

No. A08-206

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STATE OF MINNESOTA  
IN SUPREME COURT

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Pamela Krueger,

Appellant,

Diamond Dust Contracting, LLC,

Plaintiff,

vs.

Zeman Construction Company,

Respondent.

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**BRIEF OF COMMISSIONER OF MINNESOTA  
DEPARTMENT OF HUMAN RIGHTS AS *AMICUS CURIAE***

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## LEGAL ISSUE

- I. Does a business-discrimination claim under the Minnesota Human Rights Act, Minn. Stat. § 363A.17(3) (2008), alleging discrimination in the performance of a contract require a plaintiff to have privity of contract with the defendant?

*The district court and court of appeals held in the affirmative.*

Most apposite authority:

Minn. Stat. § 363A.17 (2008)

## STATEMENT OF INTEREST

Under Commissioner Velma Korbel's direction, the Minnesota Department of Human Rights enforces the Minnesota Human Rights Act (MHRA), Minn. Stat. ch. 363A (2008). The legislature charged the Commissioner with developing policies and programs to effectuate the purposes of the MHRA; investigating charges of unfair discriminatory practices and determining whether probable cause supports the charge; issuing complaints; and educating the public to eliminate illegal discrimination in Minnesota. Minn. Stat. § 363A.06, subd. 1 (2008).

The MHRA prohibits unfair discriminatory practices, including discrimination by a business while performing a contract. *Id.* § 363A.17(3) (2008). The Commissioner's interest in this case concerns the standard of proof required for a MHRA business-discrimination claim. Charges alleging various forms of discrimination are often filed with the Department. The Department must investigate these claims and, based on the facts and law, the Commissioner must determine whether probable cause exists to believe a violation of the MHRA occurred. *Id.* §§ 363A.06, subd. 1(a)(8), .28, subd. 6 (2008). While the Commissioner has no stake in the outcome of the merits of Appellant Pamela Krueger's case, she has an interest in the Court's interpretation of the MHRA. Proper application of the MHRA to complaints alleging business discrimination

is important to the Department and to the citizens of the state. The Commissioner therefore offers to the Court her views on this legal issue.<sup>1</sup>

### ARGUMENT

Statutory interpretation is a question of law, which this Court reviews de novo. *Frieler v. Carlson Mktg. Group*, 751 N.W.2d 558, 566 (Minn. 2008). The goal of statutory interpretation is to ascertain the legislature's intent. Minn. Stat. § 645.16 (2008). When the plain meaning of a statute is clear, a court must apply its plain language. *Id.* Additionally, the legislature has directed courts to construe the MHRA liberally. Minn. Stat. § 363A.04 (2008).

The MHRA's prohibition on business discrimination provides, in part, that:

It is an unfair discriminatory practice for a person engaged in a trade or business or in the provision of a services . . . 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.

*Id.* § 363A.17(3). At issue in this case is the relationship a plaintiff must have with a defendant to pursue a cause of action based on business discrimination in the performance of a contract. This is a question of first impression for this Court.

In dismissing Krueger's complaint, the district court held that Krueger lacked standing to pursue a business-discrimination claim under the MHRA because she was not party to a contract with Respondent Zeman Construction Company. Appellant's

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<sup>1</sup> Counsel for a party did not prepare any portion of this brief, and the Commissioner received no monetary contributions for this brief. *See* Minn. R. Civ. App. P. 129.03 (requiring certification of authorship and contributors).

Add. 11–12. A divided panel of the Minnesota Court of Appeals affirmed. *Krueger v. Zeman Constr. Co.*, 758 N.W.2d 881, 889–90 (Minn. Ct. App. 2009). The court relied on cases interpreting standing for claims under 42 U.S.C. § 1981 (2006) to hold that a MHRA business-discrimination claim requires privity of contract. *Id.* at 890. The dissent, however, concluded that the plain language of the MHRA does not require privity; a plaintiff must establish only that a defendant discriminated in the performance of a contract. *Id.* at 892–93 (Minge, J., dissenting). The Commissioner agrees with the dissent. The plain language of the MHRA does not include a privity requirement, and Section 1981 of the United States Code is distinct from Section 363A.17 of the MHRA. Reading a privity requirement into the MHRA would unduly narrow the act and create a gap in the law that leaves some persons without protection from illegal discrimination.

