

A07-2433

STATE OF MINNESOTA
IN COURT OF APPEALS

Amy and Sarah Monson,

Appellants,

v.

Rochester Athletic Club and John D. Remick,

Appellees.

REPLY BRIEF OF APPELLANTS

HALUNEN & ASSOCIATES

Joni M. Thome, Atty. No. 232087
220 South Sixth Street, Suite 2000
Minneapolis, MN 55402
Telephone: (612) 605-4098

OUTFRONT MINNESOTA

Philip A. Duran, Atty. No. 030279X
310 E. 38th St., Suite 204
Minneapolis, MN 55409
Telephone: (612) 822-0127, ext. 102

Attorneys for Appellants

DUNLAP & SEEGER

Gregory J. Griffiths, Atty. No. 185553
206 S. Broadway, Suite 505
Rochester, MN 55904
Telephone: (507) 288-9111

Attorney for Appellees

TABLE OF CONTENTS

TABLE OF CONTENTS..... I

TABLE OF AUTHORITIES II

PRELIMINARY REMARKS 1

REPONSIVE ARGUMENT 1-11

I. Disparate-impact analysis is fully applicable to these claims 1-4

II. RAC’s reliance upon its distorted characterization of this
Court’s ruling in Lilly is misplaced 5-7

III. RAC’s new argument that the MHRA protects only single people
And not couples is without merit..... 7-11

CONCLUSION 11

TABLE OF AUTHORITIES

MINNESOTA STATE CASES

| | |
|---|------|
| <i>Babcock v. BBY Chestnut Limited Partnership</i> , 2003 WL 21743771 (Minn. Ct. App. July 29, 2003) | 4 |
| <i>Dynamic Air, Inc. v. Bloch</i> , 502 N.W.2d 796, 800-01 (Minn. Ct. App. 1993)..... | 4 |
| <i>Khalifa v. State</i> , 397 N.W.2d 383, 388 (Minn. Ct. App. 1986)..... | 1, 2 |
| <i>Lilly v. City of Minneapolis</i> , 527 N.W.2d 107 (Minn. Ct. App. 1995)..... | 5, 6 |
| <i>Paper v. Rent-a-Wreck</i> , 463 N.W.2d 298 (Minn. Ct. App. 1990), rev. denied (Minn. January 14, 1991)..... | 3 |

MINNESOTA STATE STATUTES

| | |
|---|------|
| Minn. Stat. § 363A.02, subd.1(b)(2006)..... | 9 |
| Minn. Stat. § 363A.04 (2007) | 8 |
| Minn. Stat. § 363A.11, subd.1(a)..... | 4, 7 |
| Minn. Stat. § 363A.27(4)(2007) | 9 |
| Minn. Stat. § 363A.28, subd.10(2006) | 2, 3 |
| Minn. Stat. § 471.61 (2006)..... | 5, 6 |
| Minn. Stat. § 480A.08, subd.3 (2006) | 4 |
| Minn. Stat. § 645.08 (2007)..... | 8 |

PRELIMINARY REMARKS

In their brief to this Court, Respondents Rochester Athletic Club and its owner, John D. Remick (collectively, “RAC”), offer a wide variety of arguments intended to defeat the Appellants – including one offered for the first time on appeal. None is sufficient to refute the arguments of Amy and Sarah Monson. Rather, some of the arguments set forth by RAC emphasize the reasons this Court should reverse the District Court.

RESPONSIVE ARGUMENT

I. Disparate-impact analysis is fully applicable to these claims.

RAC argues that disparate-impact analysis under the Minnesota Human Rights Act (MHRA) is available only in the context of employment cases. *See RAC Br. at 10-11*. This argument ignores this Court’s prior rulings, as well as several public-policy bases, articulated in the Monsons’ opening brief, supporting the conclusion that disparate-impact analysis is not restricted in this manner.

RAC’s attempts to distinguish this Court’s ruling in *Khalifa v. State*, 397 N.W.2d 383 (Minn. App. 1986) from this case is particularly illuminating. According to RAC, “[t]he *Khalifa* court merely recognized the plaintiff’s *claims* were of a disparate impact nature.” *RAC Br. at 13 (emphasis in original)*. Indeed, this Court recognized *Khalifa* was

proceeding on a disparate-impact theory – and specifically held that *Khalifa* had, in fact, stated a viable claim under the MHRA. *Khalifa*, 397 N.W.2d at 388 (“... we hold that the pleadings are sufficient to state a cause of action.”). RAC further suggests that “*Khalifa* only reiterate[s] the fact that disparate impact claims are, unless explicitly authorized, limited to employment matters.” *RAC Br. at 14*. RAC conspicuously fails to provide a citation to any language in *Khalifa* that supports this surprising contention, because no such language exists.

