

**STATE OF MINNESOTA
IN COURT OF APPEALS
A-07-0360**

Michelle Kunza,

Appellant,

v.

St. Mary's Regional Health
Center, and Dr. Wade
Wernecke, individually and
as an employee of St. Mary's
Regional Health Center,

Respondents.

**RESPONDENT DR. WADE WERNECKE'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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STATEMENT OF THE ISSUES

Dr. Wernecke respectfully incorporates herein the Legal Issue set forth on page 1 of Respondent St. Mary's Brief dated May 11, 2007. Dr. Wernecke's Notice of Review filed on February 28, 2007, raises the following issues:

- I. Whether the trial court, in denying Dr. Wernecke's motion for attorneys' fees as a prevailing party under Minn. Stat. § 363A.33, subd. 7 of the Minnesota Human Rights Act, inappropriately applied the legal standard set forth in *Sigurdson v. Isanti County*, 386 N.W.2d 715, 722 (Minn. 1986) because that standard should only apply to defendants who are employers of the plaintiff.
 - A. The trial court applied the *Sigurdson* standard and denied Dr. Wernecke's fee motion thereunder.
 - B. Apposite Cases: This appears to be an issue of first impression in this state.
- II. Whether, even under the *Sigurdson* standard, the trial court erred in denying Dr. Wernecke's motion for attorneys' fees because Appellant's Minnesota Human Rights Act claims were frivolous, unreasonable or were without foundation.
 - A. The trial court denied Dr. Wernecke's motion, holding that "the resources of the parties are such" that an award of fees under *Sigurdson* would "controvert the public policy behind the MHRA."
 - B. Apposite Cases: *E.g., Obst v. Microtron, Inc.*, 588 N.W.2d 550 (Minn. Ct. App. 1999); *Waag v. Thomas Pontiac, Buick, GMC Inc.*, 930 F. Supp. 393, 407-08 (D. Minn. 1996); *Roark v. City of Hazen, Ark.*, 189 F.3d 758, 761 (8th Cir. 1999); *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 994 (8th Cir. 2003).

STATEMENT OF THE CASE & FACTS

In the interest of avoiding repetition, Respondent Dr. Wade Wernecke (“Dr. Wernecke”) respectfully incorporates herein and joins in the entire Brief and Appendix submitted by Respondent St. Mary’s Regional Health Center (“St. Mary’s”) dated May 11, 2007. For the reasons set forth in St. Mary’s brief, Dr. Wernecke requests that the trial court’s summary judgment in his favor be affirmed in its entirety. In the alternative, Dr. Wernecke requests that this matter be remanded to the trial court for consideration and determination on the alternative bases submitted for summary judgment on which the court made no ruling. Dr. Wernecke’s brief will focus on the issues relating to his Notice of Review dated February 28, 2007, in which he requests reversal of the trial court’s denial of his motion for attorneys’ fees as a prevailing party pursuant to Section 363A.33, subd. 7 of the Minnesota Human Rights Act (the “MHRA”).

Appellant asserted MHRA claims against Dr. Wernecke for discrimination, harassment and reprisal in this action. Pursuant to black letter law, however, there is no individual liability under the MHRA. Employees who feel they are the victims of discrimination or sexual harassment (and have sufficient grounds) may pursue MHRA claims against their employers and/or individuals who “aid and abet” such discrimination pursuant to Minn. Stat. § 363A.14. The MHRA, however, does not allow the imposition of direct liability against an individual who is not an employer and a person cannot “aid and abet” oneself. Appellant ignored this law, however, and initiated direct claims under the MHRA against Dr. Wernecke. Although Appellant’s MHRA claims were also

entitled “aiding and abetting,” the allegations and Appellant’s deposition testimony made clear that Dr. Wernecke was the alleged harasser in the case and did not “aid and abet” anyone. In addition, Appellant presented no evidence of any adverse employment action which resulted from any of Dr. Wernecke’s alleged actions, which is a fundamental and fatal flaw in her claim for reprisal under the MHRA.

Forced to defend against Appellant’s baseless MHRA claims, Dr. Wernecke’s counsel spent a large amount of time in discovery dealing with the allegations of harassment which were not directly relevant to any of the other claims against him. Appellant chose to wait until a footnote (footnote no. 1), placed in the introduction of her brief which was filed in opposition to the Respondents’ motions for summary judgment, to dismiss her MHRA claims against Dr. Wernecke. *See Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motions for Summary Judgment*, p. 1.

After the trial court granted summary judgment to Dr. Wernecke on the sole remaining claim against him (for battery) due to the Appellant’s breach of the parties’ tolling agreement, Dr. Wernecke filed a notice of motion and motion, brief and supporting affidavit dated September 25, 2006 for attorneys’ fees as a prevailing party pursuant to Section 363A.33, subd. 7 of the MHRA. The motion was heard before the trial court on January 17, 2007, and a copy of the transcript appears at pages 1-40 of Dr. Wernecke’s Appendix. Respondent Dr. Wade Wernecke’s Appendix, 1-40 (hereafter “Wernecke Appdx.”). Dr. Wernecke argued that because he was an individual, co-worker of Appellant’s as opposed to her employer, the higher standard for granting attorneys’ fees to prevailing defendants under the MHRA set forth in *Sigurdson v. Isanti*

County, 386 N.W.2d 715, 722 (Minn. 1986) is inapplicable to him. Dr. Wernecke Appdx., 18. Dr. Wernecke also argued, *inter alia*, that even if the *Sigurdson* standard applied to him, it was met because there was no foundation for Appellant's MHRA claims against him and they were otherwise frivolous or unreasonable as evidenced by her dismissal of the claims in a footnote in her response to Dr. Wernecke's motion for summary judgment.

