

CASE NO. A06-1693

STATE OF MINNESOTA

IN SUPREME COURT

Judy Frieler,

Appellant,

vs.

Carlson Marketing Group, Inc.

Respondent.

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

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Statement of the *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 is headquartered in San Francisco, California and has over 3,000 members nationwide. NELA has supported precedent-setting litigation and legislation affecting the rights of individuals in the workplace for many years. The Minnesota Chapter of NELA was formed in 1990.

Minnesota NELA has participated as *amicus curiae* on many occasions before this Court, the Minnesota Court of Appeals and in the Courts of the United States. In particular, Minnesota NELA has appeared as *amicus curiae* in the following cases, among many others: *Abraham v. County of Hennepin*, 639 N.W.2d 342 (Minn. 2002); *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center*, 637 N.W.2d 270 (Minn. 2002); *Williams v. St. Paul Ramsey Medical Center*, 551 N.W.2d 483 (Minn. 1996); and *Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991).

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

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

INTRODUCTION

This case comes to the Court with the lower courts and the parties suggesting several different interpretations of the Minnesota Human Rights Act ("MHRA") definition of "sexual harassment" in the context of supervisor harassment. Minnesota NELA urges the Court to afford the statute its plain meaning, which is clear, uniform and follows traditional principles of liability.

In addition, the lower courts have departed from the long standing law of foreseeability. Minnesota NELA urges the Court to follow the State's traditional principles of liability in this context as well.

I. THE COURT SHOULD ENFORCE THE PLAIN MEANING OF THE MINNESOTA HUMAN RIGHTS ACT SEXUAL HARASSMENT DEFINITION.

A. Sexual Harassment Definition Is Unambiguous.

The language of the Minnesota Human Rights Act (MHRA) is without ambiguity and should not be manipulated to mean what it does not say. The Court is “not free to disregard the words of a statute ‘under the pretext of pursuing the spirit’ if the words are free from ambiguity.” *Anderson-Johanningmeier v. Mid-Minnesota Women’s Center*, 637 N.W.2d 270, 276 (Minn. 2002). The words of the MHRA are free from ambiguity, and there is no indication that the Minnesota legislature wanted to abandon Minnesota’s long-held principle of holding companies liable for the discriminatory acts of their managers in favor of some other, legislatively undefined liability standard.

The MHRA specifically defines sexual harassment 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 when:

(1) submission to that conduct or communication is made a term or condition, whether explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing;

(2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions

affecting that individual's employment, public accommodations or public services, education, or housing; or

(3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

Minn. Stat. 363A.01, Subd. 43.

The facts before the Court are not complicated. Judy Frieler claims that she was sexually harassed and assaulted on four occasions by the employer's supervisor, Ed Janiak. Janiak worked for the employer for at least 18 years. The employer designated Janiak to be one of its supervisors. The employer gave Janiak not only the title, but also the authority to hire, interview, promote and set standards for certain positions within the company. Frieler was instructed to go to supervisor Janiak if she wanted the full-time position at issue, and it was Janiak who had the power to decide her fate. *See*, Ct. App. Decision pp. 2, 3, 7. Accordingly, Janiak is an agent for the employer and, as such, his actions are those of the employer.

Notably, had the Court of Appeals taken Frieler's facts as true, as it must do for summary judgment, she clearly met her burden of demonstrating statutory "sexual harassment" under Sections (1) and (2). Frieler alleged that Janiak, both explicitly and implicitly, made submission to his assaults a

condition of obtaining the full-time position with him. There has been absolutely no attempt on the part of the legislature or the Minnesota courts to alter in any way the parameters of Sections (1) or (2). Submission to or rejection of sexually motivated conduct when made a term or factor for employment decisions *is* statutory sexual harassment. This is true for employment, public accommodations or public services, education or housing under the MHRA.

B. Minnesota Legislature Removed And Has Rejected The “Know Or Should Have Known” Standard.

The lower courts in this matter have continued to include in Section (3) of the sexual harassment definition the requirement that an employer know or should have known of the harassment. In 2001, the legislature amended Section (3) to remove the phrase, *“and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.”* 2001 Minn. Laws c. 194 §1. In doing so, the legislature clearly removed any additional burden “in the case of employment” matters to put employment “hostile environment” sexual harassment on even footing with the other entities covered by the MHRA (housing, education, public services and public accommodations). This is sound public policy – sexual harassment is sexual harassment for all entities covered by the MHRA.

