
NO. A08-206

State of Minnesota
 In Supreme Court

Pamela Krueger,

Diamond Dust Contracting, LLC,

Appellant,

Plaintiff,

vs.

Zeman Construction Company,

Respondent.

**BRIEF OF AMICI CURIAE
 ASSOCIATED GENERAL CONTRACTORS OF MINNESOTA
 AND MINNESOTA CHAMBER OF COMMERCE**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF THE ISSUE	1
LEGAL ARGUMENT	2
I. IDENTITY OF AMICI.....	3
A. About the Association of General Contractors of Minnesota	3
B. About the Minnesota Chamber of Commerce.....	3
II. THE PLAIN LANGUAGE OF MINN. STAT. 3263A.17(3) ONLY EXTENDS A CAUSE OF ACTION WHERE THERE IS PRIVACY OF CONTRACT BETWEEN THE PLAINTIFF AND DEFENDANT.....	4
III. THE LEGISLATURE, IN CREATING A CAUSE OF ACTION BUT LIMITING IT TO CONTRACTUAL SITUATIONS, CREATED A POLICY BALANCE THAT WOULD BE DESTROYED BY APPELLANT’S EXPANSIVE MISREADING OF THE STATUTE	6
A. Multi-tiered Construction Projects in Particular, and Minnesota Businesses in General, Rely on Contractual Structures and Corporate Forms to Control Risk	6
B. Expanding the MHRA Beyond Contractual Privity Would Lead to Rampant Liability and Multiple Recovery, Crippling Minnesota Business – Policy Results that the Legislature Wished to Avoid	8
C. The Legislature Also Accounted for Corporate Form in the MHRA; Appellant Cannot Use the Effect of Corporate Form to Avoid the MHRA’s Limitations.....	11
IV. THE INTERPRETATION OF THE MHRA BY THE COURT OF APPEALS DOES NOT LEAVE ANYONE WITHOUT RECOURSE FOR DISCRIMINATION; RATHER, IT PREVENTS DOUBLE RECOVERY	13
V. NELA’S AND THE COMMISSIONER’S ADDITIONAL ARGUMENTS ARE UNSUPPORTED	15
A. The Court of Appeals Decision is Consistent, as the Court Did Not Conclude That Individuals Could Bring Suit if the Businesses for Which They Worked Were Discriminated Against	15
B. The Caselaw Does Not Support Extension of Liability to Parties Outside of the Contract.....	16
CONCLUSION	19

TABLE OF AUTHORITIES

CASES

<i>Anderson-Johanningmeier v. Mid-Minnesota Women’s Center</i> , 637 N.W.2d 270 (Minn. 2002)	13
<i>Crist v. Focus Homes, Inc.</i> , 122 F.3d 1107 (8 th Cir. 1997)	17
<i>Costilla v. State of Minnesota</i> , 517 N.W.2d 587, 591-92 (Minn. Ct. App. 1997)	17
<i>Krueger v. Zeman Const. Co.</i> , 758 N.W.2d 881, 886 (Minn. Ct. App. 2008)	16

STATUTES

Minn. Stat. § 363A.08	1, 13, 17, 18, 19
Minn. Stat. § 363A.17	1, 2, 4, 5, 6, 9, 10, 16, 19

STATEMENT OF THE ISSUE

Minnesota Statutes 363A.17(3), part of the business discrimination section of the Minnesota Human Rights Act, creates a cause of action for discrimination in “performance of the contract.” The question before the Court is whether the plaintiff and defendant must be in contractual privity in order for the plaintiff to bring a cause of action for discrimination in performance of the contract under Minn. Stat. § 363A.17(3).

The District Court concluded that Section 363A.17(3) creates a cause of action for discrimination in performance of the contract only for parties to the contract. The Court of Appeals affirmed.

Most apposite authority:

Minn. Stat. § 363A.17 (2008)

Minn. Stat. § 363A.08 (2008)

LEGAL ARGUMENT

Appellant Pamela Krueger (“Appellant”) and Appellant’s amici, the Minnesota Commissioner of Human Rights (“Commissioner”) and the National Employment Lawyers Association, Minnesota Chapter (“NELA”) argue that the Court of Appeals erred in concluding that Minn. Stat. § 363A.17(3) (the business discrimination provision of the Minnesota Human Rights Act (“MHRA”)) creates a cause of action for discrimination in the performance of a contract only between the parties to that contract. Instead, Appellant and amici argue that there is no privity requirement, and consequently, under their reading, Section 363A.17(3) extends a cause of action to anyone against anyone, so long as one of the two persons is engaged in the performance of a contract.

