

No. A08-206

STATE OF MINNESOTA
IN COURT OF APPEALS

Pamela Krueger,

Appellant,

Diamond Dust Contracting, LLC

Plaintiff,

vs.

Zeman Construction Company,

Respondent.

RESPONDENT ZEMAN CONSTRUCTION COMPANY'S
BRIEF AND APPENDIX

MULLER, MULLER & ASSOC., PLLC
Andrew P. Muller (#32467X)
3109 West 50th Street, No. 362
Minneapolis, MN 55410-2102
(612) 604-5341

JOHN A. KLASSEN, PA
John A. Klassen (#24434X)
700 Lumber Exchange Building
10 South Fifth Street
Minneapolis, MN 55402
(612) 204-4533

Attorneys for Appellant
Pamela Krueger

FAEGRE & BENSON LLP
Michael Lapidola (#286783)
Daniel G. Prokott (#220371)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Attorneys for Respondent
Zeman Construction Company

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 CONTENTS i

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 3

STATEMENT OF RELEVANT FACTS 4

ARGUMENT 4

CONCLUSION 16

APPENDIX R-1

TABLE OF AUTHORITIES

	Page(s)
STATE CASES	
<i>Bodah v Lakeville Motor Express, Inc.</i> , 663 N.W.2d 550 (Minn.2003).....	3
<i>Costilla v. State of Minnesota</i> , 571 N.W.2d 587 (Minn. Ct. App. 1997)	10
<i>Cummings v. Koehnen</i> , 568 N.W.2d 418, 423 (Minn. 1997)	12
<i>Fabio v. Bellomo</i> , 504 N.W.2d 758 (Minn. 1993).....	5
<i>Flour Exch Bldg Corp. v. State</i> , 524 N.W.2d 496 (Minn. Ct. App. 1994)	6
<i>ILHC of Eagan, LLC v. County of Dakota</i> , 693 N.W.2d 412 (Minn. 2005)	6
<i>Martens v Minn Mining & Mfg Co.</i> , 616 N.W.2d 732 (Minn. 2000).....	5
<i>Mut Serv. Cas Ins Co. v. Midway Massage, Inc.</i> , 695 N.W.2d 138 (Minn. Ct. App. 2005)	5
<i>Northern States Power Co. v. Franklin</i> , 122 N.W.2d 26 (Minn. 1963).....	5
<i>Pederson v. Lutheran Church</i> , 404 N.W.2d 887 (Minn. Ct. App. 1987)	5
<i>State ex rel. Gardner v Holm</i> , 62 N.W.2d 52 (Minn. 1954)	6
<i>Tollefson Dev. Inc v McCarthy</i> , 668 N.W.2d 701 (Minn. Ct. App. 2003)	5

FEDERAL CASES

Bentley v Glickman,
234 B.R. 12 (N.D.N.Y. 1999)..... 14

Capital Nat'l Bank v McDonald's Corp.,
625 F. Supp. 874 (S.D.N.Y. 1986)..... 15

Cardinal Towing & Auto Repair, Inc. v. City of Bedford,
991 F. Supp. 573 (N.D. Tex. 1998) 14

Crist v. Focus Homes, Inc.,
122 F.3d 1107 (8th Cir. 1997)..... 10

Danco, Inc. v. Wal-Mart Stores, Inc.,
178 F.3d 8 (1st Cir. 1999) 15

Daud v. Gold'n Plump Poultry, Inc. ,
No. 064013 (DSD/JJA), 2007 U.S. Dist. LEXIS 43352, *23 (D. Minn. May 11,
2007)..... 13

Des Vergnes v Seekonk Water Dist. ,
601 F.2d 9 (1st Cir. 1979)..... 15

Diva's, Inc v Bangor,
176 F. Supp. 2d 30 (D. Me. 2001)..... 13

Diversified Educ Training and Mfg Co. v. Wichita,
473 F. Supp. 2d 1140 (D. Kan. 2007) 13

Domino's Pizza, Inc. v. McDonald,
546 U.S. 470 (2006) 13

Essling's Homes Plus, Inc. v. City of St. Paul,
356 F. Supp. 2d 971 (D. Minn. 2004)..... 15

