

CASE NO. A07-2433

State of Minnesota
In Court of Appeals

AMY MONSON AND SARAH MONSON,

Appellants,

vs.

ROCHESTER ATHLETIC CLUB AND JOHN D. REMICK,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF THE ISSUES

- I. The District Court found that based on the evidence the Rochester Athletic Club's ("RAC") family membership policy did not, on its face or as implemented, intentionally discriminate against Plaintiff-Appellants on the basis of sexual orientation. The trial court concluded the policy did not violate the Minnesota Human Rights Act ("MHRA").**

Was the District Court correct in concluding that the RAC family membership policy, on its face or as implemented, did not intentionally discriminate against Plaintiffs-Appellants in violation of the MHRA?

- II. The District Court found that the MHRA limits the disparate impact standard to employment-related cases. The trial court therefore concluded the disparate impact standard did not apply to Plaintiffs-Appellants' claims.**

Was the District Court correct in concluding that the MHRA limits the disparate impact standard to employment-related matters?

STATEMENT OF THE CASE

On January 31, 2007, Plaintiffs Amy Monson and Sarah Monson served a Summons and Complaint on Defendants Rochester Athletic Club and John Remick alleging causes of action under the MHRA.¹ On Count I, Plaintiffs alleged Defendants violated the MHRA by discriminating in public accommodations because of sexual orientation. On Count II, Plaintiffs alleged Defendants violated the MHRA by discriminating in business contracting because of sexual orientation. On Count III, Plaintiffs alleged that Mr. Remick aided and abetted discrimination in violation of the MHRA.

On February 15, 2007, Defendants responded with an Answer that denied the Plaintiffs' allegations and asserted a number of affirmative defenses. On March 27, 2007, Plaintiffs filed their Complaint with the District Court of Olmsted County. On June 27, 2007, Defendants filed a Notice of Motion and Motion for Summary Judgment. On November 5, 2007, Judge Kevin Lund of the District Court of Olmsted County granted summary judgment in favor of the Defendants. Judge Lund granted summary judgment on all counts on the basis that the disparate impact standard did not apply and on the basis that the RAC's family membership policy, on its face or as implemented, did not intentionally discriminate against Plaintiffs on the basis of their sexual orientation.

¹ Rather than use *(sic)*s, Respondents silently corrected any errors of spelling and grammar of text within quotes.

On December 27, 2007, Plaintiffs appealed the judgment of the District Court. This appellate brief followed.

STATEMENT OF THE FACTS

Respondent Rochester Athletic Club ("RAC") is a full service health club facility located in Rochester, MN. (R. App. - 1). Respondent John Remick is the President and CEO of the RAC. The RAC offers a discounted rate for family memberships. (A.3). To receive a family membership, RAC policy requires a couple be legally married as husband and wife. (R. App. - 2). RAC policy follows the State of Minnesota's legal definition of marriage. (R. App. - 8).

Appellants Sarah Monson and Amy Monson are a lesbian couple in a relationship and are raising an eleven (11) year old child. (A.3, 13-14). In 2002, Sarah changed her last name to Monson. (A.14). Sarah and Amy are not married under the law of Minnesota because state law does not permit the marriage of same-sex couples. (A.14).

During the winter of 2006, Appellants contemplated joining a local health club. (A.14). After comparing costs, location, and services of area gyms, Appellants designated the RAC as their top choice. (A.14). In February 2006, Sarah was reading the RAC's webpage whereby she learned that RAC policy required couples be "legally married" before receiving a family membership. (A.15).

On February 28, 2006, Sarah sent an email to Barbara McGovern, the RAC's Finance Director, to inquire about family membership policy. (A.15). On March 1, 2006, Ms. McGovern responded that the website language was correct and accurately

represented RAC policy. (A.15). Ms. McGovern explained Sarah and Amy did not qualify for a family membership because they were not “legally married” according to the RAC’s definition and they could not jointly file their taxes. (A.15).

