry; it is the product of the RAC's arbitrary decision to tie its family-membership policy (in theory) to marriage. That decision imposes a disparate impact on gays and lesbians, which the MHRA prohibits. Accordingly, the decision of the District Court must be reversed.

**E. The District Court's Interpretation of the MHRA is Internally Inconsistent in Significant Ways.**

In addition to ignoring controlling case law permitting the Monsons to bring a disparate-impact claim as part of their case, the court below also identified a non-existent "problem" for which it crafted a self-contradictory "solution." As questions of statutory construction, these questions are also reviewed under a *de novo* standard.

**1. There is no conflict between the MHRA provisions on which the Monsons' claims are based.**

In attempting to apply the MHRA to the facts at hand, the District Court stated that due to "significant overlap between the issues involving 'public accommodation' and 'business contracting,'" the court was confronted with the task of "attempting to reconcile" the MHRA's public-accommodations and business-contracting provisions. (A 7) This perceived need to "reconcile" these provisions reflects an impression that these provisions are in conflict. Simply being different provisions does not make the provisions conflicting.

The Monsons' case involves charges of discrimination against (1) a place of public accommodation that offers memberships on (2) a business-contract basis. While it is true that the facts of this specific case reflect a significant factual overlap between the claims arising under these two areas

of the MHRA, this does not indicate any inherent conflict between the statutory provisions themselves. For example, the Mall of America is a public accommodation, but it would be difficult to see how a visitor alleging discrimination against the Mall would experience a “significant overlap” with the MHRA’s business-contracting language. If one specific set of facts gives rise to two different types of discrimination claims, this does not require a court to “reconcile” the different statutory provisions: it requires a court to examine the facts under one framework, and then under the other. It may prove that one claim succeeds and the other fails, or both succeed, or both fail – but it does not mean that the underlying statutory provisions are in some sort of inherent conflict that must be “reconciled.”

The trial court’s identification of a conflict between the MHRA’s public-accommodations and business-contracting provisions was in error as no conflict exists. According to the court below, “... the specific language of Minnesota Statutes section 363A.17 [business contracting] makes it clear that *intentional* acts of discrimination, not *disparate impact*, was [sic] the object of this piece of legislation.” (A 8) (emphasis added). However, unlike the language pertaining to business contracting, there is nothing in the public-accommodations provisions of the MHRA requiring a showing of discriminatory intent. Indeed, this Court in *Paper* specifically admonished

providers of public accommodations to be mindful of their obligation under the MHRA to avoid disparate impacts, knowing that disparate-impact analysis does not require a showing of intent. Had the Legislature intended to require such a showing, Minn. Stat. § 363A.17 demonstrates that the Legislature knew precisely how to accomplish it, yet in Minn. Stat. § 363A.11 (public accommodations), it chose not to. Instead, the Legislature required a showing of intent with regard to business-contracting discrimination, but not with regard to public-accommodations discrimination. This is not a conflict; these are merely different standards for different claims.

2. Disparate-impact analysis is focused on indirect discrimination, not unintentional discrimination.

The trial court's determination that a conflict nevertheless existed may have been influenced by confusion between two distinct concepts. That is, the court erred when it stated that Minn. Stat. § 363A.17 was concerned with "intentional ...discrimination, not disparate impact." This shows that the court viewed "disparate-impact discrimination" as the opposite of "intentional discrimination" – that is, that disparate-impact discrimination is necessarily unintentional. This is incorrect: disparate-impact analysis focuses on *indirect* discrimination, not *unintentional* discrimination; the issue of intent is irrelevant. The question of whether discrimination is

*intentional or unintentional* is wholly separate from the question of whether discrimination is *direct* (disparate treatment) or *indirect* (disparate impact). There simply is no logical reason to imagine that someone intending to discriminate could not consciously select an indirect method of doing so. In fact, the court below specifically concluded that “clearly, the RAC and Mr. Remick have intentionally chosen not to voluntarily accommodate or recognize the Monsons as a family within the RAC’s membership framework.” (A 10) The Monsons agree: the discrimination here is both intentional and (in part) indirect. There is no conflict to reconcile and the court should be reversed.