In the 82nd Legislative Session (following the amendment) there were Senate and House proposals to put the “knew or should have known” language *back into* the MHRA for sexual harassment claims. *See* H.F. No. 3471; S.F. No. 3318; as introduced, 82nd Legislative Session (2001-2002). They were rejected.

Despite the legislative deletion of the “knew or should have known” language, the Court of Appeals decision quotes it and relies upon it as if it still existed. In doing so, the decision ignores statutory law and public policy. The Court of Appeals acknowledged the 2001 Amendment to the MHRA which deleted the “knew or should have known” element, yet proceeded to re-insert the language into the statute and apply it. The Court of Appeals supported the decision with pre-amendment and inapplicable case law, citing the *Goins* and *Gagliardi* cases. Neither case supports a non-legislative addition of the “knew or should have known” language to a statute which has been properly amended by the Minnesota legislature.

The *Goins* case was pre-amendment. Accordingly, its ‘standards’ as to Subd. 43 (3) are inapplicable to MHRA cases post 2001. Further, in *Goins* the issue addressed was the lack of “severe or pervasive” harassment, not the employer’s knowledge. *See Goins v. West Group*, 635 N.W.2d 717 (Minn. 2001).

In *Gagliardi*, the Plaintiff alleged harassment by a customer and also by her supervisor, who owned the business. The Court applied the “knew or should have known” standard for third-party non-employee harassment, which is not at issue here. The Court did not address the 2001 amendment, finding instead that the owner-harasser circumstance is “unique.” See *Gagliardi v. Ortho-Midwest*, 733 N.W. 2d 171 (Minn. Ct. App. 2007).

C. Plain Language Of Statute Consistent With Well Settled Law Of Imputed Liability.

Defendants, and presumably some other *amici*, will urge the Court not to apply the plain meaning of the definition, calling this standard “strict liability.” Using the phrase “strict liability” is merely a scare tactic, designed to illicit a negative response from the Court. Corporations act only through their agents. Holding a company liable for the acts of its manager is nothing new. This concept was perhaps explained best by Justice Marshall in his concurring opinion in *Meritor Savings Bank, FSB, v. Vinson*, 477 U.S. 57 (1986), the case in which the United States Supreme Court first recognized an employer’s liability for sexual harassment by a supervisor.

He wrote:

An employer can act only through individual supervisors and employees; discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors. Although an employer may sometimes adopt companywide discriminatory policies violative of Title VII, acts that may constitute Title VII

violations are generally effected through the actions of individuals, and often an individual may take such a step even in defiance of company policy. Nonetheless, Title VII remedies, such as reinstatement and backpay, generally run against the employer as an entity.^{FN1} The question thus arises as to the circumstances under which an employer will be held liable under Title VII for the acts of its employees.

The answer supplied by general Title VII law, like that supplied by federal labor law, is that the act of a supervisory employee or agent is imputed to the employer.^{FN2} Thus, for example, when a supervisor discriminatorily fires or refuses to promote a black employee, that act is, without more, considered the act of the employer. The courts do not stop to consider whether the employer otherwise had “notice” of the action, or even whether the supervisor had actual authority to act as he did.

Meritor, 477 U.S. at 75-76 (Marshall, concurring)(footnotes and citation omitted).

Minnesota has long recognized that a corporation, as an entity, has no ability to act on its own. Whether a corporation, a school district, or other public institution, an entity can only take action through its agent(s). *See Minnesota CIVJIG 30.60*. As a matter of public policy, Minnesota has long imposed liability on an employer for the acts of its employees. *See Lange v. National Biscuit Company*, 211 N.W. 2d 783 (Minn. 1973)(Ct. rejected an “arbitrary determination of when, and at what point, the argument and assault leave the sphere of the employer’s business and become motivated by personal animosity”). The public policy behind Minnesota’s application of imputed liability is sound. The authority bestowed by the

employer/entity on its managers creates an undeniably powerful position for the manager, and a potentially dangerous situation for the person/employee who lacks power.

