MINNESOTA STATE LAW LIBRARY

NO. A08-206

State of Minnesota
In Supreme Court

Pamela Krueger,

Appellant,

Diamond Dust Contracting, LLC,

Plaintiff,

vs.

Zeman Construction Company,

Appellee/Respondent.

APPELLANT'S REPLY BRIEF AND SUPPLEMENTAL APPENDIX

MULLER, MULLER & ASSOC., PLLC
Andrew P. Muller (#32467X)
3109 West 50th Street, No. 362
Minneapolis, MN 55410-2102
(612) 604-5341

JOHN A. KLASSEN, PA
John A. Klassen (#24434X)
700 Lumber Exchange Building
10 South Fifth Street
Minneapolis, MN 55402
(612) 204-4533

Attorneys for Appellant

FAEGRE & BENSON, LLP
Michael Lapicola (#286783)
Daniel G. Prokott (#310256)
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Attorneys for Appellee/Respondent

(Additional Counsel listed on following page)

2008 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

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).

CULBERTH & LIENEMANN, LLP
Leslie L. Lienemann (#230194)
1050 UBS Plaza
444 Cedar Street
St. Paul, MN 55101
(651) 290-9300

DORENE R. SARNOSKI LAW OFFICE
Dorene R. Sarnoski (#212933)
333 Washington Avenue North
101 Union Place
Minneapolis, MN 55401
(612) 359-0050

Attorneys for Amicus Curiae
National Employment Lawyers Association, Minnesota Chapter

LORI SWANSON
Attorney General, State of Minnesota
ANGELA BEHRENS (#351076)
Assistant Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101-2127
(651) 296-3546

Attorneys for Amicus Curiae Commissioner, Minnesota Department of Human Rights

FABYANSKE, WESTRA, HART & THOMSON, P.A.
Dean B. Thomson (#141045)
Hannah R. Stein (#0345908)
800 LaSalle Avenue, Suite 1900
Minneapolis, MN 55402
(612) 359-7600

Attorneys for Amici Curiae
Associated General Contractors of Minnesota and Minnesota Chamber of Commerce

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

LEGAL ARGUMENT 2

A. The MHRA, Section 363A.17(3), Unambiguously Outlaws Discrimination by a Business Against a Person While Performing a Contract and Includes no Limitation Based on Contractual Privity 2

B. The MHRA, Section 363A.17(3) Outlaws Discrimination Against a Party to a Contract *or* Discrimination Against a Person Performing a Contract 4

C. This Court Should not Engraft Section 1981's Unique and Restrictive Requirements for Standing Upon the MHRA as a Basis to Deny Ms. Krueger's Right to Proceed Against Zeman 6

1. Textual Differences Between the MHRA and Section 1981 Require That This Court Analyze Standing Under the MHRA More Broadly Than Under Section 1981. 8

2. Adherence to the Broad Legislative Intent Behind the MHRA Requires That This Court Analyze Standing Under the Section 363A.17(3) More Broadly Than Under Section 1981 9

3. The Legislative History of the MHRA, Section 363A.17, Guides This Court to Analyze Standing Under the MHRA More Broadly Than Under Section 1981. .. 10

CONCLUSION 12

SUPPLEMENTAL APPENDIX ..... App. 1

TABLE OF AUTHORITIES

CASES

Amaral v. Saint Cloud Hosp., 598 N.W.2d 379 (Minn. 1999) 4

Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. Lodge 364 v. State by Balfour, 229 N.W.2d 3 (Minn. 1975) 10

Cummings v. Koehnen, 568 N.W.2d 418 (Minn. 1997) 7

Dominos Pizza, Inc. v. McDonald., 546 U.S. 470 (2006) 8, 9, 10

Kolton v. County of Anoka, 645 N.W.2d 403 (Minn. 2002) 7

Macedonia Church v. Lancaster Hotel Ltd., 560 F. Supp. 2d 175 (D. Conn. 2008) 7

Metro. Sports Facilities Comm'n v. County of Hennepin, 561 N.W.2d 513 (Minn. 1997) 2

Owens v. Federated Mut. Implement & Hardware Ins., 328 N.W.2d 162 (Minn. 1983) ... 4

