

NO. A10-2095

State of Minnesota
In Court of Appeals

Sheila D. Matthews, n/k/a Sheila D. Heller,
Appellant,

v.

Eichorn Motors, Inc.,
Defendant,
Mitch Eichorn and Justin Eichorn,
Respondents.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. When the Minnesota Human Rights Act requires liberal interpretation to effectuate the broad public policy purposes of the Act, and when the appellant has proffered evidence to satisfy the requirements of the aiding and abetting provision of the Act, Minn. Stat. Section 363A.14, did the District Court err in drawing inferences and making evidentiary assumptions favorable to the moving party below in granting partial summary judgment dismissing the appellant's claim that the respondents were liable to her for aiding and abetting discrimination under the Act?

The District Court held that the appellant had failed to satisfy the requirements for liability under for aiding and abetting discrimination because there was no evidence that the respondent Mitch Eichorn intentionally assisted or encouraged the unlawful sexual harassment of and reprisal against the appellant by her supervisor. The District Court further held that there was no evidence that the respondent Justin Eichorn knew or had reason to know of the alleged unlawful sexual harassment of and reprisal.

Apposite Cases:

Failla v. City of Passaic, 146 F. 3d 149 (3rd Cir. 1998)

Gillson v. State Department of Natural Resources, 492 N.W. 2d 835 (Minn. App. 1992), rev. denied, (1993)

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Wallin v. Minnesota Department of Corrections, 598 N.W. 2d 393 (Minn. App. 1999)

Minn. Statute Section 363A.14

2. Did the court err in declining to apply the responsible corporate office doctrine to the Appellant's claims under Minnesota Human Rights Act?

The District Court declined to apply the doctrine because the MHRA is not a "strict liability" statute.

Apposite Cases:

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

In re Dougherty, 482 N.W. 2d 485 (Minn. App. 1992)

State by Beaulieu v. RSJ, Inc., 532 N.W. 2d 610 (Minn. App. 1995),
aff'd as modified, 552 N.W. 2d 695 (Minn. 1996)

STATEMENT OF THE CASE

The present case was commenced in Itasca County District Court by the appellant against her former employer, Eichorn Motors, Inc., alleging discrimination and reprisal under the Minnesota Human Rights Act, Minn. Statute Section 363A.01, *et seq.* and against the two individual respondents under the MHRA's aiding and abetting provision, Minn. Stat. Section 363A.14.

The Honorable Jon A. Maturi, Judge of Itasca County District Court, presiding over the proceeding, entered an Order for partial summary judgment upon motion of the two individual respondents. Their motion was limited to the issue of their personal liability under the aiding and abetting provision. In its December 11, 2009, Order, the District Court held that the appellant had presented sufficient evidence of sexual harassment and reprisal for which the employer was liable but granted the motion to

dismiss the aiding and abetting claims against the individual respondents. Consequently, the aiding and abetting claims against the two individuals dropped out of the pending case. The corporate defendant remained a defendant in the case, and the case remained on the trial calendar. The case never proceeded to trial, however, because the court was informed that the remaining defendant had gone out of business and did not intend to make any further appearance. The court then granted the appellant leave to move for default judgment against the remaining defendant, Eichorn Motors, Inc., and by Order dated July 9, 2010, granted the default motion and hence determined the remaining claims in this case.

This Court subsequently ruled that the July 9, 2010, Order of the District Court had not been entered as a final judgment and so was not appealable. Appellant's Appendix ("AA") at 122-124. In response to this ruling, the Itasca County District Court entered final judgment on October 13, 2010. AA at 125.

The appellant now appeals the District Court's December 11, 2009, Order for partial summary judgment in favor of the two respondents.

STATEMENT OF FACTS

Appellant Sheila Heller was hired by Eichorn Motors, Inc., as its Business Manager and began her employment in June of 2006. Eichorn Motors was run by a General Manager, Michael Coombe; her understanding was that the owners were Justin Eichorn, the President, and Mitch Eichorn, his father. AA at 002, 046.

