

Nos. A05-158 and A05-473

State of Minnesota
In Court of Appeals

Lester Wenigar,

Respondent,

vs.

Lee Johnson, d.b.a. Johnson's,
Johnson's Sanitation, and Stratton Farms,

Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Wenigar's Respondent's Brief is replete with red-herring assertions and inapposite arguments. Since they are immaterial, Johnson will not address the bulk of the extraneous contentions Wenigar has raised. It suffices to say that to the extent Wenigar has failed to meaningfully counter the arguments set forth in Johnson's Appellant's Brief, there is no need for Johnson to make any additional response. *Cf. Correll v. Distinctive Dental Servs.*, 636 N.W.2d 578, 582 (Minn. Ct. App. 2001) (since reply briefs are optional, an appellant's failure to file a reply brief does not reflect on the merits of its case). To avoid unnecessary duplication of the opening Brief, Johnson addresses here only those arguments of Wenigar that require additional comment, and asks the Court to see the opening Brief for additional responses to Wenigar's arguments.

I. WENIGAR'S ARGUMENTS IN SUPPORT OF THE DISTRICT COURT'S FINDINGS OF LIABILITY AND DAMAGES UNDER THE MHRA ARE UNTENABLE

A. Minnesota Does Not Recognize A MHRA Claim For Hostile Work Environment

In his Brief, Wenigar implicitly concedes that the Minnesota Supreme Court has never recognized a claim for disability hostile work environment under the MHRA. Further, the Minnesota Legislature has not created a MHRA disability hostile work environment claim. The Legislature certainly knows how to create such a claim if it chooses; indeed, the MHRA expressly provides a cause of action for hostile work environment caused by sexual harassment. *See* Minn. Stat. § 363A.03, subs. 13 and 43.

Accordingly, Wenigar's citation to United States Eighth Circuit Court of Appeal authorities recognizing a claim for disability hostile work environment under the Americans with Disabilities Act is of no assistance to this Court's inquiry. It is the Eighth Circuit's prerogative to construe federal law to provide a disability hostile work environment claim. However, this Court (like the district court) is not free to recognize a newly-minted claim for disability hostile work environment under the MHRA. That is a job for either the Legislature or the Minnesota Supreme Court. *See, e.g., Johnson v. Johnson*, 611 N.W.2d 823, 825 (Minn. Ct. App. 2000) ("Appellant argues that this court should create a law imposing on Minnesota sellers of motor vehicles a duty to determine the license and insurance status of car purchasers. Creating such a law, however, is beyond the scope of this court's authority"); *Stubbs v. N. Mem'l Med. Ctr.*, 448 N.W.2d 78, 83 (Minn. Ct. App. 1989) (declining to recognize a cause of action not yet recognized previously by the courts or created by legislative action because "[t]he function of this court is primarily decisional and error correcting, rather than legislative or doctrinal").

For this reason alone, Johnson is entitled to judgment on the MHRA claim.

B. There Is No Basis For Awarding Wenigar MHRA Damages

As is set forth in detail in Johnson's Appellant's Brief, (*see* App. Br., at 40-44), there is no basis for awarding Wenigar MHRA damages, and the district court committed reversible error by awarding Wenigar "\$119,909.50 pursuant to the Minnesota Human Rights Act as damages in addition to the amounts already awarded. (\$150,000 emotional

distress + \$50,000 future distress + \$39,819 = \$239,819 x 50%)." (A.31).¹ Johnson will not repeat these arguments here, but some response is warranted to Wenigar's suggestion that the MHRA damages award can be sustained as "multiple" MHRA damages.

The MHRA provides that a district court may award an "aggrieved party, who has suffered discrimination, compensatory damages in an amount up to three times the actual damages sustained." Minn. Stat. § 363A.29, subd. 4(a). The MHRA does not provide any basis for multiplying damages awarded under non-MHRA causes of action. Thus, the MHRA does not provide courts with authority to multiply tort damages for intentional infliction of emotional distress -- indeed; MHRA emotional distress style damages cannot be multiplied even when properly awarded under the Act. *See Ray v. Miller Meester Advertising, Inc.*, 664 N.W.2d 355, 370 (Minn. Ct. App. 2003), *aff'd*, 686 N.W.2d 404. Likewise, the MHRA does not provide authority to multiply state or federal Fair Labor Standards Act damages. Wenigar cites to no authority to support this extraordinary proposition.