Appellants later called RAC General Manager Greg Lappin. (A.15). Mr. Lappin reiterated that Amy and Sarah did not qualify for a family membership. (A.15). However, Mr. Lappin offered Appellants full access to the RAC through individual and individual with child memberships. (A.4). This is the same offer of membership the RAC extends to *all* unmarried couples raising children. Respondents even offered the Appellants the opportunity to pay the discounted family-rate initiation fee. (A.15) Despite this special discount, Appellants rejected the RAC’s offer of membership. (A.16).

STANDARD OF REVIEW

In granting the RAC’s 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).

ARGUMENT

III. THE DISTRICT COURT PROPERLY HELD RESPONDENTS DID NOT DISCRIMINATE AGAINST APPELLANTS BASED ON SEXUAL ORIENTATION UNDER THE MHRA.

The MHRA prohibits unfair discrimination based upon sexual orientation in public accommodations. Minn. Stat. § 363A.11. Minnesota Statutes section 363A.11 provides:

It is unfair discriminatory practice:

(1) to deny any person the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of race, color, creed, religion, disability, national origin, marital status, sexual orientation, or sex, or for a taxicab company to discriminate in the access to, full utilization of, or benefit from service because of a person’s disability.

Minn. Stat. § 363A.11 subd.1(a). The MHRA also prohibits such discrimination in business. Minn. Stat. § 363A.17. Minnesota Statutes section 363A.17 states:

It is unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service:

.....

(c) to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person’s race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.

Minn. Stat. § 363A.17 (emphasis added). Furthermore, § 363A.27 states in pertinent part:

Nothing in this chapter shall be construed to: (1) mean the state of Minnesota condones homosexuality or bisexuality or any equivalent lifestyle...or (4) authorize the recognition of or the right of marriage between persons of the same sex.

Minn. Stat. § 363A.27.

Under the MHRA, discrimination claims are analyzed using the burden shifting analysis of McDonnell Douglas. See Dietrich v. Canadian Pac. Ltd., 563 N.W.2d 319, 323 (Minn. 1995). See also McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The courts have explained, “To successfully proceed under the MHRA, (1) the plaintiff must establish a prima facie case of discrimination; (2) the burden then shifts to the employer to articulate a nondiscriminatory reason for its action; and (3) the plaintiff must then prove by a preponderance of the evidence that the reason is merely a pretext for discrimination.” Hamblin v. Alliant Techsystems Inc., 636 N.W.2d 150, 153 (Minn. Ct. App. 2001).

In arguing their case for discrimination, Appellants misstate the rights that exist under the MHRA. The MHRA prevents public accommodations and business from discriminating against *individuals* on account of their sexual orientation—not as couples. In regards to public accommodations, 363A.11 subd. 1(a) states “It is unfair discriminatory practice to deny any **person** the full goods, services, facilities, privileges, advantages, and accommodations of a place of public accommodation because of...sexual orientation.” Minn. Stat. § 363A.11 subd. 1(a). The Appellants, as

individuals, were never denied access to the RAC on account of their sexual orientation. Rather, Appellants *were* offered full and equal access to all the goods and services at the RAC. However, Appellants chose to reject the RAC's offer. They were never denied access to the RAC and thus their claim fails.

Appellants argue the RAC discriminated against them because they were not given a family membership. As a threshold to the family membership, the RAC requires that all couples receiving the family membership be legally married. The RAC's marriage policy follows the State of Minnesota's definition of a legal marriage. Minn. Stat. § 517.01 states:

Marriage, so far as its validity in law is concerned, is a civil contract between a man and a woman, to which the consent of the parties, capable in law of contracting, is essential. Lawful marriage may be contracted only between persons of the opposite sex and only when a license has been obtained as provided by law and when the marriage is contracted in the presence of two witnesses and solemnized by one authorized, or whom one or both of the parties in good faith believe to be authorized, so to do. Marriages subsequent to April 26, 1941, not so contracted shall be null and void.

