

NO. A08-206

State of Minnesota
In Court of Appeals

Pamela Krueger,

Appellant,

Diamond Dust Contracting LLC,

Plaintiff,

v.

Zeman Construction Company,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUE	1
STANDARD OF REVIEW	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
LEGAL ARGUMENT	5
A. When the Language of Minn. Stat. § 363A.17, subd. 3 is Given Proper Effect, A Plaintiff Sufficiently States a Claim for Relief by Alleging That She Suffered Discrimination During the Performance of a Contract Because of Sex.....	6
B. Minn. Stat. § 363A.17, subd. 3 Does Not Prohibit Only Discrimination That is Inflicted Upon a Person Standing in Privity of Contract to the Person Committing the Discrimination	8
1. The Text of Minn. Stat. § 363A.17, subd. 3 Does Not Require a Plaintiff to Prove That She Stood in Privity of Contract with the Defendant	8
2. Requiring a Plaintiff Seeking Redress Under Minn. Stat. § 363A.17, subd. 3 to Stand in Privity of Contract with the Defendant Renders Meaningless the Phrase “or performance” as it Appears in the Statute.....	9
3. Requiring a Plaintiff Seeking Redress Under Minn. Stat. § 363A.17, subd. 3 to Prove that She Stood in Privity of Contract with the Defendant Leads to an Absurd Result that is Contrary to the Purpose of the Minnesota Human Rights Act.....	12
CONCLUSION	16
APPENDIX	A-1
INDEX TO APPENDIX	A-2

TABLE OF AUTHORITIES

Cases

Amaral v. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999) 9

Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. Lodge 364 v State by Balfour, 229 N.W.2d 3, 13 (Minn. 1975)..... 12

Costilla v. State of Minn., 571 N.W.2d 587, 592 (Minn. Ct. App. 1998)..... 14

Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997).....1, 12, 13

Devane v. Sears Home Improvement Prod., Inc., 2003 WL 22999363 (Minn. Ct. App. 2003)..... 15

Elzie v. Comm’r of Pub. Safety, 298 N.W.2d 29, 32 (Minn. 1980)..... 1

Erickson v. Sunset Mem’l Park Ass’n, 108 N.W.2d 434, 441 (1961)..... 12

Frank’s Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604, 608 (Minn. 1980)..... 7

Jones v. Blandin Paper Co., 2003 WL 23816532 (D.Minn.) 14

Kalema v. U.S. Oil Co., Inc , 2006 WL 2289849 (D.Minn.) 13, 15

Leonard v. Northwest Airlines, Inc., 605 N.W.2d 425, 428 (Minn. Ct. App. 2000)..... 2

Northern States Power Co. v. Franklin, 122 N.W.2d 26, 29 (1963) 2

Owens v. Federated Mut. Implement & Hardware Ins., 328 N.W.2d 162, 164 (Minn. 1983)..... 9

Pullar v. Indep. Sch. Dist. No. 701, 582 N.W.2d 273, 275-76 (Minn. Ct. App. 1998)..... 2

State v. Rosow, 247 N.W.2d 398, 400 (1976) 9

Statutes

Minn. Stat. § 363A.02 12

Minn. Stat. § 363A.03, subd. 13..... 6

Minn. Stat. § 363A.03, subd. 43.....	6
Minn. Stat. § 363A.04	12
Minn. Stat. § 363A.17, subd. 3.....	passim
Minn. Stat. § 645.17(1)	12

Rules

Minn. R. Civ. P. 12.02(e).....	1, 2
--------------------------------	------

Other Authorities

Black’s Law Dictionary, 1137 (6 th ed. 1990).....	7, 10
Black’s Law Dictionary, 1470 (6 th ed. 1990).....	10
Black’s Law Dictionary, 293 (6 th ed. 1990).....	10

STATEMENT OF THE ISSUE

The Minnesota Human Rights Act (the “Act” or “MHRA”) makes it unlawful to discriminate against a person while performing a contract.¹ The Act does not require that a plaintiff be in privity of contract with the defendant. Imposing such a requirement is contrary to the Act’s text and purpose. Must a plaintiff allege privity of contract with the defendant, in addition to alleging discrimination in the performance of a contract, to state a claim for relief under the Act?

The lower court held in the affirmative, that a plaintiff must be in privity of contract with the defendant, in addition to alleging discrimination in the performance of a contract, to state a claim for relief under the Act.