Moreover, this argument runs head-on into another of RAC’s assertions: namely, that the 1990 amendment to the MHRA adding what is now Minn. Stat. § 363A.28, subd.10 (2007) inserted the first MHRA language regarding disparate-impact analysis, and restricted the analysis to employment claims. *See RAC Br. at 11-12*. *Khalifa* permitted a disparate-impact claim to move forward, though RAC contends that nothing in the MHRA explicitly authorized them until four years later. Thus RAC’s argument that *Khalifa* stands for the proposition that disparate-impact claims are impermissible absent explicit authorization in the statute is in error.

RAC argues further that the 1990 language “explicitly and solely authorized the disparate impact standard for employment-related claims.” *RAC Br. at 11*. While the Legislature specified a disparate-impact standard

to be applied in employment claims, nothing in Minn. Stat. § 363A.28, subd.10 (2007) precludes the applicability of the disparate-impact analysis in other contexts. Moreover, this Court decided *Paper v. Rent-a-Wreck*, 463 N.W.2d 298 (Minn. App. 1990), months *after* the 1990 language became effective, and the Minnesota Supreme Court permitted this Court's ruling to stand without further review on January 14, 1991. RAC is indeed correct that *Paper* was a claim based on the Minneapolis Civil Rights Ordinance, a point the Monsons themselves have made clear. *See RAC Appx. at 21.* However, RAC ignores this Court's specific admonition to providers of public accommodations to avoid policies having disparate impacts on groups protected not only by the Minneapolis ordinance, but also by "similar laws." *Paper*, 463 N.W.2d at 300. Considering that *Paper* was decided by this Court (and review denied by the Minnesota Supreme Court) very shortly after the 1990 amendment came into effect, it is clear that this Court correctly understood that the amendment did *not* wholly prohibit the application of disparate-impact doctrine to areas beyond employment. As the Monsons have noted, the disparate-impact analysis this Court applied in *Khalifa* "is similar to, but distinct from, the disparate-impact analysis the Legislature included in the MHRA itself."¹ *RAC Appx. at 22.*

¹ It should be noted that the amendment was originally codified at Minn.

RAC places great weight on this Court's unpublished decision in *Babcock v. BBY Chestnut L.P.*, 2003 WL 21743771 (Minn. App. July 29, 2003). RAC suggests that Eighth Circuit case law discouraging unpublished opinions generally requires that *Babcock* be applied as authoritative here. *See RAC Br. at 12 n. 3.* This Court has made clear that it is "improper to rely on unpublished opinions as binding precedent." *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800-01 (Minn. App. 1993); see also Minn. Stat. § 480A.08, subd.3 (2007) (*unpublished decisions are "not precedential."*) This Court should firmly reject RAC's invitation to disregard the statute and case law and apply *Babcock*. Further, *Babcock* contradicts case law and other principles governing the interpretation of the MHRA.

This Court thus made clear in *Paper* that the disparate-impact analysis identified in *Khalifa* in 1986 remained viable after the 1990 amendment, and was never limited strictly to employment claims. RAC's efforts to avoid this conclusion must be rejected.

Stat. § 363A.03, subd.11. It was not then, nor has it subsequently been, inserted into the MHRA's employment section or grouped with the MHRA's employment provisions. It was originally, and remains, placed within a section dealing with MHRA claims in general (entitled "Grievances"). This fact contradicts the argument that the language was intended to restrict disparate-impact claims solely to employment matters.

II. RAC's reliance upon its distorted characterization of this Court's ruling in *Lilly* is misplaced.

RAC accuses the Monsons of taking “particular liberty in citing [the transcript of the proceedings below] and blatantly [taking] statements out of context, thereby misguiding this Court.” *RAC Br. at 18*. The Monsons stand by their characterization of the record and specifically of RAC's concessions made during oral argument. On the other hand, RAC is guilty of the very charges it hurled at the Monsons.

