
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 REPLY 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).

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ISSUE

The Minnesota Human Rights Act (“MHRA”) confers standing upon any individual who suffers an injury-in-fact because of unlawful discrimination. The MHRA does not require a plaintiff to demonstrate privity of contract with a defendant as a prerequisite for standing. Should this Court, nonetheless, require that Appellant allege she stood in privity of contract with Respondent before permitting her to maintain an action under the MHRA for unlawful discrimination by Respondent which caused her an “injury-in-fact”?

The lower court found in the affirmative, that Appellant must demonstrate potential or actual privity of contract with the respondent to have standing under Minn. Stat. § 363A.17. Appellant urges this Court to reverse the lower court’s decision that denied her standing to proceed against Respondent.

INTRODUCTION

In its responsive brief, Respondent asks this Court to uphold the lower court’s decision. Respondent maintains that Appellant (“Ms. Krueger”) must demonstrate privity of contract (or potential privity of contract) with Respondent before she can avail herself of the protections of the MHRA. Respondent’s arguments fail for four reasons: First, the text of Minn. Stat. § 363A.17 contains no language that restricts standing to only persons who are (or potentially are) in privity of contract to the defendant. Second, the prior cases cited by Respondent in support of its argument, each interpreting standing under 42 U.S.C. § 1981 (“Section 1981”), are not applicable to determining Ms. Krueger’s standing. Instead, the broader language, history and intent of the MHRA require that this

Court construe the MHRA more broadly than Section 1981 so as to include the claims of Ms. Krueger. Third, Ms. Krueger has alleged a sufficient injury-in-fact to satisfy the applicable and traditional standard for standing. Thus, recognition of her standing by this Court will not, as Respondent argues, result in a sea of new discrimination claims.¹ Fourth, consistency with prior interpretations of the MHRA, which have sought to provide all persons harmed by a violation of the Act the right to recover, dictates that this Court should recognize Ms. Krueger's standing.

LEGAL ARGUMENT

A. The Plain Language of Minn. Stat. § 363A.17 Does not Limit Standing To Only Those Plaintiffs Who Are a Party (or a Potential Party) to a Contract With the Defendant.

In its response, Respondent mischaracterizes the plain language of Minn. Stat. § 363A.17 in an effort to make the text of the Act conform to its argument that Ms. Krueger must first prove that she executed or sought to execute a contract *with* Respondent in order to have standing. Respondent recasts the pertinent plain language of Minn. Stat. § 363A.17 as prohibiting discrimination, “in the basic terms, conditions, or performance of a contract with Appellant because of Appellant's sex.”² The actual pertinent plain language of the statute includes no words that are commensurate with, the same as, or similar to the words “with Appellant” or “Appellant's sex” as used by Respondent. As written, the statute simply makes it unlawful “...to discriminate in the basic terms, conditions, or performance of the contract because of a person's... sex.”

¹ All future plaintiffs will be required to meet the same burden as Ms. Krueger; namely, to identify an independent, injury-in-fact before standing will be conferred upon them.

² Respondent's Brief at 7 (emphasis in original).

Minn. Stat. § 363A.17. The absence of any restrictive language such as the words “with Appellant” or “Appellant’s sex”, which Respondent saw fit to write into the statute, compel against limiting standing to only plaintiffs who stand in privity of contract with the defendant.

B. No Relevant Case Law Supports the Lower Court’s or Respondent’s Interpretation of Minn. Stat. § 363A.17.

Respondent erroneously cites cases interpreting Section 1981 as binding upon this Court in deciding Ms. Krueger’s standing under Minn. Stat. § 363A.17. For the reasons set forth below, interpretations of Section 1981 are inapplicable to determining Ms. Krueger’s standing.

Critically, when the text of the MHRA is distinct from federal anti-discrimination laws in its content, coverage or intent, Minnesota courts decline to use interpretations of such federal laws in construing the MHRA. See, *Kolton v. County of Anoka*, 645 N.W.2d 403, 407 (Minn. 2002); see also, *Cummings v. Koehnen*, 568 N.W.2d 418, 423 (Minn. 1997) (departing from federal rule of interpretation because of textual difference between MHRA and federal statute); see also, *Ray v. Miller Meester Advertising Inc.*, 684 N.W.2d 404, 409 (Minn. 2004) (stating as follows: “Because the scope of discrimination liability... is more onerous under our state laws than under Title VII, we are not bound to follow seemingly analogous federal court decisions”). In the present case, distinctions between Section 1981 and the MHRA compel against this Court ruling that standing is coterminous (and thus equally limited) under the federal and state law.