Gersman v. Group Health Ass'n, Inc. ,
931 F.2d 1565 (D.C. Cir.1991) 14

Guides, Ltd. v Yarmouth Group Prop. Mgmt, Inc. ,
295 F.3d 1065 (10th Cir. 2002) 13

Marchese v Umstead,
110 F. Supp. 2d 361 (E.D. Pa. 2000)..... 14

<i>NDN Drywall, Inc v Custom Drywall, Inc.,</i> No. 04-CV-4706 (DSD/SRN), 2005 U.S. Dist. LEXIS 42271, * 14-15 (D. Minn. May 4, 2005)	13, 14
<i>Potthoff v. Morin,</i> 245 F.3d 710 (8th Cir. 2001)	13
<i>Randle v. LaSalle Telecommunications, Inc.,</i> 697 F. Supp. 1474 (N.D. Ill. 1988), <i>aff'd</i> 876 F.2d 563 (7th Cir. 1989).....	15
<i>Searcy v. Houston Lighting & Power Co.,</i> 907 F.2d 562 (5th Cir. 1990)	15
<i>Sims v Order of United Commercial Travelers of America,</i> 343 F. Supp. 112 (D. Mass. 1972).....	15
<i>Smith v. DataCard Corp ,</i> 9 F. Supp. 2d 1067 (D. Minn. 1998)	13
<i>Willis v Lipton,</i> 947 F.2d 998 (1st Cir. 1991).....	13

STATE STATUTES

Minn. Stat. § 363A.02	11, 12
Minn. Stat. § 363A.07	6
Minn. Stat. § 363A.08.....	9, 10
Minn. Stat. § 363A.09-363A.10.....	9
Minn. Stat. § 363A.11	9
Minn. Stat. § 363A.12	9
Minn. Stat. § 363A.13	9
Minn. Stat. § 363A.17	passim
Minn. Stat. § 645.16.....	7

FEDERAL STATUTES

42 U.S.C. § 198113, 14, 15

RULES

Minn. R. Civ. P. 12.02(e).....passim

Minn. R. Civ. P. 565

STATEMENT OF THE ISSUE

Whether Appellant Pamela Krueger, who did not contract with Respondent Zeman Construction Company, has standing to state a business discrimination claim against Respondent under Minn. Stat. § 363A.17.

The District Court held that Appellant lacked standing and therefore dismissed her claim pursuant to Minn. R. Civ. P. 12.02(e).

STATEMENT OF THE CASE

In January 2007, Diamond Dust Contracting LLC (“Diamond Dust”) commenced a mechanic’s lien foreclosure action against Respondent in Wabasha County, alleging Respondent had failed to pay Diamond Dust for work Diamond Dust claimed it had performed under a Standard Subcontract Agreement by and between Diamond Dust and Respondent (the “SSA”). Diamond Dust and Appellant (Diamond Dust’s owner) subsequently commenced this second lawsuit in Hennepin County in October 2007. In this second lawsuit both Diamond Dust and Appellant alleged a single count of business discrimination in violation of Minn. Stat. § 363A.17.

Respondent moved to dismiss Appellant’s business discrimination claim in the Hennepin County action. Hennepin County District Court Judge Denise D. Reilly granted Respondent’s motion, holding that Appellant lacked standing to assert a business discrimination claim against Respondent. Accordingly, Judge Reilly dismissed Appellant’s claim pursuant to Rule 12.02(e) of the Minnesota Rules of Civil Procedure.¹

This appeal followed.

¹ Judge Reilly also granted a second motion filed by Respondent, a motion to transfer venue to Wabasha County District Court for the resolution of Diamond Dust’s business discrimination claim. Diamond Dust did not appeal this portion of Judge Reilly’s Order and Wabasha County District Court Judge Terrence M. Walters has since consolidated the two lawsuits.

STANDARD OF REVIEW

The Hennepin County District Court dismissed Appellant's sole claim against Respondent under Rule 12.02(e) of the Minnesota Rules of Civil Procedure. This Court reviews the district court's decision de novo. *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn.2003).

STATEMENT OF RELEVANT FACTS

Diamond Dust is a Minnesota limited liability company. Appellant's Appendix ("App. App.") A-4, ¶ 3. Appellant is the owner and operator of Diamond Dust. *Id.* at A-5, ¶ 5.