She did not anticipate that there was a price to pay for her exciting new job: the General Manager, Michael Coombe, the person who had hired her, commenced very quickly to press her for dates, make grossly inappropriate comments, find excuses to touch her in a highly offensive sexually charged manner, such as rubbing her back, and otherwise creating a hostile work environment because of his sexual harassment and causing her great discomfort and nervousness. AA at 047. Her repeated efforts to ask him to stop had no effect; on the contrary, he told her he had received “permission” from the owners to date her. AA at 048.

On August 1, 2006, the plaintiff was scheduled to go on a business trip with Coombe but decided that she could not face being along with him on the trip. She made an excuse to travel separately. Furious, he refused to allow her to make the trip. AA at 048. His overreaction was the final straw; she realized that she could not handle the harassment on her own and considered how she might obtain assistance. The dealership had no sexual harassment policy and no one could offer guidance to her for seeking assistance. AA at 048-049. The logical conclusion was to speak to Mitch Eichorn as the most senior person there, and so she sought him out to ask for his assistance in ending the sexual harassment. *Ibid.* Mitch Eichorn listened with half an ear. He assured her that *he* would not harass women and gave her information about a Christian radio station. AA at 005-006; 049. He offered no other response or assistance. On the contrary, he did nothing to address sexual harassment. AA at 063. A few days later, after Coombe returned from the business trip from which he had excluded her, he and Justin Eichorn fired her. AA at 006; 049 – 050.

A number of basic facts in this proceeding are not in dispute. For purposes of the partial summary judgment motion, the respondents did not deny that Ms. Heller was the victim of sexual harassment by Michael Coombe, the General Manager of the dealership; that issue is thus not part of this appeal. The respondents, however, disavow any personal responsibility for violation of the law. AA at 075-076; 063. The respondents further acknowledged that Mr. Coombe was Sheila Heller's direct supervisor. AA at 074; 059-060.

Eichorn Motors employed over sixty employees while it was in business. AA at 066-070. The dealership had been purchased for 3.4 million dollars. AA at 059. Justin Eichorn was the President and major shareholder and Mitch Eichorn had been Vice President. AA at 107-108. The Eichorns had readily admitted that the dealership had no sexual harassment policy or procedure. AA at 062 and 076. Indeed, the two individual respondents had made it eminently clear that any such issues were of no interest whatsoever to them. AA at 063; 075-076. On the contrary, Mr. Coombe had "free rein" to act in whatever manner he pleased. AA at 072. When Coombe had asked at least one of the Eichorns for permission to "date" Ms. Heller, albeit contrary to her wishes, desires, or well being, that question was considered "their" personal business. AA at 049; 062; 076.

Accordingly, Ms. Heller had no policy or procedure to consult or follow and no one to whom to turn for assistance when her working conditions became utterly intolerable because of the sexual harassment.

The respondents further asserted that Mitch Eichorn had no management involvement or ownership interest in the Eichorn dealership. He claimed that he was hardly ever on the premises except to keep to himself and work on the remodeling. His actions at the time had belied his words, however. He was constantly present and inserting himself in the business affairs of the dealership. AA at 046-047; 051-052. Moreover, Mitch Eichorn had held himself out as Vice President of Eichorn Motors, Inc. AA at 088. He had been actively involved in the negotiation and purchase of the business, as well. AA at 089-090. When Ms. Heller went to him to seek assistance with respect to Coombe's conduct, he did not tell her that it was not his place to hear about it; in fact, he responded, albeit in a highly inappropriate manner. AA at 049.

The district court's findings for purposes of summary judgment were that all the employees knew that respondent Mitch Eichorn was in charge of the business. AA at 109.

Finally, the respondents asserted that Justin Eichorn had no participation in any of the illegal acts, since he hardly had any participation, generally, in the business at all, despite the fact that he was President and major shareholder. The appellant thus alleged that his dereliction of responsibility was a determining factor in the hostile work environment of the dealership. AA at 048-049; 051-052.