Any objective reading of the full statute supports the Court of Appeals’s conclusion that contractual privity is required for a claim under Minn. Stat. § 363A.17(3). This is ably discussed in more length in Appellee’s brief. What the Minnesota Association of General Contractors (“MnAGC”) and the Minnesota Chamber of Commerce (“MN Chamber of Commerce” or “the Chamber”)¹ will add to the discussion is an explanation, from businesses on the ground, of *why* the legislature made the choice to limit liability to contracting parties – and of what will occur if this Court fails to uphold the limitations set by the legislature. Appellant and amici stress that the MHRA should be broadly construed to effectuate its policy of opposing discrimination – but

¹ No counsel for any party authored this brief in whole or in part. No one other than the Associated General Contractors of Minnesota made any monetary contribution to the preparation of this brief. This disclosure is made in conformity with Minn. R. Civ. App. P. 129.03.

there was more than one policy effectuated by the legislature in creating the MHRA. The limitations placed by the legislature in the plain language of the statute protect other policy objectives, and the plain language used by the legislature to protect those objectives must be respected also.

I. IDENTITY OF AMICI.

This brief is submitted by the MnAGC, and is joined in by the MN Chamber of Commerce.

A. About the Association of General Contractors of Minnesota.

The MnAGC, formed in 1919, was the first recognized chapter of the Associated General Contractors of America. The MnAGC has more than 400 members, including general contractors, specialty contractors, and affiliated businesses interested in the construction industry.

One of the MnAGC's purposes is to represent its members on industry-related issues. It is in a position to accurately estimate the potential effects of the immense expansion in liability supported by Appellant and Appellant's amici on the Minnesota construction industry.

B. About the Minnesota Chamber of Commerce.

The MN Chamber of Commerce has joined MnAGC in this brief. The Chamber of Commerce is Minnesota's largest business advocacy organization. The Chamber was founded in 1909 and represents more than 2,400 businesses of all types and sizes in urban, suburban, and rural areas throughout the state. The membership of the Minnesota Chamber of Commerce includes small businesses and Fortune 500 companies alike. The

mission of the Chamber is to enhance the competitiveness of Minnesota companies. The Chamber is uniquely able to provide this Court information and perspective on the importance of the employment liability issues this Court will address, from a broad spectrum of Minnesota businesses.

II. THE PLAIN LANGUAGE OF MINN. STAT. 363A.17(3) ONLY EXTENDS A CAUSE OF ACTION WHERE THERE IS PRIVITY OF CONTRACT BETWEEN THE PLAINTIFF AND DEFENDANT.

Because the cause of action asserted herein is set forward in a statute, the plain meaning of the statute, read in context, must control the decision in this case. The statute specifically limits liability under the statute to contractual situations:

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. Grammatically, the legislature's intention was clear. The legislature prohibited discrimination in "performance of *the* contract," not in "performance of *a* contract." To trigger liability under the statute, it is not sufficient, as NELA and the Commissioner contend, for one of the parties to be performing pursuant to just any contract. The alleged discrimination must take place in the performance of *the* contract – i.e., the contract into which the two parties have entered.

In context, the legislature was listing prohibited actions, and relating them together. A person is not permitted to “to discriminate in the basic terms, conditions, or performance of the contract.” This is a disjunctive statement: A person is not allowed to discriminated in the terms, conditions or performance of the contract.

Furthermore, if the alleged victim and alleged discriminator did not have to be parties to the contract to fall under the “performance of the contract” provision of the MHRA, why does this provision mention a contract at all? Why is it in any way important that there be a contract involved, if the prospective plaintiff and defendant do not have to be parties to the contract? Simply put, the fact that the legislature included the “performance of the contract” language at all, instead of simply opening up liability without qualifications (e.g., “or discriminates in the performance of a contract” instead of “or discriminates in the performance of the contract” – or, alternatively, simply banning all discrimination in business altogether, without reference to contracts) indicates that the legislature wanted to limit the liability to contracting parties.