Most apposite case:

Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997)

Most apposite statute:

Minn. Stat. § 363A.17, subd. 3

STANDARD OF REVIEW

This appeal presents a case of first impression and arises from the dismissal of Appellant Pamela Krueger’s claim. When deciding an appeal that follows a dismissal for failure to state a claim, the only question before this Court is whether the complaint sets forth a legally sufficient basis for relief. *Elzie v. Comm’r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980); see also Minn. R. Civ. P. 12.02(e). A claim is legally sufficient if any evidence might be produced consistent with the

¹ Minn. Stat. § 363A.17, subd. 3

complaint to grant the relief demanded. *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (1963). In deciding whether dismissal is appropriate, this Court accepts as true the facts in the complaint and gives the plaintiff the benefit of all favorable inferences. *Pullar v. Indep. Sch. Dist. No. 701*, 582 N.W.2d 273, 275-76 (Minn. Ct. App. 1998). This Court reviews de novo a lower court's dismissal of a plaintiff's cause of action under Rule 12.02(e). *Leonard v. Northwest Airlines, Inc.*, 605 N.W.2d 425, 428 (Minn. Ct. App. 2000), review denied (Minn. Apr. 18, 2000); see Minn. R. Civ. P. 12.02(e).

Under Minn. Stat. § 363A.17, subd. 3, in order to state a cause of action, a plaintiff need only allege that she suffered discrimination in the performance of a contract. She need not plead that she stood in privity of contract with the perpetrator. Appellant Krueger alleged that she suffered discrimination and sexual harassment in the performance of a contract. Therefore, she sufficiently stated a claim for relief under Minn. Stat. § 363A.17, subd. 3, and dismissal of her individual claim is inappropriate.

STATEMENT OF THE CASE

This is an appeal from an order entered on January 24, 2008, by the Hennepin County District Court, the Honorable Denise D. Reilly, dismissing the entire claim of Appellant Pamela Krueger (hereafter, "Krueger") A-20. Krueger commenced this action (under Minn. Stat. § 363A.17, subd. 3) seeking recovery for direct and individualized harm that she allegedly suffered as a consequence of sexual harassment and gender discrimination. The alleged harassment and

discrimination occurred while Krueger performed services in connection with a sub-contract between Respondent Zeman Construction Company, Inc. (hereafter, “Zeman”) and her company, Diamond Dust Contracting, LLC (“Diamond Dust”).

At the District Court, Zeman moved to dismiss Krueger’s complaint for failing to state a claim upon which relief may be granted. A-16. Zeman argued that Krueger could not recover for the discrimination she allegedly suffered as an individual while performing the sub-contract because she did not stand in privity of contract to Zeman. The lower court agreed, and Krueger appealed. A-20; A-34.

STATEMENT OF FACTS

Appellant Krueger is the sole owner-member and operator of Diamond Dust, a Minnesota limited liability company. A-4, A-5 at ¶¶3, 5. On or about December 21, 2005, Krueger executed a contract on Diamond Dust’s behalf with Zeman (“the sub-contract”) to perform labor and furnish materials to a construction project known as Eagles Landing (“the Worksite”). A-5 at ¶6. From January 2006 to November 2006, Zeman required Krueger to check in each workday and to be present on the Worksite, starting at 8:00 a.m. and continuing for eight uninterrupted hours. A-6 at ¶13. Krueger was the sole woman rendering services as the owner of a subcontracting company. A-5 at ¶8. From the moment she set foot on the Worksite, Zeman unlawfully discriminated against Krueger because of her gender, which discrimination included sexual harassment and creation of a hostile environment. A-5, A-6 at ¶¶10, 12.

Zeman's unlawful actions included, without limitation, the following: Zeman's male managers verbally abused Krueger, regularly referring to her as a "cunt" and a "fucking bitch." A-6 – A-9 at ¶13. These same managers also subjected Krueger to regular acts of physical intimidation. *Id.* For instance, they stalked her daily around the Worksite. *Id.* They also monitored each time Krueger used the bathroom. *Id.* On at least one occasion a male manager of Zeman followed Krueger to the bathroom and stood just outside the door until she had finished using the facility. *Id.*

As part of creating a hostile environment, Zeman installed open air urinals throughout the Worksite, which, for a time, resulted in Krueger being forced to observe males urinating and exposing their genitals on a regular, on-going basis. *Id.* When Krueger complained about the urinals, Zeman responded in a demeaning manner, suggesting that she could "back up into them" and offering to paint one pink for her use. *Id.*

During a particularly disturbing episode, one of Zeman's male managers ordered Krueger to get down upon her hands and knees and scrub the floor while workers applied a mud-like material to the ceiling. *Id.* He stood directly over Krueger as she knelt and scrubbed stating loudly "well, it looks like we finally found something you are good at!" *Id.* Significantly, Zeman's managers subjected no male to the type of abuse they inflicted upon Krueger. A-9 at ¶14.

