

NO. A10-543

State of Minnesota
In Supreme Court

Carol J. LaMont,

Petitioner,

vs.

Independent School District #728,

Respondent.

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

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I. STATEMENT OF AMICUS CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, MINNESOTA CHAPTER¹

The National Employment Lawyers Association (“NELA”) is a non-profit organization of lawyers who represent employees. NELA has approximately 3,000 members nationwide. For decades, NELA has appeared as amicus curiae before the United States Supreme Court and United States Courts of Appeals to support precedent-setting litigation affecting the rights of individuals and classes of employees.

The Minnesota Chapter of NELA (“Minnesota NELA”) has participated as amicus curiae on many occasions before the Minnesota Supreme Court. See, e.g., Goodman v. Best Buy, Inc., 777 N.W.2d 755 (Minn. 2010); 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); Lake v. Wal-Mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998); Williams v. St. Paul Ramsey Medical

¹ The undersigned is a member of Minnesota NELA’s amicus curiae committee and is qualified to address the legal and policy issues presented by the appeal herein. The position that Minnesota NELA takes in this Brief has not been drafted or approved by any party or their counsel. The undersigned counsel wholly authored this Brief for the amicus curiae pursuant to Minn. R. Civ. App. P. 129.03. In addition, no person or entity other than Minnesota NELA, its members, and its counsel has made any monetary contribution to the preparation or submission of this Brief. Minnesota NELA thanks the Minnesota Supreme Court for permitting Minnesota NELA to appear here in the public interest.

Center, 551 N.W.2d 483 (Minn. 1996); Hasnudeen v. Onan Corp., 552 N.W.2d 555 (Minn. 1996); Nordling v. Northern States Power Co., 478 N.W.2d 498 (Minn. 1991).

II. THE COURT OF APPEALS INVENTS A SWEEPING EXCEPTION TO COVERAGE BY THE MINNESOTA HUMAN RIGHTS ACT, CONTRAVENING CLEAR STATUTORY LANGUAGE, CODIFIED PUBLIC POLICY, AND SETTLED PRECEDENT

The Court of Appeals recognizes that the record contains significant evidence regarding the disparate treatment of Appellant based on sex by her male supervisor:

[A]ppellant presented evidence that her male supervisor made sexist statements about the role of women at home and in employment settings. She offered further evidence that the supervisor placed restrictions on the women that did not apply to the men, such as not talking during work, checking in with him before and after breaks. . . .

LaMont v. Independent Sch. Dist. No. 728, 2011 WL 292131, *1 (Minn. Ct. App. 2011).

Despite this evidence – which includes “verbal . . . communication of a sexual nature” – the Court of Appeals held that Appellant did not experience harassment based on sex because the conduct purportedly did not involve “sexual advances, [] sexual favors, or [] sexually motivated physical contact.” LaMont, 2011 WL 292131, *2.

In short, the Court of Appeals ruled against Appellant by improperly redefining harassment based on sex to mean only conduct that is overtly sexual or motivated by sexual desire. The plain terms of the Minnesota Human Rights Act (“MHRA”), the underlying policy of that statute, and the related Supreme Court precedent do not impose any such requirement.

A. The Court of Appeals Opinion Disregards Clear Statutory Language

In recently concluding that the applicable MHRA language was unambiguous, the Minnesota Supreme Court reiterated, “*the plain meaning* of the statute’s words *controls* our interpretation of the statute.” Taylor v. LSI Corp., 796 N.W.2d 153, 156 (Minn. 2011) (citation omitted) (emphasis added) (affirming reversal of summary judgment for the defendant).

As in Taylor, the relevant MHRA language is unambiguous here. The MHRA includes a definition of sex harassment as a *subset* of harassment based on sex, which reads as follows:

“Sexual harassment” *includes* unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature. . . .

See Minn. Stat. § 363A.03, Subd. 43 (emphasis added); see also Minn. Stat. § 363A.03, Subd. 13 (emphasis added) (“The term ‘discriminate’ *includes*

segregate or separate and, for purposes of discrimination based on sex, it *includes* sexual harassment.”).