The Commissioner argues that the Court of Appeals erred in limiting Minn. Stat. § 363A.17(3) because “Krueger has a right as an individual who was harassed to seek redress against the discriminating party.” But the legislature *did not say* that any person who is sexually harassed has an individual right to seek redress against the discriminating party (nor, in fact, has Appellant even *sought* redress against the actual individuals who harassed her). The legislature created a limited right – a cause of action that offers redress to victims of business discrimination

without expanding liability to any individual that engages in discrimination or any entity that may employ that individual.

The Commissioner, like Appellant and NELA, is drawing her opinion of what liability should be from her own belief system, not from the statute passed by the legislature. The Court of Appeals, in contrast, followed the actual statute, effectuating the legislature's intention. If the Commissioner wishes to see her personal belief effectuated, she should lobby the legislature and not ask this Court to turn a limited statutory claim into a broad common law cause of action by ignoring the legislative limitations in the statute.

III. THE LEGISLATURE, IN CREATING A CAUSE OF ACTION BUT LIMITING IT TO CONTRACTUAL SITUATIONS, CREATED A POLICY BALANCE THAT WOULD BE DESTROYED BY APPELLANT'S EXPANSIVE MISREADING OF THE STATUTE.

Appellant and her amici argue that a correct interpretation of Minn. Stat. § 363A.17, requiring contractual privity, fails to effectuate the policy of the statute. But in fact, Minn. Stat. § 363A.17's correct interpretation is a balance of anti-discrimination and business policies, and reflects the legislature's understanding of both business and discrimination.

A. Multi-tiered Construction Projects in Particular, and Minnesota Businesses in General, Rely on Contractual Structures and Corporate Forms to Control Risk.

The legislature deliberately avoided exposing Minnesota businesses to the wide, indiscriminate liability advocated by Appellant – for good reason. Some basic background on construction projects may be helpful in understanding the problems that

Appellant's proposed expansion of MHRA would unleash on the construction industry (and, consequently, anyone paying for construction work) and on other multi-tiered business arrangements.

Usually, on a large project, there is a general contractor in charge of the project. The general contractor selects subcontractors to perform the various specific portions of the work (e.g. plumbing, heating/cooling systems, concrete work, wiring, material procurement), often through a bidding process. In turn, these subcontractors may contract with sub-subcontractors (and sub-subcontractors with sub-sub-subcontractors, etc.) to perform some portion of the subcontractor's work. Subcontractors and the general contractor may also order supplies or other project materials from third party suppliers, and may hire independent contractors for some work (for example, for trucking work). There is also often a design professional (such as an architect or engineer) involved in the project. All these parties and more are often simultaneously on the project site, performing separate work, but inter-related work and all pursuant to various contracts.

The general contractor may not even be aware of the identity of all the tiers of sub-subcontractors and suppliers contributing to the Project (because they are under the control of the general contractor's subcontractors), let alone what all these subcontractors, suppliers and their employees are doing at any given time. The general contractor is occupied with making sure the project is being completed according to the (often tight) schedule, troubleshooting any problems that arise, and usually performing some portion of the work itself.

Therefore, in order to keep the project operational and organized, the general contractor must be able to rely on the protections and responsibilities detailed in its contracts with its subcontractors and suppliers. The contracts between the parties establish the subcontractors' and suppliers' roles, assigned work, and the obligations of both parties to each contract. The general contractor also relies on the corporate structure of its corporate subcontractors in order to know which individuals in the organization it should be talking to so as to obtain a reliable response.

B. Expanding the MHRA Beyond Contractual Privity Would Lead to Rampant Liability and Multiple Recovery, Crippling Minnesota Business – Policy Results That the Legislature Wished to Avoid.

In the project at issue in this case, Diamond Dust and Appellee worked together pursuant to a contract. Diamond Dust sued Appellee for discrimination in the performance of that contract. Apparently not satisfied with the prospect of a single recovery, Appellant wishes to obtain a second recovery – a personal recovery – for the exact same alleged discrimination. But Appellant was not an employee of Diamond Dust. Nor did she have a contract with Appellee. She was an unconnected third party, with no obligations to anyone on the site.