Nevertheless, the trial court denied Dr. Wernecke's motion for fees, holding that he was not entitled to them under the *Sigurdson* standard. Dr. Wernecke Appdx. 42-48. The relevant portion of the trial court's memorandum supporting its order denying Dr. Wernecke's request for attorneys' fees stated as follows:

Nevertheless, the court is now denying Dr. Wernecke's request for attorney fees. In this case the MHRA claims of the Plaintiff were a part of a much larger action that included several causes of action. Even though the MHRA claims were not voluntarily dismissed until immediately before the summary judgment hearing, any financial burden on Defendant Wernecke, relating to the MHRA claims, was mitigated by the fact that these claims were a part of the larger overall case, all of which was somewhat tied together. Additionally, the resources of the parties are such that to award attorney fees under the circumstances would controvert the public policy behind the MHRA. See, *Sigurdson v. Isanti County*, 386 N.W.2d 715, 722 (Minn. 1986) (discussing public policy of MHRA)).

Dr. Wernecke Appdx. 47-48. Dr. Wernecke filed his Notice of Review from this order of the trial court on February 28, 2007.

ARGUMENT

I. INTRODUCTION.

Again, Dr. Wernecke joins and incorporates the entire Statement of the Case, Statement of Facts, Standard of Review and Argument sections contained at pages 4-47 of Respondent St. Mary's Brief dated May 11, 2007 and joins in its request that the trial court's summary judgment, based on the Appellant's breach of the parties' tolling agreement, be affirmed in its entirety. To supplement the list of "Reserved, Alternative Theories" presented for summary judgment upon which the trial court did not rule contained at pages 16-17 of St. Mary's Brief, however, Dr. Wernecke points out that on the sole remaining count against him for battery (Count VII of the Amended Complaint), which Plaintiff refused to dismiss, he also argued that summary judgment was mandated pursuant to the exclusivity provision of the Minnesota Workers Compensation Act (Minn. Stat. § 176.031). Therefore, should this Court reverse the summary judgment entered in this matter, then Dr. Wernecke respectfully requests that the case be remanded to the trial court for a decision on this Reserved, Alternative Theory pursuant to *Mattson v. Underwriters of Lloyds of London*, 414 N.W.2d 717, 721 (Minn. 1987).

Also, to supplement St. Mary's argument on pages 26-30 of its brief relating to the fact that the parties' tolling agreement prohibited Appellant from suing or filing a charge during the 10-day cancellation period, it is black letter law in Minnesota that courts must not construe contracts in a manner which would lead to an absurd result. *See, e.g., Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998). To "prevent and absurd or unreasonable result, the word 'and,' used in a contract may be

read ‘or,’ or vice versa.” *People of Colorado v. Great Western Sugar Co.*, 29 F.2d 810, 815 (8th Cir. 1928) (quoting *Manson v. Dayton*, 153 F. 258, 269 (8th Cir. 1907)) (the *Great Western* and *Manson* courts replaced the term ‘and’ with ‘or’ in construing contracts to avoid absurd results).

The remainder of Dr. Wernecke’s argument in this brief relates solely to the issues relating to the trial court’s denial of his motion for attorneys’ fees pursuant to the MHRA.

II. STANDARD OF REVIEW.

The general standard of review on a trial court’s decision whether or not the facts of a case warrant an award of attorneys’ fees under the MHRA is abuse of discretion. *See, e.g., Bilal v. Northwest Airlines, Inc.*, 537 N.W.2d 614, 620 (Minn. 1995). The issue of whether the trial court applied the correct legal standard in making its determination, however, should be reviewed *de novo*. *See, e.g., Ayers v. Ayers*, 508 N.W.2d 515, 518 (Minn. 1993) (stating that “[d]etermining the proper standard to be applied presents a question of law”); *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003). No deference is given to a lower court on questions of law. *Frost-Benco Elec. Ass’n v. Minnesota Pub. Utils. Comm’n*, 358 N.W.2d 639, 642 (Minn. 1984).

III. THE HIGHER THRESHOLD FOR AWARDING ATTORNEYS’ FEES TO DEFENDANT-EMPLOYERS WHO PREVAIL ON MHRA CLAIMS UNDER SIGURDSON DOES NOT APPLY TO COWORKERS LIKE DR. WERNECKE.

The trial court erred as a matter of law by applying the standard set forth in *Sigurdson v. Isanti County*, 386 N.W.2d 715, 722 (Minn. 1986) to Dr. Wernecke, who was not the Appellant’s employer, in denying his motion for attorneys’ fees as a prevailing party under the MHRA. This section of Dr. Wernecke’s brief first sets out the

Sigurdson standard, the policy rationale behind it, and why that policy does not support application of the standard to non-employer defendants. Next, the legislative history of the MHRA attorney fee shifting statute is discussed, which further demonstrates that the legislative intent behind the statute militates against applying the *Sigurdson* standard to Dr. Wernecke. Proposals for the correct standard to be applied to prevailing non-employer defendants like Dr. Wernecke are then presented. Finally, the reasons for reversal or remand of the trial court's order denying Dr. Wernecke's motion, under the argued standards, are set forth.