Ray v. Miller Meester Advertising Inc., 684 N.W.2d 404 (Minn. 2004) 7

Reiter v. Kiffmeyer, 721 N.W.2d 90 (Minn. 2006) 2

State v. Breaux, 620 N.W.2d 326 (Minn. Ct. App. 2001) 11

State v. Rosow, 310 Minn. 399, 247 N.W.2d 398 (Minn. 1976) 4

STATUTES

42 U.S.C. § 1981(a)(b) 2, 7, 8

Minn. Stat. § 363A.02 10

Minn. Stat. § 363A.17 11

Minn. Stat. § 363A.17(3) ..... passim

Minn. Stat. § 363A.17, subd. 1 9

OTHER AUTHORITIES

Black's Law Dictionary, 1470 (6th ed. 1990) 5

Black's Law Dictionary, 293 (6th ed. 1990) 5

William E. Schmidt, *Minnesota Widens Rights Act to Counter High Court Move*, The *New York Times*, May 12, 1990 11

TREATISES

West Minnesota Practice Series, 17 Minn. Prac., Employment Law & Practice § 3.9 (2d ed), 2007 11

INTRODUCTION

This case calls upon the Court to interpret as a matter of first impression the scope of the "Business Discrimination" provision of the Minnesota Human Rights Act ("MHRA"), Minn. Stat. § 363A.17(3) ("Section 363A.17(3)"). Section 363A.17(3) makes it unlawful for a business to "discriminate in the basic terms, conditions or performance of the contract because of a person's... sex...." The issue upon appeal is whether the MHRA's prohibition against discrimination in the performance of a contract protects all individuals who suffer harm while performing a contract or whether the law is limited to protecting only actual signatories to the agreement.

In her primary brief, Ms. Krueger requested that this Court interpret Section 363A.17(3) according to its plain meaning: to hold that Section 363A.17(3) grants a cause of action to individuals who, because of unlawful discrimination during the performance of a contract, suffer an independent injury; thus, enabling the injured individual to recover against the business which was performing reciprocal obligations under the contract and which committed the unlawful discrimination while the contract was being performed. The rule of law urged by Ms. Krueger would recognize a right of recovery based upon whether the individual who was harmed was performing a contract at the time of the independent injury, not based upon whether she was an actual signatory to the agreement.

In response, Respondent Zeman Construction Company ("Zeman") has urged this Court to impose severe limitations upon the application and scope of Section 363A.17(3). Zeman would have this Court engraft a privity of contract requirement upon Section

363A.17(3); thus, a business that discriminates in the performance of a contract would be liable for the harm caused by such discrimination only if the victim were a signatory to the contract being performed. As detailed below, this Court should refuse to adopt the rule of law urged by Zeman for the following three reasons: First, the plain meaning of the text of Section 363A.17(3) contains no restriction based on privity of contract, and this Court should not re-write the statute to conform to Zeman's argument. Second, in writing Section 363A.17(3) the legislature stated alternate bases of liability and protection; to wit, the MHRA prohibits discrimination against a party to the contract *or* against a person performing the contract. Third, Zeman's argument depends upon this Court turning to interpretations of 42 U.S.C. § 1981(a)(b) ("Section 1981"); however, this Court should not rely upon Section 1981 as a basis to construe Section 363A.17(3) because the federal law is peculiarly limited by its language, history and intent, in a manner the MHRA is not.

LEGAL ARGUMENT

A. The MHRA, Section 363A.17(3), Unambiguously Outlaws Discrimination by a Business Against a Person While Performing a Contract and Includes no Limitation Based on Contractual Privity.

When interpreting a statute that is plain and unambiguous, this Court applies the statute according to its plain meaning and goes no further. *Reiter v. Kiffmeyer*, 721 N.W.2d 908, 910 (Minn. 2006). Moreover, this Court will not read into a statute a provision that the legislature has omitted, either purposefully or inadvertently. *Id.* at 911 (citing, *Metro. Sports Facilities Comm'n v. County of Hennepin*, 561 N.W.2d 513, 516-17 (Minn. 1997)).

In its response, Zeman has erroneously urged this Court to conclude that the plain language of Section 363A.17(3) protects only potential or actual parties to a contract and excludes all others. According to Zeman: "its plain text defines business injuries and grants a right of action to business parties... The cause of action it creates belongs to the people who seek the contract... who get the contract."[1] By recasting the pertinent statutory language, Zeman conveniently left out another group of people Section 363A.17(3) protects; namely, those who perform the contract. Although Zeman cited the "plain meaning rule" for its conclusion, Zeman failed to identify any actual text from Section 363A.17(3) that would compel this Court to recognize the limitations Zeman saw fit to write into the statute.