**I. THE PLAIN LANGUAGE OF SECTION 363A.17(3) DOES NOT REQUIRE PRIVACY OF CONTRACT TO CONFER STANDING.**

To have standing to pursue a claim of discrimination under the MHRA, “the act of discrimination itself constitutes sufficient injury for the law to provide a remedy, in the absence of statutory language requiring more.” *Potter v. LaSalle Court Sports & Health Club*, 384 N.W.2d 873, 875 (Minn. 1986) (quotation omitted). Section 363A.17(3) does not require more; the plain language of Section 363A.17 permits a plaintiff to bring a cause of action for business discrimination without showing she is party to a contract with the defendant.

Section 363A.17(3) defines the unfair discriminatory practice at issue as discriminating in “performance of the contract because of a person’s race, national origin,

color, sex, sexual orientation, or disability.” The statute broadly uses “a person’s.” Although the MHRA defines person to include entities, entities do not have a race, national origin, color, sex, sexual orientation, or disability. *See* Minn. Stat. § 363A.03, subd. 30 (2008) (defining person). Only individuals have these characteristics. Discrimination occurs on a personal level based on personal traits or statuses, and companies may only perform contracts through individuals on their behalf. In this case, Krueger alleged that while Zeman Construction Company performed a contract with her company, Diamond Dust Contracting, LLC, Zeman discriminated against her based on sex.

This Court has recognized that “a widely accepted method of statutory construction is to read and examine the text of the statute and draw inferences concerning its meaning from its composition and structure.” *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 n.5 (Minn. 2005) (quotation omitted). The structure of Section 363A.17 as a whole reinforces that its focus is on businesses as the discriminating parties, not contracting parties as victims. The first two clauses of the section prohibit discrimination against women based on use of current or former surnames. Minn. Stat. § 363A.17(1)–(2) (2008). The third clause provides a general prohibition on businesses discriminating based on specified protected classes, both in the formation and performance of a contract. The first two clauses plainly encompass discrimination by businesses against individuals. The third clause does as well. Each provision focuses on discrimination by a business. The scope of who may be a victim of discrimination in the performance of a contract is not limited to contracting parties.

Notably, the statute does not use the phrase “contract with a person.” If the legislature had intended to limit Section 363A.17(3), it would have used specific limiting language. The plain text of Section 363A.17 does not require privity of contract. A business cannot escape liability by harassing an employee of a contracting party; the discrimination still interferes with the performance of a contract.

**II. THE COURT SHOULD NOT GRAFT REQUIREMENTS OF 42 U.S.C. § 1981 ONTO THE MHRA BECAUSE THE STATUTES ARE NOT SIMILAR.**

In interpreting the MHRA, the court of appeals relied on cases interpreting 42 U.S.C. § 1981 (2006). *Krueger*, 758 N.W.2d at 887–89. Although Minnesota courts have often looked to federal law in interpreting the MHRA, the courts have done so only when interpreting identical or substantially similar statutory language. *See, e.g., Cummings v. Koehnen*, 568 N.W.2d 418, 422 n.5 (Minn. 1997) (declining to follow federal rule because MHRA and Title VII treated sexual harassment differently); *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983) (recognizing application of Title VII principles when construing substantially similar language in MHRA). In this case, the Court should not follow interpretations of Section 1981 when interpreting Section 363A.17(3).