LEGAL ARGUMENT

I. STANDARD OF REVIEW ON SUMMARY JUDGMENT

This Court reviews a grant of summary judgment *de novo*. *Kratzer v. Welsh Companies, LLC*, 771 N.W.2d 14, 18 (Minn. 2009). It will affirm summary judgment

only if there are no genuine questions of material fact such that the respondents were entitled to judgment in their favor as a matter of law. *Id.* The Court conducts this review regarding all evidence in the light most favorable to the non-movant, here, Ms. Heller, and must refrain from weighing evidence, finding facts, or attempting to determine the truth of the matter. *Zander v. State*, 703 N.W.2d 845, 856 (Minn. App. 2005).

Appellate courts are cautious to affirm summary judgment. Summary judgment is a “blunt instrument,” *Republic Nat'l Life Ins. Co. v. Lorraine Realty Corp.*, 279 N.W.2d 349, 356 (Minn. 1979), and “is inappropriate when reasonable persons might draw different conclusions from the evidence presented,” *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997). The Court’s only function is to determine whether a reasonable jury could return a verdict for the nonmoving party based on the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Statutory construction is a part of the present case, and to that extent it also presents a question of law subject to de novo review. *Doe v. Minnesota State Bd. of Medical Examiners*, 435 N.W. 2d 45, 48 (Minn. 1989).

The appropriate application of these standards to the record before this Court compels reversal of the district court’s decision.

II. THE DISTRICT COURT ERRED BY NARROWLY INTERPRETING THE REACH OF MINN. STAT. SECTION 363A.14 AND BY IMPROPERLY WEIGHING AND DETERMINING GENUINE ISSUES OF MATERIAL FACT

A. The MHRA is a remedial statute mandating a broad interpretation.

Appellant Sheila Heller brought the present action in part against respondents Mitch Eichorn and Justin Eichorn under the “aiding and abetting” provision of the Minnesota Human Rights Act, Minn. Stat. Section 363A.14. The statute provides in relevant part:

It is an unfair discriminatory practice for any person:

- (1) intentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter;
- (2) intentionally to attempt to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter....

At issue in the present case is Ms. Heller’s allegation that both Eichorns aided Michael Coombe – actively enabled and empowered him – to engage in practices forbidden by the MHRA.

The provision is part of the broader statutory scheme of ridding the workplace and other venues enumerated in the act of discrimination. Minn. Stat. Sec. 363A.02, subd. 1. As stated in the MHRA, “discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of democracy.” Minn. Stat. Sec. 363A.02, subd. 1 (b). As a final punctuation to its message of eliminating discrimination, the legislature has mandated a broad and liberal interpretation

of the MHRA. Minn. Stat. Sec. 363A.04. All these provisions make it clear that the legislature intended that the Act cast a wide net to protect and ensure the citizens of this state from discrimination, including specifically sexual harassment and reprisal.

B. The appellant proffered sufficient evidence to satisfy the elements of an aiding and abetting claim.

As a preliminary consideration, there is no requirement that the term “any person” refers only to an owner or employee of the employer, and the district court properly found that whether or not Mitch Eichorn was an owner was irrelevant. In addition, there has to have been an underlying act or underlying acts of discrimination that were aided and abetted by the individuals. *Hubbell v. Better Business Bureau of Minnesota*, 2009 WL 5184346 at *2 (D. Minn. 2009). Given the posture of the present case, the underlying discrimination was also established.

Although the MHRA is often invoked and interpreted, the aiding and abetting provision does not appear with any frequency, whatsoever, and thus the cases interpreting it are sparse. Consequently, it appears that there has not been a good deal of opportunity to consider all the parameters of such a claim. The district court focused primarily on the respondents’ denials of any involvement with the management of the dealership and denial of specific knowledge of Coombe’s conduct to hold that there was insufficient evidence proffered by Ms. Heller to establish that they had assisted or encouraged the discrimination by their General Manager in any fashion.