On or about December 21, 2005, Diamond Dust and Respondent entered into the SSA.² *Id.* at ¶ 6. On or about January 10, 2006, Diamond Dust began work under the SSA. *Id.* at ¶ 7. Diamond Dust ceased doing any work under the SSA on or about November 8, 2006.³ *Id.* at A-9, ¶ 18.

Although Appellant's brief includes many additional inflammatory allegations, all of which Respondent disputes, the above-cited facts are the only facts that are relevant to Appellant's appeal.

ARGUMENT

I. The Standards For Dismissal

The Minnesota Rules of Civil Procedure provide that a party may move to dismiss claims for failure to state a claim upon which relief can be granted where a plaintiff is entitled to no relief under any state of the facts that could be proven. Minn. R. Civ. P. 12.02(e). Motions pursuant to Rule 12.02(e) have long been recognized as a useful

² The Complaint inaccurately asserts that Appellant entered into the SSA "on behalf of herself and Plaintiff Diamond Dust." App. App. A-5, ¶ 6. The SSA is clear on its face; it is a contract by and between Respondent and Diamond Dust. *See* Respondent's Appendix ("Resp. App.") R-1. Appellant is not a party to the SSA. *See id.*

³ Although Appellant alleges she experienced harassment "from the moment she set foot on the worksite," Diamond Dust does not allege that it ever attempted to terminate or otherwise modify the SSA in response to the alleged harassment.

means by which to dispose of legal issues with a minimum of time and expense to the interested parties. *See, e g , Martens v. Minn. Mining & Mfg Co.*, 616 N.W.2d 732, 746-48 (Minn. 2000) (dismissing plaintiff's complaint in its entirety pursuant to Rule 12.02(e)). A pleading will be dismissed under Rule 12.02(e) if "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Northern States Power Co. v. Franklin*, 122 N.W.2d 26, 29 (Minn. 1963). It is immaterial whether or not the plaintiff can prove the facts alleged; dismissal is proper where a party, as here, lacks standing and therefore is unable to state a claim upon which relief can be granted. *Martens*, 616 N.W. 2d at 739, 748; *see also Mut. Serv. Cas. Ins. Co v Midway Massage, Inc* , 695 N.W.2d 138, 142-43 (Minn. Ct. App. 2005); *Tollefson Dev. Inc. v. McCarthy*, 668 N.W.2d 701, 705-06 (Minn. Ct. App. 2003).⁴

⁴ The district court appropriately decided Respondent's motion to dismiss pursuant to Rule 12.02(e) by reviewing only the face of the Complaint. Minn. R. Civ. P. 12.02(e); *see also Pederson v. Lutheran Church*, 404 N.W.2d 887, 888-89 (Minn. Ct. App. 1987). Respondent asks that this Court do the same, but if the Court considers any allegations outside of the Complaint it should then treat Respondent's motion as one for summary judgment under Minn. R. Civ. P. 56. *See Fabio v Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Under Rule 56.01, summary judgment should be granted for a defendant where the evidence fails to create any genuine issues of material fact. Minn. R. Civ. P. 56. Regardless of whether the Court applies Rule 12 (as the district court did) or Rule 56, the district court's dismissal of Appellant's claim should be affirmed.

II. Appellant Lacks Standing To Assert A Business Discrimination Claim Under Minn. Stat. § 363A.07.

A. The Unambiguous Language Of Minn. Stat. § 363A.07 Precludes Appellant From Stating A Claim Against Respondent.

A statute does not give rise to a civil cause of action unless the statute expressly or implicitly creates a cause of action. *Flour Exch. Bldg. Corp v. State*, 524 N.W.2d 496, 498 (Minn. Ct. App. 1994). The relevant statute here, Minn. Stat. § 363A.17, provides:

It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a service: ... (3) 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 (2006)⁵

As the District Court noted, “the ‘touchstone’ for statutory interpretation is the plain meaning of the statute’s language.” App. App. A-25 (citations omitted). When words are “clear, explicit, unambiguous, and free from obscurity, courts are bound to expound the language according to the common sense and ordinary meaning of the words.” *State ex rel Gardner v Holm*, 62 N.W.2d 52, 55 (Minn. 1954). Thus, “[w]hen a statute’s meaning is plain from its language as applied to the facts of the particular case, a judicial construction is not necessary.” *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn.