The governing statutory language does not define or otherwise state that harassment based on sex means only explicitly sexual conduct. Id. To the contrary, the relevant language merely provides examples of conduct covered by the MHRA’s prohibition of “discrimination based on sex.” See Minn. Stat. § 363A.08, Subd. 2; see also Minn. Stat. § 363A.03, Subd. 13; Minn. Stat. § 363A.03, Subd. 43. In other words, the Court of Appeals turns the MHRA’s illustrative list of conduct constituting “discrimination based on sex” – and, therefore, harassment based on sex – into an exhaustive list. LaMont, 2011 WL 292131, *2.

Contrary to the Court of Appeals’ apparent view, the Minnesota Legislature understood the difference between an exhaustive list and an illustrative list when drafting the MHRA. The Minnesota Legislature used “means” when defining terms under the MHRA in an exhaustive fashion and “includes” when defining terms under the MHRA in an illustrative fashion. Compare Minn. Stat. § 363A.03, Subd. 36 with Minn. Stat. § 363A.03, Subds. 12, 18, 24.

The MHRA’s definition of “Sexual orientation” underscores the Minnesota Legislature’s intent for terms defined by “means” to be exhaustive and terms

defined by “includes” to be illustrative because the Minnesota Legislature used both approaches in that definition:

“Sexual orientation” *means* having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. “Sexual orientation” *does not include* a physical or sexual attachment to children by an adult.

See Minn. Stat. § 363A.03, Subd. 44 (emphasis added).

Had the Minnesota Legislature intended to exclude harassment based on sex from the concept of “discrimination based on sex” and from the concept of “Sexual harassment” when the conduct is not overtly sexual, the Minnesota Legislature would have done so by defining those terms with “means” rather than with “includes.” The Minnesota Legislature did not do so. See Minn. Stat. § 363A.03, Subd. 13; Minn. Stat. § 363A.03, Subd. 43.

In addition to overlooking the plain language of the MHRA’s statutory definitions, the Court of Appeal’s narrow interpretation of harassment based on sex ignores the MHRA’s explicit dictate concerning statutory construction. See, Minn. Stat. § 363A.04 (emphasis added) (“The provisions of [the MHRA] *shall be construed liberally* for the accomplishment of the purposes thereof.”). By

redefining “includes” as “means,” the Court of Appeals does not construe the MHRA liberally. LaMont, 2011 WL 292131, *2.

B. The Court Of Appeals Opinion Disregards Codified Public Policy

The Minnesota Legislature intended for Minnesota courts to take an expansive approach to eradicating discrimination in the workplace and elsewhere when the Minnesota Legislature enacted the MHRA. Through that broad civil rights law, the Minnesota Legislature outlaws discrimination (including harassment based on sex) in virtually every aspect of life for Minnesotans – such as in employment, education, business, public services, credit, housing, public accommodations, and real property. See Minn. Stat. § 363A.01, et seq.

The Minnesota Legislature states the intent underlying the MHRA as follows:

*It is the public policy of this state to secure for persons in this state, freedom from discrimination. *** Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.*

See Minn. Stat. § 363A.02, Subd. 1(a)-(b) (emphasis added).

Toward that end, the Minnesota Legislature has made both individuals and entities liable under the MHRA for harassment based on sex and for other forms of discrimination in the workplace. See, e.g., Minn. Stat. § 363A.08; Minn. Stat. § 363A.14. In addition, the Minnesota Legislature has provided for the

extraordinary remedy of treble damages under the MHRA to aggrieved parties like Appellant. See Minn. Stat. § 363A.29, Subd. 4.

That the Minnesota Legislature recognizes the importance of construing the MHRA broadly is logical because Appellant and people like her serve as private attorneys general in cases like this. See, e.g., Phelps v. Commonwealth Land Title Ins., 537 N.W. 2d 271, 277 (Minn. 1995) (citation omitted) (“Legislative history indicates that one objective the legislature sought to achieve through enactment of [the damages multiplier provision] was the enticement of the private bar into bringing claims based on violations of the MHRA.”).

When interpreting the MHRA’s Federal analog, Title VII, the United States Supreme Court also has consistently reaffirmed that people in Appellant’s position play a pivotal role in preserving the rule of law. See, e.g., Burlington North and Santa Fe Ry. Co. v. White, 548 U.S. 53, 67 (2006) (“Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints. . . .”); N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980) (citation omitted) (“Congress has cast the Title VII plaintiff in the role of a ‘private attorney general,’ vindicating a policy ‘of the highest priority.’”).