A. The Standard For Awarding Prevailing Employer-Defendants Fees Under the Minnesota Human Rights Act.

The MHRA provides, in relevant part, that “[i]n any action or proceeding brought pursuant to this section the court, in its discretion, may allow the prevailing party a reasonable attorney’s fee as part of the costs.” Minn. Stat. § 363A.33, subd. 7. It is silent as to whether the same standard should be applied to prevailing plaintiffs and defendants. Regardless, when applied to prevailing defendant-employers, the MHRA has been construed to permit the recovery of attorney’s fees when the employee’s “action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.” *Sigurdson v. Isanti County*, 386 N.W.2d at 722 (emphasis added); *Bilal v. Northwest Airlines, Inc.*, 537 N.W.2d at 620 (citations omitted). A finding of bad faith is not a prerequisite. *Id.* Rather, an award of fees is appropriate under this standard if a plaintiff either 1) commenced an action that was frivolous, unreasonable or without foundation; or 2) continued to litigate the case after it clearly became so. *Christiansburg*

Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).¹ The purpose of the fee shifting provision is to provide “a potentially effective device for protecting defendants from the burdens of meritless civil rights claims.” *Id.* at 420; *Kremer v. Chemical Construction Corp.*, 477 F. Supp. 587, 594 (S.D.N.Y. 1979), *aff’d*, 623 F.2d 786 (2nd Cir. 1980), *aff’d*, 456 U.S. 461(1982), *reh’g denied*, 458 U.S. 1133, (1982).

Contrary to the corporate and governmental employer-defendants at issue in *Christiansburg, Sigurdson and Bilal*, Dr. Wernecke was an individual, coworker of Appellant’s. He did not employ Appellant and, although he almost certainly earns a higher salary as a doctor, he is still an individual employee of relatively limited means who must support his wife and two children who live in Fargo, North Dakota. In *Sigurdson*, our supreme court held that the defendant-employer in that case was not entitled to attorneys’ fees as a prevailing party under the MHRA without a showing of frivolousness, unreasonableness or lack of foundation, as opposed to a prevailing plaintiff where such a showing does not need to be made, due to two policy considerations:

- (1) One purpose of the MHRA “was to encourage victims of discrimination to bring suit . . . and to make legal counsel available in these cases. Making awards of attorneys’ fees equally available to plaintiffs and defendants would likely produce the reverse of this intended effect. Victims with legitimate cases would

¹ The Minnesota Supreme Court has made it clear that “[b]ecause of the substantial similarities in the language and purpose of the two statutes, in construing the Minnesota Human Rights Act this court has applied principles developed in the adjudication of claims arising under Title VII” *Hubbard v. United Press Int’l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983). Indeed, Title VII has a provision concerning attorney’s fees which is almost identical to Minn. Stat. § 363A.33, subd. 7. *See* 42 U.S.C. § 2000e-5(k).

be discouraged from filing suit, fearing that if they did not prevail, they might be liable for substantial attorney fees incurred by a defendant.” And

- (2) “Moreover, the typically substantial difference in resources between plaintiffs and defendants in employment discrimination cases supports the conclusion that awards of attorney fees should not be available to prevailing defendants on the same basis as to prevailing plaintiffs.”

Sigurdson, 386 N.W.2d at 722-23 (citations omitted). The *Christianburg* decision, upon which the *Sigurdson* Court relied, also discussed expressions of legislative intent that the purpose of Title VII (like the MHRA) is to “make it easier for a plaintiff of limited means to bring a meritorious suit” while also deterring “the bringing of lawsuits without foundation.” 434 U.S. at 420 (citations omitted) (emphasis added). The *Sigurdson* Court stressed that the most important of these policy considerations, however, is the typically substantial difference in resources between plaintiffs and defendants. *Sigurdson*, 386 N.W.2d at 722-23 (“Moreover, the typically substantial difference in resources between plaintiffs and defendants . . . supports the conclusion [for different standards for the award of fees to prevailing plaintiffs and defendants]”) (emphasis added)).

The only issue before the court in *Sigurdson* was whether the plaintiff’s former employer – a county – was entitled to an award of fees as a prevailing party: not a defendant who was simply an individual, coworker of the plaintiff’s. 386 N.W.2d at 722. The same is true in *Bilal*, where the court dealt solely with the issue of whether the defendant-employer, Northwest Airlines, was entitled to an award of fees. 537 N.W.2d at 619-20 (holding that Northwest Airlines could have been awarded its fees, but refusing to

reverse trial court on abuse of discretion standard). The main public policy supporting the *Sigurdson* Court's decision to impose a higher threshold for awarding prevailing defendants attorneys' fees under the MHRA (typical difference in resources between plaintiffs and defendants) simply does not apply in many cases where the defendant in question is not a big corporation or the plaintiff's employer, but rather an individual coworker. Counsel for Dr. Wernecke has not found any case where the *Sigurdson* standard has been applied to deny attorneys fees to a prevailing defendant who was not the plaintiff's employer in a MHRA case. Accordingly, the issue of whether the *Sigurdson* standard should apply to non-employer defendants appears to be one of first impression in this state.

B. The Legislative History Of Section 363A.33 Supports The Same Standard For Awarding Fees To Prevailing, Individual Defendants.

The legislative history of Section 363A.33 also does not support application of the higher *Sigurdson* standard to a prevailing defendant who is not the plaintiff's employer. There have been two major revisions to Section 363A.33, subd. 7 over the past 30 years. The original language of the provision in 1973 read as follows:

In any action or proceeding brought pursuant to this section the court, in its discretion, may allow the prevailing party, other than the department, a reasonable attorney's fee as part of the costs.

Minn. Laws 1973, c. 729, § 18. In 1988, the provision was amended to delete the exception for when the department represented the prevailing party:

In any action or proceeding brought pursuant to this section the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs.

Minn. Laws 1988, c. 660, § 13. Finally, in 1992, the provision was supplemented to create Section 363A.33, subd. 7 as it exists today:

In any action or proceeding brought pursuant to this section the court, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. In any case brought by the department, the court shall order a respondent who is determined to have engaged in an unfair discriminatory practice to reimburse the department and the attorney general for all appropriate litigation and court costs expended . . . unless payment of the costs would impose a financial hardship on the respondent.