1. Textual Differences Between the MHRA and Section 1981 Require That This Court Analyze Standing Under the MHRA More Broadly Than Under Section 1981.

As written, Section 1981 serves a limited and specific function: “It protects the equal right of ‘[a]ll persons within the jurisdiction of the United States’ to ‘to make and enforce contracts’ without respect to race.” See, *Dominos Pizza, Inc. v. McDonald*, 546 U.S. 470, 475-476 (2006) (quoting 42 U.S.C. § 1981(a)). Section 1981 states further that its scope is limited to “enjoyment of all the benefits, privileges, terms and conditions of the contractual relationship.” *Id.* (quoting 42 U.S.C. § 1981(b)). The explicit text-based limitations found in Section 1981 are absent from the text of Minn. Stat. § 363A.17.

Unlike Section 1981, the text of Minn. Stat. § 363A.17 is not constrictive or concerned exclusively with granting persons the right “to make and enforce contracts” free from racial bias. Instead, Minn. Stat. § 363A.17 prohibits a multitude of unlawful discriminatory acts, in a broad range of settings, by a business because of race, color, national origin, sex, sexual preference, or disability. For instance, the Act makes it unlawful for a business to “refuse to do business with or provide a service to” a woman who uses her current or former surname. Minn. Stat. § 363A.17, subd. 1. By expressly prohibiting discrimination that occurs apart from the confines of a contractual relationship, such as in “doing business” or “provid[ing] a service,” the MHRA exceeds the limited and specific function served by Section 1981. Thus, standing under the

MHRA exceeds standing under Section 1981.

2. Differences Between the Broad Legislative Intent Behind the MHRA and the Limited Legislative Intent Behind Section 1981 Require That This Court Analyze Standing Under the MHRA More Broadly Than Under Section 1981.

Federal decisions have also cited Section 1981's limited statutory intent as a basis to restrict standing under Section 1981. See, *Dominos Pizza Inc.*, 546 U.S. at 479. For example, in *Dominos Pizza Inc.*, the Supreme Court refused to interpret Section 1981 as a comprehensive civil rights statute because trying to make Section 1981 a "cure-all" would require going beyond any expression of congressional intent. *Id.*

While Congress, on the one hand, may have expressed no intention that Section 1981 serve as a comprehensive "cure all" for discriminatory conduct, the Minnesota legislature, on the other hand, did intend for the MHRA to reach all persons in a comprehensive manner. The clearly articulated legislative intent behind the MHRA 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).

Respondent erroneously argues that the MHRA's stated purpose to protect all persons in Minnesota from discriminatory acts does not apply to business discrimination because Minn. Stat. § 363A.02 fails to explicitly list "business discrimination" as one of the areas within the Act's overarching purpose. Respondent is wrong in this regard for three reasons: First, the very presence of Minn. Stat. § 363A.17, prohibiting

discriminatory practices by businesses, belies Respondent's argument that the legislature did not intend to extend its protections to all persons. Second, because Minn. Stat. § 363A.17 was added years prior to Minn. Stat. § 363A.02, the failure to include "business discrimination" in the latter provision is more likely than not a drafting anomaly as opposed to an intentional omission designed to limit the purpose of the Act.⁴ Finally, Respondent's argument is antithetical to the legislature's directive, found in Minn. Stat. § 363A.04, to construe the MHRA in a manner that effectuates its broad remedial purpose.

3. Differences Between the Legislative History Behind the MHRA and the Legislative History Behind Section 1981 Require That This Court Analyze Standing Under the MHRA Differently Than Under Section 1981.