**F. The District Court’s “Reconciliation” Inherently Contradicts its Analysis Regarding Other Issues in the Case.**

The District Court’s “solution” to the conflict it erroneously identified resulted in the Monsons’ claims and the RAC’s defenses being examined under fundamentally contradictory analyses. The District Court concluded because business-contracting discrimination requires a showing of intent, “any public accommodation claim must also deal with intentional acts of discrimination given the acknowledged intertwining and overlapping Public Accommodations and Business Contracting claims.” (A 8) The court therefore “solved” its “conflict” by importing the “intent” requirement of the MHRA’s business-contracting provision into the MHRA’s public-

accommodations provision. Yet at the same time, the court tied the MHRA's "disparate impact" concept solely to its employment provisions and held that it may *not* be imported into its public accommodations section. The District Court attempts to have it both ways: concepts it determines are unique to one section of the law may not be applied to others when it comes to the Monsons' claims, but they may be moved around at will in order to bolster the RAC's defenses. If the "intent" language may be imported from the business-contracting section into the public-accommodation section, then the "disparate impact" language allegedly unique to employment may also be imported into public accommodations. To hold otherwise would create a contradiction the Legislature never intended. Because the purpose of statutory construction is to effectuate the Legislature's intent, the analysis resulting in this unintended contradiction must be rejected.

**III. The Trial Court's Interpretation of the MHRA as it Applies to the "Homosexual Lifestyle" is Unsupportable and Irrational.**

Perhaps the most bizarre and disturbing aspect of the District Court's analysis of the issues raised in this case is its spontaneous discussion of the MHRA's language regarding the so-called "homosexual lifestyle." Specifically, the Legislature directed that nothing in the MHRA "mean[s] the state of Minnesota condones homosexuality or bisexuality or any equivalent lifestyle; ... ." Minn. Stat. § 363A.27(1) (2006). Relying on this

language, the District Court held that the RAC is entitled to maintain membership policies that have a disparate impact on gay and lesbian Minnesotans because “our legislature has expressly permitted such a definition by unequivocally stating that [sic] gay and lesbian lifestyle should neither be condoned nor recognized.” (A 10) Further, the District Court held that:

The consequence of interpreting the MHRA to prohibit discrimination against sex-sex [sic] domestic partners would negate the legislature’s specific intent that couples such as the Monsons not be recognized as a family unit and, by logical extension, that they not be recognized as a legal entity. ... The Monsons, as a couple, are not a protected class under MHRA and not entitled to any of its perceived protections.

*Id.*

It is difficult to know where to begin unpacking the court’s multiple analytical errors in this particular discussion. First, the statutory provision at issue has never been authoritatively construed by a court. Additionally, the Legislature itself provided no definition for what constitutes an alleged “homosexual lifestyle.” There is not case law on the subject either. It remains unclear, even in light of the District Court’s opinion, what a “homosexual lifestyle” might actually be or entail. Whether the phrase “homosexual lifestyle” has any meaning at all is an open question; see *Hogue v. Hogue*, 2004 WL 578593 at \* 6-7 (Tenn. App. March 24, 2004) (“... the term ‘gay lifestyle,’ like urban lifestyle, is anything but specific.”)

If one were to infer a meaning from the District Court's decision, one may imagine that the court understood that the "homosexual lifestyle" involves being in a couple (presumably it does not mean simply attempting to join a gym). Consequently, it appears that single gay and lesbian people do not have a "homosexual lifestyle" at all.

The Monsons do not seek recognition as a "legal entity," nor could any conceivable decision under the MHRA result in their being so recognized. The Monsons seek to be free of discrimination on the basis of sexual orientation and to have access to the opportunities society provides in general, and to not be faced with arbitrary policies of private businesses that exclusively benefit heterosexuals while wholly excluding gay and lesbian people.