On more than one occasion, Krueger reported the mistreatment and sexual harassment to Zeman's upper management and owners. A-9 at ¶16. Zeman did

nothing to remedy the situation. A-9 at ¶17. In fact, Dave Zeman, the patriarch of the company, participated directly in the harassment stating to Krueger that, “working with you is like working with a piece of shit!” A-9 at ¶15.

Because of Zeman’s unlawful actions, Krueger suffered embarrassment, humiliation, emotional pain and anguish, and loss of enjoyment of life. A-10 at ¶22. Further, she suffered individual economic harm. *Id.*

LEGAL ARGUMENT

Minn. Stat. § 363A.17, subd. 3 makes it unlawful to discriminate in the “terms, conditions, or *performance*” of a contract. As elaborated upon below, four reasons compel against requiring a plaintiff to stand in privity of contract with the defendant in order to be afforded protection under the Act: First, the plain language of Minn. Stat. § 363A.17, subd. 3 imposes only two pleading requirements, a plaintiff must allege (i) discrimination arising (ii) in performance of a contract. Second, Minn. Stat. § 363A.17, subd. 3 includes no word or phrase that supports requiring an allegation of privity of contract. Third, requiring a plaintiff to plead privity of contract would render meaningless the explicit prohibition on discrimination in the performance of a contract. Fourth, imposing such a requirement would lead to an absurd and unjust result that is contrary to the broad remedial purposes behind the Act.

A. When the Language of Minn. Stat. § 363A.17, subd. 3 is Given Proper Effect, A Plaintiff Sufficiently States a Claim for Relief by Alleging That She Suffered Discrimination During the Performance of a Contract Because of Sex.

The pertinent text reads as follows: “It is an unfair discriminatory practice for a person... to discriminate in the... performance of the contract because of a person’s... sex...” Minn. Stat. § 363A.17, subd. 3. Two essential elements are required to state a cause of action under this provision: (i) the plaintiff must allege that the defendant took actions *to discriminate* against her because of sex; and (ii) the alleged discrimination must have occurred in the *performance* of a contract. Thus, the proper meanings of just two phrases “to discriminate” and “or performance” are at issue in determining whether an individual has stated a claim for relief under Minn. Stat. § 363A.17, subd. 3.

The MHRA defines “to discriminate” as follows: “The term discriminate includes segregate or separate and, for purposes of discrimination based on sex, it includes sexual harassment.” Minn. Stat. § 363A.03, subd. 13.² The word “performance” is not defined within the Act. Accordingly, this Court should interpret “performance” in a manner that gives effect to the word’s plain and

² “‘Sexual Harassment’ includes unwelcome sexual advances... or other verbal or physical conduct or communication of sexual nature when... that conduct or communication has the purpose or effect of substantially interfering with an individual’s employment... or creating an intimidating, hostile, or offensive employment... environment.” Minn. Stat. § 363A.03, subd. 43.

ordinary meaning.³ As pertains to a contract, “performance” means: “the fulfillment or accomplishment of a promise, contract or other obligation....” Black’s Law Dictionary, 1137 (6th ed. 1990).⁴

Reading the phrases “to discriminate” and “or performance” in light of their proper definitions compels a finding that Krueger sufficiently pled a claim for relief under Minn. Stat. § 363A.17, subd. 3. First, Krueger alleged that, because of her sex, Zeman singled her out for unlawful disparate treatment and harassment. A-9 at ¶14. This allegation satisfies the statutory definition of “to discriminate” in so much as it recounts actions based on gender that tended to “segregate or separate.” Second, Krueger alleged that Zeman subjected her to sexual harassment, which harassment created a hostile work environment for her. A-6 at ¶12. This allegation falls within the statutory definition of “sexual harassment,” which also satisfies the definition of “to discriminate.” Third, Krueger alleged that the discrimination arose while she and Zeman performed services in the furtherance of a contract. This allegation brings the alleged discrimination as occurring under circumstances that satisfy the definition of “or performance” of

³ Basic tenets of statutory construction guide this Court to construe words and phrases according to their plain and ordinary meaning. See, *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).