One of the essential elements of an aiding and abetting claim is that more than one person must be involved; one cannot “aid and abet” oneself. *Iyorbo v. Quest*

International Food Flavors & Food Ingredients Company, 2003 WL 22999547 at *3 (D. Minn. 2003). There is no question in the present case that more than one person was involved; the appellant's contention is that either or both Eichorns – since either one in addition to Coombe would total two -- aided Michael Coombe in his acts of harassment and reprisal by affirmatively refusing to take any steps to provide a safe workplace for female employees.

A second element involves the proposition that there must be some connection between the persons charged with aiding and abetting discrimination and the perpetrator to have assisted or encouraged the actual discrimination. The district court, relying upon *Wallin v. Minnesota Department of Corrections*, 598 N.W. 2d 393, 405 (Minn. App. 1999), interpreted this element by deeming it necessary that there must be evidence that the respondents had acted in concert with Coombe. It rejected the different type of evidence proffered by the appellant that the respondents had created an atmosphere that permitted sexual harassment and reprisal to flourish. *Wallin* was an action in which the plaintiff had alleged that he was the victim of disability discrimination and harassment and that three other employees had aided and abetted the discrimination. The trial court in that case, however, had seen no evidence that the individual defendants had acted in concert with other staff or supervisors to discriminate against Wallin. In other words, there was no evidence presented that the individual defendants had taken any step that had assisted or caused others to discriminate against Wallin or had enabled, incited or coerced the employer to discriminate. The evidence considered by the court showed no connection at all between Wallin's substantive claims and the actions attributed to the

individual defendants. One of the defendants had made what the court considered stray remarks totally unrelated to the decisions that led to his discharge and the remaining two, the warden and the human resources director, had a minimal role in the decision making, except ultimately to execute a recommendation of discharge after an investigation by others.

There is no reason to presume that the statutory language limits assisting or encouraging solely to acting in concert. The facts present in *Wallin* presented one type of situation, in which there was essentially no connection between the actions of the defendants and the discrimination, but this fact situation is not the only one that might be contemplated by the statute. The district court in the instant case seemed to suggest that unless the respondents had participated more directly in some way in the actual harassment and reprisal, the claim would fail. It was evident that they had both earlier known that Coombe intended to “date” Ms. Heller (AA at 048, 049, and 062). In addition, there is a strong inference they did participate in the reprisal, as further discussed below. The statutory language does not define or limit aiding and abetting specifically to acting in concert; other types of conduct might lead to a claim of aiding and abetting. Rather, the statutory language suggests that there should be a factually grounded inquiry as to whether the behavior in questions assisted or aided the harassment in a broader sense.

C. The District Court erred in finding that the respondents did not affirmatively engage in acts that encouraged or assisted discrimination by the appellant's supervisor.

The Eichorns' participation was of a very different nature than that described in *Wallin*. The *carte blanche* the Eichorns gave to Michael Coombe to conduct himself in any manner he pleased, including specifically the freedom to create a hostile work environment for Ms. Heller and other women without regard for the law, without any attempt to offer even the most minimal safeguards, such as a sexual harassment policy, their refusal to consider and act on her complaint and their acquiescence in firing her after she sought relief from the harassment were all intentional acts that aided and abetted – clearly enabled -- the General Manager to engage in unlawful discriminatory practices. Indeed, they practically invited him to do so.

The district court also opined that there must be “some form of assistance” to support an aiding and abetting claim but heavily relied on the deposition testimony of the two respondents denying their active involvement in managing the workplace to determine that they were not acting in concert with the harasser. AA at 115-116. Justin Eichorn had testified that Michael Coombe had free rein to run the business as he pleased. AA at 072. He testified that Coombe was charged with developing a sexual harassment policy but had not done so. AA at 076. He testified that he was present – and thus acquiesced -- when Coombe fired the plaintiff and that he had been asked to be there, although it was unusual for him to get involved. AA at 077. Indeed, this testimony could easily raise an inference that he *wanted* to be there to see the appellant fired after she had had the temerity to complain. The testimony was also clear that neither