Minn. Stat. § 363A.33, subd. 7. Therefore, in 1988, the Minnesota legislature removed the complete restriction upon the Minnesota Department of Human Rights' ("MDHR's") ability to obtain an award of attorneys' fees when it successfully sued on behalf of a plaintiff. Later, in 1992, the legislature qualified the Department's right to obtain fees when it prevails, prohibiting an award in cases where "payment of the costs would impose a financial hardship on the respondent." The statute defines "costs" as including the costs of "services rendered by the attorney general [and] private attorneys if engaged by the department." Minn. Stat. § 363A.33, subd. 7.

Accordingly, the express language of Section 363A.33, subd. 7 evinces a clear legislative intent to prohibit an award of attorneys' fees to the government (the MDHR) in cases where it successfully proves a defendant (whether a corporate employer or an individual coworker) had violated the MHRA in cases where it would impose a financial hardship on the defendant. Common sense suggests that if the legislature intended to protect defendants found liable for violations of the MHRA from having to pay attorney's fees in cases of financial hardship, it would also intend to protect, at a minimum,

individual, non-employer defendants who prevail in such actions, regardless of whether they are brought by private plaintiffs or the MDHR.

C. The Standard To Be Applied To Individual, Non-Employer Defendants Like Dr. Wernecke.

Assuming the Court agrees that the higher standard for awarding fees to prevailing employer-defendants adopted in *Sigurdson* does not apply to individual, non-employer defendants, the next issue to address is what standard should apply.

Dr. Wernecke requests that the standard be the same as the one applied to prevailing plaintiffs. A plaintiff may be considered a “prevailing party” for attorney fees purposes under the MHRA if the plaintiff “succeed[s] on any significant issue in litigation which achieves some of the benefit [plaintiff] sought in bringing suit” and awarded fees unless special circumstances render such an award unjust. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (standard adopted under MHRA in *Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d 619, 628 (Minn. 1988)). The same standard should apply to individual, co-workers defendants like Dr. Wernecke, who typically do not have the substantially greater resources than plaintiffs, unlike defendant employers. Accordingly, the standard the trial court should have applied in this case is whether Dr. Wernecke succeeded on any significant issue in the litigation which achieved some benefit to him, and whether an award of his fees would otherwise have been unjust due to special circumstances. *See Anderson v. Hunter, Keith, Marshall & Co., Inc.*, 417 N.W.2d at 628 (citing *Hensley*, 461 U.S. at 433.).

In the alternative, given the *Sigurdson* Court's and the Minnesota legislature's emphasis on the disparate resources between plaintiffs and defendants in MHRA cases, this Court should adopt a new, separate standard for the award of attorneys' fees to prevailing defendants who are not employers in MHRA cases. At a minimum, the standard should require trial courts to examine the resources available to the defendant in question in comparison with the amount of attorneys' fees and costs incurred in connection with obtaining the result. Regardless of the resources available to a plaintiff, this analysis should simply entail an examination of the prevailing defendant's income and other financial means in comparison with the amount of fees and costs expended in achieving success on the MHRA claims.

D. Application Of Either Potential Standard For Awarding Fees To Prevailing, Individual Defendants Requires Reversal Or Remand Of The Trial Court's Order Denying Dr. Wernecke's Fee Motion.

If the Court adopts the same standard that is applied to prevailing plaintiffs, Dr. Wernecke is clearly entitled to an award of his fees. After nearly two years of discovery including nearly 20 depositions and the preparation and filing of a lengthy summary judgment motion, Appellant dismissed her MHRA claims against Dr. Wernecke in a footnote of her brief opposing summary judgment. Appellant's decision had nothing to do with the tolling agreement issue: she dismissed her MHRA claims against Dr. Wernecke months before the trial court issued its summary judgment order. In essence, after forcing Dr. Wernecke and his counsel to defend against her MHRA claims and research and prepare a summary judgment motion, and having the benefit thereof, Appellant said "sorry, on second thought, never mind – I guess I will lose

on the MHRA claims anyway, so I will just dismiss them.” Any way one looks at it, Plaintiff’s MHRA claims against Dr. Wernecke should never have been pursued in the first case and he had to defend against them in order to prove the point. Dr. Wernecke achieved full victory on Plaintiff’s MHRA claims and therefore succeeded on a significant issue in the litigation which gained some benefit to him. Therefore, the trial court’s denial of Dr. Wernecke’s motion for attorneys’ fees should be reversed.

If this Court determines that a new standard involving an analysis of the prevailing, individual defendant’s available resources in comparison with the amount of fees and costs incurred is required, then this matter should be remanded to the trial court for further consideration. The trial court made no inquiry into Dr. Wernecke’s financial resources in comparison with the fees which were incurred on his behalf.

IV. EVEN IF THE *SIGURDSON* STANDARD APPLIES TO DR. WERNECKE, THE TRIAL COURT ERRED IN DENYING HIS REQUEST FOR ATTORNEYS’ FEES UNDER THE MHRA.

Even if this Court holds that the *Sigurdson* requirement that a plaintiff’s MHRA claims be “frivolous, unreasonable or without foundation, even though not brought in subjective bad faith” applies to non-employer defendants like Dr. Wernecke, reversal of the trial court’s decision is still required. The MHRA claims in this case failed to state any claim upon which Plaintiff could reasonably have hoped to recover against Dr. Wernecke. In *Bilal*, 537 N.W.2d at 620, the Minnesota Supreme Court held that the defendant employer, Northwest Airlines, could have been awarded its attorneys’ fees when the spouse of an employee pursued a derivative claim under the MHRA for alleged discrimination against the employee because there was no foundation for such a claim.