The supervisor's access to and power of intimidation over the employee only comes from the grant of power from the corporate entity. *See, Marston v. Minneapolis Clinic of Psychiatry and Neurology, Ltd*, 329 N.W. 2d 306 (Minn. 1983); *Fahrendorff v. North Homes, Inc.*, 597 N.W. 2d 905 (Minn. 1999)(liability when employer gives power to supervisors and/or counselors over subordinates). The employer, or other entity, is liable whether its designated agent is acting with actual delegated authority or apparent delegated authority. *See, Duluth Herald & News Tribune v. Plymouth Optical Co.*, 176 N.W. 2d 522 (Minn. 1970); *Foley v. Allard*, 427 N.W. 2d 647 (Minn. 1988); *see also* Restatement (Second) of Agency §8 (1958). Minnesota courts have continued to apply liability for the actions of managers and it would be unsupportable to do differently in this case in light of the clear legislative creation of employer liability.

Moreover, even when the "know or should know" language was included in statutory definition of sexual harassment, Minnesota courts imputed knowledge to the employer when the harasser was a supervisor. *See, e.g., Heaser v. Lerch, Bates & Assoc., Inc.*, 467 N.W.2d 833, 835

(Minn. Ct. App. 1991). Thus, imputed liability for sexual harassment by managers is nothing new.

In holding an employer liable for hostile environment harassment in its workplace, the legislature is simply placing liability with the party who controls the environment—the employer. This is true whether the harasser is a supervisor or a co-worker. The MHRA simply requires an employer to be aware of the environment in which its employees work, and be held responsible when that environment is “hostile or intimidating.”

D. Legislature Has Expressly Rejected Federal *Faragher/Ellerth* Affirmative Defenses.

It has been suggested to the Court that, despite the clear, unambiguous, uniform language of the MHRA sexual harassment definition, the Court should import the affirmative defenses outlined for Title VII liability in the cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). When the language of a statute is clear, the Court may not read into it language that is not there. See, *Anderson-Johanningmeier*, 637 N.W.2d at 273-74, 276; *Eischen Cabinet Co., v. Hildebrandt*, 683 N.W.2d 813, 815 (Minn. 2004). Judicially inserting new language into the sexual harassment definition would depart from the long standing law and policy of this State.

The Court of Appeals and the parties to this action have focused on Section (3) of the sexual harassment definition and the legislative amendment thereto removing the “know or should have known” language. Had the legislature wanted to add an additional element, or an affirmative defense, in the case of employment matters, it could have done so. In fact, it did just the opposite. It chose uniformity. The attempt to add phantom language that simply is not there, as suggested by defendants and by the Court of Appeals, must fail. The attempt to construe or interpret language that simply is not there must also fail. It is unnecessary to construe or interpret words in a statute that are unambiguous. *See* Minn. Stat. §645.08(1)(1996). An interpretation that expands the language of the statute would be contrary to the plain meaning of the statute and to well-established public policy. *See, Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 64 S. Ct. 582 (1944)(cannot expand statutory limitations); *Anderson-Johanningmeier*, 637 N.W.2d at 273-74, 276. In *Anderson-Johanningmeier*, this Court refused to add a “public policy” requirement into the Minnesota Whistleblower Act, despite the employer’s argument that the legislature intended such a requirement, because it was not included in the plain language of the act. *See, Anderson-Johanningmeier*, 637 N.W.2d at 274 - 276.

Rather than relying on the clear words of the statute, with its amendment, and the long precedent of imputed liability, the parties have asked the Court instead to rely on legislative history. The Court should decline to do so. Reference to legislative history is inappropriate in an instance, such as this, where the statute is free from ambiguity. *See* Minn. Stat. § 645.16.

However, should the Court wish to review the history of the 2001 MHRA amendment, it will become clear that the legislature rejected this federal standard. Section (1) of the MHRA sexual harassment definition includes both explicit and implicit uses of authority, reflecting the legislature's original intent to address not only the actual use of power, such as a "tangible job action," but also the implicit threat of use of power. The affirmative defenses afforded employers by the *Faragher/Ellerth* cases is only available in cases in which there has been no "tangible job action." Thus, if the legislature intended to adopt the *Faragher/Ellerth* defenses, they would have amended Section (1) as well as Section (3). They did not do so, but instead left in the definition of sexual harassment the "implicit" use of power.

In the 82nd Legislative Session (following the amendment) there were Senate and House proposals to put the "knew or should have known"

language *back into* the MHRA for sexual harassment claims. The same proposals added a new section, specifically adopting the “federal affirmative defenses” for sexual harassment by an “employee’s supervisor.” *See* H.F. No. 3471; S.F. No. 3318; as introduced, 82nd Legislative Session (2001-2002). The proposals were rejected.