⁵ Appellant’s claim is not grounded in either of the first two clauses of the statute, which make it an unfair discriminatory practice for a person “(1) to refuse to do business with or provide a service to a woman based on her use of her current or former surname; or (2) to impose, as a condition of doing business with or providing a service to a woman, that a woman use her current surname rather than a former surname.” Minn. Stat. § 363A.17.

2005); *see also* Minn. Stat. § 645.16 (2006) (stating that when the words of a statute are clear and free of ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit).

Minn. Stat. § 363A.17 is not ambiguous. To state a claim Appellant must show that Respondent (a) intentionally refused to do business with Appellant because of Appellant's sex, (b) refused to contract with Appellant because of Appellant's sex, or (c) discriminated in the basic terms, conditions, or performance of a contract with Appellant because of Appellant's sex. Any other interpretation of the statute, including the strained interpretation Appellant unsuccessfully urged upon the district court and again asks this Court to adopt, is at odds with the statute's plain language. Because Respondent neither refused to contract with Appellant nor discriminated in the performance of a contract with Appellant, she lacks standing to assert a claim for business discrimination and the district court's dismissal of Appellant's claim should be affirmed.

B. Appellant's Interpretation Of Minn. Stat. § 363A.17 Is Irreconcilable With The Plain Language of The Statute.

Appellant apparently concedes that most of the language in Minn. Stat. § 363A.17 does not give her standing to assert a claim against Respondent. Appellant does not claim Respondent intentionally refused to do business with her or refused to contract with her because of her sex. This is because Appellant never attempted to contract directly with Respondent. Nor does Appellant claim Respondent discriminated against her in the terms or conditions of the contract between Diamond Dust and Respondent, conceding that any claim based on alleged discrimination in the terms or conditions of a contract may "arise

only between the parties [to the contract] during the formation of the contract.” Appellant’s Brief (“App. Br.”) at 10.

Despite these concessions, Appellant argues that the statutory prohibition against discriminating in the “performance of the contract” must be read much more broadly than the rest of the statute. While recognizing that the rest of the Minn. Stat. § 363A.17 grants standing only to the party actually denied the opportunity to contract or a contracting party, Appellant argues that the phrase “performance of the contract” confers standing to “anyone who is involved in the day-to-day carrying out of [a] contract, irrespective of whether she is a party to the contract.” App. Br. at 11. If this were true, any employee, independent contractor, subcontractor or other agent of one party to any contract could assert a claim under Minn. Stat. § 363A.17 against the other party to the contract. For example, a female employee of a cleaning service company that contracts with a large corporation to clean all of that corporation’s stores, offices or other facilities could sue that corporation for business discrimination if that employee believes she has been harassed by any employee of the corporation while performing her cleaning services. This is just one example to illustrate the broad scope of claims Appellant argues should be allowed to be stated under Minn. Stat. § 363A.17, and that would necessarily be allowed in the future were the Court to conclude Appellant has standing to state a business discrimination claim in this case.⁶ The statute cannot possibly be read this broadly.

⁶ Although Appellant focuses her argument on “the performance of the contract” language, the National Employment Lawyers Association, Minnesota Chapter (“NELA”) argues that an employee of a company should be able to state a claim under Minn. Stat. § 363A.17 not only after the formation of a contract but also any time a business refuses

If the Minnesota legislature intended Minn. Stat. § 363A.17 to create a cause of action for anyone who alleges unlawful discrimination under any circumstance it would have said so. To suggest that the Minnesota legislature intended the business discrimination statute to reach all situations where discrimination may arise after the formation of any business contract is to suggest that the statute enables all persons who have had any sort of involvement in the performance of a contract to state a claim under Minn. Stat. § 363A.17. This would make employee status irrelevant and would effectively render the MHRA's specific employment-related discrimination statutes meaningless. If the legislature's intent was what Appellant claims (without any citation to legislative history or case law support), then there is absolutely no explanation for why the legislature bothered to define discrimination claims under the MHRA in terms of specific circumstances, such as employment (Minn. Stat. § 363A.08), real property (Minn. Stat. § 363A.09-363A.10), public accommodations (Minn. Stat. § 363A.11), public services (Minn. Stat. § 363A.12), education (Minn. Stat. § 363A.13) and business (Minn. Stat. § 363A.17).