respondent had even considered thinking about the plaintiff's discrimination complaint once known. AA at 078. Mitch Eichorn testified, for instance, "I just blew it off..." AA at 063. The court relied upon such self-serving testimony as determinative their knowledge or participation, rather than as an appropriate inquiry by a finder of fact, effectively, for instance, making the credibility determination that Justin Eichorn was to be believed as to his protestations of innocence. Not only is such a determination not appropriate in the context of summary judgment, but in this procedural posture the court should have viewed the evidence and the inferences that may reasonably be drawn from it in the light most favorable to the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Graves v. Ark. Dep't of Fin. & Admin.*, 229 F. 3d 721, 723 (8th Cir. 2000); *Calvit v. Minneapolis Public Schools*, 122 F. 3d 1112, 1116 (8th Cir. 1997).

Mitch Eichorn's involvement was far more active. Ms. Heller had tried to approach him for assistance with the harassment and was severely rebuffed; hence, he had affirmatively permitted – enabled and assisted -- Coombe to carry on the misconduct to his heart's content. *Cf. Iyorbo, supra*. In that case, the plaintiff had alleged that co-workers reporting to the same supervisor who was personally responsible for the discrimination and harassment against her had also acted in a discriminatory and harassing manner toward her. The court held that for purposes of a motion to dismiss, these allegations stated a viable aiding and abetting claim against the supervisor. The claim against the supervisor thus depended upon the fact that acts of discrimination by co-workers reporting to that same supervisor had occurred precisely because the

supervisor had created a discriminatory working climate, thus aiding and abetting the acts of discrimination.

Once an individual in a position of authority knows or should have known of the existence of the harassment and not only fails to take timely and appropriate action, as in the present case, but also sends the clear message that the harassment will be tolerated and condoned, then liability for aiding and abetting should attach. This Court has held that there is an affirmative duty to respond appropriately. Failure to do so “**gives tacit support to the discrimination because the absence of sanctions encourages abusive behavior,**” exactly the appellant’s argument in the instant case. [Emphasis added.] *Gillson v. State Department of Natural Resources*, 492 N.W. 2d 835, 841 (Minn. App. 1992), rev. denied, 1993. In the instant case, too, knowledge of the sexual harassment could be imputed to the Eichorns no matter how much they protested that it was none of their business, because the harassment was by a high level supervisor. *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W. 2d 558 (Minn. 2008). *Cf.*, *Chapin v. University of Massachusetts at Lowell*, 977 F. Supp. 72 (D. Mass. 1977), in which the Massachusetts court interpreting a statute similar to the MHRA held that inaction by a supervisory employee, with knowledge that sexual harassment or other prohibited discrimination was occurring in the workplace, is actionable for aiding and abetting. The inaction, the court said, could be considered more than merely passive, as it had actively contributed to the discriminatory working environment. *Id.* at 79. In the instant case, Mitch Eichorn had actual knowledge and Justin Eichorn – at the very least -- imputed knowledge under *Frieler*. As to the latter, his affirmative decision to be blind to harassing conduct in the

workplace suggests a substantive fact question as to whether or not his knowledge was more than imputed and his lack of knowledge, instead, deliberate.

The district court in the instant case, however, citing *Failla v. City of Passaic*, 146 F. 3d 149 (3rd Cir. 1998), stated that mere knowledge of the discriminatory acts is not sufficient to sustain a claim for aiding and abetting. In *Failla*, a disability discrimination case under a New Jersey statute similar to the MHRA, the individual defendant had actually been the decisionmaker refusing to accommodate the plaintiff's disability. The appellate court opined that the full extent of aiding and abetting liability had not been determined by the New Jersey courts and turned to the Restatement (Second) of Torts for guidance. The court concluded, "aiding and abetting requires that one know the other's conduct constitutes a breach of duty and give substantial assistance or encouragement to that conduct." *Id.* at 158. The court added that inaction can constitute assistance or encouragement of the unlawful act: "Rather, we conclude that inaction can form the basis of aiding and abetting liability if it rises to the level of providing substantial assistance or encouragement. *See Dici v. Pennsylvania*, 91 F. 3d 542, 553 (3rd Cir. 1996) (noting that a plaintiff states a claim for aiding and abetting harassment if he alleges that a supervisor knew of the harassment but repeatedly refused to stop it)." *Id.* at 158, n. 11. The appellant's contention in this case is that the two respondents did not merely sit back but that they intentionally enabled Coombe to discriminate, first by telling him that his effort to "date" her was his personal business, and then by not just acquiescing but actually condoning his conduct after she complained of it and was quickly discharged.