Minn. Stat. § 517.01. As the RAC's policy regarding family memberships follows state law as to the definition of marriage, it does not violate state law. Appellants' complaints are better directed to the Minnesota legislature and the voters of Minnesota, not the RAC. The District Court correctly analyzed this issue when it stated:

The RAC does not discriminate "because of" sexual orientation; it discriminates "because of" marital status...The RAC's policy does not, on its face or as implemented, intentionally discriminate against the Monsons or the basis of their sexual orientation. Critically, neither of the Monsons, as individuals, [were] denied membership at the RAC because of their sexual orientation. It is only in their capacity as a same-sex domestic couple that they have been denied family membership benefits. For all practical

purposes, heterosexual cohabitating couples are treated no differently than same-sex cohabitating couples. (A.9)

Lilly v. City of Minneapolis, 527 N.W.2d (Minn. Ct. App. 2003) is instructive in illustrating how Minnesota courts have responded to claims made by unmarried couples under the MHRA. The Court in Lilly held that denying extension of health benefits to the partners of nonmarried couples did not violate the MHRA prohibition against discrimination based on sexual orientation. The logic applied by the Court of Appeals in Lilly applies equally to this case demonstrating why summary judgment is proper.

It does not violate the MHRA prohibition against discrimination based upon sexual orientation. *Cf. Hinman v. Department of Personnel Admin.*, 213 Cal. Rptr. 410 (1985) (denial of dental benefits does not constitute sexual orientation discrimination, but instead merely distinguishes eligibility on the basis of marriage), *pet. for rev. denied* (Cal. Aug. 15, 1985); Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121, 127 (Wis. Ct. App. 1992) (it is not sexual orientation discrimination under state law to extend employee health insurance coverage only to married spouses of state employees).

In Phillips, the court stated: While she complains that she is not married to [her partner] only because she may not legally marry another woman, that is not a claim of sexual orientation discrimination in employment; it is, as we have noted earlier, a claim that the marriage laws are unfair because of their failure to recognize same-sex marriages. It is a result of that restriction, not the insurance eligibility limitations in the statute and the [Defendant's] rule, that [Plaintiff] is unable to extend her state employee health insurance benefits to [her partner]. And, as we said at the outset of this opinion, any change in that policy is for the legislature, *not the courts*. Phillips, 482 N.W.2d at 127 (*emphasis in original*). The present marriage laws of Minnesota are consistent with these foreign cases. *Cf. Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (state law prohibits marriage between persons of the same sex) *appeal dismissed*, 409 U.S. 810 (1972).

Lilly v. City of Minneapolis, 527 N.W.2d 107, 112-113 (Minn. Ct. App. 1995).

Plaintiffs argue that the above-referenced foreign cases of Hinman and Philips are neither controlling nor persuasive. However, the Minnesota Court in Lilly did find their analysis highly persuasive; persuasive enough that it incorporated verbatim large, unaltered portions of the Hinman and Philips holdings into its own holding regarding MHRA sexual orientation and marriage discrimination. Therefore, it is reasonable to incorporate analysis from these cases into the present one. The Lilly decision makes clear that defining a family membership consistent with marital status does not violate Minnesota law.

After stating that foreign cases are neither controlling nor persuasive, Appellants and *Amici Curiae* cite several foreign cases in support of their position.² These cases are neither dispositive nor instructive to the present matter. Those foreign courts and foreign constitutions do not control, and Minnesota courts have not adopted these holdings, and those cases did not involve the MHRA. Foreign cases cannot be substituted for the clear intent and instruction of Minnesota law.

² Alaska Civil Liberties Union v. State of Alaska, 122 P.3d 781 (Alaska 2005); Bedford v. New Hampshire Community Technical College System, 2006 WL 1217283 (N.H. Super. 2006); Erie County Retirees Assn. v. County of Erie, 220 F.3d 193 (3rd Cir. 2000); Foray v. Bell Atlantic, 56 F. Supp. 2d 327 (S.D.N.Y. 1999); Koebke v. Bernardo Heights Country Club, 115 P.3d 1212 (Cal. 2005); Levin v. Yeshiva Univ., 96 N.Y.2d 484 (N.Y. 2001); McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998); McWright v. Alexander, 982 F.2d 222 (7th Cir. 1992); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996); Snetsinger v. Montana Univ. Sys., 104 P.3d 445 (Mont. 2004); Tanner v. Oregon Health Sciences Univ., 971 P.2d 435 (Or. App. 1998); Hogue v. Hogue, 147 S.W.3d 245 (Tenn. Ct. App. 2004); Robinson v. Power Pizza, 993 F. Supp. 1462 (M.D. Fla. 1998)

For the foregoing reasons, the District Court properly dismissed Appellants' claims of discrimination under the MHRA.