Minn. Stat. § 363A.17 is a business discrimination statute. The statute prohibits a business from discriminating against a party it contracts with because of that party's protected classification; it does not make it unlawful for one party to a contract to

to enter into a business contract with the employee's company. NELA Br. at 4-6. In other words, the cleaning employee referenced above would be able to state a business discrimination claim against the corporation if that corporation refused to contract with her employer and the employee believed such refusal was because of her gender. Whether the employee could actually prove her case is of no consequence for purposes of Rule 12; she would have standing to state such a claim according to NELA. NELA's argument, like Appellant's argument, is not supported by the statute's plain language.

discriminate against anyone who works for, contracts with, or is otherwise associated with the other party to the contract. This does not mean that an employee of a contracting party, such as Appellant (who Respondent believes to be a Diamond Dust employee), is left unprotected by the MHRA. In fact, both Appellant and the National Employment Lawyers Association, Minnesota Chapter (“NELA”) recognize that Appellant, like any employee of Diamond Dust, may assert a claim against Diamond Dust under Minn. Stat. § 363A.08 (which prohibits discrimination against employees) based on Respondent’s alleged actions. See App. Br. 14, n.12; NELA Br. 10-11 (citing *Costilla v State of Minnesota*, 571 N.W.2d 587, 592 (Minn. Ct. App. 1997) (recognizing that the MHRA imposes liability upon an employer when it is aware that its employee is subject to sexual harassment by a non-employee and fails to take timely and appropriate action to protect the employee)). Appellant’s cause of action under the MHRA, if any, is under Minn. Stat. § 363A.08, not Minn. Stat. § 363A.17; and it is not against Respondent, it is against Diamond Dust.⁷

Appellant disagrees with this plain language interpretation of the statute for obvious reasons: Appellant owns Diamond Dust and therefore does not intend to sue her own company. Although Appellant may bemoan the fact that she personally does not have a cause of action under Minn. Stat. § 363A.17 because Diamond Dust, and not she, contracted with Respondent, this fact has not left her company without a remedy. Diamond Dust is

⁷ NELA’s argument that “[c]ourts have extended the protections of the MHRA to the non-employee category in similar situations” is curious given that it is followed by a discussion of two cases, *Costilla* and *Crist v Focus Homes, Inc*, 122 F.3d 1107 (8th Cir. 1997), in which the courts recognized claims by an employee against an employer. NELA Br. 10-11. In neither case did the court hold that the employee could sue a third party harasser under the MHRA.

seeking to recover the exact same economic damages in the Wabasha County action that Appellant was seeking on her own behalf⁸

Presumably, Appellant formed Diamond Dust, at least in part, as a means of insulating herself from the liability. She cannot, on the one hand, take advantage of the protections afforded by her formation of Diamond Dust while on the other hand assert Diamond Dust's business discrimination claim as her own (while also asserting the same claim as Diamond Dust). But this is exactly what Appellant did, with the only difference between Appellant's claim and Diamond Dust's claim being Appellant's desire to seek emotional distress damages that she cannot recover through Diamond Dust. But however much Appellant may want to sue Respondent and seek emotional distress damages related to Respondent's performance of a contract with Diamond Dust, the unavoidable conclusion remains: Appellant lacks standing to do so. The district court correctly reached this conclusion and its decision should be affirmed.

C. Appellant's "Public Policy" Arguments Cannot Usurp The Plain Language Of Minn. Stat. § 363A.17.

Appellant's arguments regarding the purpose of the MHRA are misleading and yet another attempt to distract the Court from the plain language of the statute and other relevant legal authority. For example, Appellant argues that she should be allowed to state a claim against Respondent based on the MHRA's public policy statement (Minn. Stat. § 363A.02).⁹ App. Br. 12. This statute identifies five areas in which Minnesota

⁸ Diamond Dust is seeking to recover its economic damages by asserting both a business discrimination claim and a lien foreclosure claim against Respondent.