Their responses should be at the very least submitted to a finder of fact to determine whether they constituted more than passive acquiescence.

The district court below also dismissed the respondents' role as nothing more than "trusting" Coombe to run the business and not specifically authorizing him to act unlawfully. AA at 177. Taken to its logical consequences, this position is contrary to the broad purposes of the MHRA and the case law imputing liability in the case of supervisory harassment, and because it could serve to exempt owners, executives or other members of upper management who have an obligation to provide a non-discriminatory workplace to avoid liability for the discriminatory acts of harassing supervisors merely by avoiding their obligations.

This type of argument has been addressed by the courts in a different context, particularly housing discrimination cases, and the public policy considerations discussed in these cases may be helpful in considering this argument. For instance, in *Walker v. Crigler*, 976 F. 2d 900 (4th Cir. 1992), a housing discrimination case brought by prospective tenants against a landlord alleging violation of the Fair Housing Act, 42 U.S.C. Section 3601 *et seq.*, the landlord had exerted considerably more effort than the Eichorns ever did in that he had sent a memorandum to his agent reminding her not to discriminate. At trial, this landlord had been successful in his assertion that he should not be held liable for the illegal acts of his agent because he had not authorized her to discriminate, even though she had done so. The appellate court refused to permit the defendant to "insulate" himself from liability "merely by relinquishing the responsibility for preventing such discrimination to another party." The duty not to discriminate was

“non-delegable.” *Id.* at 904. The analogy drawn by the court could, in particular, apply to the Eichorns as officers of Eichorn Motors:

Just as we feel no qualms in holding a property owner responsible for paying property taxes, meeting health code safety requirements, or ensuring that other responsibilities to protect the public are met, and we refuse to allow the owner to avoid these responsibilities with an assertion that he had conferred the duty to another, we must hold those who benefit from the sale and rental of property to the public to the specific mandates of antidiscrimination law if the goal of equal housing opportunity is to be reached.

Id. at 905. Indeed, the court cited the minimal supervisory activity on the part of the owner as basis to hold him liable for discrimination. This case and others in the tort context, in which the corporate shield will not protect an individual officer, shareholder or manager from liability for his or her own tortious or discriminatory actions, recognize discrimination claims as equivalent to tort claims. *See, for example, Meyer v. Holley*, 537 U.S. 280 (2003). We do not contend that the MHRA goes that far. But the public policy behind these housing cases is the same as the public policy behind the MHRA, that discrimination is unacceptable, and for this reason there is reason to suggest that the aiding and abetting provision is in the Act for a reason, namely to impose liability on individuals for their own failure to provide a nondiscriminatory working environment to their employees. *Cf., Crist v. Focus Homes, Inc.*, 122 F. 3d 1107 (8th Cir. 1997). In *Crist*, the Eighth Circuit analyzed a “not my fault” defense against claims under the MHRA and Title VII of the Civil Rights Act, 42 U.S.C. Section 2000e *et seq.*, by program employees of a residential program for developmentally disabled clients, one of whom had sexually harassed them. Their employer had successfully argued in a

summary judgment motion that it had no duty toward its employees when the resident's mental incapacity had precluded his conduct from being deemed sexual harassment and prevented the employer from controlling the conduct. The appellate court viewed the case differently; the focus should be on the employer's responsibility to its employees rather than on the mental capacity of the resident. On the one hand, the employees had a right to expect a safe working environment, although the court recognized, as well, that it was not interpreting a strict liability statute. "In light of these allegations, a fact finder could characterize Focus Homes' response as implicitly or even explicitly requiring appellants to endure repeated sexual assaults as an essential part of their job." *Id.* at 1111. The balance the court struck was to return "this fact intensive" determination to "a finder of fact after a full trial" and that it was error to foreclose this factual inquiry. *Id.* at 1111 – 1112. In the present case, Ms. Heller faced a similar working environment, if somewhat different in degree, and ended up being required either to endure it or leave.