The MHRA, moreover, provides that only "actual damages sustained" may be multiplied. Wenigar has not sustained any MHRA "actual damages"; indeed, the district court made no finding of any MHRA "actual damages sustained". Rather, the district court found that Wenigar had suffered \$39,819 in FLSA unpaid overtime damages -- which the district court then doubled under the FLSA's "multiplier" -- and \$200,000 as

¹ In this Brief, references to Appellant's Appendix are prefixed "A.", references to Appellant's Reply Appendix are prefixed "R.A.", and references to the trial transcript are prefixed "T." together with the date of the trial testimony.

tort damages for emotional distress. (A.31-32). The MHRA \$119,909.50 damages award is wholly duplicative of these FLSA and tort damages awards. As such, the MHRA damages award is an impermissibly duplicative double recovery. See *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 379 (Minn. 1990); *Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 745 (Minn. 1997); *Redalen v. Farm Bureau Life Insurance Co.*, 504 N.W.2d 237, 238 (Minn. Ct. App. 1993).

II. WENIGAR'S ARGUMENTS IN SUPPORT OF THE DISTRICT COURT'S FINDINGS OF LIABILITY AND DAMAGES UNDER THE STATE AND FEDERAL FAIR LABOR STANDARDS ACTS ARE UNTENABLE

In his Brief, Wenigar makes numerous factual and legal errors in addressing the district court's erroneous findings and conclusions regarding the Fair Labor Standards Act claims. A few comments regarding these errors are in order.

A. Wenigar Was Exempt Under The Federal FLSA As An "Employee Employed In Agriculture"

Wenigar completely misconstrues the nature and extent of the federal FLSA's agriculture exception. His arguments are both factually and legally flawed. First, Wenigar attempts to muddle the inquiry by his repeated references to Johnson's "two different garbage operations". This is a red herring. Wenigar worked only for the farm. He never worked for Johnson Sanitation, the garbage hauling business that was sold in 2000. Unlike the farm operation, Johnson Sanitation was a commercial garbage hauler that picked up rubbish and hauled it to landfills. (A.127; 12/17/03, T. 38; 1/6/04, T.120). Johnson has never contended that Johnson's Sanitation was an agricultural business, and

Johnson Sanitation's operations are wholly irrelevant to the inquiry of whether Wenigar was an "employee employed in agriculture".

Second, Wenigar ignores the relevant law construing the agricultural exception, including controlling United States Supreme Court cases, analogous recent federal appellate and district court cases, and Department of Labor regulations that are entitled to judicial deference. *See, e.g., Maneja v. Waialua Agric. Co.*, 349 U.S. 254, 260-61 (1955); *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1190 (10th Cir. 2004); *Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1029 (5th Cir. 1993); *Baldwin v. Iowa Select Farms, L.P.*, 6 F. Supp.2d 831, 840-41 (N.D. Iowa 1998); 29 C.F.R. § 780.105(b); 29 C.F.R. §§ 780.119 – 780.121.² Most incredibly, Wenigar does not even mention -- let alone distinguish -- 29 C.F.R. § 780.157(a), a Department of Labor regulation that ambiguously states,

² Wenigar relies instead upon *Walling v. Friend*, 156 F.2d 429 (8th Cir. 1946), a sixty-year-old opinion, that has not been cited in a published opinion in 35 years, and which has little to say about the agricultural exception since it was quite plain that the employees involved (bookkeepers and office workers employed by livestock brokers -- not farmers) were working neither on a farm nor in agriculture. Notably, *Walling* was decided almost ten years before the United States Supreme Court's controlling decision in *Maneja v. Waialua Agric. Co.*, 349 U.S. 254 (1955). *Walling* does not cite to any controlling U.S. Supreme Court precedent construing the agricultural exception -- there was none in 1946 -- and instead relies upon a 1939 administrative Interpretative Bulletin for the rather unremarkable proposition that livestock commission brokers "are not within the exemption because the practices performed by them do not constitute practices performed by a farmer, nor do they take place on a farm." *Walling*, 146 F.2d at 432. Johnson, by contrast, has cited to administrative regulations in force and effect as of this day, including a regulation that unambiguously states, "[T]ruckdrivers employed by a farmer to haul feed to the farm for feeding pigs are engaged in 'agriculture.'" 29 C.F.R. § 780.157(a).

[T]ruckdrivers employed by a farmer to haul feed to the farm for feeding pigs are engaged in "agriculture."

Id.

