MINNESOTA STATE LAW LIBRARY

CASE NO. A08-0206

STATE OF MINNESOTA

IN SUPREME COURT

Pamela Krueger,

Appellant

Diamond Dust Contracting LLC,

Plaintiff,

vs.

Zeman Construction Company

Respondent.

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, MINNESOTA CHAPTER

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

Statement of the Amicus Curiae National Employment Lawyers, Minnesota Chapter 1

INTRODUCTION 3

ARGUMENT 3

I. Purpose Of The Minnesota Human Rights Act 3

II. Plain Meaning Of The MHRA 3

III. Court of Appeal's Decision Is Internally Inconsistent 8

IV. Public Policy Underlying The MHRA 10

CONCLUSION 14

CERTIFICATION 16

TABLE OF AUTHORITIES

Cases

Abraham v. County of Hennepin,
639 N.W. 2d 342 (Minn. 2002) 1

Anderson-Johanningmeier v. Mid-Minnesota Women's Center, 637 N.W.2d 270 (Minn. 2002) 1, 3

Costilla v. State of Minnesota,
571 N.W. 2d 587 (Minn. Ct. App. 1997) 13

Crist v. Focus Homes, Inc., 122 F.3d 1107 (8th Cir. 1997) 13, 14

Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8 (3d Cir. 1999) 7, 8

Faragher v. City of Boca Raton, 524 U.S. 775 (1998) 11

Frieler v. Carlson Marketing Group, Inc.
751 N.W. 2d 558 (Minn. 2008) 1

Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) 11

Krueger v. Zeman Construction Company,
758 N.W.2d 881(Minn. Ct. App. 2008) 9, 10

Nordling v. Northern States Power Co.,
478 N.W.2d 498 (Minn. 1991) 2

Ray v. Miller Meester Advertising, Inc.,
684 N.W. 2d 404 (Minn. 2004) 1

Williams v. St. Paul Ramsey Medical Center,
551 N.W.2d 483 (Minn. 1996) 1, 2

Federal Statutes

Title VII of the Civil Rights Act of 1964,
as amended, 42 U.S.C. §2000e, *et. seq.* 13

42 U.S.C. Section 1981 ..... 7, 8

State Statutes

Minnesota Human Rights Act, 363A.01 *et. seq.* ..... passim

Minn. Stat. §363A.02 Subd. 1 ..... 3, 4

Minn. Stat. §363A.03 Subd. 13 ..... 3, 7

Minn. Stat. §363A.03 Subd. 30 ..... 4, 9

Minn. Stat. §363A.04 ..... 3, 10

Minn. Stat. §363A.17 ..... 4, 8, 11, 12

Minn. Stat. §363A.17 (c) 4

Minn. Stat. §363A.28 8

Minn. Stat. §363A.28 Subd. 1 ..... 4, 6

Minn. Stat. §645.16 7

Rules

Minn. App. P. 129.03 1

Statement of the *Amicus Curiae* National Employment Lawyers Association, Minnesota Chapter[1]

The National Employment Lawyers Association ("NELA") is a non-profit organization of lawyers who represent employees. NELA is headquartered in San Francisco, California and has over 3,000 members nationwide. NELA has supported precedent-setting litigation and legislation affecting the rights of individuals in the workplace for many years. The Minnesota Chapter of NELA was formed in 1990.

Minnesota NELA has participated as *amicus curiae* on many occasions before the Minnesota Supreme Court, the Minnesota Court of Appeals and in the Courts of the United States. In particular, Minnesota NELA has appeared as *amicus curiae* in the following cases, among many others: *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W. 2d 558 (Minn. 2008); *Ray v. Miller Meester Advertising, Inc.*, 684 N.W. 2d 404 (Minn. 2004); *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002); *Anderson-Johanningmeier v. Mid-Minnesota Women's Center*, 637 N.W.2d 270 (Minn. 2002); *Williams v. St. Paul Ramsey*

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[1] Rule 129.03 Certification: This brief was wholly authored by the undersigned counsel for the *amicus curiae* Minnesota Chapter of the National Employment Lawyers Association. No counsel for any party authored this brief in whole or in part. No person or entity other than the Minnesota Chapter of the National Employment Lawyers Association, its members and/or its counsel, have made any monetary contribution to the preparation or submission of this brief.