⁴ In the same context, the word “perform” is defined as “to perform [a]... contract is to execute fulfill or accomplish according to its terms. This may consist either in action on the part of the person bound by the contract or an omission to act, according to the nature of the subject matter; but the term is usually applied to *any action in discharge of a contract other than payment.*” Black’s Law Dictionary, 1137 (6th ed. 1990).

the contract. Therefore, Krueger's individual claims fall squarely within the scope of Minn. Stat. § 363A.17, subd. 3.

B. Minn. Stat. § 363A.17, subd. 3 Does Not Prohibit Only Discrimination That is Inflicted Upon a Person Standing in Privity of Contract to the Person Committing the Discrimination.

In dismissing Krueger's claims, the lower court chose to eschew the straight forward analysis of Minn. Stat. § 363A.17, subd. 3 set forth above. Instead, the lower court erroneously construed the statute in three ways: First, in order to find a limitation on the scope of the Act, the lower court went beyond the text of Minn. Stat. § 363A.17, subd. 3. Second, the lower court interpreted the provision in a manner that renders nugatory the words "or performance" as they appear in the Act. Third, the lower court interpreted the provision in a manner tending towards an unjust and absurd result that is counter to the Act's purpose. Each of these errors is addressed in turn below.

1. The Text of Minn. Stat. § 363A.17, subd. 3 Does Not Require a Plaintiff to Prove That She Stood in Privity of Contract with the Defendant.

In giving proper effect to the language of the Act, this Court should constrain itself to the words that actually appear in the Act.⁵ Minn. Stat. § 363A.17, subd. 3 contains no word or phrase that makes privity of contract with the defendant a pre-requisite to protection from discrimination. If the legislature had intended to limit the scope of the provision in such a manner, the words "to

⁵ Again, the pertinent language states: "It is an unfair discriminatory practice for a person... to discriminate in the... performance of the contract because of a person's... sex...." Minn. Stat. § 363A.17, subd. 3.

discriminate” would have been accompanied by other restrictive language. For example, the statute would describe the unlawful practice as, “to discriminate *against a party to the contract.*” Importantly, the Act includes no words of limitation that are the same or similar to the italicized phrase in the preceding example.

The legislature defined the unlawful practice as “to discriminate” and saw fit to stop. The words “to discriminate” stand alone and should be given effect as standing alone. Because the lower court disregarded the statutory text in favor of words that are not within the statute as the sole basis to dismiss Krueger’s claims, it committed a reversible error.

2. Requiring a Plaintiff Seeking Redress Under Minn. Stat. § 363A.17, subd. 3 to Stand in Privity of Contract with the Defendant Renders Meaningless the Phrase “or performance” as it Appears in the Statute.

Two canons of statutory construction guide how this Court should interpret the Act. First, a statute should be interpreted, whenever, possible to give effect to all of its provisions: “no words, phrases, or sentences should be deemed superfluous, void, or insignificant.” See, *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (citing, *Owens v. Federated Mut. Implement & Hardware Ins.*, 328 N.W.2d 162, 164 (Minn. 1983). Second, under accepted doctrines of statutory construction, the legislature’s use of the disjunctive “or” invites an interpretation of a statutory provision as outlawing two separate and distinct categories of acts. See, e.g. *State v. Rosow*, 247 N.W.2d 398, 400 (1976).

In construing the provision at hand, this Court must give proper meaning to the words, “terms, conditions, or performance” as used in the Act. In relation to contracts, the word “terms” relates to matters that exist only within the four corners of an agreement.⁶ Similarly, the word “conditions” refers to things inextricably tied to the language of the contract.⁷ Because “terms” and “conditions” are written into the contract, they are incidences that arise only between the parties during the formation of the contract.

The performance of a contract differs significantly from the formation of a contract. The word “performance” refers to actions that arise after the formation of a contract and after the parties themselves have agreed upon a contract’s terms and conditions.⁸ It is during a contract’s performance that the rubber hits the road and other persons besides the signatories to the contract necessarily become involved in effectuating the parties’ intent. When interpreting Minn. Stat. § 363A.17, subd. 3, this distinction between performance-related events and formation-related events must be respected. Discrimination arising in the

⁶ With respect to a contract, the word “term” refers to: “[a] word, phrase, or condition *in a contract*, instrument or agreement which relates to a particular matter.” Black’s Law Dictionary, 1470 (6th ed. 1990).

⁷ With respect to a contract, the word “condition” refers to: “a future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of liability under a contract to a certain future event.” Black’s Law Dictionary, 293 (6th ed. 1990).