IV. THE DISTRICT COURT PROPERLY HELD THE DISPARATE IMPACT STANDARD INAPPLICABLE.

The District Court properly held the disparate impact theory inapplicable because (1) the District Court's statutory interpretation of the Minnesota Human Rights Act ("MHRA") correctly acknowledges that disparate impact is limited to employment cases; and (2) the District Court properly applied controlling case law in rejecting the disparate impact standard.

A. The District Court Properly Interpreted the Minnesota Human Rights Act in Rejecting the Disparate Impact Standard in Non-Employment Related Claims.

Under the MHRA, the disparate impact standard is limited to employment-related matters. Appellants' claims are not employment-related and, therefore, the disparate impact standard does not apply. The Appellants incorrectly contend the MHRA authorizes the disparate impact standard for non-employment related claims. To the contrary, the Minnesota legislature made clear that the disparate impact standard is limited to employment-related matters. In the MHRA's "Grievances" section, Minn. Stat. § 363A.28 subd. 10 illustrates disparate impact's limited application in stating:

Subd. 10. Disparate impact cases.

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 (2007) (emphasis added).

In writing Subd. 10, the legislature explicitly and solely authorized the disparate impact standard for employment-related claims. Subd. 10 demonstrates the legislature never authorized the use of disparate impact for any other claim outside the context of employment. Had the legislature intended for the use of the disparate impact standard outside of employment-related matters, it would have either (1) omitted using the limiting “employment” and “employer” language in Subd. 10, thereby extending the disparate impact standard to *all* MHRA claims; or (2) explicitly authorized the disparate impact standard for individualized claims (e.g. businesses, housing, etc.) as it did under Subd. 10 for employment-related matters. Therefore, the plain reading of the MHRA restricts disparate impact solely to employment-related matters. As the District Court properly stated, “Adoption of the disparate impact theory to 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.” Because this case is a non-employment related discrimination claim, the District Court properly held the disparate impact theory inapplicable.

B. The District Court Properly Applied Controlling Case Law in Analyzing the MHRA and Rejecting the Disparate Impact Standard.

Since 363A.28 subd. 10 was written into law in 1990, Minnesota courts have followed the clear intent of the MHRA and limited the disparate impact theory under the MHRA to employment-related matters. Since 1990, no Minnesota case has extended the

MHRA disparate impact theory to non-employment related matters *under a MHRA claim*. It appears only one Minnesota case, Babcock v. BBY Chestnut L.P., 2003 Minn. App. LEXIS 899 (Minn. Ct. App. 2003), has directly construed the extent of disparate impact use under the MHRA. Babcock thus serves as the only Minnesota case to directly confront the precise disparate impact issue before the Court today.³

Babcock best represents this Court's understanding and interpretation of 363A.28 subd. 10 and disparate impact under the MHRA. In Babcock, the Plaintiff brought a disparate impact claim against a landlord who refused to participate in a Section 9 housing program. Babcock rejected the plaintiff's non-employment disparate impact claim under the MHRA. The Babcock decision directly stated:

The MHRA recognizes "disparate impact" discrimination *only with respect to discrimination in employment*. See Minn. Stat. § 363.03, subd. 11 (2002) (establishing burdens of proof in cases in which plaintiff alleges an employment practice is responsible for a statistically significant adverse impact on a particular class of persons protected by the MHRA's employment provisions).

Babcock v. BBY Chestnut L.P., 2003 Minn. App. LEXIS 899 (Minn. Ct. App. 2003) (emphasis added) (R. App. – 47-51). The District Court's rejection of Appellants' disparate impact claim is consistent with Minnesota case law. The Appellants have no basis for a disparate impact claim and the court should reject their appeal.

³ Although Babcock is unpublished, it serves as the best Minnesota case law guidance because of its direct analysis of the scope of disparate impact under the MHRA. Further, it is worth note that United States District Court Chief Judge for the District of Minnesota Paul Magnuson, in discussing unpublished opinions, wrote, "Inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and *must be applied in subsequent cases to similarly situated parties*." Anastasoff v. United States, 223 F.3d 898, 899-900 (8th Cir. 2000) (vacated as moot on other grounds).