Similarly, in this case, Plaintiff's MHRA claims against Dr. Wernecke were unreasonable and without foundation. Her eleventh-hour dismissal of the claims in a footnote of her memorandum opposing summary judgment, without any explanation, is strong evidence of their lack of foundation. As a prevailing party, Dr. Wernecke should be awarded his attorneys' fees incurred in defense of Plaintiff's baseless MHRA claims pursuant to Minn. Stat. § 363A.33, subd. 7, even under the *Sigurdson* standard.

Dr. Wernecke is entitled to an award of his fees because it was clear from the outset that there is no individual liability under the MHRA. In addition, if not clear from the outset, it became abundantly clear during the litigation that Dr. Wernecke (and Respondent St. Mary's) had not taken any adverse employment action against the Plaintiff: a required element of the reprisal claim. Finally, Dr. Wernecke and St. Mary's put Plaintiff on notice, as early as October of 2004, that she had violated the parties' tolling agreement by serving her claims.

A. The Appellant's Claims Of Individual Liability Against Dr. Wernecke Under The MHRA Were Unreasonable And Without Foundation.

The paramount mistake which Appellant made in this case was the assertion of factually and legally baseless MHRA claims against Dr. Wernecke. At the outset, each of Appellant's MHRA claims against Dr. Wernecke, including Count I (sexual discrimination, sexual harassment and aiding and abetting of same) and Count II (reprisal and aiding and abetting of same) were baseless because there is no direct, individual liability for violations of the MHRA's provisions. It has been undisputed throughout this action that Dr. Wernecke was not the Appellant's employer. Direct liability cannot be

imposed upon individuals, who are not employers, under the MHRA. *Waag v. Thomas Pontiac, Buick, GMC Inc.*, 930 F. Supp. 393, 407-08 (D. Minn. 1996) (applying the MHRA); *McKenzie v. Rider Bennett, LLP*, 2006 WL 839498, *3 (D. Minn. 2006) (Dr. Wernecke Appdx. 49-57). *See also Obst v. Microtron, Inc.*, 588 N.W.2d 550, 553-54 (Minn. Ct. App. 1999) (holding no individual liability under Title VII or the Minnesota Whistleblower Act and that they only impose liability upon “employer[s]”) (*aff’d on other grounds*, 614 N.W.2d 196 (Minn. 2000)); *Roark v. City of Hazen, Ark.*, 189 F.3d 758, 761 (8th Cir. 1999) (holding no individual liability under discrimination provision of Title VII); *EEOC v. Rotary Corp.*, 297 F. Supp. 2d 643, 662 n. 10 (N.D.N.Y. 2003) (same); *Shape v. Barnes County, North Dakota*, 396 F. Supp. 2d 1067, 1078-79 (N.D. 2005) (no individual liability under North Dakota human rights law); *Foley v. Mobil Chemical Co.*, 647 N.Y.S.2d 374 (N.Y. Sup. 1996) (no individual liability under New York human rights law and aiding and abetting provision only applied outside of employment context).

In *Obst*, this Court held that individual non-employers cannot be held liable under the Minnesota Whistleblower Act (Minn. Stat. § 181.931, subd. 3). *Obst*, 588 N.W.2d at 553-54. As with Section 363A.03, subd. 16 of the MHRA, Section 181.931, subd. 3 of the Whistleblower Act defines an “employer” as “any person having one or more employees” *Id.* at 553. Because co-workers or supervisors do not employ other employees, the court held that there could be no individual liability under the act. *Id.* at 554 (citing *Lenhardt v. Basic Inst. of Tech., Inc.*, 55 F.3d 377, 380 (8th Cir. 1995) and

D.W. v. Radisson Plaza Hotel Rochester, 958 F. Supp. 1368, 1375 (D. Minn. 1997) (no individual liability under Title VII)).

Section 363A.14 of the MHRA does provide that it is an “unfair discriminatory practice for any person” to “[i]ntentionally aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter.” Minn. Stat. § 363A.14(1). This aiding and abetting provision of the MHRA, however, cannot be used to simply “re-cast” a claim for direct, personal liability against an individual. *Iyorbo v. Quest Int’l Food Flavors & Food Ingredients Company*, 2003 WL 22999547 at *3 (D. Minn. 2003) (Dr. Wernecke Appdx. 58-61).

In *Iyorbo*, the plaintiff sued her employer and an individual employee/supervisor for sexual harassment, gender discrimination, and aiding and abetting of the same. The plaintiff’s complaint made clear, however, that the individual defendant was personally responsible for “much of the alleged discriminatory and harassing conduct.” *Id.* Recognizing that co-workers and supervisors cannot be held directly liable for violations of the MHRA, the court granted the individual defendant’s motion to dismiss pursuant to Federal Rule of Civil Procedure 12. *Id.* Although the plaintiff alleged that the individual defendant had aided and abetted the MHRA violations, the court recognized that a person “cannot aid and abet oneself” and dismissed the claims as merely an end-run attempt to impose direct liability. *Id.*

In the present case, Appellant alleged in her complaint that Dr. Wernecke purportedly engaged in the vast majority of the alleged conduct which she claimed constituted violations of the MHRA. Appellant made no allegations that Dr. Wernecke

engaged in any conduct to aid and abet alleged violations of the MHRA by anyone else. In fact, Appellant explicitly admitted during her deposition that Dr. Wernecke did not do anything to help or assist anyone else to harass, retaliate against, or do anything inappropriate toward her:

Q: I'm asking did Dr. Wernecke do or say anything to help or assist anybody else retaliate against you or harass you or do anything else inappropriate, that you feel is inappropriate towards you?

A: No, not that I'm aware of.