Medical Center, 551 N.W.2d 483 (Minn. 1996); and *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991).

The undersigned are current members of the Amicus Curiae Committee of the Minnesota Chapter of NELA and are qualified to brief this court on the legal and policy issues presented by this appeal. The position that the Minnesota Chapter of NELA takes in this brief has not been drafted, approved or financed by appellant or appellant's counsel. Any duplication of NELA's analysis and the appellant's is purely coincidental. Minnesota NELA thanks the Court for permitting it to appear in this case.

INTRODUCTION

This case comes to the Supreme Court from the Court of Appeals' affirmation of dismissal by the District Court, which concluded that appellant, Pamela Krueger, could not sustain a cause of action against respondent for violation of the Minnesota Human Rights Act ("MHRA") prohibition of discrimination in business because she was not, as an individual, a signatory to the contract between the company she owned and the defendant. This narrow reading of the Minnesota Human Rights Act eviscerates the purpose of the business discrimination provision.

ARGUMENT

I. Purpose Of The Minnesota Human Rights Act

The Minnesota Human Rights Act is to be construed liberally to accomplish its purpose. *See*, Minn. Stat. §363A.04. "It is the public policy of this state to secure to persons in this state, freedom from discrimination." Minn. Stat. §363A.02 Subd. 1. Discrimination based upon sex includes sexual harassment. *See*, Minn. Stat. §363A.03 Subd. 13. Therefore, it is the purpose of the MHRA, and the public policy of the State, to secure for Minnesotans freedom from sexual harassment in business.

II. Plain Meaning Of The MHRA

The language of the Minnesota Human Rights Act (MHRA) is without ambiguity. The court is not free to disregard the words of a statute if the words are free from ambiguity, and the court is not free to read into a statute language that does not appear in the statute. *See Anderson-Johanningmeier v. Mid-Minnesota Women's Center*, 637 N.W.2d 270, 276 (Minn. 2002). The Minnesota Human Rights Act provides:

> It is an unfair discriminatory practice for a person engaged in trade or business or in the provision of a service:
>
> (c) to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person's race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.

Minn. Stat. § 363A.17 (c).

The MHRA defines "person" to include partnership, association, corporation, legal representative, trustee, trustee in bankruptcy, receiver, and the state and its departments, agencies, and political subdivisions. *See* Minn. Stat. § 363A.03 Subd. 30. Any person aggrieved by a violation of the Act may bring a civil action. *See* Minn. Stat. § 363A.28 Subd. 1.

A reading of the plain language in Section 363A.17, when read with the whole section, leads to only one conclusion – a business may not discrimination in the terms, conditions or performance of a contract because of a *person's* sex. There is an obvious reason for this language: while legal entities like corporations or partnerships may sue and be sued, *these entities do not have a race or a gender.* Only people are of a race or gender. Therefore, this provision cannot be read to only prohibit discrimination among actual parties to a business contract. To do so would restrict the provision to apply only in situations in which a business entity is contracting with an individual, and not to situations in which a business entity is contracting with another business entity. This is a tortured reading of the statute.

Consider the following examples: 1) corporation A refuses to enter into an independent contractor relationship with Abbey because she is a woman, and A believes women are not capable of performing the job; 2) partnership B refuses to enter into a business contract with Abbey, Inc. because Abbey, Inc. is owned by a

woman and B believes women are not capable of performing the job; 3) company C refuses to enter into a business contract with Abbey, Inc. because all of Abbey, Inc.'s employees are women and C believes women are not capable of performing the job.