Appellant's answer to the fact that she had no contract with anyone pursuant to which to sue is that no one should be required to be a party to a contract to sue for discrimination in "performance of the contract" under the MHRA. But expanding MHRA liability beyond contractual privity would open up more than just the double recovery Appellant personally desires. As the legislature foresaw, it will also have the consequence of creating innumerable third-party causes of action, which could cripple

Minnesota business with additional claims and lawsuits to defend. Appellant and her amici urge this Court to adopt the broadest possible scope for the statute – that anyone may be sued for “business discrimination”, so long as either they or the person suing them are doing something pursuant to some sort of contract.² (Appellant’s Brief, p. 10, 15; NELA Brief, p.11 (“The policy is clear – the Act is in place to stop discrimination in all of its forms in the workplace – whether the perpetrator is an employer, a customer, or another business.”)) In this world of business, of course, virtually everything is done according to some sort of a contract, so Appellant is essentially transmogrifying the statute into a broad prohibition against discrimination by anyone who happens to be operating under (or in contact with someone who is operating under) a contract.

That is, in fact, the end result of discarding the legislature’s considered requirement of contractual privity. A random passerby could sue a worker (or the

² The Commissioner ostensibly attempts to place a limit on the broad liability for which she is arguing by stating that “Section 363A.17(3) is not boundless. The cause of action must be based on discrimination that occurs while the claimant is performing pursuant to the contract.” (Commissioner’s Brief, p. 11.) In essence, the Commissioner’s reading would give a cause of action to a worker against a passerby who sexually harass the worker, but not to a passerby who is sexually harassed by a worker. But there is no language in the statute to support this distinction. No statutory language indicates that the claimant, as opposed to the defendant, must be operating pursuant to the contract for a cause of action to arise. Section 363.17(3) simply bans discrimination in the “performance of the contract.” If anything, the language implies that the defendant must be performing the contract.

It is also odd that the Commissioner is ostensibly comfortable with limiting liability, when elsewhere in her brief, the Commissioner argues that Appellant has a right as a person who was sexually harassed to seek redress against the harassing party – implying that all individuals who are sexually harassed have the right to seek redress directly against the harassing party, regardless of the actual language of the MHRA. It is difficult to avoid the conclusion that the Commissioner believes that any limitations on the MHRA at all are wrong. If so, the Commissioner should seek redress in the legislature, not this Court.

worker's employer) for sexual harassment, because that worker is operating under a contract; a store's employee could sue a customer for sexual harassment because the employee is operating under a contract; employees of different sub-subcontractors on a project site could sue one another, each others' employers, or the general contractor for alleged MHRA violations because all are operating pursuant to contracts, although not with each other! The litigation would be as limitless as the human contact involved in the business. In the construction context in particular, the general contractor on a project would be both unable to control the risk and unable to avoid the liability.

And even that is not the extent of the liability created under Appellant's reading of the MHRA. NELA, for example, argues that under the MHRA, because there is no privity requirement, should a company ("Company C") refuse to contract with another company ("Company A") because Company C's 50 employees are women, not only could Company A sue Company C, but *every single female employee of Company A could also sue Company C under the MHRA*. (NELA Brief, p. 6.) This could easily lead to a fifty-fold recovery not contemplated by the language the legislature chose.

Section 363A.17(3) contains a privity requirement specifically because the legislature wished to avoid this explosion of liability. Appellant and her amici may argue that while technically, it might be possible, under their reading of the statute, for a passerby to commence suit against a construction worker for sexual harassment, surely no one would *really* institute such a suit. But if there is one thing that is certain, it is that if there is any basis for a type of suit, the plaintiff's bar will in fact sue. If this Court misinterprets the statute in the way Appellant and her amici request, it *will* subject the

Minnesota construction industry – and every other Minnesota business – to unprecedented levels of litigation and liability. It is unsurprising that NELA supports this; they would be the prime beneficiary of such a litigation windfall.

Neither the MnAGC nor the MN Chamber of Commerce support discrimination of any kind. But Minnesota businesses are also concerned with being able to control and contractually allocate the risk of any liability. This is a particular concern in multi-tiered construction projects, where several different contractors are performing separate, independent aspects of a construction project, often with multiple levels of subcontractors. The legislature understood this, and intended to limit discrimination liability accordingly. Appellant’s misinterpretation of the statute widens liability far beyond what was intended by the legislature, and would wreck havoc on the construction industry (and Minnesota business in general).