⁸As indicated first above, with reference to a contract, the word “perform” is defined as “To perform [a]... contract is to execute fulfill or accomplish according to its terms. This may consist either in action on the part of the person bound by the contract or an omission to act, according to the nature of the subject matter; but the term is usually applied to *any action in discharge of a contract other than payment.*” Black’s Law Dictionary, 1137 (6th ed. 1990).

“performance of the contract” must be viewed as discrimination that occurs after a contract is written and that potentially harms persons other than the parties to the contract.

In order to emphasize that “performance of the contract” should be viewed as distinct from “terms” and “conditions”, the legislature used the disjunctive “or” to set “performance” apart from “terms” and “conditions.” By using the disjunctive “or,” the legislature stated two alternate bases of liability. First, the legislature made it unlawful to discriminate in writing a contract’s terms or conditions, which discrimination would involve only the parties to the contract. Second, the legislature made it unlawful to discriminate against persons who may be performing a contract, which discrimination would involve anyone who is involved in the day-to-day carrying out of the contract, irrespective of whether he or she is a party to the contract.

In dismissing Krueger’s claims, the lower court construed Minn. Stat. § 363A.17, subd. 3 as outlawing only discrimination against one or both of the contracting parties (Diamond Dust and Zeman), as if the phrase “or performance” were of no significance. The lower court stripped Krueger of protections that the legislature intended to confer upon her. Because the lower court construed the provision contrary to the legislature’s intent, it committed reversible error.

3. Requiring a Plaintiff Seeking Redress Under Minn. Stat. § 363A.17, subd. 3 to Prove that She Stood in Privity of Contract with the Defendant Leads to an Absurd Result that is Contrary to the Purpose of the Minnesota Human Rights Act.

This Court interprets statutes such as the MHRA in a manner that avoids absurd results and unjust consequences. See, *Erickson v. Sunset Mem'l Park Ass'n*, 108 N.W.2d 434, 441 (1961); Minn. Stat. § 645.17(1). As a means to accomplishing the Act's broad remedial purpose, the legislature has directed this Court to liberally construe provisions of the MHRA. Minn. Stat. § 363A.04. The overarching purpose of the Act is to ensure freedom from discrimination for *all* persons in Minnesota (Minn. Stat. § 363A.02) and to place persons discriminated against in the same position they would have been had no discrimination occurred. See, *Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. Lodge 364 v. State by Balfour*, 229 N.W.2d 3, 13 (Minn. 1975). In giving effect to the Act's purpose, the Act should be interpreted in a manner that avoids leaving one class of individuals unprotected from the harms of discrimination and harassment. See, *Cummings v. Koehnen*, 568 N.W.2d 418, 422-423 (Minn. 1997).

In *Cummings*, the Court refused to require that a male plaintiff prove same-sex harassment (male on male) impacted him differently than similarly situated women. *Id.* The Court also declined to require the plaintiff to establish that the alleged harassment occurred because the perpetrator was homosexual. *Id.* The Court reasoned that to adopt such requirements would improperly leave two classes of employees unprotected from sexual harassment. *Id.* In explaining its

decision, the Court wrote: “There is nothing in the MHRA to indicate the legislature intended to leave these classes of employees unprotected, and we cannot presume the legislature intended such an absurd result.” *Id.* at 423. As in *Cummings*, the matter presently before this Court requires interpreting the Act in a manner that extends protection equally to different classes of individuals who may suffer identical discrimination and harassment.

Requiring an individual business-owner to prove privity of contract with the defendant, as an element of stating a claim for relief under Minn. Stat. § 363A.17, subd. 3, leaves one class of individuals unprotected from discrimination and harassment. By way of illustrating the affect of such a requirement, consider the example of different individuals performing services in furtherance of a sub-contract on a construction site. An individual business owner operating as a sole proprietorship would be in privity of contract to the general contractor.⁹ Accordingly, if she suffered sexual harassment and/or discrimination at the hands of the general contractor during the performance of the sub-contract, she would be afforded the protection of Minn. Stat. § 363A.17, subd. 3.¹⁰ By contrast, an individual business owner operating as a legal-entity and suffering the identical

⁹ The small business owner who operates as a sole proprietorship will, by virtue of being a sole proprietorship, execute the sub-contract agreement in her individual capacity.