D. Justin Eichorn is liable to the appellant whether or not he was a major shareholder.

After citing *State by Beaulieu v. RSJ, Inc.*, 532 N.W. 2d 610 (Minn. App. 1995), *aff'd as modified*, 552 N.W. 2d 695 (Minn. 1996), for the proposition that a major shareholder cannot be held liable for aiding and abetting discrimination since the shareholder already faces financial loss by virtue of corporate liability, the district court recognized that this principle should not govern the present case. AA at 115. The corporate defendant had gone out of business and so both it and hence Justin Eichorn had effectively escaped any financial impact arising out of the discrimination claims in this

lawsuit. The court further noted that in the circumstances so presented, lack of any financial deterrent could be tantamount to giving the employer *carte blanche* to discriminate. Thus, the court suggested that it was more appropriate not to apply such an exemption in this case and instead to consider whether there was evidence that would support the appellant's claim that respondent Justin Eichorn should be liable for aiding and abetting discrimination by virtue of his own conduct. The court held, however, that there was no support for the claim because there was no showing that Justin Eichorn knew or had reason to know of the alleged harassment.

This conclusion by the district court raises two issues. While the appellant agrees with the court that *Beaulieu* should not be determinative of Justin Eichorn's liability, she believes that it should not be so for an additional reason. In addition, she respectfully submits that the district court erred in deciding that Justin Eichorn did not know or had no reason to know about the harassment, when his failure to know was the product of his own dereliction of duty and when such knowledge is imputed to him by operation of law.

It is of course true that in *Beaulieu, supra.*, the appellate court did state without discussion that the aiding and abetting statute could not be read as an exception to limited corporate liability, indicating that it was following the rule established in *State v. Sports & Health Club, Inc.*, 370 N.W. 2d 844 (Minn. 1985). In the *Sports and Health Club* case, however, the Minnesota Supreme Court had held that three majority shareholders could not be charged with aiding and abetting not because of the double jeopardy, so to speak, alluded to in *Beaulieu*, but for an entirely different reason. Three owners/majority shareholders of the company had originally been charged with aiding and abetting the

discrimination at issue, until the Commissioner of Human Rights had successfully pierced the corporate veil. Consequently, the three individuals could not be charged with aiding and abetting because they were now directly liable for discrimination as the employer. In accord with the *Sports & Health Club* decision, therefore, if the corporate veil has not been pierced -- and such an issue has not been raised by either party in this proceeding -- then invocation of the aiding and abetting statute is perfectly appropriate. Nor is it necessary or required first to pierce the corporate veil first to impose individual liability. *Bloomquist v. Wisdom Development Group, LLC*, 2009 WL 67059 at *2 (Minn. App. 2009).

On the other hand, the holding in *Beaulieu* also seems to carve out an exception for major shareholders that is not authorized by the statute. Minn. Stat. Sec. 363A.14 expressly refers to “any person;” it does not state that certain persons should be exempt because of the number of shares they own. Moreover, this exception, taken to its logical consequence, seems to be predicated on an assumption that corporate assets and the individual assets of major shareholders are commingled; this, too, has no support in the law except as a basis for piercing the corporate veil.

As further discussed above, Justin Eichorn was the President of the company and, as such, charged by law with an affirmative duty to prevent rather than tolerate or ignore sexual harassment. *Gillson, supra*. The knowledge imputed to the company should be imputed to him as President, as well, as a person with an affirmative responsibility to ensure a safe working environment for his employees. Moreover, there was evidence, as also further discussed above, that despite his protestations he was not necessarily

unknowledgeable. His denials are mere assertion, and for purposes of summary judgment the evidence and any inferences to be derived therefrom must be viewed in the light most favorable to the nonmoving party below, not the moving party. *Fabio v. Bellomo*, 504 N.W. 2d 758, 761 (Minn. 1993).