In 2003, there were again proposals to change the wording of the MHRA sexual harassment section. This time, Section 363A.03, Subd. 43 (3) was left untouched, with the “knew or should have known language” deleted. However, a new paragraph was added, which would adopt the “elements of proof, burdens of proof, and affirmative defenses” that apply to Title VII cases. Again, the proposals would only relate “in the case of employment.” *See* H.F. No. 2443; S.F. No. 2816; as introduced, 83rd Legislative Session (2003-2004). Again, they were rejected. Had either proposal passed, it would have delineated the “employee” claims of sexual harassment from those of the public accommodations or public services, education, or housing. The Minnesota legislature has chosen not to do so.

The Minnesota legislature has chosen to continue with its public policy of applying the same standard to all protected classes, regardless of whether the harassment occurs in employment, education, public services or housing. The language is clear. This Court must follow the law.

E. Public Policy Underlying The MHRA Would Be Eviscerated By The Federal *Faragher/Ellerth* Defenses.

The public policy interests protected by the MHRA would be eviscerated by this Court's adoption of the *Faragher/Ellerth* defenses, not only because these defenses undermine the MHRA's prohibition of sexual harassment in employment, but also because the Court's interpretation would impact other areas of the law in which such defenses serve no public policy purpose.

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

The federal *Faragher/Ellerth* affirmative defenses at issue in this case allow an employer to escape liability when an employee has suffered sexual harassment at the hands of a manager. For this reason alone, the *Faragher/Ellerth* affirmative defenses contravene the public policy of the state. Put simply, the federal *Faragher/Ellerth* defenses negate liability of

an employer for the acts of its managers, something that the Minnesota Courts have never done.

Minnesota Courts have very clearly rejected any notion that employers may escape liability simply by having a policy prohibiting harassment. Instead, Minnesota Courts have chosen a case-by-case analysis of the issue of supervisor liability, imputing knowledge of sexual harassment to the employer when the harassing conduct is committed by a manager. *See, e.g., Heaser*, 467 N.W.2d at 835.

The federal *Faragher/Ellerth* affirmative defenses operate to place an additional burden on employees beyond showing the creation of a hostile work environment. In essence, the United States Supreme Court has put the burden on the employee being harassed to attempt to stop the illegal harassment. This approach ignores the reality of most workplaces, in which the reasonable fear of negative job action by a harassing manager stops an employee from reporting the harassment.

The United State Supreme Court in *Meritor* determined that conduct in the workplace that creates a hostile environment for women is a form of discrimination. In effect, the harassment is the “tangible job action” that constitutes discrimination. The Supreme Court in *Faragher/Ellerth* apparently assumed that a manager could harass a subordinate employee

under circumstances in which that manager is not aided by his or her position as a manager, and formulated an affirmative defense for employers when there has been no “tangible” employment action *beyond sexual harassment*. To suggest that a manager’s actions toward a subordinate employee are ever divested of that manager’s authority over the subordinate employee’s job is simply unrealistic. To go further and permit an employer to escape liability even when it has been shown through the tangible job detriment *that is the sexual harassment itself* that the manager has abused his authority in violation of the employer’s policy is contrary to public policy. The purpose of the MHRA is to ensure employee freedom from discrimination, not to insulate employers from liability for discrimination of their agents.

Other state courts have declined to import the federal *Faragher/Ellerth* affirmative defense into their interpretation of state anti-discrimination statutes. *See, e.g., Myrick v. GTE Main Street Inc.*, 73 F. Supp.2d 94, 98 (D. Mass. 1999)(citing *College-Town v. Massachusetts Comm’n Against Discrim.*, 400 Mass. 156 (1987); *State Dept. of Health Services v. Superior Court of Sacramento County*, 31 Cal.4th 1026, 1042 (Cal. 2003)(refusing to import *Faragher/Ellerth* defense as to liability into state statute, but allowing “avoidable consequences” defense as to damages);

Polluck v. Wetterau Food Distribution Group, 11 S.W.3d 754, 767 (Miss. Ct. App. 200)(rejecting *Faragher/Ellerth* defenses and enforcing plain language of statute).

F. Plain Reading Of Definition Uniformly Applies Law In Context Of Employment, Public Accommodation, Public Services, Education and Housing.

In addition to thwarting the purposes of the MHRA, any importation of federal defenses into the legal standard for liability in employment cases will also impact the standards for liability in cases involving public accommodation, public services, education and housing. Since the legislative amendment eliminating the phrase “and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action” the definition has been uniform for sexual harassment in the areas of employment, public accommodation, public services, education and housing.