RAC cites *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 112-13 (Minn. App. 1995) for the proposition that providing dependent benefits only to employees' spouses does not violate the MHRA and specifically refers to dicta in the decision to support its position. That is, “It does not violate the MHRA prohibition against discrimination based upon sexual orientation.” *RAC Br. at 8*. RAC fails, however, to provide the Court with the complete statement and the context of the dicta. The language cited by RAC from *Lilly* actually reads: “As Minn. Stat. § 471.61 stands, without inclusion of benefits to same sex domestic partners, it does not violate the MHRA prohibition against discrimination based upon sexual orientation.” *Lilly*, 527 N.W.2d at 112. RAC's sleight-of-hand regarding *Lilly* attempts to mask the core reality of that case: it was not about the MHRA at all, it was about the statutory language of 471.

The “Syllabus by the Court” in *Lilly* does not mention the MHRA, *Id.* at 108, nor does the Court’s “Decision” summary. *Id.* at 113. Given that James Lilly’s claim against the City of Minneapolis was most certainly not based on the MHRA, any language in *Lilly* purporting to interpret the MHRA is quite simply *dicta*. The discussion of the MHRA in *Lilly* is restricted solely to a discussion about whether the 1993 amendment adding “sexual orientation” to the MHRA affected the scope of Minn. Stat. 471.61, regarding municipal employee benefits:

Given the legislative history provided in Senator Spear’s remarks and the requirements for interpretation of the sexual orientation amendments provided in Minn. Stat. § 363.021 [now codified at Minn. Stat. § 363A.27], it is apparent that the legislature did not intend to expand the list of health care benefits in Minn. Stat. § 471.61 to give the same health care benefits to employees with same sex domestic partners as are available to employees who are married.

Id. at 112. When this Court’s ruling is read in its original text, instead of the truncated version RAC provides, it is abundantly clear that the holding in *Lilly* was that Minn. Stat. § 471.61 itself did not violate the MHRA.

The viability of Minn. Stat. § 471.61 is not at issue in this case, nor is the question, decisive in *Lilly*, of the relationship between cities and the State.

In *Lilly* the Court held that Minn. Stat. § 471.61 *required* Minneapolis to take into consideration whether a marriage existed. The instant case

presents the opposite scenario: RAC, a private business, freely acknowledges that its policies are within its own control and its “marriage” policy is its own to interpret and apply, not dictated from above. *See RAC Br. at 4* (stating that it “even offered the [Monsons] the opportunity to pay the discounted family-rate initiation fee.”)² As such, this Court should firmly reject RAC’s suggestion that the Monsons turn to the “Minnesota legislature and the voters of Minnesota” for relief. *Id.* at 7. It does not require an act of the Legislature, or a vote of the people, to secure a gym membership on non-discriminatory terms when, by enacting the MHRA, the Legislature has already spoken. This policy and its implications are the sole responsibility of the RAC and its owner, and it is they, not the Legislature or the voters, who must remedy its discriminatory effects.

III. RAC’s new argument that the MHRA protects only single people and not couples is without merit.

RAC maintains that “[t]he MHRA prevents public accommodations and business [*sic*] from discriminating against *individuals* on account of their sexual orientation – not as couples.” *RAC Br. at 6* (*emphasis in original*). RAC points to language in Minn. Stat. § 363A.11, subd.1(a), which states that the MHRA prohibits the denial to “any person” the full

² RAC offers no explanation as to why the Monsons are a family for purposes of its initiation fee, but not for its family-membership policy.

goods, services, etc. of places of public accommodations, *id.*, and argues that this means only individuals are protected. This misinterpretation of the MHRA directly conflicts with one of the Legislature’s statutory canons of construction:

645.08 CANONS OF CONSTRUCTION.

In construing the statutes of this state, the following canons of interpretation are to govern, unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute:

...

(2) the singular includes the plural; and the plural, the singular; ...

Minn. Stat. § 645.08(2) (2007). Clearly, the MHRA prohibits discrimination against *persons* – plural – and not just against individuals. In order to find otherwise, this Court would have to find that to do so would be inconsistent with the manifest intent of the legislature.

As the Monsons articulated below, “[i]n 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.” *RAC Appx. at 35*. The Legislature included “sexual orientation” in the expansive MHRA and directed courts, including this Court, to construe that statute liberally to achieve its objective of eradicating discrimination. See Minn. Stat. § 363A.04 (2007).