The essential function served by people like Appellant in advancing the express purpose of the MHRA further militates against a narrow interpretation of

harassment based on sex. Yet, the Court of Appeals redefines harassment based on sex in a truncated manner. LaMont, 2011 WL 292131, *2.

If allowed to stand, then, the Court of Appeals opinion will undercut Minnesota's public policy not just regarding the workplace but also concerning – for example – schools, public accommodations, business affairs, and government services because the MHRA's definition of discrimination (including harassment based on sex) apply to those areas in the same way it does to the employment area. Compare Minn. Stat. § 363A.08 with Minn. Stat. § 363A.11; Minn. Stat. § 363A.12; Minn. Stat. § 363A.13; Minn. Stat. § 363A.17.

C. The Court Of Appeals Opinion Disregards Settled Precedent

The Minnesota Supreme Court has “consistently held that *the remedial nature of the Minnesota Human Rights Act requires liberal construction of its terms.*” Frieler v. Carlson Marketing Group, Inc., 751 N.W. 2d 558, 572 (Minn. 2008) (citation omitted) (emphasis added).

The Court of Appeals takes the opposite view here, however, construing the MHRA in a restrictive fashion. In particular, the Court of Appeals interprets the MHRA to mean that the harassment of Appellant based on sex is not actionable because the conduct was not explicitly sexual. LaMont, 2011 WL 292131, *2.

That erroneous reading of the MHRA does not give full effect to all sections of the statute, especially to the prohibition of “discrimination based on sex” and to

the definition of “Sexual harassment.” Compare Minn. Stat. § 363A.03, Subd. 43 with Minn. Stat. § 363A.03, Subd. 13. In so doing, the Court of Appeals’ approach contravenes the Minnesota Supreme Court authority requiring courts to give effect to all provisions of the MHRA. See, e.g., Cummings v. Koehnen, 568 N.W.2d 418, 422 (Minn. 1997) (requiring all provisions of the MHRA to be given full effect); Continental Can Company, Inc., v. State of Minnesota, 297 N.W.2d 234, 248 (Minn. 1980) (“One of the purposes of the [MHRA] is to rid the workplace of disparate treatment of female employees merely because they are female.”); see also Minn. Stat. § 645.17.

The Court of Appeals flouts this long-standing Minnesota Supreme Court precedent by interpreting the definition of “Sexual harassment” to limit the scope of the MHRA’s prohibition against discrimination based on sex. Specifically, the Court of Appeals’ construction improperly permits such discrimination, including harassment based on sex, to occur without redress when the conduct is not overtly sexual.

1. The Minnesota Supreme Court has established that harassment based on sex includes conduct that is not sexual

Under clear Minnesota Supreme Court precedent, aggrieved parties like Appellant need not prove that the harassment based on sex is “because of” sex to succeed with their claims. Cummings, 568 N.W.2d at 422. In other words,

Appellant can prove unlawful harassment based on sex occurred “[*without showing*] that the harassment resulted in the disparate treatment of one gender or that *the conduct was motivated by the harasser’s actual sexual interest in the victim.*” Cummings, 568 N.W.2d at 421; see also id. at 422.

2. Other States reaching the issue have ruled that harassment based on sex includes conduct that is not sexual

The Court of Appeals’ holding here that behavior must be overtly sexual before it is actionable harassment based on sex also conflicts with well settled precedent in other States that have addressed the matter. See, e.g., Payne v. Children’s Home Society of Washington, Inc., 892 P.2d 1102, 1105 (Wash. App. Div. 3, 1995) (citation omitted) (emphasis added) (“When gender-based harassment is not of a sexual nature, but is a term or condition of employment, it too unfairly handicaps the employee against whom it is directed and creates a barrier to sexual equality in the workplace. *A court-imposed requirement that the conduct be explicitly sexual to be actionable would be contrary to the purpose* of [the statute].”); see also generally City of San Antonio v. Cancel, 261 S.W.3d 778 (Tex. Ct. App. 2008); Speedway SuperAmerica, LLC, v. Dupont, 933 So.2d 75 (Fla. App. 5 Dist. 2006); DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13 (R.I. 2005); Nava v. City of Santa Fe, 103 P.3d 571 (N.M. 2004); Hampl v. Food Ingredients Specialists, Inc., 729 N.E.2d 726 (Ohio 2000); Willis v. Wal-Mart