C. In Granting Summary Judgment, the District Court Properly Considered Cases Cited by Appellants.

The District Court properly considered Appellants' case law arguments. Appellants argue the District Court erred in rejecting the disparate impact standard due to the holdings in Khalifa v. State, 397 N.W.2d 383 (1986); Paper v. Rent-a-Wreck, 463 N.W.3d 298 (Minn. Ct. App. 1990); and Levin v. Yeshiva University, 96 N.Y.2d 484 (N.Y. 2002). Appellants' use of Khalifa, Paper, and Levin is misguided.

1. Khalifa Does Not Support MHRA Disparate Impact Use in a Non-Employment-Related Matter.

Appellants inappropriately rely on Khalifa in attempting to argue that disparate impact claims apply outside of the employment context. Khalifa fails to provide guidance on the issue because Khalifa does not fully contemplate the narrow statutory issue before this Court. Khalifa did not analyze whether the disparate impact theory should apply outside of employment-related matter. The Khalifa court merely recognized the plaintiff's *claims* were of a disparate impact nature. Khalifa, 397 N.W.2d at 388 ("This is essentially a claim based on disparate impact theory."). The Khalifa court never contemplated or analyzed the precise issue of whether disparate impact standard deserved expansion outside of employment-related matters under the MHRA. In fact, Khalifa never provided any legal authority demonstrating the use of disparate impact outside the context of employment. Rather, in supporting the use of a disparate impact standard, Khalifa relies on and cites International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 (U.S. 1977), which is an employment-related case. Interestingly, in discussing disparate impact, Teamsters writes:

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. See *infra*, at 349. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. Compare, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430-432, with McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-806.

Teamsters, 431 U.S. 324, 335 FN 15 (U.S. 1977) (emphasis added). Thus, Teamsters and Khalifa only reiterate the fact that disparate impact claims are, unless explicitly authorized, limited to employment-related matters.

Further, because Khalifa was a 1986 case, that court never had the opportunity to contemplate fully the MHRA statutory issue as presented to this Court. Khalifa never had the opportunity because 363A.28 Subd. 10's limiting language was not written into the MHRA until 1990. 1990 Minn. ALS 567; 1990 Minn. Chapter Law 567; 1990 Minn. S.F. No. 1847. Thus, it was impossible for the Khalifa court to provide the same instructive analysis as that provided in Babcock, which did have the opportunity to contemplate 363A.28 subd. 10. To espouse the Appellants' misguided understanding of Khalifa would disrupt the intent of the legislature.

2. Paper Does Not Support MHRA Disparate Impact Use in a Non-Employment-Related Matter.

The analysis used in Paper is also inapplicable here because Paper does not involve an MHRA claim. Rather, the plaintiff's claim in Paper was made under a Minneapolis civil rights city ordinance—a law completely separate from the MHRA. Paper, 463 N.W.3d at 299. In fact, not once does the Paper court contemplate or cite the

MHRA. As paper did not involve an analysis of the MHRA, it is inapplicable to this case.

But assuming Paper did intend to expand the disparate impact theory to non-employment-related claims, the written decision provides no legal authority or discussion for such an expansion of the doctrine to the MHRA. In discussing the plaintiff's possible disparate impact claim, Paper relies on and cites to Schlemmer v. Farmers Union Cent. Exch., Inc., 397 N.W.2d 908 and Griggs as the sources for disparate impact theory. Notably, both Schlemmer and Griggs involved employment-related matters. Schlemmer, 397 N.W.2d 908 (former employees brought an action against their former employer, alleging unlawful discharge on the basis of age); Griggs 401 U.S. 424 (employees sued over employer's requirements of a high school education or the passing of a general intelligence test as a condition of employment). Thus, the court did not offer any legal authority providing for the extension of the disparate impact theory outside of employment-related matters. Further, neither provided any statutory interpretation of 363A.28 subd. 10. Thus, neither case supports the Appellants' contention that the disparate impact standard applies to the case at hand. Therefore, the District Court properly held the disparate impact theory inapplicable.