Deposition of Appellant p. 318, lines 10-15 (Dr. Wernecke Appdx. 62(a)). Accordingly, by asserting MHRA claims against Dr. Wernecke under the label of "aiding and abetting," Appellant was simply attempting to circumvent the law which prohibits the imposition of direct liability upon an individual under the MHRA. As recognized by the *Iyorbo* Court, and pursuant to common sense, Dr. Wernecke cannot aid and abet his own alleged conduct. In light of their dismissal of the claims in footnote 1 of Appellant's brief opposing the Respondents' summary judgment motion,² Appellant and her counsel apparently agreed.

The case law is replete with examples of cases where MHRA and/or federal discrimination statute defendants were awarded attorney's fees because the plaintiff had brought baseless claims of discrimination. *See, e.g., Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 994 (8th Cir. 2003) (awarding defendant-employer's attorneys' fees in

² It should be noted that pursuant to Rule 41.01(a) of the Minnesota Rules of Civil Procedure, Appellant technically lost the ability to unilaterally and voluntarily dismiss her claims against Dr. Wernecke once he served his Answer to the Complaint.

sexual harassment case under Title VII where plaintiff claimed employee grabbed her buttocks); *EEOC v. Hendrix College*, 53 F.3d 209, 211 (8th Cir. 1995) (awarding fees to defendant in Title VII case); *Grant v. Farnsworth*, 869 F.2d 1149, 1152 (8th Cir. 1989); *American Family Life Assurance Co. v. Teasdale*, 733 F.2d 559, 569 (8th Cir. 1984); *Hales v. Prudential Ins. Co.*, 2002 WL 31242213, *3 (D. Minn. 2002) (awarding fees to defendant employer on MHRA age discrimination claim) (Dr. Wernecke Appdx. 76-79); *Quiroga v. Hasbro, Inc.*, 934 F.2d 497, 503 (3rd Cir. 1991); *Lane v. Sotheby Parke Bernet, Inc.*, 758 F.2d 71, 72-73 (2nd Cir. 1985) (reversing district court's refusal to award attorneys' fees to defendant); *Charves v. The Western Union Telegraph Co.*, 711 F.2d 462, 464-65 (1st Cir. 1983); *Arnold v. Burger King Corp.*, 719 F.2d 63, 66 (4th Cir. 1982), *cert. denied*, 469 U.S. 826 (1984) (awarding fees to defendant in Title VII case); *Harris v. Group Health Assoc., Inc.*, 662 F.2d 869, 873-74 (D.C. Cir. 1981).³ Most significantly, courts have awarded attorneys' fees to individual non-employer defendants when plaintiffs, such as Appellant in this case, have chosen to sue them under the discrimination statutes despite the clear legal precedent precluding individual liability. *See, e.g., Stewart v. Town of Zolfo*, 1998 WL 776848, *5 (M.D. Fla. 1998) (plaintiff had sued individuals under Title VII and attorneys' fees awarded) (Dr. Wernecke Appdx. 67-

³ *See also, Wilson v. Continental Mfg. Co.*, 599 F. Supp. 284 (E.D. Mo. 1984); *Slaughter v. City of Maplewood*, 612 F. Supp. 374, 378 (E.D. Mo. 1985); *Neidhardt v. D.H. Holmes Co., Ltd.*, 583 F. Supp. 1271, 1277 (D.C. La. 1984); *Moss v. ITT Continental Baking Co.*, 468 F. Supp. 420, 421-22 (D.C. Va. 1979); *Goff v. Texas Instruments Inc.*, 429 F. Supp. 973 (N.D. Tex. 1977).

73); *Evans v. The Port Authority of New York and New Jersey*, 2003 WL 1842876, *1 (S.D.N.Y. 2003) (same) (Dr. Wernecke Appdx. 74-75).

Furthermore, Appellant cannot defend against an imposition of attorney's fees under the MHRA by placing the blame upon her attorneys. Although her decision to file and maintain her MHRA claims against Dr. Wernecke may indeed have been influenced by counsel's opinion, Appellant bears the ultimate responsibility for subjecting him to these pointless claims. As the Eleventh Circuit has explained, "[w]hether or not [the plaintiffs'] reliance on their attorneys' judgment was misplaced, they are legally responsible for the filing of these actions." *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 916 (11th Cir. 1982) (quoting *Prate v. Freedman*, 583 F.2d 42, 48 (2nd Cir. 1978)). Thus, "the perception that counsel was primarily at fault in filing or maintaining a frivolous, groundless, or unreasonable claim should play no role in the decision whether to assess attorney's fees against the plaintiff in a Title VII case." *Id.*

Dr. Wernecke is a prevailing party on Appellant's MHRA claims and is entitled to an award of his attorneys' fees under the *Sigurdson* standard. Appellant's MHRA claims against Dr. Wernecke lacked foundation or were unreasonable from the outset. Two recent decisions from the Eighth Circuit are instructive. In *Thompson v. Wal-Mart Stores, Inc.*, 472 F.3d 515 (8th Cir. 2006), Wal-Mart prevailed in a Section 1981 race discrimination claim brought by an employee. The district court, however, denied Wal-Mart's motion for attorneys' fees as a prevailing party despite the fact the plaintiff had failed to establish a *prima facie* case of race discrimination at trial. *Thompson*, 472 F.3d at 516-17. The Eighth Circuit vacated and remanded the issue to the district court for

further consideration. *Id.* Likewise, in *Flowers v. Jefferson Hospital*, 49 F.3d 391, 392 (8th Cir. 1995), the Eighth Circuit affirmed an award of attorneys' fees to the defendant hospital against the plaintiff employee on a Section 1981 race discrimination claim, holding the claim was without foundation despite the fact the defendant had lost its motion for summary judgment.