Finally, to the extent that the District Court concluded that as a couple, the Monsons enjoy no protection under the MHRA, this appears squarely to contradict the court's own suggestion, on the very same page of its opinion (A 10), that the Monsons, as a couple, *would* have had an MHRA claim had the RAC permitted unmarried heterosexual couples to purchase family memberships (which it concedes is possible).

Construing such a statement to be a gratuitous condemnation of gay and lesbian people generally as a matter of law raises substantial equal-

protection concerns. If “homosexual lifestyle” has any meaning at all, it presumably represented the Legislature’s efforts to reconcile prohibiting discrimination against gay and lesbian people while simultaneously purporting to criminalize their private intimate conduct; see Minn. Stat. § 609.293 (2006) (consensual sodomy a crime). The need to engage in such a reconciliation effort dropped away in light of the U. S. Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), holding such laws unconstitutional. Seen in this light, this provision responds to a situation that no longer exists and thus, like Minnesota’s sodomy law itself, it has no further application.

The Legislature has a long-standing public policy of promoting marriage. See Minn. Stat. § 517.01 (2006) *et seq.* In enacting the Minnesota Human Rights Act, the Legislature demonstrated its manifest intent to articulate a strong public policy of prohibiting, *inter alia*, sexual-orientation discrimination. See Minn. Stat. § 363A.02, subd.1(a) (2006) (“It is the public policy of this state to secure for persons in this state, freedom from discrimination ... in public accommodations because of ...sexual orientation.”). Undeniably, the Legislature recognized that there was conflict inherent in prohibiting sexual-orientation discrimination while simultaneously withholding the right to marry from same-sex couples. The

Legislature chose to address this potential conflict by specifying only that “[n]othing in [the MHRA] shall be construed to ... authorize the recognition of or the right of marriage between persons of the same sex.” Minn. Stat. § 363A.27(4) (2006). In other words, the Legislature’s clear intent was to forestall a claim under the MHRA that the State’s own marriage laws violated the Act’s prohibitions on sexual-orientation discrimination in public services. There is nothing in this language remotely purporting to prohibit claims against private entities which arbitrarily use marriage as a tool to withhold privileges from gay and lesbian people. Nor is there any aspect of this case in which “the recognition of or the right of marriage” is at issue. The Legislature recognized the potential for conflict between two strong public policies, and resolved that conflict in a narrow way, taking off the table solely those questions regarding the right to marry. Liberally construing the MHRA, as the Legislature specifically directed, to prevent discrimination against same-sex couples in public accommodations and through business contracts is fundamentally consistent with the Legislature’s manifest intent: eradicating discrimination while insulating its marriage statutes from MHRA analysis.

## CONCLUSION

The District Court erred in granting the RAC's motion for summary judgment, because the RAC conceded at oral argument that, in fact, they subject unmarried heterosexual and unmarried homosexual couples to different standards when it comes to selling them family memberships. Additionally, the court below erred as a matter of law in failing to acknowledge this Court's controlling precedents, establishing that the Monsons may bring discrimination claims based on disparate-impact analysis in other areas under the MHRA besides employment. Further, the Monsons have satisfied each element of a disparate-impact claim of discrimination on the basis of sexual orientation. Finally, the District Court's analyses regarding questions of intentional vs. unintentional discrimination, direct vs. indirect discrimination, and the so-called "homosexual lifestyle" are also fundamentally flawed. For these reasons, the Monsons respectfully request that this Court reverse the judgment of the District Court.

Dated this 17<sup>th</sup> day of March, 2008.

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**STATE OF MINNESOTA**

**IN COURT OF APPEALS**

**Case No. A07-2433**

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Amy Monson and Sarah Monson,

Appellants,

v.

**CERTIFICATE OF WORD COUNT  
COMPLIANCE**

Rochester Athletic Club and John D. Remick,

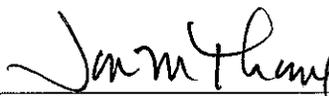
Appellees.

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I, Joni M. Thome, counsel for Appellant, hereby certify that the word count of the herewith-filed Appellant's 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 8,676 words.

Dated this 17<sup>th</sup> day of March, 2008

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