3. Levin Does Not Support MHRA Disparate Impact Use in a Non-Employment-Related Matter.

Appellants also cite Levin in arguing for the use disparate impact standard. However, Levin is inapplicable to the present matter. In Levin, 96 N.Y.2d 484 (N.Y. 2002), New York's highest court held that a lesbian couple articulated a sexual-

orientation discrimination complaint against a university that provided preferential housing opportunities only to students who were married. However, the Plaintiffs fail to include the court's legal analysis in its appropriate context:

"In 1991, the *City of New York enacted Human Rights Law § 8-107 (17), explicitly creating a disparate impact cause of action* for plaintiffs who can demonstrate "that a policy or practice of a covered entity [e.g., employer, housing provider] or a group of policies or practices of a covered entity results in a disparate impact to the detriment of any [protected] group" (Administrative Code § 8-107 [17] [a]). *Unlike the State Human Rights Law*, the City law both specifies a right of action for policies or practices that have a disparate impact and specifically prohibits any form of discrimination based on sexual orientation. *The New York City Council also explicitly made "disparate impact" applicable to discrimination claims outside of the employment context (Administrative Code § 8-107 [17]).*

Levin v. Yeshiva Univ., 96 N.Y.2d 484, 492-493 (N.Y. 2001)(emphasis added).

Unlike the City of New York ordinance, the MHRA only recognizes "disparate impact" discrimination in employment. See Minn. Stat. § 363.03 subd. 11 (2002). Further, unlike here, the Plaintiffs in Levin were entirely denied equal goods and access to a product (i.e. studio apartments). Levin, 96 N.Y.2d at 489. Whereas here, the RAC offered the same access to the entire club that all members receive. Thus, the New York case fails to support the argument being set forth by Plaintiffs in this case.⁴

⁴ In addition, the ACLU *amici* brief cited several non-Minnesota cases of similar nature to Levin. These cases are foreign, do not address the MHRA, any other Minnesota law, and thus, fail to support the position taken by Appellants in this case.

D. Appellants Failed to Meet Disparate Impact Standards.

Alternatively, even if the disparate impact theory did apply, Appellants offered no statistical evidence at the trial level showing a disparate impact on a protected class. Thus, even if the disparate impact theory did apply as a legal standard, the District Court granted summary judgment because Appellants did not make a *prima facie* case by failing to provide statistical evidence supporting their claim as provided by Minn. Stat. § 363A.28 subd.10 (2006).

V. ARGUMENTS OR STATEMENTS OF COUNSEL ARE NOT EVIDENCE AND CANNOT BE USED TO AVOID SUMMARY JUDGMENT.

Appellants argue that during the summary judgment hearing Respondents' counsel made oral statements equivalent to an admission of sexual orientation discrimination. This argument is unfounded since: (1) Attorney statements made during oral arguments are not evidence; (2) Appellant erroneously interprets dialogue between District Court Judge and Respondent Attorney and; (3) Case law does not support Appellants' suggested use of attorney oral argument statements.

A. Attorney Statements Made During Oral Arguments Are Not Evidence.

In granting summary judgment, Minn. R. Civ. P. 56.03 (2007) states "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." Minn. R. Civ. P. 56.03 (2007) (emphasis added). Notably missing from the list of evidentiary items is "attorney statements made during oral arguments." The Minnesota

Rules of Civil Procedure provide litigants ample opportunity to obtain facts and evidence during the discovery phase of litigation. The rules provide interrogatories, depositions, requests for admissions, and requests for production as discovery devices.

The Appellants had every opportunity to depose RAC administration, employees, and customers in attempting to produce intentional discrimination evidence. However, despite having ample avenues for discovery, Appellants failed to produce any evidence of intentional discrimination based on sexual orientation. If anything, Appellants reaching argument regarding attorney oral argument statements as evidence further bolsters the fact they had no actual reliable evidence of intentional discrimination.