If Wal-Mart can be awarded its attorneys' fees, or Northwest Airlines in the *Bilal* case, or a hospital-employer who lost its motion for summary judgment but prevailed at trial as in *Flowers*, then an individual non-employer such as Dr. Wernecke who prevailed on the MHRA claims against him when the plaintiff dropped them in a footnote in her response to his summary judgment motion should be as well. The present case clearly falls within the rule that fees should be awarded under the MHRA to prevailing defendants when "the action was frivolous, unreasonable, or without foundation, or was brought in bad faith." *See Sigurdson, supra*. As one court has reasoned:

Under these circumstances, an award of attorney's fees to defendants is justified. Defendants have been forced to defend a lawsuit that was baseless from its inception. However, defendants are not the only victims in this case, because 'the entire public inevitably suffers when a vindictive plaintiff squanders limited judicial resources by prosecuting frivolous lawsuits.' . . . An award of attorney's fees in this case will further the purpose of deterring groundless lawsuits.

Wilson, 599 F. Supp. at 286 (quoting *American Family Life Assurance Co. v. Teasdale*, 733 F.2d at 570). Again, Appellant chose to wait to dismiss her MHRA claims against Dr. Wernecke until a footnote in her brief opposing his motion for summary judgment, served more than a year and a half after she commenced her lawsuit and after extensive

discovery. As a prevailing party, Dr. Wernecke is entitled to an award of his attorneys' fees pursuant to Section 363A.33, subd. 7 and the trial court abused its discretion in holding otherwise.

B. Appellant's Reprisal Claim Under The MHRA Against Dr. Wernecke Also Lacked Foundation.

Appellant's claim of reprisal under the MHRA against Dr. Wernecke was also baseless because there was no evidence that he took any adverse employment action against her. Appellant only claimed that Dr. Wernecke "stared" at her and drafted a letter to St. Mary's administration, which she admits she never heard about until after she resigned. Appellant Depo. 322-24; 589:2-7 (Dr. Wernecke Appdx. 63-66). The MHRA prohibits reprisal against any person because that person: "(1) opposed a practice forbidden under this chapter..." Minn. Stat. § 363A.15. The elements of a claim of retaliation require that the plaintiff show 1) participation in protected conduct, 2) an adverse employment action, and 3) a causal connection between the protected conduct and the adverse employment action. *Dietrich v. Canadian Pacific Ltd.*, 536 N.W.2d 319, 327 (Minn. 1995); *Jackson v. Missouri Pacific Railroad Co.*, 803 F.2d 401, 406-07 (8th Cir. 1986).⁴

⁴ See also, *Hunt v. Nebraska Public Power District*, 282 F.3d 1021, 1028 (8th Cir. 2002); *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1136 (8th Cir. 1999) (for cases on causal connection), *cert. denied*, 528 U.S. 818 (1999); *Cross v. Cleaver*, 142 F.3d 1059, 1071-72 (8th Cir. 1998); *Brekke v. City of Blackduck*, 984 F. Supp. 1209, 1230 (D. Minn. 1997); *Nelson v. J.C. Penney Co., Inc.*, 75 F.3d 343 (8th Cir. 1996), *cert. denied*, 519 U.S. 813 (1996); *Cram v. Lamson & Sessions Co.*, 49 F.3d 466 (8th Cir. 1995); *Winchester v. Galveston Yacht Basin*, 943 F. Supp. 776 (S.D. Tex. 1996), *aff'd* 119 F.3d 1 (5th Cir. 1997). As with other aspects of the MHRA, Minnesota Courts look to Federal Title VII precedent in construing the anti-retaliation provisions of the

Assuming Appellant participated in protected conduct, the undisputed evidence in this case established that she did not suffer any adverse employment action as a result. Appellant admitted that she did not see Dr. Wernecke's letter to St. Mary's, submitted after hearing of Appellant's allegations, until after she had resigned from her employment. Appellant Depo. 589:2-7 (Dr. Wernecke Appdx. 66). She further admitted that she has no evidence or information that Dr. Wernecke's letter, submitted to St. Mary's in response to her allegations, had any impact at all on her job. Appellant Depo. 589:8-11 (Dr. Wernecke Appdx. 66).

The only other allegations Appellant made against Dr. Wernecke in support of her retaliation claim was that he stared at her. Appellant Depo. pp. 322-24 (Dr. Wernecke Appdx. 63-65). This conduct is not even the type of severe or pervasive conduct which alters the conditions of employment that is required to support a sexual harassment claim, let alone one for retaliation. *See, e.g., Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001); *Goins v. West Group*, 635 N.W.2d 717, 725 (Minn. 2001); *Thompson v. Campbell*, 845 F. Supp. 665, 673 (D. Minn. 1994) (citing *Bersie v. Zycad Corp.*, 417 N.W.2d 288 (Minn. Ct. App. 1987)); *Grozdanich v. Leisure Hills Health Center, Inc.*, 25 F. Supp. 2d 953, 967 (D. Minn. 1998). *See also Oncale v. Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1000 (1998) ("Title VII is not a general civility code.").⁵ Again,

MHRA. *See Hubbard v. United Press International Inc.*, 330 N.W.2d 428, 444-45 (Minn. 1983); *Kletschka v. Abbott-Northwestern Hosp., Inc.*, 417 N.W.2d 752 (Minn. Ct. App. 1988).

⁵ *See also Scusa v. Nestle USA Co., Inc.*, 181 F.3d 958 (8th Cir. 1999); *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1158 (8th Cir. 1999) ("simple teasing, off-

however, Appellant offered no explanation, let alone any evidence, as to how this alleged conduct resulted in any adverse employment action. For these reasons, there was never any foundation for Appellant's retaliation claim under the MHRA or it was otherwise unreasonable and, as a prevailing party, Dr. Wernecke was entitled to an award of his attorneys' fees.