Of course, that is exactly what Wenigar was doing when he and others picked up food by-products, and returned them to the farm. The undisputed evidence at trial was that these food products were collected for one purpose only -- to feed to the pigs. (12/18/03, T.131; 12/29/03 T.45, 64). Under the controlling legal authority, including the plain meaning of the Department of Labor regulations, Wenigar was an "employee engaged in agriculture" when working the food collection route.

B. Wenigar Is Exempt From The State FLSA

Wenigar has not rebutted Johnson's showing that Wenigar was also exempt from coverage under the Minnesota Fair Labor Standards Act. (*See App. Br.*, at 25-26). Instead, Wenigar states only that Johnson is raising this argument for the first time on appeal, suggesting implicitly that Johnson has waived this argument. But Wenigar is wrong; Johnson did raise the argument below. (*See R.A.* 13). As Wenigar was exempt under the Minnesota FLSA, *see* Minn. Stat. § 177.23, subd. 7(2), the district court committed reversible error to the extent it found Johnson liable under the state Act.

C. Johnson's Farm Business Was Not An "Enterprise Engaged In Commerce" And Thus Is Not Covered By The Federal FLSA

In his Appellant's Brief, Johnson has detailed the reasons why the farm was not an "enterprise engaged in commerce" and thus is not covered by the federal FLSA. (*See App. Br.*, at 27-30). Johnson will not repeat that analysis here, however, it is important to

note that in responding to this argument, Wenigar has cited to inapplicable law. Specifically, he has relied entirely on the wrong test for determining when two or more business entities can be combined to form an "enterprise engaged in commerce" under the federal FLSA. As noted in Johnson's main Brief, the term "enterprise" means "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." 29 U.S.C. § 203(r)(1). The United States Supreme Court has established a three-part test for the "single enterprise" inquiry. To be considered a single enterprise under the FLSA, two or more businesses must satisfy each of three elements. They must (1) perform related activities; (2) under unified operations or common control; and, (3) for a common business purpose. *See Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 518 (1973); *Nelson v. Long Lines Ltd.*, 335 F. Supp.2d 944, 965 (N.D. Iowa 2004).

In his Brief, Wenigar does not cite or apply this controlling *Brennan* test. Instead, citing to this Court's decision in *Fahey v. Avnet, Inc.*, 525 N.W.2d 568 (Minn. Ct. App. 1994), he relies upon a four-part test developed to determine whether two or more businesses can constitute an "integrated enterprise" for purposes of Title VII of the Civil Rights Act of 1964's definition of "employer". *See* 42 U.S.C. § 2000e(b). In *Fahey*, this Court adopted this Title VII test as a test for resolving an analogous "integrated enterprise" inquiry in an MHRA case. 525 N.W.2d at 572. But *Fahey* does not hold that this Title VII test is the proper test for resolving the "single enterprise" inquiry under the FLSA. Rather, the U.S. Supreme Court's three-part *Brennan* test is controlling, and

Wenigar has not even attempted to rebut Johnson's arguments as to why the *Brennan* test has not been satisfied.

III. WENIGAR'S ARGUMENTS IN SUPPORT OF THE DISTRICT COURT'S FINDINGS OF LIABILITY AND DAMAGES FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ARE UNTENABLE

Johnson has already extensively briefed the reasons why the district court committed reversible error both in finding Johnson liable for intentional infliction of emotional distress and in awarding Wenigar \$200,000 as emotional distress damages. (See App. Br., at 44-51). Johnson will not belabor this analysis in this Brief. A couple of points, however, are worth some discussion.

A. Johnson Did Not Engage In Extreme, Outrageous, Intentional Or Reckless Conduct

In his Brief, Wenigar cites to inapposite authority for the proposition that Johnson engaged in extreme, outrageous, intentional or reckless conduct. *Venes v. Professional Service Bureau, Inc.*, 353 N.W.2d 671 (Minn. Ct. App. 1984) does not involve a Minnesota law claim for emotional distress damages; rather, the case involved review of an award of emotional distress damages under the federal Fair Debt Collection Practices Act. This Court has previously distinguished *Venes* on this very basis, to wit:

Appellant claims respondent's conduct during the 5 1/2 hour questioning session "offend[s] our basic sense of human decency." To support the argument that this conduct is extreme and outrageous appellant relies on *Venes v. Professional Service Bureau, Inc.*, 353 N.W.2d 671 (Minn.Ct.App.1984). However, in *Venes* the court sustained damages for intentional infliction of emotional distress based on violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692k (1982). Therefore, reliance on *Venes* under these facts is misplaced.