Instead of offering reliable, substantive evidence, Appellants attempt to offer as evidence *arguendo* hearsay discussions between Respondents' counsel and the Judge that occurred during the summary judgment hearing. These discussions contained hypothetical questioning and assumptions. Statements made by Respondents' attorney were not sworn testimony made under oath, nor subject to a cross-examination. In addition, the oral argument statements were not concessions, but rather answers to judicial hypothetical questioning and do not support the position taken by Appellants.

B. Appellants Mischaracterize and Misrepresent Statements Made During the Summary Judgment Hearing.

Further, Appellants took particular editorial liberty in citing the Court-Counsel exchange in their appellate brief and blatantly took statements out of context, thereby misleading this Court. Respondents could restate here in full the discussions that occurred during oral argument so that the Court could have a holistic and accurate

representation of the hearing. However, the Court can find the entire unedited transcript in the appellate record and objectively decide the nature of the statements made during oral argument.

Upon reading the transcript, the Court will find that Respondents' attorney never admitted that the RAC applies the family membership differently between unmarried heterosexual couples and unmarried homosexual couples. Rather, Respondents' attorney merely acknowledged the Judge's recognition that it was and is *possible* for unmarried couples to gain a family membership discount by using any form of fraud, lies, deceit, stealth, or misrepresentation to misguide the RAC into believing that they are a legally married couple under the laws of Minnesota. Specifically, Judge Lund stated, "So presumably, *given my experience at the courthouse*, they have got people that aren't married who *claim* to be married at the athletic club." (A.41) (emphasis added). Respondents' attorney simply affirmed the Judge's suspicion that—like any system, law or policy—immoral individuals could use fraud to work their way around the RAC's family membership policy. Despite their best efforts to prevent such fraud, the RAC, like all businesses, is not immune to deceitful individuals and it is of course possible they could fall victim to such fraudulent acts. Ultimately, Appellants never offered a mere scintilla of evidence suggesting the RAC intentionally applied their family membership policy discriminatorily between unmarried homosexual couples and unmarried heterosexual couples, making summary judgment proper.

C. Case Law Does Not Support Appellants' Suggested Use of Attorney Oral Argument Statements as Evidence.

Case law cited by Appellants does not support their argument that attorney oral arguments statements are material evidence. Appellants cite Lundgren v. Eustermann, 370 N.W.2d 877, 881 n.1 (Minn. 1985) and Kasson State Bank v. Haugen, 410 N.W.2d 392, 394 (Minn. Ct. App. 1987) in suggesting the Court use attorney statements made during summary judgment hearing as party admissions or concessions of counsel. However, both cases are distinguished from the present matter. Kasson is distinguished in that the statements in question were made during the summary judgment motion hearing by a *pro se litigant making sworn statements under oath*. Kasson 410 N.W.2d at 393. Lundgren is also distinguished in that it did not involve statements of an attorney during a court hearing, but rather written statements in a letter made by an expert witness. Lundgren 370 N.W.2d at 881. For these reasons, Kasson and Lundgren do not support Appellants' argument.

VI. APPELLANTS' "PUBLIC POLICY" ARGUMENT IS IRRELEVANT.

Appellants assert that RAC policy is against Minnesota public policy. The Court must reject this argument because the RAC's policy, as written and as implemented, is not unlawful. As the District Court recognized based on the evidence before it, the RAC policy treats people equally and there is no requirement in Minnesota law that requires a business to provide any particular benefit to same sex partners. The question is not whether one likes or agrees with the RAC policy. The question is whether it is unlawful. It is not. For example, while many employers across the state have elected to provide

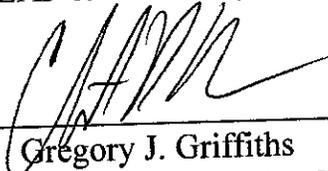
employee benefits to same-sex partners, it is not required. If employers across the state are not violating the law by refusing to provide benefits to same-sex partners, the RAC is not violating the law here. The real question is whether the RAC treats people differently based on their sexual orientation. As noted above, it does not and the policy is lawful within Minnesota. For these reasons, the Court should dismiss Appellants' public policy arguments which essentially derive from inapplicable foreign case law.

CONCLUSION

For the foregoing reasons, the District Court properly granted summary judgment and Appellants' appeal should be dismissed.

Dated: April 18, 2008.

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