In the first example, corporation A is a business, as that term is defined by the MHRA, who has discriminated against a "person" (Abbey) because of her sex. Clearly, in this example, A has violated the MHRA, and Abbey is an aggrieved "person" who has the right to file a claim for violation of the Act.

In the second example, partnership B is a business, as that term is defined by the MHRA, who has discriminated against a "person" (Abbey and Abbey, Inc.) as that term is defined by the MHRA, because of Abbey's sex. In this example, B has violated the MHRA, by refusing to contract because of a "person's" sex. It would make no sense to say that B did not discriminate against Abbey, when she is the person whose sex was the basis of the discrimination. It would also make no sense to say that B did not discriminate against Abbey, Inc., because Abbey, Inc. is also a "person" as defined by the Act, who has been aggrieved by a violation of the act, that being B's discrimination against Abbey because of her sex, which resulted in Abbey, Inc. being deprived of business.

In the third example, company C has violated the Act, as well. C is a business, as that term is defined by the MHRA, who has discriminated against a

"person" (Abbey, Inc. and its female employees) as that term is defined by the MHRA, because of Abbey's employees' sex. In this example, C has violated the MHRA, by refusing to contract because of a "person's" sex. It would make no sense to say that C did not discriminate against Abbey's female employees, when they are the people whose sex was the basis of the discrimination. It would also make no sense to say that C did not discriminate against Abbey, Inc., because Abbey, Inc. is also a "person" as defined by the Act, who has been aggrieved by a violation of the act, that being C's discrimination against Abbey Inc. because of the sex of its employees, which resulted in Abbey, Inc. being deprived of business.

Had the legislature intended to limit aggrieved parties under the business discrimination provision to the formal parties to a contract, it could have done so. It did not, however, and the Court may not read into the provision limiting language. The MHRA specifically provides that, "Any person aggrieved by a violation of this chapter may bring a civil action...." Minn. Stat. §363A.28 Subd. 1. Clearly, use of the defined term "person" includes both individual and other legal entities, and use of that defined term in the business discrimination provisions permits suit by any person or entity who has been negatively affected by the discrimination.

In this case the discrimination occurred in the performance of the contract. Discrimination in the performance of the contract is a violation of the Act, in the

same way that discrimination in the terms or conditions of the contract is a violation of the Act. Sexual harassment is included within the definition of discrimination. *See*, Minn. Stat. §363A.03 Subd. 13.

Krueger has alleged that she was sexually harassed in the performance of the contract. Krueger was performing work in furtherance of the contract between Zeman and Krueger's company. The contract required Krueger to provide labor – in the form of 'persons' – to perform work for Zeman. During her performance of this work, Zeman discriminated against Krueger by repeated acts of sexual harassment affecting the basic terms, conditions and performance of her work under the contract.

The plain unambiguous language of the MHRA prohibits discrimination in the 'performance' of the contract based on a 'person's' individual sex, without limiting language as to standing. The language of the statute should be given its plain and ordinary reading. *See,* Minn. Stat. §645.16.

In a case interpreting 42 U.S.C. Section 1981, which prohibits discrimination in contracts based upon race, the United States Court of Appeals for the Third Circuit agreed with the approach we suggest. In *Danco, Inc. v. Wal-Mart Stores, Inc.*, the Third Circuit reasoned, "A corporation ordinarily carries out its activities through its employees, and work-site racial discrimination against Danco's employees could amount to racial discrimination against Danco causing

damage to the company." *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (3d Cir. 1999).

Because of the limited language of Section 1981, however, the Third Circuit held in *Danco* that the individual did not have a cause of action. *Id.* The expansive language of the MHRA, however, does provide a cause of action for the individual. Section 1981 is drafted to 'give' people the right to make and enforce contracts. In contrast MHRA § 363A.17 *prohibits* certain discrimination, specifically discrimination *by* businesses on the basis of a *person's* race, color, national origin, sex, sexual orientation or disability. Section 363A.28 of MHRA provides a cause of action for any *person* aggrieved by the discrimination. It was clearly error on the part of the Court of Appeals to disregard this plain language providing Krueger with a cause of action.