While clearly removing the question of marriage from the MHRA's scope, see Minn. Stat. § 363A.27 (2007), the Legislature in no way articulated anything resembling a direction that the MHRA offered no protections whatsoever to gay or lesbian couples. To accept such a proposition would require one to accept that the Legislature intended, for example, that a restaurant owner would be prohibited from refusing to seat a gay or lesbian person, but that the owner could freely refuse to seat gay or lesbian couples. This is preposterous, and RAC wisely offers no authority for such a proposition.

In amending the MHRA in 1993 to prohibit discrimination on the basis of sexual orientation, the Legislature recognized that arbitrarily excluding gay and lesbian people (among many others) from the myriad transactions of a civil society “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) (2007). While RAC continues to maintain that it's “policy treats people equally,” *RAC Br. at 20*, RAC has yet to dispute the Monsons' assertion that, in fact, gay and lesbian people are flatly barred from purchasing family memberships at the RAC. A policy that exclusively benefits one group while entirely excluding another is not one which treats these groups “equally.”

By freely conceding that it was willing to consider the Monsons a family for at least some purposes, RAC simply underscores that it is fully capable of amending or waiving its purported policy to lessen its impact on the Monsons' rights, finances, and dignity. The RAC now flees from its multiple concessions (now characterized as "hearsay" responses to "hypothetical" questions, *see RAC Br. at 18*)³ below that it does not enforce its "marriage" policy with respect to heterosexuals. Nonetheless, its statement to this Court that "immoral" (*RAC Br. at 19*) unmarried heterosexual couples can buy family memberships only serves to illustrate the obvious fact that such couples know they can do so because RAC does not enforce this policy with regard to heterosexual couples in the first place.⁴ For the RAC, the determinative question is not whether the heterosexual couple is married, but simply whether the couple is heterosexual. RAC fails to offer even a hint as to any rational purpose this policy serves, other than

³ RAC makes no effort to explain why a party's representations through counsel before a trial court should simply be disregarded.

⁴ RAC states that unmarried heterosexual couples can purchase family memberships "[d]espite [RAC's] best efforts to prevent such fraud" *RAC Br. at 19*. Not only does RAC offer not a single example of such "best efforts," this contradicts its answer to the court below, when asked whether it made "any independent determination" of whether a couple is married, that "No, [RAC] trust[s] people." *Monson Appx. at 41*. This statement followed by mere seconds the assertion that "we don't want to have someone fill out a form that promises that we're really in a committed relationship, trust us" *Id.*

simply as a vehicle for providing financial benefits exclusively to heterosexuals. All of this conduct exemplifies precisely the sort of discrimination the Legislature seeks to eradicate through MHRA.

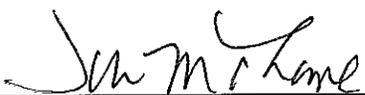
CONCLUSION

For the foregoing reasons, Amy and Sarah Monson respectfully urge this Court to reverse the decision of the trial court.

Respectfully Submitted,

Dated April 29, 2008.

HALUNEN & ASSOCIATES



Joni M. Thome, Atty. No.232087
220 South Sixth Street, Suite 2000
Minneapolis, MN 55402
(612) 605-4098

OUTFRONT MINNESOTA

Philip A. Duran, Atty. No. 030279X
310 E. 38th St., Suite 204
Minneapolis, MN 55409
(612) 822-0127, ext. 102

Attorneys for Appellants

STATE OF MINNESOTA

IN COURT OF APPEALS

Case No. A07-2433

Amy Monson and Sarah Monson,

Appellants,

v.

**CERTIFICATE OF WORD COUNT
COMPLIANCE**

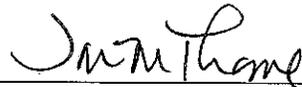
Rochester Athletic Club and John D. Remick,

Appellees.

I, Joni M. Thome, counsel for Appellants, 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 2,107 words.

Dated this 29th day of April, 2008

HALUNEN & ASSOCIATES



Joni M. Thome, Atty. No. 232087
220 South Sixth Street, Suite 2000
Minneapolis, MN 55402
Telephone: 612.605.4098
Fax: 612.605.4099

Attorneys for Appellants