As first addressed in Ms. Krueger's primary brief, Section 363A.17(3) is unambiguous. It makes it unlawful "to discriminate in the... performance of the contract because of a person's...sex...." Zeman has not and cannot point to any textual support (nary a word nor a phrase) for its position that the term "person" as used in the statute is synonymous with only those "people who seek the contract... who get the contract." The text upon which Zeman would have this Court base its decision does not exist.

In assessing Ms. Krueger's right to proceed against Zeman, this Court has no reason to go beyond the law as written. There is no dispute that Ms. Krueger satisfies the definition of a "person" as used in Section 363A.17(3). Nor is there any dispute that she alleged unlawful "discrimination" during the "performance" of a contract. Accordingly, this Court should conclude that Ms. Krueger has sufficiently alleged a violation of

[1] Respondent's Brief Pg. 7.

Section 363A.17(3) and, therefore, she has standing to recover for her own, unique and independent injuries.

B. The MHRA, Section 363A.17(3) Outlaws Discrimination Against a Party to a Contract *or* Discrimination Against a Person Performing a Contract.

By outlawing discrimination in the "terms, conditions or performance of the contract," Section 363A.17(3) protects persons other than only those who make the contract.

Two cannons of statutory construction guide how this Court should interpret the meaning of the words "or performance" in comparison to the words "terms" and "conditions" as they appear in Section 363A.17(3). First, a statute should be interpreted, whenever possible, to give effect to all of its provisions; "no words, phrases, or sentences should be deemed superfluous, void, or insignificant." See, *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (citing, *Owens v. Federated Mut. Implement & Hardware Ins.*, 328 N.W.2d 162, 164 (Minn. 1983)). Second, under accepted doctrines of statutory construction, the legislature's use of the disjunctive "or" invites an interpretation of a statutory provision as outlawing two separate acts. See e.g., *State v. Rosow*, 310 Minn. 399, 401-402, 247 N.W.2d 398, 400 (Minn. 1976).

In construing Section 363A(17), this Court must give proper meaning to each of the words "terms, conditions, or performance" as used in the Act. In relation to contracts, the word "terms" refers to matters that exist only within the four corners of an

agreement.[2] Similarly, the word "conditions" refers to things inextricably tied to the language of the contract.[3] Because "terms" and "conditions" are written into the contract, they are incidences that arise only between the parties, during the formation of the contract. Therefore, the Act's prohibition against discrimination in "terms" and "conditions" arguably applies to discrimination that occurs only between two parties during the making of the contract.

However, the performance of a contract differs significantly from the formation of a contract. The word "performance" refers to actions that arise after the formation of a contract and after the parties themselves have agreed upon a contract's terms and conditions. It is during a contract's performance that the rubber hits the road and other persons besides the signatories to the contract necessarily become involved in effectuating the parties' intent. Thus, incidences arising in the "performance" of the contract are distinct from occurrences in the making of the contract. In interpreting Section 363A.17(3) this distinction between performance-related events and formation-related events must be respected. Discrimination in performance of the contract must be viewed as discrimination that potentially arises apart from only the parties to the contract and beyond the discrimination that may arise only in the terms and conditions of the contract.

---

[2] With respect to a contract, the word "term" refers to: "[a] word, phrase, or condition *in a contract*, instrument or agreement which relates to a particular matter." Black's Law Dictionary, 1470 (6th ed. 1990).

[3] With respect to a contract, the word "condition" refers to: "a future and uncertain event of which is made to depend the existence of an obligation, or that which subordinates the existence of liability *under a contract* to a certain future event." Black's Law Dictionary, 293 (6th ed. 1990).

In order to clarify that "performance" of the contract should be viewed as distinct from "terms" and "conditions", the legislature used the disjunctive "or" to set the word "performance" apart from the words "terms" and "conditions." By using the disjunctive "or," the legislature stated two alternate bases of liability. First, the legislature made it unlawful to discriminate in writing a contract's terms or conditions, which discrimination would involve only the parties to the contract. Second, the legislature made it unlawful to discriminate against persons who may be performing a contract, which discrimination would involve anyone who is involved in the day-to-day carrying out of the contract, irrespective of whether he or she is a party to the contract.