C. The Legislature Also Accounted for Corporate Form in the MHRA; Appellant Cannot Use the Effect of Corporate Form to Avoid the MHRA’s Limitations.

Appellant argues that it is “absurd” and unfair to divest her of her personal claim simply because she chose for her business, Diamond Dust, to contract with Appellee instead of contracting with Appellee personally. (Appellant’s Brief, p.15-16.) But there is nothing “absurd” about respecting the corporate form – as Appellant herself would surely argue if she were utilizing her corporate form to avoid personal liability. Furthermore, as noted above, legal corporate protections have a large role in making possible the multi-tiered contractor-subcontractor relationships necessary for a construction project. A general contractor dealing with a subcontractor corporation relies

on the corporation to handle the corporation's workers' concerns, to handle their problems, and to act as their representative with the general contractor. The general contractor cannot run a project if it must oversee the concerns and listen to the complaints of all of the subcontractors' individual employees.

As the Court of Appeals pointed out in its opinion, Appellant herself deliberately chose to incorporate a business and work through that business instead of simply offering her services as an employee or independent contractor. And Appellant reaped substantial benefits by avoiding being the party contracting directly with Appellee. For one thing, she avoided any personal liability under her contract with Appellee. She also became able to take advantage of the Minnesota Disadvantaged Business Enterprise program, which encourages businesses such as Appellee to contract with her company as a woman-owned business enterprise.

Now, after having taken extensive advantage of the corporate form, Appellant argues that she should be allowed to ignore her corporate form when it comes to the liability of *other parties*. Appellant's position is not only hypocritical, it is also highly damaging to business entities, who rely on the corporate form to control risk and contractually delegate responsibility. General contractors could no longer rely on their subcontractors to protect the subcontractors' employees from discrimination and advocate on their behalf. Instead, the general contractors would have to individually oversee all the subcontractors' employees, or face direct lawsuits from those employees. This is simply unworkable. The MHRA did not indicate in any way that it intended to

ignore corporate structure – because the legislature respected the fact that respecting the corporate form is essential to Minnesota business.

IV. THE INTERPRETATION OF THE MHRA BY THE COURT OF APPEALS DOES NOT LEAVE ANYONE WITHOUT RECOURSE FOR DISCRIMINATION; RATHER, IT PREVENTS DOUBLE RECOVERY.

Appellant and her amici argue that the Court of Appeals’s interpretation of the MHRA would leave victims of business discrimination without recourse and attempt to raise the specter of rampant, unchecked business discrimination.

Assuming *arguendo* that the accurate reading of the statute *did* leave some persons without legal recourse for unique situations of discrimination, the plain meaning of the statute would still have to control. The court may not “disregard the words of a statute ‘under the pretext of pursuing the spirit’ if the words are free from ambiguity.” *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center*, 637 N.W.2d 270, 276 (Minn. 2002).

But it is difficult to understand who Appellant and amici believe would be without recourse under the MHRA as the legislature intended it. Employees can sue their employers under Minn. Stat. § 363A.08 (the employment discrimination section of the MHRA) if they are discriminated against or forced to endure sexual harassment on the job. And – as NELA itself points out repeatedly – the MHRA permits corporations to sue as “persons,” therefore businesses or independent contractors that are discriminated against could sue pursuant to the business discrimination section of the MHRA. NELA claims that unless privity is discarded, if Contractor A harassed female employees of Contractor B, Contractor B would refuse to hire female workers, and those workers

would be left without recourse. (NELA Brief, p.12.) But in fact, if Contractor B refused to hire female workers, those non-hired workers could sue Contractor B under § 363A.08.

In the case at issue here, the Court of Appeals decision certainly leaves recourse, and ensures that any proven discrimination will be punished. Specifically, Diamond Dust itself has asserted a claim against Appellee – a claim that is exactly the same as Appellant’s. Appellee has explicitly conceded that Diamond Dust can bring its claim against Appellee under the MHRA. As Appellant presumably pays herself by distributing Diamond Dust’s earnings to herself (as its sole shareholder), she would certainly distribute to herself any money Diamond Dust receives as a result of its claim.