Section 1981 differs significantly from Section 363A.17. Section 1981 provides that

All persons within the jurisdiction of the United States shall have the same right and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981(a) (2006). In interpreting the “make and enforce contracts” provision of the section, the United States Supreme Court held that an individual could not bring a claim against a company unless he identified an impaired contractual relationship under which he has rights. *Domino’s Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). The court of appeals relied on this decision in interpreting the business-discrimination provision of the MHRA. *Krueger*, 758 N.W.2d at 887–89. The court construed the MHRA even more narrowly by requiring the plaintiff to be a party to the operative contract. *Id.* at 883, 886–87.

Section 1981 is distinct from Section 363A.17 in several key ways. First, the statutes do not use similar language. Whereas the MHRA broadly prohibits discrimination by businesses based on multiple protected statuses, Section 1981—which dates to the Reconstruction era—is limited in its focus on racial equality. *See* Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27 (1866); *see also CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1956 (2008) (recognizing that Section 1981 “represents an immediately post-Civil War legislative effort to guarantee the then newly freed slaves the same legal rights that other citizens enjoy”). Second, Section 1981 includes limiting language in its definition of “make and enforce contracts.” 42 U.S.C. § 1981(b) (2006). Congress defined the phrase to “include[] the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of *the contractual relationship*.” *Id.* (emphasis added). The MHRA, in

contrast, has no comparable limiting language to narrow the business-discrimination provisions to contracting parties.

Congress defined “make and enforce contracts” in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). In *Patterson*, the United States Supreme Court held that Section 1981 did not apply to post-contract-formation conduct. *Patterson*, 491 U.S. at 177–79. In reaching its decision, the Court also focused on contractual obligations. *Id.* at 171. As part of the Civil Rights Act of 1991, Congress defined “make and enforce contracts.” Civil Rights Act of 1991, Pub. L. 102–166, § 101, 105 Stat. 1071, 1071–72 (1991). This new definition rejected *Patterson*’s temporal limitation and encompassed postformation conduct. *Id.* at 1072; *see also* H.R. Rep. No. 102-40, pt. 2, at 2 (stating Civil Rights Act of 1991 overruled *Patterson*’s holding that Section 1981 does not prohibit race discrimination after parties form contract). But, in defining the phrase to include a specific reference to “the contractual relationship,” Congress also reinforced *Patterson*’s focus on contracting parties. *Domino’s*, 546 U.S. at 477.

The legislative history of Section 363A.17 of the MHRA is scant, but its timing informs its interpretation. The Minnesota legislature first prohibited discrimination in the performance of a contract in 1990, after *Patterson* in 1989 but before the Civil Rights Act of 1991. 1990 Minn. Laws ch. 567, § 5, at 1746. The general prohibition on discriminatory business practices derived from more specific prohibitions on sex discrimination. In 1984, the legislature enacted the prohibitions in clauses (1) and (2) of Section 363A.17. 1984 Minn. Laws ch. 533, § 3, at 787. The two provisions were

codified as Section 363.03, subd. 8a, entitled “Business, Sex Discrimination.” *Id.* In 1990, the legislature added the third clause and renamed the section “Business Discrimination.” 1990 Minn. Laws ch. 567, § 5, at 1746. Since 1990, the only substantive changes to the section have been the addition of sexual orientation and national origin as protected classes in 1993 and 2001, respectively. 2001 Minn. Laws ch. 194, § 2, at 724; 1993 Minn. Laws ch. 22, § 15, at 140. The statute was renumbered as Section 363A.17 in 2003.

In enacting the third clause of Section 363A.17, the Minnesota legislature did not follow the then-prevailing understanding of Section 1981. As of 1990, the standing interpretation of Section 1981 was very narrow because of *Patterson*. In interpreting “make and enforce contracts,” the *Patterson* Court held that the right to make contracts “does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions.” *Patterson*, 491 U.S. at 177. The Court continued that the right to enforce contracts extended only to “efforts to impede access to courts or obstruct non-judicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities, such as labor unions, in enforcing the terms of a contract.” *Id.*

The Minnesota legislature implicitly rejected having such a narrowly construed law in Minnesota; the legislature enacted a broad antidiscrimination statute that plainly extends past formation of a contract and that does not include any limiting language. Diverging from *Patterson*, the legislature expressly prohibited discrimination in the

terms, conditions, and performance of a contract. Moreover, the legislature did not limit Section 363A.17 to race; it afforded protection to multiple protected classes. Congress, in contrast, reacted to *Patterson* in part by reinforcing its focus on the contractual relationship between the parties.