III. Court of Appeal's Decision Is Internally Inconsistent

In reaching its conclusion that Krueger did not have a claim against Zeman, the Court of Appeals divided the statute into three clauses: "to intentionally refuse to do business with;" "to refuse to contract with," and "to discriminate in the basic terms, conditions, or performance of the contract." The Court of Appeals opinion very quickly acknowledged that Pamela Krueger, *herself*, would have standing to bring this claim had Zeman refused to contract with her because of her sex. It wrote:

> 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 Construction Company, 758 N.W.2d 881, 886 (Minn. Ct. App. 2008). The Court of Appeals apparently, with respect to the first two clauses, recognizes that, had Zeman refused to contract with Diamond Dust because of *Krueger's* sex, it would have violated the Minnesota Human Rights Act. The Court of Appeals did not suggest that Krueger would not have had standing to file suit for the violation because it would have been Diamond Dust which had been deprived of the contract, given that Krueger was seeking the contract under a corporate form. The reason the Court of Appeals did not so suggest is clear; to do so would render the statute meaningless. Corporations are legal fictions created to allow individuals to conduct business. This is the reason the legislature defined the terms "person" to include corporations. *See* Minn. Stat. §363A.03, subd. 30. A plain reading of the definition of "person" in conjunction with the business discrimination prohibition necessarily requires the conclusion reached by the Court of Appeals that Krueger would have a cause of action had Zeman refused to contract with Diamond Dust because of her sex.

Yet, the Court of Appeals then determined with respect to the third clause, which prohibits discrimination in the terms, conditions or performance of the contract, that Krueger did not have standing to pursue a claim against Zeman for its employees' sexual harassment of her.

The Court of Appeals complains that Krueger's "broad interpretation" is not supported by the statutory language. *Id.* at 887. Yet, the legislature expressly directs the court to construe the Human Rights Act broadly. *See*, Minn. Stat. §363A.04.

The Court of Appeals offers no explanation for its inconsistent interpretation, under which it would hold that Krueger would have had a claim against Zeman had it refused to contract with Diamond Dust, but does not have a claim against Zeman for discriminating against her in the performance of the contract. This Court should interpret the MHRA so that it is internally consistent, and has meaning. The only way to give effect to the intent of this statute is to view it with common sense. The Court of Appeals did not.

IV. Public Policy Underlying the MHRA

The public policy underlying the business discrimination prohibition section of the MHRA is clear. The legislature intended not only to prohibit discrimination in employment by employers, but also to prohibit discrimination when it occurs in the context of business relations. Historically, discrimination has existed in

business, which has resulted disparate business opportunities for women and minority populations. This is the public policy underlying state and federal programs seeking to retain women and minority-owned businesses for government contracts. The MHRA is not this type of a program, but its prohibition against discrimination in business serves the same purpose.

It is the public policy of the state to eliminate discrimination in business based upon race, national origin, color, sex, sexual orientation and disability. This inclusive reading of Section 363.17 is supported by the remaining sections of the MHRA, the stated purpose of the Act, and it interpretations by the courts. The purpose has been and remains to protect individuals from discriminatory treatment in the workplace.

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. It is well settled that the scope of discriminatory prohibition covers more than the 'terms' and 'conditions' in the narrow contractual sense. *See Faragher v. Boca Raton*, 524 U.S. 775, 786 (1998). The phrase 'terms and conditions' of employment was meant to 'strike at the entire spectrum' of disparate treatment which includes 'requiring people to work in a discriminatorily hostile or abusive environment.' *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

The Court of Appeals' holding means that Krueger, as a sole proprietor performing under her own contract, should be denied the right to take action against the business responsible for blatant, ongoing, prohibited sexual harassment against her in the workplace. Further, beyond the sole proprietor, any person who is performing work as a non-employee under a business-to-business contract would be denied the protections of the MHRA if the reading of the statute were limited to only those who are parties to the contract. If the suggested reading of Section 363A.17 were to be adopted in Minnesota it would not only decimate the purpose of the MHRA, but it would result in a rubber stamp for businesses to discriminate without liability as long as they limited their harassment to people who were performing contract work, but who were not actually parties to the contract. This is not the reading intended by the legislature, whose stated purpose under the Act is to secure for "persons" the freedom from discrimination.