What Appellant and her amici really appear to be protesting, therefore, is that Appellant is being denied an opportunity for double recovery for the exact same alleged injury – one recovery through Diamond Dust, and one on her own behalf. It is a significant stretch to call a denial of double recovery an injustice, or contrary to the “policy” of the MHRA.

Furthermore, Appellant’s situation is very unusual in that she a) incorporated and contracted through her corporation, and b) did her corporation’s work, but not as an employee – presumably because she wished to avoid paying employee-related taxes (social security, unemployment, etc.) that she would have had to pay if her company had hired her as an employee. That is, however, no reason for Appellant to receive double recovery under the MHRA. One recovery – through Diamond Dust – is sufficient to address any alleged discrimination. Certainly, there is no need to subvert the plain language of the MHRA and open up vast vistas of unintended liability, wrecking havoc

on Minnesota business, simply to accommodate Appellant's wish to avoid employee taxes, utilize a corporate form, and yet still *personally* recover (in addition to recovering through Diamond Dust) for discrimination under the MHRA.

V. **NELA'S AND THE COMMISSIONER'S ADDITIONAL ARGUMENTS ARE UNSUPPORTED.**

A. **The Court of Appeals Decision is Consistent, as the Court Did Not Conclude That Individuals Could Bring Suit if the Businesses for Which They Worked Were Discriminated Against.**

NELA appears to argue in its brief that the Court of Appeals was inconsistent, because, if Appellee had refused to contract with Diamond Dust for discriminatory reasons, Diamond Dust's owner – Pamela Krueger – would have been able to file suit against Appellee *individually*, for herself, as opposed to on behalf of Diamond Dust.³ (NELA Brief, p.8-9.) NELA states that this position is in direct contradiction to the Court of Appeals's conclusion that Appellant cannot personally sue for Appellee's alleged discrimination against Diamond Dust in the performance of Diamond Dust's contract. (*Id.*)

³ Strangely, NELA asserts that the Court of Appeals did this because, NELA apparently argues, a corporation cannot sue for discrimination under the Minnesota Human Rights Act, and the Court of Appeals wanted to maintain a course for recovery for discrimination against corporations under the MHRA. (NELA Brief, p.9) NELA appears to believe that Diamond Dust cannot bring suit under the MHRA – only Appellant can. NELA confusingly asserts this while simultaneously pointing out that “person” is defined under the MHRA to include corporations. It is worth noting that neither Appellee, nor Appellant, nor MnAGC, nor the MN Chamber of Commerce has argued that a corporation cannot bring suit under the MHRA. It seems clear that a corporation can indeed bring suit under the statute. In the instant case, Diamond Dust's own cause of action was not challenged by Appellee on summary judgment.

The problem with NELA's position is that the Court of Appeals did not in fact say that Appellant could sue individually if Appellee refused to contract with Diamond Dust.

The paragraph NELA cites contains no such statement or even implication:

Appellant does not claim that respondent discriminated against her under the first two clauses by intentionally refusing to do business with her or by refusing to enter into a contract with her because of her sex, either of which constitutes an unfair discriminatory practice under the first two clauses of section 363A.17(3). In fact, it did enter into a contract with Diamond Dust.

Krueger v. Zeman Const. Co., 758 N.W.2d 881, 886 (Minn. Ct. App. 2008). The rest of the Court of Appeal's opinion similarly does not contain any statement or indication that Appellant could sue individually if Appellee refused to contract with Diamond Dust. She could not; her corporation could.

Furthermore, NELA's argument that an employee could, under MHRA, file suit against a third party because the third party did not hire the employee's employer is more evidence of how broad the range and scope of liability would be under Appellant's interpretation of the statute. As discussed above, if any and every employee could sue because their employer was not hired for a project, every general contractor would face the prospect of dozens or hundreds of lawsuits from various employees of any subcontractor with whom it does not contract on each project it bids. The Minnesota legislature never intended such an expansion of third-party liability.