It is anticipated that Appellant will argue her voluntary dismissal of the MHRA claims against Dr. Wernecke in a footnote of her brief opposing summary judgment precludes an award of attorneys' fees. The U.S. District Court for Minnesota recently, and soundly rejected that argument. In *Hales v. Prudential Ins. Co. of America*, 2002 WL 31242213, *2-3 (D. Minn. 2002) (Dr. Wernecke Appdx. 77-78), the court awarded attorneys' fees to a prevailing defendant-employer in an age discrimination case. There,

hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999) (“[i]ncidental, occasional or merely playful sexual utterances will rarely poison the employee’s working conditions to the extent demanded for liability.”); *Hartsell v. Duplex Products, Inc.*, 123 F.3d 766, 772-73 (4th Cir. 1997); *Minor v. Ivy Tech State College*, 174 F.3d 855, 858 (7th Cir. 1999) (“It is not enough that a supervisor or co-worker fails to treat a female employee with sensitivity, tact, and delicacy, uses coarse language, or is a boor. Such failures are too commonplace in today’s America, regardless of the sex of the employee, to be classified as discriminatory.”); *Gleason v. Mesirov Fin., Inc.*, 118 F.3d 1134, 1144-45 (7th Cir. 1997) (referring to female customers as bitchy or dumb, ogling other female employees, flirting with female relatives, commenting on a co-worker’s anatomy, telling workers he spent a weekend at a nudist camp, telling plaintiff he dreamed of holding her hand insufficient to support Title VII sexually hostile work environment claim); *Galloway v. General Motors Serv. Parts Operation*, 78 F.3d 1164, 1168 (7th Cir. 1996) (male co-worker’s description of female employee as “sick bitch” for indefinite number of times over a four-year period, his statement to her “if you don’t want me, bitch, you won’t have a damn thing,” and his use of obscene gesture while stating “suck this, bitch,” did not create a hostile work environment in violation of Title VII).

although the parties had discussed the potential dismissal of several of the plaintiff's claims, the plaintiff did nothing to formally dismiss them: he simply abandoned them in his response after the defendant brief the claims in its motion for summary judgment. *Id.* at *2. The plaintiff argued that the defendant "should have realized" that he was abandoning those claims and "simply rolled the dice" by "not bothering to brief those claims" in the motion for summary judgment. *Id.* The court soundly rejected this argument, holding that the plaintiff's "failure to take any action at all-prior to Defendants briefing their motion for summary judgment-to eliminate the six claims it intended to abandon shows a reckless disregard for Plaintiff's counsel's responsibility to this Court and to opposing counsel." *Id.* See also *Thorner v. City of Fort Walton Beach*, 568 So. 2d 914, 919 (Fla. 1990) (in federal civil rights suit, defendants were prevailing parties when plaintiff voluntarily dismissed action). This argument also goes against the general rule that "when a plaintiff voluntarily dismisses an action, the defendant is the prevailing party within the meaning of statutory provisions awarding attorneys' fees to the "prevailing party." See *Alhambra Homeowners Assoc., Inc. v. Asad*, 943 So. 2d 316, 318 (Fla. Ct. App. 2006).

C. Dr. Wernecke Promptly And Repeatedly Warned Appellant That Her MHRA Claims Were Served In Violation Of The Parties' Tolling Agreement.

As set forth in Respondent St. Mary's May 11, 2007 Brief, Appellant's MHRA claims (and, indeed, her entire Complaint) were served in breach of the parties' tolling agreement and, therefore, lacked foundation or were otherwise unreasonable for this reason as well. Dr. Wernecke gave Appellant ample warning of her breach. Affirmative

Defense No. 15 contained in Dr. Wernecke's Answer to the First Amended Complaint, served in October of 2004, stated that Appellant's claims were served in "breach of contract." St. Mary's Appdx. 14. In addition, in response to an interrogatory from Appellant which asked for all facts supporting his affirmative defenses, Dr. Wernecke served the following answer in January of 2005:

Plaintiff, through her attorney, entered a tolling agreement with St. Mary's and Dr. Wernecke, through their attorneys, agreeing that she would not commence suit until at least ten days after the agreement was terminated. Plaintiff's complaint was served upon Dr. Wernecke's attorney less than ten days after the tolling agreement was terminated.

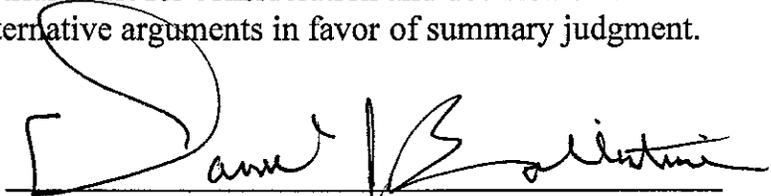
St. Mary's Appdx. 20 (answer to Interrogatory No. 12). Therefore, Appellant's MHRA claims were also baseless or unreasonable because they were served in clear breach of the parties' tolling agreement. Appellant simply ignored the warnings from Dr. Wernecke (and St. Mary's). Again, Dr. Wernecke is entitled to an award of his attorneys' fees as a prevailing party under the MHRA.

CONCLUSION

For the reasons and set forth in the Brief of Respondent St. Mary's Regional Health Center dated May 11, 2007, Respondent Dr. Wade Wernecke respectfully requests the following:

1. That the trial court's order for summary judgment be affirmed in its entirety;
2. Reversal of the trial court's order denying his motion for attorneys' fees pursuant to the MHRA;
3. An award of his attorneys' fees on appeal; and
4. Alternatively, if the summary judgment is reversed, that the case be remanded to the trial court for consideration and decision on the Respondents' alternative arguments in favor of summary judgment.

Dated: May 25, 2007.



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