In the present case, Ms. Heller's discharge occurred within days of her complaint to Mitch Eichorn and very shortly, as well, after she had refused to travel alone with Michael Coombe on a business trip. AA at 049-050. The short time span between complaint and severely adverse action raises a clear inference of reprisal, and Justin Eichorn's active, not passive, acquiescence in the adverse action ties him squarely to it.

III. THE RESPONSIBLE CORPORATE OFFICER DOCTRINE COULD ALSO SERVE AS A BASIS FOR LIABILITY BY THE INDIVIDUAL DEFENDANTS

Finally, the district court held that the "responsible corporate officer doctrine" recognized by this Court in *In re Dougherty*, 482 N.W. 2d 485, 486 (Minn. App. 1992), does not apply to the Minnesota Human Rights Act, citing *State by Beaulieu v. RSJ, supra*. This doctrine has been applied in environmental cases and other contexts in which a statutory imposition of liability on individual corporate officers reflects the importance of the public policy involved, such as preserving clean water and air, and the necessity of an added deterrent. The doctrine holds that

“[c]orporate officers are liable for violations of law by their corporations when (1) the law violated is a public welfare statute that imposes strict liability, (2) the individual occupies a position of responsibility within the corporation, (3) the individual's position is reasonably related to the violations, and (4) the individual's action or inaction facilitated the violations.”

Ibid. In *Dougherty*, the doctrine operated to impose liability on the president of the company who had had not participated directly in the violations of the law, but his inaction and failure to address the violations had facilitated them.

In *State by Beaulieu v. RSJ, supra.*, the court had considered application of that doctrine to the MHRA but rejected it because liability may be imposed “only if ‘the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.’” The law has changed, however, since *Beaulieu* was decided. In the landmark case of *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W. 2d 558 (Minn. 2008), the Minnesota Supreme Court revisited the “knows or should have known” standard in the context of sexual harassment by a supervisor in light of recent U.S. Supreme Court cases interpreting Title VII. The Court held that, as under Title VII, when the harasser is a supervisor, then an employee is *not* required to prove that the employer knew or should have known about the sexual harassment; instead, liability would be imputed in such situations -- albeit vicarious liability rather than strict liability. This holding makes particular sense in the present case because of the “free rein” given General Manager Michael Coombe. Since liability may now be imposed in the absence of actual knowledge by the employer, then it there is no reason not to apply the same principle to an aiding and abetting claim. It thus follows that the responsible corporate office doctrine might also be applicable in the instant case. *Frieler* did not reach this issue. The court did, however, pay heed to the public policy underpinnings of the MHRA. (“...[W]e have consistently held that the remedial nature of the Minnesota Human Rights Act requires liberal construction of its terms.” *Id.* at 573.)

Justin Eichorn, President of the corporation, at the very least, and also Mitch Eichorn, as at least a one time Vice President of the corporation (AA at 107-108), were corporate officers like the president in *Dougherty*. Their intentional inaction and failure to address a hostile work environment and clear condonation of Coombe's behavior caused serious damage to the plaintiff's well being and to her career.

CONCLUSION

Those who aid and abet are jointly and severally liable for the resulting injury as if they had committed the primary act. *Canada v. McCarthy*, 567 N.W. 2d 496, 507 (Minn. 1997). Liability of the employer has already been established.

For the reasons discussed above, the district court erred as a matter of law in granting summary judgment against Heller on her aiding and abetting claims against the respondents. Appellant therefore respectfully requests that this Court reverse the partial summary judgment of the district court dismissing her claims against the two individual respondents and remand the matter for entry of the default judgment against them, as well.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd.'s 1 and 3. This brief was prepared using a proportional spaced font size of 13 pt. and contains 6,377 words. The word count is stated in reliance on Microsoft Word 2010, the word processing system used to prepare this brief.

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