Luzach v. United Parcel Service, Inc., No. C8-88-2130, 1989 WL 20484 at *2 (Minn. Ct. App., Mar. 14, 1989) (R.A. 20-21).³

Further, Wenigar misstates the holding of *Kelly v. City of Minneapolis*, 598 N.W.2d 657 (Minn. 1998). Contrary to Wenigar's assertions, the Minnesota Supreme Court did not uphold a verdict for intentional infliction of emotional distress in that case. Specifically, there were two issues before the supreme court in *Kelly*: (1) whether a jury's findings that appellant police officers engaged in intentional infliction of emotional distress but acted without malice were inconsistent; and (2) whether, in the absence of malice, the doctrine of official immunity applies to the conduct of public officials performing discretionary duties later determined to constitute intentional infliction of emotional distress. 598 N.W.2d at 659. The supreme court answered the first question in the negative, the latter question in the affirmative, and affirmed the judgment for the police officers. *Id.* at 662-65. The supreme court did not address whether the jury properly found that the police officers had intentionally inflicted emotional distress because the question was not before the court.

³ Further, *Venes* appears to be of dubious value even as authority for cases brought under the Fair Debt Collection Practices Act. See *Reno v. Supportkids, Inc.*, No. Civ.01-2331(JNE/JSM), 2004 WL 828150 at *1, 5 (D. Minn., Apr. 13, 2004) (granting summary judgment for defendant on intentional infliction of emotional distress claim in Fair Debt Collection Practices Act case where alleged outrageous conduct consisted of private debt collector's numerous telephone calls wherein collector stated that plaintiff owed \$120,000 in back child support and that if he did not pay his past-due support, debt collector was going to charge him with a felony, put him in prison, and take his driver's license and home). (R.A. 22-27).

Accordingly, neither *Kelly* nor *Venes* supports the district court's findings that Johnson engaged in extreme, outrageous, intentional or reckless conduct.

B. Wenigar Does Not Attempt To Defend The District Court's Error In Awarding Emotional Distress Damages For 44½ Months Occurring Before The Statute Of Limitations Cut-Off

As Johnson explained in his Appellant's Brief, (*see* App. Br., at 50-51), the district court inexplicably erred by awarding Wenigar damages for intentional infliction of emotional distress for 44½ months elapsing before the September 14, 2001 statute of limitations deadline on the claim. In his Brief, Wenigar does not even attempt to defend this damages award; as a consequence, he implicitly concedes that the district court erred in awarding damages for events occurring before the limitations period. At a minimum, therefore, the award of present emotional distress damages must be reduced by approximately 45% (\$67,500) -- i.e., to account for the 44½ months from January 1, 1996 through September 13, 1999 for which the district court erroneously awarded emotional distress damages.

CONCLUSION

Accepting Wenigar's extravagant testimony at face value while disregarding all contradictory evidence -- even the contradictory evidence from Wenigar's own mouth -- the district court ignored controlling law so as to dispense the sort of justice the court deemed to be appropriate. Compounding this error, the district court found Johnson liable under the federal and state Fair Labor Standard Acts although it is clear that, as a matter of law, Wenigar was exempt from the provisions of both Acts. In addition, the district court found Johnson liable under the Minnesota Human Rights Act pursuant to a legal theory that has not been adopted by the Minnesota Legislature or recognized by the Minnesota Supreme Court.

The district court also awarded Wenigar six-figure MHRA damages even though Wenigar had not proven any entitlement to MHRA damages and under circumstances that resulted in a double recovery. Lastly, the district court found Johnson liable for intentional infliction of emotional distress despite the fact that Wenigar did not come anywhere near to carrying his burden of proof on this demanding and disfavored tort. Further, in awarding emotional distress damages, the district court ignored the tort's two-year statute of limitations, and awarded Wenigar damages for events occurring 44½ months before the limitations deadline.

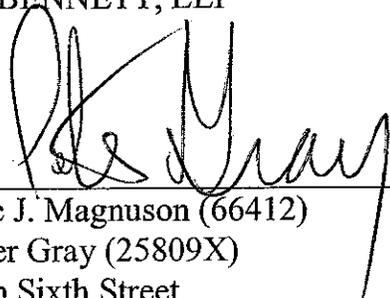
The judgment against Johnson should be reversed in all respects -- liability, damages, and attorneys' fees and costs -- and the case remanded for entry of judgment in Johnson's favor.

Respectfully submitted,

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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) (with amendments effective July 1, 2007).