Decisions interpreting Section 1981 have also cited its unique legislative history as a basis to strictly limiting standing under the federal Act. See, *Dominos Pizza Inc.*, 546 U.S. at 475. In *Dominos Pizza Inc.*, the Court noted that when Section 1981 was enacted as the Civil Rights Act of 1866, it was well-settled that an agent could not maintain an action for breach of a contract that he had made on behalf of his principal. *Id.*⁵ Thus, the Court concluded the history behind Section 1981 established that Congress did not intend to grant standing to any person beyond the bounds of (actual or potential) contractual privity. *Id.* at 475-476

Importantly, the unique history of Minn. Stat. § 363A.17 weighs strongly against this Court adhering to federal interpretations of Section 1981 in determining standing

⁴ See, *Cummings*, 568 N.W.2d at 423-424 (noting that an apparent requirement that a man alleging same-sex harassment must also prove that the harassment was "because of sex" in addition to the elements of sexual harassment was a drafting anomaly that resulted from different provisions being added at to the MHRA at different times).

⁵ Citing, 1 S. Livermore, *A Treatise on the Law of Principal and Agent* 215 (1818).

under the MHRA. A newspaper article appearing in the *New York Times*, contemporaneous to amendment of the MHRA, recounts that the Minnesota legislature enacted Minn. Stat. § 363A.17 specifically to counteract restrictive federal interpretations of Section 1981. (William E. Schmidt, *Minnesota Widens Rights Act to Counter High Court Move*, The New York Times, May 12, 1990 at A1, R.A. 4-6.)^{6 7 8} This article notes that the purpose behind enactment of Minn. Stat. § 363A.17 was to permit persons to bring claims of discrimination in hiring decisions and after the person is hired and to permit similar discrimination claims against contractors by persons discriminated against in performing a subcontract. *Id.*

This interpretation of the purpose behind enactment of Minn. Stat. § 363A.17 (in its current form) is affirmed by scholarly treatises regarding the scope of standing under the MHRA. See, West Minnesota Practice Series, 17 Minn. Prac., Employment Law & Practice § 3.9 (2d ed), 2007. Regarding the standing of independent contractors to pursue employment law claims against a non-employer, Professor Stephen F. Befort has written:

Thus, independent contractors have no claim under the Act's [MHRA'S] anti-discrimination in employment provisions. Independent contractors may nevertheless have a cause of action under the MHRA, but not because they have the status of "employees." A related provision of the MHRA

⁶ A copy of the same *New York Times*' article was submitted to the trial court in this matter.

⁷ The *New York Times*' article is the best available evidence regarding the legislative history behind Minn. Stat. § 363A.17 because the committee hearings of the Minnesota Legislature were not reduced to audio tape until 1991, the year after amendment of the MHRA.

⁸ This Court may take judicial notice of matters appearing in newspaper articles, especially where the article in question presents information that is not intended to establish facts outside the record and is material that the Court could have discovered on its own. See, *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. Ct. App. 2001).

[Minn. Stat. § 363A.17] prohibits the intentional refusal to do business or contract with an individual on the basis of race, color, sex or disability, and prohibits discrimination in the basic terms, conditions or performance of the contract on those same grounds. This provision may provide a cause of action in state court to the independent contractor who is outside the scope of Title VII. *Id.*

Resort to prior decisions on Section 1981's standing requirement may be appropriate to assessing a limited range of claims under the MHRA, but only under circumstances where (i) the alleged discrimination is racially based (including national origin bias); (ii) the alleged discrimination arises in the context of the creation of a contractual relationship or within the context of the existence or termination of a contractual relationship; and, (iii) the alleged discrimination does not consist of sexual harassment or other discrimination because of sex.

Ms. Krueger's claims arise from circumstances that are beyond those which would lend themselves to an analysis of standing that is commensurate with a Section 1981 claim for three reasons: First, the discrimination suffered by Ms. Krueger was not based upon race or national origin. Second, the discrimination suffered by Ms. Krueger occurred beyond the confines of contractual privity or potential contractual privity (Ms. Krueger suffered discrimination during the performance of a contract). Third, the discrimination suffered by Ms. Krueger consisted of sexual harassment and other discrimination because of sex. Thus, while conferring standing upon a person such as Krueger may be inconsistent with the narrow language, intent and history behind Section 1981, it is entirely consistent with the broader language, history and intent behind the MHRA.