¹⁰ See, *Kalema v. U.S. Oil Co., Inc.*, 2006 WL 2289849 (D.Minn.) at *4 (in unreported decision, the court stated that the plaintiff, a minority business owner operating through an assumed name, had standing under the MHRA as an individual person to sue over unlawful discrimination he suffered in connection with the termination of a contract that his business had with the defendant). A-39.

unlawful treatment, in the same hostile environment, would be excluded from the protection of the Act.¹¹ The inequity of excluding the individual operating as a legal entity from the Act's protection (as in the previous example) is compounded by the fact that if she were an employee performing services for her own company, she would have standing under the Act.¹² Thus, if privity of contract is made a requirement of stating a cause under Minn. Stat. § 363A.17, subd. 3, only the individual who operates her business as a legal entity is left unprotected. The unlawful actions and the resulting harms to the individuals are identical, yet the outcome in terms of statutory protections is different.

As a further consequence of requiring a plaintiff to show privity of contract with the defendant before pursuing a claim under Minn. Stat. § 363A.17, subd. 3, a range of harms the legislature intended to prevent and redress would go unabated and unpunished. The anomalies and loopholes created by protecting only some individual business owners will give defendant businesses the green light to harass and discriminate against any individual who chooses to conduct her business as an entity rather than as a sole proprietor.

¹¹ An individual business owner operating as a single-member LLC will not execute the standard sub-contract in her individual capacity. Accordingly, she will not be in privity of contract with the general contractor.

¹² See e.g., *Costilla v. State of Minn.*, 571 N.W.2d 587, 592 (Minn. Ct. App. 1998) (holding that under the MHRA an employer may be liable for harassment inflicted upon an employee by a non-employee); see also, *Jones v. Blandin Paper Co.*, 2003 WL 23816532, at *13 (D.Minn.) (in unreported decision, the court recognized that in certain circumstances both an employer and third party exercising control over an employee may be liable under MHRA for sexual harassment of the employee by the third party). A-52.

In addition to inviting abuse, such a narrow construction of the Act will result in situations where an individual operating as an entity suffers extreme non-economic harm without any recourse. Often in sexual harassment cases, little or no economic harm accompanies significant mental anguish.¹³ If the standing of an individual business owner is denied on grounds that she lacked privity of contract with her abuser, only her business entity (if anyone at all) will be permitted to proceed with a claim under Minn. Stat. § 363A.17, subd. 3. As a likely outcome, the defendant in such cases will challenge any award of emotional distress damages to a non-individual plaintiff (despite the entity being a legal person). If such a challenge were to succeed, a remedy which the legislature intended to confer upon the individual business owner who is the victim of discrimination and sexual harassment would be rendered unavailable.¹⁴ The adverse impact that intentionally inflicted mental anguish has on an individual business owner is the same whether the victim transacts business as sole proprietor or through a legal entity. Yet, under the lower court's interpretation of Minn. Stat. § 363A.17, subd. 3, the ability to redress such harms is vastly different depending upon how a victim elects to transact business. Such an inequitable result cannot stand in light

¹³ See, e.g., *Devane v. Sears Home Improvement Prod., Inc.*, 2003 WL 22999363, *10 (Minn. Ct. App. 2003) (in unreported decision, this Court upheld an award of \$750,000 in mental anguish damages and \$300,000 in attorneys' fees to a plaintiff alleging sexual harassment under the MHRA, where the plaintiff incurred no economic harm). A-65.

¹⁴ See, e.g., *Kalema*, 2006 WL 2289849 (D.Minn.) at *6 (the court upheld an award of emotional distress damages under Minn. Stat. § 363A.17, subd. 3 to minority business owner). A-40.

of the MHRA's broad remedial purpose.

CONCLUSION

The lower court's decision, if left to stand, would force judges sitting in business discrimination cases to look beyond the two statutory requirements of whether (i) an unlawful act of discrimination (ii) occurred in the performance of a contract. Judges would be forced to consider matters not within the statute, such as whether the victim executed a contract with the defendant as an individual or as an individual operating a legal entity. This additional inquiry would result in an inconsistent application of the MHRA, protecting some victims and excluding others who suffer the same harm under identical circumstances. Such a result is contrary to the language and purposes of the Act. Accordingly, this Court should reject the lower court's interpretation of Minn. Stat. § 363A.17, subd. 3. Instead this Court should interpret the statute as written, in a manner that does not require the victim of discrimination arising in the performance of a contract to prove privity of contract with her assailant.

Therefore, based on the foregoing, this Court respectfully should reverse the lower court's ruling and determine that Krueger has standing to pursue her individual claims against Zeman for discrimination and sexual harassment arising in the performance of a contract.

RESPECTFULLY SUBMITTED,

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