In upholding dismissal of Ms. Krueger's claims, the Court of Appeals construed Section 363A.17(3) in the manner urged by Zeman, as applying only to discrimination between contracting parties, as if the words "or performance" were of no significance. This misinterpretation of Section 363A.17(3) stripped Ms. Krueger of protections that the legislature intended to confer upon her. This Court should reverse the Court of Appeals. This Court should read the words "or performance" in the manner the legislature intended, as extending to discrimination that potentially arises apart from and beyond the confines of the contractual relationship and includes persons harmed during the performance of the contract, even if they are not a party to the contract.

C. This Court Should not Engraft Section 1981's Unique and Restrictive Requirements for Standing Upon the MHRA as a Basis to Deny Ms. Krueger's Right to Proceed Against Zeman.

Unlike the MHRA, Section 1981 is peculiarly concerned with preserving the right to make and enforce contracts and is correspondingly limited in its application.[4] Zeman would erroneously have this Court engraft Section 1981's unique limitations upon the far broader MHRA, Section 363A.17(3). For the reasons set forth below, this Court should refrain from relying upon federal case law interpreting Section 1981 as a basis to deny Ms. Krueger's standing to sue Zeman.

In construing the MHRA, this Court does not resort to interpretations of federal anti-discrimination laws when the text of the MHRA is distinct from such federal laws in content, coverage or intent. See, *Kolton v. County of Anoka*, 645 N.W.2d 403, 407 (Minn. 2002); see also, *Cummings v. Koehnen*, 568 N.W.2d 418, 423 (Minn. 1997) (departing from federal rule of interpretation because of textual difference between MHRA and federal statute); see also, *Ray v. Miller Meester Advertising Inc.*, 684 N.W.2d 404, 409 (Minn. 2004) (stating as follows: "Because the scope of discrimination liability... is more onerous under our state laws than under Title VII, we are not bound to follow seemingly analogous federal court decisions"). In the present case, because of significant differences between the two laws, this Court should not find standing under the MHRA, Section 363A.17(3), to be coterminous (and thus equally limited) to standing under Section 1981.

---

[4] Although Appellant and Respondent have characterized standing under Section 1981 as requiring actual or potential privity of contract, federal decisions have also upheld standing under Section 1981 based upon a plaintiff's status as a third party beneficiary. See e.g., *Macedonia Church v. Lancaster Hotel Ltd.*, 560 F. Supp. 2d 175, 180-186 (D. Conn. 2008).

1. Textual Differences Between the MHRA and Section 1981 Require That This Court Analyze Standing Under the MHRA More Broadly Than Under Section 1981.

Section 1981 serves a limited and specific function: "It protects the equal right of '[a]ll persons within the jurisdiction of the United States'...'to make and enforce contracts' without respect to race." See, *Dominos Pizza, Inc. v. McDonald.*, 546 U.S. 470, 475-476 (2006) (quoting 42 U.S.C. § 1981(a)). Section 1981 states further that its scope is limited to protecting persons involved in the "making, performance, modification and termination of contracts, and the enjoyment of all the benefits, privileges, terms and conditions of the contractual relationship." *Id.* (quoting 42 U.S.C. § 1981(b)).

Through use of the conjunctive word "and," the authors of Section 1981 reinforced its limited application, as belonging to a contracting party. Only a party to a contract has the right to "make *and* enforce a contract." *Id.* at 475. Only a party to a contract is involved in each aspect of the "making, performance, modification, *and* termination of contracts, *and* the enjoyment of all the benefits, privileges, terms *and* conditions of the contractual relationship." Had the authors of Section 1981 used the disjunctive "or" instead of "and," alternate bases of liability could be found. Instead, Section 1981 is explicitly limited in its application. Critically, the explicit text-based limitations found in Section 1981 are absent from the MHRA, Section 363A.17.

Unlike Section 1981, the text of Section 363A.17 is not constrictive. Section 363A.17 is not concerned exclusively with granting persons the right "to make *and* enforce contracts" and to preserving "all the benefits, privileges, terms *and* conditions of

the contractual relationship" free from racial bias. Instead, Section 363A.17 prohibits a multitude of unlawful discriminatory acts, in a broad range of settings, by a business because of race, color, national origin, sex, sexual preference, or disability. For instance, the Section 363A.17 makes it unlawful for a business to "refuse to do business with or provide a service to" a woman who uses her current or former surname. Minn. Stat. § 363A.17, subd. 1.