C. Because She Suffered a Distinct and Independent Injury-in-Fact Within the Zone of Protection Afforded by the MHRA, Ms. Krueger has Standing under Minn. Stat. § 363A.17.

In its responsive brief, Respondent mischaracterizes Ms. Krueger's argument as one which seeks to have this Court recognize a boundless right for any person to assert a claim for relief under Minn. Stat. § 363A.17. Respondent also erroneously suggests that this Court apply federal case law to determine Ms. Krueger's standing. Under Minnesota law, her standing is a much simpler matter to determine.

Only the Minnesota doctrine of standing, the "injury-in-fact" test, not its unwieldy federal counterpart, applies to Ms. Krueger's claims. See, *Snyder's Drug Stores, Inc. v. Minn. Bd. of Pharmacy*, 221 N.W.2d 162, 165 (Minn. 1974). By simply being the target of a discriminatory act, Ms. Krueger has alleged a sufficient injury-in-fact to confer standing upon her under Minnesota's civil rights laws, unless the specific statute requires more. *Potter v. LaSalle Court Sports & Health Club*, 384 N.W. 873, 875 (Minn. 1986). The MHRA confers the right to bring a private cause of action upon "any person aggrieved by a violation of [the Act]." Minn. Stat. § 363A.28, subd. 1.

As a basis for standing, the MHRA requires only that a plaintiff demonstrate an independent injury arising from a violation of the Act.⁹ Respondent violated the MHRA when it discriminated against Ms. Krueger directly, as an individual person, during the performance of a contract. Respondent's misconduct consisted of discrimination

⁹ Respondent has urged this Court to recognize privity of contract as a limitation upon standing that would bar Ms. Krueger's claims. As set forth above and in Appellant's primary brief, the MHRA contains no language or other expression of legislative intent that supports imposing a privity of contract requirement upon standing.

“because of sex” that included “sexual harassment.” As a consequence, Ms. Krueger suffered embarrassment, humiliation, emotional pain and anguish, loss of enjoyment of life and independent economic harm. The unlawful discriminatory acts which Respondent inflicted upon Ms. Krueger bring her within the zone of protection of the MHRA. Likewise, the individual harm (i.e. mental anguish) which she suffered also brings her within the scope of the MHRA’S protection.¹⁰ Thus, Respondent’s mistreatment of Ms. Krueger and the resulting personal harm to her as an individual constitute an “injury-in-fact” that confers standing upon her under the MHRA.

Because Ms. Krueger’s claims bring her within the traditional framework for determining standing (the injury-in-fact standard), recognition of her right to sue Respondent will not, as Respondent argues, result in a boundless expansion of claims under the MHRA. Any future plaintiff seeking redress under the MHRA will be required to set forth a distinct, injury-in-fact in the same manner as Ms. Krueger. The litany of cases cited by Respondent in support of its proposition that Ms. Krueger should be denied the right to recover for the harm that she has uniquely suffered are inapposite to the case at hand for two reasons: First, all of these cases involve Section 1981 claims and thus, are subject to Section 1981’s unique constrictive privity-of-contract analysis; second, all of these cases involve individuals seeking redress for injuries that are derivative in nature.

In the present case, Ms. Krueger’s claims are anything but derivative. If, for example, Respondent had fully adhered to the terms and conditions of its agreement with

¹⁰ See, Minn. Stat. § 363A.29, allowing for recovery of compensatory damages and punitive damages, including for mental anguish and suffering.

Diamond Dust (the company solely-owned and operated by Ms. Krueger and the other plaintiff in this matter), Ms. Krueger would still have suffered an independent injury in the day-to-day performance of the agreement. Respondent's mistreatment of Ms. Krueger—degrading her at every turn, as an individual, because of sex, over many months, during the *performance* of a contract—caused her unique harm. Ms. Krueger's pain is not the injury suffered by Diamond Dust; it is her own. Accordingly, Ms. Krueger's claim for relief is not Diamond Dust's claim for relief; it, too, is her own. Thus, she should have standing to pursue a remedy for her own personal harm.

D. Consistency With Prior Interpretations of the MHRA Dictate That This Court Recognize Ms. Krueger's Standing Under Minn. Stat. § 363A.17.