⁹ NELA advances the same specious argument in its brief: NELA Br. 2-3.

seeks to secure freedom from discrimination: (1) in employment, (2) in housing and real property, (3) in public accommodations, (4) in public services, and (5) in education; it says nothing about business discrimination. Minn. Stat. § 363A.02 (2006). Minn. Stat. § 363A.17 is clear on its face and its purposes are separate and distinct from any of the areas addressed by Minn. Stat. § 363A.02. Therefore, the MHRA's public policy statement does not give Appellant standing to assert a business discrimination claim against Respondent.

Appellant's reliance on *Cummings v. Koehnen* is similarly misplaced. In *Cummings*, the Minnesota Supreme Court concluded that the MHRA should not be read to leave certain "classes of employees unprotected." 568 N.W.2d 418, 423 (Minn 1997). This case has absolutely no relevance to Appellant's business discrimination claim against Respondent. As addressed above, the MHRA does not leave Appellant, or any other employees of Diamond Dust, unprotected against discrimination committed by third parties – they have a remedy against their employer.

Because Appellant did not have a contractual relationship with Respondent she cannot state a claim under Minn. Stat. § 363A.17 upon which relief can be granted and the district court's dismissal of Appellant's business discrimination claim should be affirmed

D. The District Court's Decision Is Supported By Relevant Case Law.

Although the district court based its ruling on the plain language of the statute, and Respondent believes the plain language of the statute provides sufficient grounds to affirm the district court's order, its conclusion is also supported by relevant case law. On a number of occasions courts have analyzed claims under Minn. Stat. § 363A.17 using the same

analytical framework as 42 U.S.C. § 1981. *Smith v DataCard Corp*, 9 F. Supp 2d 1067, 1078 (D. Minn. 1998) (recognizing that the elements of a Section 1981 claim are the same as discrimination claims under the MHRA); *NDN Drywall, Inc v. Custom Drywall, Inc*, No. 04-CV-4706 (DSD/SRN), 2005 U.S. Dist. LEXIS 42271, * 14-15 (D. Minn. May 4, 2005) (analyzing plaintiff's Section 1981 and Minn. Stat. 363A.17 claims together). To establish a federal business discrimination claim under Section 1981, a plaintiff must initially identify the impaired contractual relationship under which it has rights. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006); *Daud v. Gold'n Plump Poultry, Inc*, No. 064013 (DSD/JJA), 2007 U.S. Dist. LEXIS 43352, *23 (D. Minn. May 11, 2007).

Applying the reasoning of many courts that have considered standing arguments under Section 1981, Appellant lacks standing to assert a business discrimination claim under the MHRA because she cannot identify a contractual relationship between her and Respondent. *See, e.g., Potthoff v. Morin*, 245 F.3d 710, 715-17 (8th Cir. 2001) (affirming dismissal of sole shareholder of business because "if a harm has been directed toward the corporation, then only the corporation has standing to assert a claim"); *see also Guides, Ltd. v. Yarmouth Group Prop Mgmt, Inc*, 295 F.3d 1065, 1072-73 (10th Cir. 2002) (affirming dismissal of sole shareholder of business alleging unlawful interference with a contract); *Willis v Lipton*, 947 F.2d 998, 1002 (1st Cir. 1991) (stockholders lacked standing to assert RICO injuries); *Diversified Educ. Training and Mfg Co v. Wichita*, 473 F. Supp 2d 1140, 1152 (D. Kan. 2007) (concluding that corporation that was the party to the contracts, not the corporation's shareholders, had standing to allege discrimination under Section 1981); *Diva's, Inc v. Bangor*, 176 F. Supp. 2d 30, 39 (D Me. 2001) (business

owner had no standing absent claim of personal harm); *Marchese v. Umstead*, 110 F. Supp. 2d 361, 367-68 (E.D. Pa. 2000) (sole stockholder failed to point to any personal injury as opposed to derivative damages resulting from criminal citation to corporation); *Bentley v Glickman*, 234 B.R. 12, 21 (N.D.N.Y. 1999) (“shareholder, even one of a closely held corporation, does not have standing to bring a claim to redress an illegal act of discrimination done to a corporation”); *Cardinal Towing & Auto Repair, Inc v. City of Bedford*, 991 F. Supp. 573, 576 (N.D. Tex. 1998) (owner lacked standing to prosecute racial discrimination claims stemming from corporation’s bidding process).