Courts have struggled with this definition in the past, and have had particular difficulty with the question of whether to import the former “know or should have known” standard, which related only to cases of employment, into the definition of sexual harassment in education, public accommodation, public services and housing. *See, e.g., Longen v. Federal Express Corp.*,

113 F. Supp.2d 1367, 1377 (D. Minn. 2000)(sexual harassment in public accommodation case in which court notes lack of guidance on issue).

There is no legal support for manipulating the MHRA so that different standards apply in different situations. Importantly, the MHRA plainly designates one, and only one, standard for sexual harassment as it relates to: employment, public accommodations or public services, education, or housing. *See*, Minn. Stat. 363A.01 Subd. 43. If the Court were to affirm the Court of Appeals decision in this matter, it would require a tortured reading of the statute to mold it to some, but not all, federal cases so that a particular type of entity would receive a particularized liability standard, less stringent for employers than for other types of entities. We urge the Court to avoid such an outcome.

Importing the *Faragher/Ellerth* affirmative defense into other areas of the law causes obvious public policy concerns. For example, in the areas of public accommodation and public services, members of the public are typically served in these areas on one occasion, or on a few occasions, by frequenting a restaurant, staying in a hotel, visiting a theater, utilizing a public service, etc. In this context, members of the public have no real opportunity to utilize a complaint procedure or other process. As such, the *Faragher/Ellerth* defenses would act purely as an escape from liability for

these types of entities in complete disregard for the public purposes served by the MHRA.

II. THE COURT OF APPEALS ERRONEOUSLY APPLIED THE FORESEEABILITY STANDARD FOR RESPONDEAT SUPERIOR LIABILITY.

The Court of Appeals erroneously affirmed dismissal of Frieler's assault/battery claims which were based on respondeat superior liability. The court reasoned that liability would not attach because appellant failed to demonstrate that "sexual harassment is a well-known hazard in her particular workplace." This is an artificial barrier that ignores the realities of the workplace. "It is by now well recognized that hostile environment sexual harassment by supervisors (and, for that matter, co-employees) is a persistent problem in the workplace. See *Lindemann & Kadue* 4-5 (discussing studies showing prevalence of sexual harassment); *Ellerth*, 123 F.3d, at 511 (Posner, C.J. concurring and dissenting)("[E]veryone knows by now that sexual harassment is a common problem in the American workplace").

An employer is vicariously liable for its employee's intentional acts committed within the scope of employment. See, *Lange v. National Biscuit Company*, 211 N.W.2d 783, 786 (Minn. 1973). Liability is based on whether the tortious conduct is related to the employee's duties and occurs

within work-related limits of time and place. *Id.* Foreseeability is an important consideration in evaluating whether the questionable conduct is related to an employee's duties. *See, Hagen v. Burmeister & Associates, Inc.*, 633 N.W.2d 497, 504 (Minn. 2001); *Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905 (Minn. 1999); *P.L. v. Aubert*, 545 N.W.2d 666 (Minn. 1996); *Marston v. Minneapolis Clinic of Psychiatry and Neurology*, 329 N.W.2d 306 (Minn. 1982); *Lange v. National Biscuit Company*, 211 N.W.2d 783 (Minn. 1973); *Boykin v. Perkins Family Restaurant*, 2002 WL 4548 (Minn. Ct. App. 2002). This stems from the notion that respondeat superior imposes liability on an employer who is not directly at fault for the tortious conduct. Thus, "an employer, knowing that he is liable for the torts of his servants, can and should consider this liability as a cost of his business." *Lange*, 211 N.W.2d at 785. A plaintiff need not show that the exact tortious conduct was foreseeable, but that "'an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.'" *Fahrendorff*, 597 N.W.2d at 912. Foreseeability is a question of fact. *Id.*

Here, there is no question the assault and battery occurred during work-related limits of time and place. All four occurrences happened at work during work hours. The real question is whether the tortious conduct

was related to the Janiak's duties. In other words, was the conduct "foreseeable, related to, and connected with acts otherwise within the scope of his employment." *Marston*, 329 N.W.2d 311.

Janiak would have been in no position to assault Frieler but for his position as her prospective supervisor. Moreover, he exploited his nascent power and authority over Frieler by reminding her that she would have to get used to his harassing conduct because he was going to be her boss. He told her that she would have to learn "to take it" and "to handle him." Janiak understood the leverage he held over Frieler because he knew she wanted the full-time job in his department. On at least two occasions, Janiak used the pretense of discussing job-related matters to get Frieler alone to assault her.