Practically speaking, the narrow reading of Section 363A.17 would also place a worker at the mercy of the contracting business. For instance, if Contractor A harasses or discriminates against certain workers of Contractor B, Contractor B may decline hire those individuals or may refuse to take action under the MHRA for fear of losing future contracts. The worker, consequently, can either accept the discriminatory treatment or work elsewhere – she/he has no right under the proposed reading of the MHRA to take any action against the perpetrator.

Courts have extended the protections of the MHRA to the non-employee category in similar situations. The Minnesota Court of Appeals and the Court of Appeals for the Eighth Circuit have unequivocally held that a hostile environment claim against the employer includes harassment by non-employee third parties. In *Crist v. Focus Homes, Inc.*, 122 F.3d 1107 (8th Cir. 1997), the Eighth Circuit Court of Appeals held that an employee could hold her employer liable for a client's actions that created a hostile work environment for its employee. This liability attached even though the client/harasser was not an employee. The Eighth Circuit specifically noted that the claim of an employee against an employer for the acts of a non-employee was "cognizable under Title VII and the Minnesota Human Rights Act."

Similarly, in *Costilla v. State of Minnesota*, 571 N.W. 2d 587 (Minn. Ct. App. 1997), the Court held that an employer can be held liable for a non-employee's harassment of an employee pursuant to the Minnesota Human Rights Act. The Minnesota Court specifically noted that the MHRA, under certain circumstances, required protection for the employees from non-employee sexual harassment." The *Crist* and *Costilla* Courts relied on precedent from several federal courts and from the EEOC guidelines, as well as the MHRA's broad remedial intent to stop harassment in all of its forms in the workplace. The *Costilla* Court noted that the remedial purposes of the MHRA must be liberally

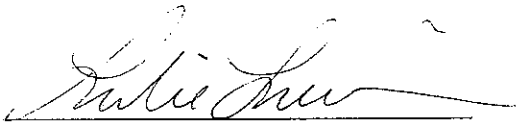
construed. This liberal construction demands that an individual worker would also be entitled to hold a business liable for discriminatory treatment that has been prohibited by the Act.

Interpretation of the MHRA must focus on the duty to prevent discrimination against individuals in their workplaces. If the courts had not allowed liability for third-party harassment, they would essentially permit the employer to "'tell its employees that they have no right to expect a safe working environment." *See, Crist* 122 F.3d at 1110. In the current matter, that is exactly what has happened. The Court of Appeals has told Krueger that she, as an individual worker, has no ability to enforce her right to a safe working environment. The Court has told each person who is performing work under someone else's contract that she/he has no right to protection under the MHRA, even though that Act has made it unlawful for a business to discriminate.

CONCLUSION

This Court should not add limiting language to a statute where none exists, particularly when doing so would deny a victim of discrimination a remedy. Instead, this Court should give the MHRA its full meaning and afford Krueger the freedom from discrimination that the MHRA promises.

Dated: April 23, 2009



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CERTIFICATION

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief produced using proportional serif font, 14-point or larger. The length of this brief is 3,263 words. This brief was prepared using Microsoft Word.

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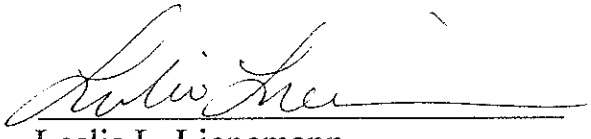

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