Stores, Inc., 504 S.E.2d 648 (W. Va. 1998); McIntyre v. Manhattan Ford, Lincoln, Mercury, Inc., 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997); Alphonse v. Omni Hotels Management Corp., 643 So.2d 836 (La. App. 4 Cir. 1994); Accardi v. Superior Court, 21 Cal.Rptr.2d 292 (Cal. App. 2 Dist. 1993); Lehman v. Toys R Us, Inc., 626 A.2d 445 (N.J. 1993); Huch v. McCain Foods, 479 N.W.2d 167 (S.D. 1991).

3. The United States Supreme Court and the Eighth Circuit Court of Appeals also have ruled that harassment based on sex includes conduct that is not explicitly sexual

The United States Supreme Court has held that actionable harassment based on sex goes beyond behavior of a sexual nature: “*harassing conduct need not be motivated by sexual desire* to support an inference of discrimination on the basis of sex.” Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998) (emphasis added) (reversing summary judgment for the defendant); see also EEOC v. National Educ. Ass’n, 422 F.3d 840, 845 (9th Cir. 2005) (emphasis added) (reversing summary judgment because “[t]he *district court erred in holding* that the ‘because of . . . sex’ *element of the action requires* that the *behavior be either ‘of a sexual nature’ or motivated by ‘sexual animus.’*”).

Similarly, the Eighth Circuit Court of Appeals has consistently rejected the notion that harassment based on sex must be sexual to be actionable:

A worker “need not be propositioned, touched offensively, or harassed by sexual innuendo” in order to have been sexually harassed, however. *Intimidation and hostility may occur without*

explicit sexual advances or acts of an explicitly sexual nature. Furthermore, physical aggression, violence, or verbal abuse may amount to sexual harassment.

Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1379 (8th Cir. 1996) (citations omitted) (reversing summary judgment for the defendant); see also Fuller v. Fiber Glass Systems, LP, 618 F.3d 858, 864 (8th Cir. 2010) (citations omitted) (upholding the jury verdict for the plaintiff because she experienced racial harassment “even if the conduct was not inherently racial.”); Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999) (citations omitted) (emphasis added) (reversing summary judgment because “[h]arassment alleged to be because of sex *need not be explicitly sexual* in nature.”); Hall v. Gus Constr. Co., Inc., 842 F.2d 1010, 1014 (8th Cir. 1988) (citation omitted) (emphasis added) (affirming judgment for the plaintiffs because “[w]e have *never held that sexual harassment* or other unequal treatment of an employee or group of employees that occurs because of the sex of an employee *must*, to be illegal under Title VII, *take the form of sexual advances or* of other incidents with clearly *sexual overtones.*”).

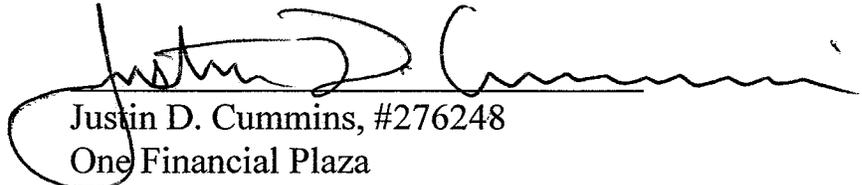
III. CONCLUSION

The district court opinion ignores controlling statutory language, overlooks manifest intent of the Minnesota Legislature, and disregards settled precedent in the process of creating a new definition of harassment based on sex. Besides being legally erroneous, the Court of Appeals’ approach is unreasonable and will

have a chilling effect on protected activity if allowed to stand. For the foregoing reasons, Minnesota NELA respectfully requests that the Minnesota Supreme Court reverse the Court of Appeals in this case.

Dated: May 25, 2011

MILLER O'BRIEN CUMMINS, PLLP

A handwritten signature in black ink, appearing to read "Justin D. Cummins", is written over a horizontal line. The signature is fluid and cursive.

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