NDN Drywall is a particularly persuasive case. In that case, NDN, like Diamond Dust, was in the business of installing and finishing drywall. *NDN Drywall*, 2005 U.S. Dist. LEXIS 42271 at *1. NDN sued the defendant, Custom Drywall, alleging discrimination under 42 U.S.C. § 1981 and Minn. Stat. § 363A.17. The President and sole shareholder of NDN, who was Native American, did not sue Custom Drywall, even though NDN’s claims were grounded in the owner’s race. The reason the owner did not sue in her individual capacity is readily apparent; the contract at issue was between NDN and Custom, not between NDN’s owner and Custom. *Id.* at *3. Although the court in *NDN Drywall* did not specifically address standing under Minn. Stat. § 363A.17 (because NDN’s owner had apparently concluded (correctly) that she could not assert such a claim), its analysis of NDN’s Section 1981 and Minn. Stat. § 363A.17 claims together is relevant because the case law is rife with examples of courts dismissing Section 1981 claims because individual plaintiffs lacked standing. *See, e.g., Gersman v Group Health Ass’n, Inc.*, 931 F.2d 1565, 1569 (D.C. Cir.1991) (holding that a shareholder cannot bring a Section 1981 claim for

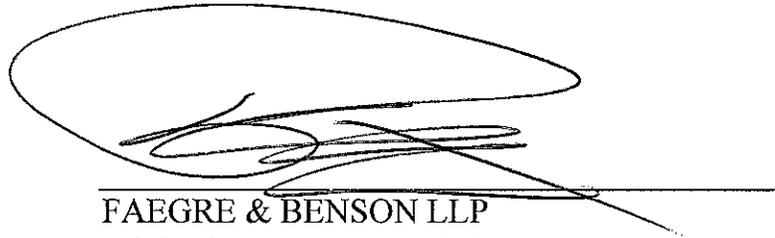
discrimination where it was the corporation that sought to make or enforce a contract); *Searcy v Houston Lighting & Power Co*, 907 F.2d 562, 565 (5th Cir. 1990) (same); *Des Vergnes v Seekonk Water Dist*, 601 F.2d 9, 16 (1st Cir. 1979) (same); see also *Essling's Homes Plus, Inc v. City of St. Paul*, 356 F. Supp. 2d 971, 976 (D. Minn. 2004) (concluding individual shareholders lacked standing to assert federal or state equal protection claims). Just as Section 1981 does not create a cause of action for an owner of a contracting party, neither does Minn Stat. § 363A.17. See *Danco, Inc v Wal-Mart Stores, Inc*, 178 F.3d 8, 14 (1st Cir. 1999) (“Nothing in section 1981 provides a personal claim, so far as its language is concerned, to one who is merely *affiliated*—as an owner or employee—with a contracting party that is discriminated against by the company that made the contract”); *Randle v. LaSalle Telecommunications, Inc*, 697 F. Supp. 1474, 1481 (N.D. Ill. 1988) (plaintiff-employee lacks standing to sue for defendant’s alleged racially discriminatory assignment of sales territories under its contract with plaintiff’s employer), *aff’d* 876 F.2d 563 (7th Cir. 1989); *Capital Nat’l Bank v McDonald’s Corp*, 625 F. Supp. 874, 882 (S.D.N.Y. 1986) (secured lender and assignee of franchisee lacks standing for injury resulting from defendant’s termination of contract with franchisee for alleged reason of racial discrimination); *Sims v Order of United Commercial Travelers of America*, 343 F. Supp. 112, 115 (D. Mass. 1972) (wives named as intended beneficiaries in applications by husbands for insurance lack Section 1981 standing as wives had not sought to make contracts with defendant insurer).

In summary, the plain language of the statute and relevant case law both support the district court's dismissal of Appellant's business discrimination claim for failing to state a claim upon which relief can be granted.

CONCLUSION

For the reasons set forth above, Respondent Zeman Construction Company respectfully requests that the Court affirm the district court's ruling dismissing Appellant's business discrimination claim with prejudice.

Dated this 3 day of April, 2008



FAEGRE & BENSON LLP
Michael Lpicola (#286783)
Daniel G. Prokott (#310256)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Attorneys for Respondent
Zeman Construction Company.