As first discussed in Appellant's primary brief, prior interpretations of the MHRA are replete with examples where courts of this state have looked beyond formal legal relationships to allow recovery under the Act. For instance, this Court has recognized the right of an employee to proceed against her employer for harassment inflicted upon her by a third party. See, *Costilla v. State of Minn.*, 571 N.W.2d 587, 592 (Minn. Ct. App. 1998). Further, the U.S. District Court of Minnesota has recognized the right of an employee to sue a third-party for harassment inflicted upon her by that third-party. See, *Jones v. Blandin Paper Co.*, 2003 WL 23816532, *13 (D.Minn. 2003) (Granting summary judgment for the employer, a staffing agency, with respect to claims of the employee, but denying summary judgment for the third-party, non-employer, who had utilized the services of the employee of the staffing agency). The case-at-hand presents

another circumstance where this Court should look beyond the existence of any formal legal relationship and allow Ms. Krueger to pursue a remedy under the Act.

Respondent erroneously argues that if Ms. Krueger desired to recover under the MHRA for the harm she suffered, she should have sought to do so as an employee suing Diamond Dust. Respondent's argument in this regard is incorrect for three reasons: First, Respondent's argument misconceives the state of the law; actual business owners such as Ms. Krueger *do not* have standing as "an employee" under Title VII or the MHRA. See, *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440 (2003) (Outlining six-factor test to determine who is an "employee," which test, when applied to the present case, results in Ms. Krueger being denied standing to proceed as an "employee"); See also, *Midwest Sports Marketing Inc. v. Hillerich & Bradsby of Canada*, 552 N.W.2d 254, 260 (Minn. Ct. App. 1996) (owner of sales agency was not an "employee" for purposes of MHRA). Second, Respondent's argument leads to an absurd and untenable result; namely, it belies reason to assert that Ms. Krueger should or would sue Diamond Dust (which is tantamount to suing herself) for the harm caused by Respondent. Third, Respondent's argument contradicts the manner in which other individual business owners have been allowed, under Minn. Stat. § 363A.17, to proceed and recover for injuries.

Specifically with respect to how other business owners have been allowed to proceed, in *Kalema*, the plaintiff (an individual business owner) recovered for individual harm (mental anguish) directly against the defendant. *Kalema v. U.S. Oil Co., Inc.*, 2006 WL 2289849 at * 4 (D.Minn. 2006). As with the present case, the harm suffered by the

business owner in *Kalema*, arose from discriminatory treatment occurring during the performance and termination of a contract between the defendant and the plaintiff's company (a sole proprietorship). *Id.*. Because the plaintiff in *Kalema* was not required to sue himself in order to recover for individual harm, Ms. Krueger should not be required to sue herself in order to recover the identical type of harm.

If this Court were to deny Ms. Krueger's standing in the manner urged by Respondent, it would result in an application of the MHRA that is contrary to providing *all* persons a remedy for harm arising from violations of the Act. Some business owners, such as the plaintiff in *Kalema*, would be protected; while other business owners, such as Ms. Krueger, would be denied protection against the same or more egregious violations of the Act—namely, sexual harassment. In order for this Court to act in a manner that is consistent with prior interpretations of who has standing under the MHRA and to fully effectuate the Act's purpose, this Court (respectfully) must confer standing upon Ms. Krueger and reverse the lower court's decision that denied her such standing.

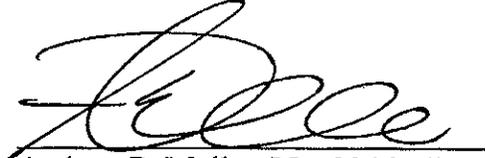
CONCLUSION

Wherefore Ms. Krueger respectfully requests that this Court reverse the lower court's decision and rule that she has standing to maintain an action for recovery of the individual, injury-in-fact that she suffered as a consequence of Respondent's unlawful discrimination, because of sex, during the performance of a contract.

RESPECTFULLY SUBMITTED,

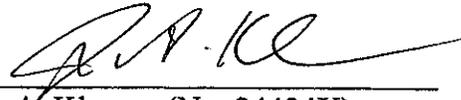
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