Because Section 1981 is substantially different than Section 363A.17, Minnesota courts should not adopt its construction when interpreting the business-discrimination provisions of the MHRA.

### **III. REQUIRING PRIVACY MAY LEAVE PERSONS IN MINNESOTA WITHOUT PROTECTION FROM DISCRIMINATION IN THE WORKPLACE.**

Although the case before the Court involves the claim of one person, the Court's interpretation of the MHRA will affect numerous persons. Workplace settings and employment relationships continue to evolve, such that not all employment settings are composed solely of traditional hierarchical employer-employee relationships. In some settings, such as a construction worksite, numerous individuals work together on a common project. But they are not in employer-employee relationships that would permit a claim under Minn. Stat. § 363A.08. Without the protection of Section 363A.17, an individual's ability to work and perform a contract without discrimination may still be at risk due to the possibility of unusually layered relationships.

The court of appeals expressed concerns about a broad interpretation of Section 363A.17. *Krueger*, 758 N.W.2d at 887. But the legislature has specifically directed courts to interpret the MHRA liberally to accomplish its purposes. Minn. Stat. § 363A.04. The purpose of the MHRA is to secure freedom from discrimination in

employment, housing, public accommodations, public services, and education. *Id.* § 363A.02, subd. 1(a) (2008). The legislature recognized that discrimination “threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.” *Id.*, subd. 1(b) (2008). Imposing a privity requirement would create a gap in the law such that some individuals are subject to discrimination in the workplace without a remedy against the discriminating parties and some businesses are able to discriminate with impunity. Krueger has a right as an individual who has been sexually harassed to seek redress against the discriminating party. Her ability to work and perform under the contract is contingent on her ability to work without sexual harassment.

Although some individuals may be able to bring a claim under either Section 363A.08 or 363A.17, alternative causes of actions are not a reason to read a privity requirement into Section 363A.17. Alternative causes of actions to remedy illegal discrimination should not be troubling. *See, e.g., CBOCS West*, 128 S. Ct. at 1960 (commenting that “Congress explicitly created the overlap [between Title VII and Section 1981] in respect to direct employment discrimination); *Johnson v. Ry. Express Agency, Inc.*, 421 U.S. 454, 468 (1975) (Marshall, J., concurring) (recognizing that Title VII and Section 1981 are “independent but related avenues of relief”).

Moreover, 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 a contract. Without a contract underlying the relationship between the actors, Section 363A.17(3) does not provide a cause of action for discrimination in the

performance of a contract. The Commissioner also does not interpret the statute to impose strict liability on a business. For example, in cases alleging harassment by a business's supervisors, as Krueger alleged in this case, the Commissioner would require the type of knowledge this Court recently discussed in the context of an employer's liability for a supervisor's sexual harassment. *See Frieler*, 751 N.W.2d at 567-69 (discussing standard under Minn. Stat. § 363A.08 for holding employer liable for supervisor's sexual harassment). The business-discrimination provisions do not abdicate the principal-agent relationship that underlies employment relationships in the MHRA. *See id.* at 569.

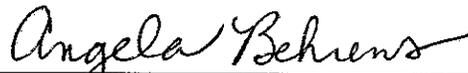
### CONCLUSION

Because the district court and court of appeals applied an erroneous legal standard in affirming the dismissal of Krueger's complaint, the Commissioner respectfully requests that the Court reverse and clarify the standard for business-discrimination claims brought under the Minnesota Human Rights Act.

Dated: April 23, 2009

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