All of this evidence demonstrates Janiak used his authority and "legitimate business matters" to affect his criminal intent toward Frieler. Thus, his assaults on Frieler were "related to and connected with acts otherwise within the scope of his employment." *Marston*, 329 N.W.2d 311.

The only remaining question in determining whether Janiak acted within the scope of his employment is whether his conduct was foreseeable. The court of appeals erroneously ruled that it was not.

Although Frieler points to CMG's reporting procedures for sexual harassment and the company's sexual-harassment

training for new employees as indicators that sexual harassment is a foreseeable risk of CMG's business, she provides no expert testimony or affidavits establishing that sexual harassment is an industry hazard in warehouse work or, more specifically, in collation work. Because her mere assertions failed to establish that sexual harassment is a well-known hazard in her particular workplace, summary judgment was properly granted as to the tort claims.

Ct. App. decision at p. 7. The Court acknowledged that respondent had a sexual harassment policy in place when the tortious conduct occurred, but it seemed to ignore the import of this fact. It is reasonable to infer that respondent implemented a sexual harassment policy to prevent and redress harassment in the workplace. Respondent need not envision the precise contours of the harassment, but only that harassment, in its myriad forms, is a foreseeable risk of doing business. *See, Fahrendorff*, 597 N.W.2d at 912. The inexorable fact that sexual harassment is an unfortunate and foreseeable part of the workplace is precisely why employers implement sexual harassment policies. It thus belies logic to conclude, as the court did here, that despite respondent's sexual harassment policy, Janiak's harassing conduct was not foreseeable.

This case is closely aligned with the decision in *Boykin v. Perkins Family Restaurant*, 2002 WL 4548 (Minn. Ct. App. 2002). There, the harasser's conduct included grabbing the plaintiff's buttocks, unsnapping her bra, and touching her genitals. *Id.* at *4. In reversing summary judgment,

the court of appeals acknowledged that Perkins sexual harassment policy presented a triable issue on the question of whether the harasser's tortious conduct was foreseeable.

Knowledge that sexual harassment is a foreseeable risk of Perkins's business is evidenced by the fact that each new Perkins employee is required to go through an orientation procedure that includes reading a handbook that discusses Perkins's sexual-harassment policies, giving new employees an alert-line packet that includes a phone number for employees to report any complaints or concerns, and having new employees watch a video that discusses Perkins's sexual-harassment policies.... This evidence raises genuine issues of material fact as to Perkins's foreseeability of Sehm's sexual touching, making summary judgment to Perkins inappropriate on Boykin's claims that Perkins is vicariously liable for Sehm's battery.

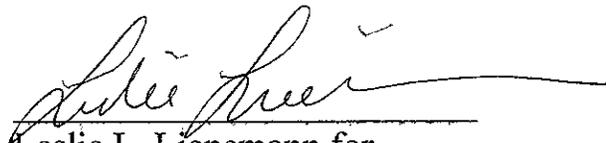
Id. This Court must appreciate the practical realities of the workplace.

Sexual harassment is an unwanted yet common experience on the job. "It is by now well recognized that hostile environment sexual harassment ... is a persistent problem in the workplace. *See Lindemann & Kadue* 4-5 (discussing studies showing prevalence of sexual harassment); *Ellerth*, 123 F.3d, at 511 (Posner, C.J. concurring and dissenting)("[E]veryone knows by now that sexual harassment is a common problem in the American workplace"). It takes many forms, some of which constitute assault and battery. The Court of Appeals erred when it expanded the need for an expert affidavit and/or testimony in sexual harassment cases alleging tortious conduct in an employment context. This Court should reverse that decision.

CONCLUSION

The Court should preserve the uniformity, clarity, and integrity of Minnesota's statutory scheme by reading the MHRA to mean exactly what it says and should reaffirm Minnesota's long-standing and consistent adherence to traditional principles of liability. The Court should refuse to read into the MHRA language that is not there and should likewise refuse to add to the traditional common law element of foreseeability the added burden suggested by the Court of Appeals.

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CERTIFICATION

I certify that this brief conforms to Rule 132.01 of the Minnesota Rules of Appellate Procedure for a brief produced using proportional serif font, 14-point or larger. The length of this brief is 5,022 words. This brief was prepared using Microsoft Word.

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