B. The Caselaw Does Not Support Extension of Liability to Parties Outside of the Contract.

NELA argues that "courts have extended the protections of the MHRA to the non-employee category in similar situations." (NELA Brief, p.13.) But in fact, neither of the

cases NELA cites extend any protections to non-employees. Rather, they concern situations in which employees were allowed causes of action against their employers under the MHRA when the employers failed to shield the employees from discrimination and harassment by third parties (clients, customers, etc.) *See Crist v. Focus Homes, Inc.*, 122 F.3d 1107, 1111-12 (8th Cir. 1997) (employer liable for not protecting employees from sexual assaults by patient); *Costilla v. State of Minnesota*, 571 N.W.2d 587, 591-92 (Minn. Ct. App. 1997) (employer liable for harassment of employee by third party where employer ignored employee's reports of harassment).

These cases actually serve to prove Appellant's point: causes of action under the MHRA are based on employment and contractual relationships; one cannot simply sue just anyone one encounters in the course of one's work. As NELA's causes demonstrate, when an employee is discriminated against by a third party in the course of their work, they cannot sue the third party. Instead, the legislature determined that the employee appropriately looks to the employer – *the person with whom they have the employment relationship* – to rectify the situation. If the employer does not rectify the situation, the employee may sue the employer. Minn. Stat. § 363A.08; *Costilla v. State of Minnesota*, 571 N.W.2d at 591-92. This is because it is not the third parties who force the employees to endure the harassment. It is the employer.

Here, Appellant allegedly worked on the project site for several months despite the alleged discrimination. It is beyond dispute that she controlled her corporation, so there is no excuse – and no underlying policy justification – to encourage her to choose to expose herself to discrimination for months and then complain that she personally cannot

sue for it. What she, or anyone else in her unique situation, could and should have done is have the corporation that she controls immediately stop work, and direct her corporation to sue Appellee for violation of the MHRA and breach of contract. Thus, Appellant had ample recourse had she mitigated her own and her corporation's damages.

Before the MHRA, an employee subjected to discrimination could face employment penalties from her employer should she leave the jobsite. Section 363A.08 of the MHRA solves that problem by allowing employees to sue their employers. Similarly, a business refusing to perform due to discrimination could face contractual penalties for non-performance; therefore, Section 363A.17(3) solved that problem by allowing the protesting business to sue for violation of the MHRA. But here, Appellant deliberately chose not to be an employee, and thus faced no punishment from an employer should she leave the jobsite – nor did she face individual contractual penalties if she should choose to stop working. She could have – and should have – left the site as soon as Appellee allegedly refused to stop the discrimination against her, and her company could have commenced suit.

Appellant is not afforded a personal cause of action under the MHRA precisely because no contractual pressure was on Appellant, as a third party, to endure the discrimination. Instead, Diamond Dust, the contracting party, has a cause of action – which it is actively pursuing. This is the appropriate implementation of the policy approved and passed by the legislature in the MHRA. It protects employee rights and encourages the companies in privity to take action to stop discrimination – while

simultaneously limiting causes of action to those in contractual privity, so as not to allow an onslaught of duplicative lawsuits.

CONCLUSION

As the Court of Appeals and Appellee aptly explain, the plain language of the business discrimination provision of the MHRA limits liability to those in contractual privity. “Performance of *the* contract” expresses a specific statutory requirement for a contract between the parties, not just “a” contract or “any” contract involving only one of the parties.

Appellant and her amici argue that implementation of the MHRA’s plain language would frustrate MHRA’s policy goals, leaving victims of discrimination who are not in contractual privity with the perpetrators of discrimination without recourse. In fact, the requirement of contractual privity does not leave anyone without recourse: employees can sue their employers for discrimination under Minn. Stat. § 363A.08, and those employers (including businesses and independent contractors) can sue other parties to the contract for discrimination in the formation and performance of contracts under Minn. Stat. § 363A.17(3). In this case, Diamond Dust retains its claim against Appellee.

But in any event, while Appellant and her amici emphasize the MHRA’s policy of combating discrimination, the legislature balanced more than one policy objective in crafting the MHRA. The legislature carefully created a limited right – here, limited to parties in contractual privity – in order to control liability and ensure that businesses were not swamped by duplicative suits seeking multiple recovery from parties with whom the businesses were not even contractually involved. The Court of Appeals’s opinion applied

the plain language that respected the balanced policies of the legislature. Consequently, MnAGC and the MN Chamber of Commerce respectfully request that this Court uphold the decision of the Court of Appeals.

Dated: May 26, 2009

FABYANSKE WESTRA HART & THOMSON, P.A.

By: _____



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