By expressly prohibiting discrimination that occurs apart from the confines of a contractual relationship, such as in "doing business" or "provid[ing] a service," Section 363A.17 exceeds the limited and specific function served by Section 1981. Moreover, as set forth above, by using the disjunctive "or" in making it unlawful to discriminate in the "terms, conditions, *or* performance of the contract," Section 363A.17(3) sets forth alternate bases of liability; discrimination in the "performance" of a contract is distinguished from (and thus, not synonymous with) discrimination in the "terms [and] conditions" of a contract. Thus, the MHRA goes beyond Section 1981 and protects persons involved in the performance of a contract without regard to actual privity.

2. Adherence to the Broad Legislative Intent Behind the MHRA Requires That This Court Analyze Standing Under the Section 363A.17(3) More Broadly Than Under Section 1981.

The unique and limited legislative intent behind Section 1981 is inconsistent with the broad, remedial purpose behind the MHRA. Section 1981's limited statutory intent was a basis relied upon by the Supreme Court in its narrow interpretation of the federal law. See, *Dominos Pizza Inc.*, 546 U.S. at 479. Specifically, in *Dominos Pizza Inc.*, the Supreme Court refused to interpret Section 1981 as a comprehensive civil rights statute

because construing Section 1981 as a "cure-all" would have required the Court to go beyond any expression of congressional intent. *Id.* Importantly, this Court need not adhere to the limited statutory intent behind Section 1981 when construing the MHRA.

While Congress did not intend for Section 1981 to serve as a comprehensive "cure all," the Minnesota legislature *did* intend for the MHRA to reach all persons in a comprehensive manner. The clearly articulated legislative intent behind the MHRA is to ensure freedom from discrimination for *all* persons in Minnesota (Minn. Stat. § 363A.02) and to place persons discriminated against in the same position they would have been had no discrimination occurred. See, *Brotherhood of Ry. and S.S. Clerks, Freight Handlers, Exp. and Station Emp. Lodge 364 v. State by Balfour*, 229 N.W.2d 3, 13 (Minn. 1975). Fidelity to the broad remedial purpose behind the MHRA requires this Court to read Section 363A.17(3) (without concern for interpretations of Section 1981) as encompassing the claims of Ms. Krueger, regardless of privity of contract.

3. The Legislative History of the MHRA, Section 363A.17, Guides This Court to Analyze Standing Under the MHRA More Broadly Than Under Section 1981.

The legislative history of Section 363A.17 weighs strongly against this Court adhering to federal interpretations of Section 1981 for determining standing under the MHRA. A newspaper article appearing in the *New York Times*, contemporaneous to amendment of the MHRA, recounted that the Minnesota Legislature enacted Section 363A.17 specifically to counteract restrictive federal interpretations of Section 1981. (William E. Schmidt, *Minnesota Widens Rights Act to Counter High Court Move*, The

New York Times, May 12, 1990 at App. 3, Supplemental Appendix.) [5] [6] [7] This article noted that the purpose behind enactment of Section 363A.17 was to permit persons to bring claims of discrimination in hiring decisions and after the person is hired, and to permit similar claims against contractors by persons discriminated against in performing a subcontract. *Id.*

This account of the purpose underlying enactment of Section 363A.17 (in its current form) is affirmed by a scholarly treatise regarding the scope of the MHRA's prohibition of discrimination by businesses. See, West Minnesota Practice Series, 17 Minn. Prac., Employment Law & Practice § 3.9 (2d ed), 2007. Addressing the standing of independent contractors to pursue discrimination claims against a non-employer, Professor Stephen F. Befort wrote:

> Thus, independent contractors have no claim under the Act's [MHRA'S] anti-discrimination in employment provisions. Independent contractors may nevertheless have a cause of action under the MHRA, but not because they have the status of "employees." A related provision of the MHRA [Minn. Stat. § 363A.17] prohibits the intentional refusal to do business or contract with an individual on the basis of race, color, sex or disability, and prohibits discrimination in the basic terms, conditions or performance of the contract on those same grounds. This provision may provide a cause of action in state court to the independent contractor who is outside the scope of Title VII. *Id.*

---

[5] A copy of the same *New York Times* article was submitted to the trial court in this matter.

[6] The *New York Times* article is the best available evidence regarding the legislative history behind Minn. Stat. § 363A.17 because the committee hearings of the Minnesota Legislature were not reduced to audio tape until 1991, the year after amendment of the MHRA.

[7] This Court may take judicial notice of matters appearing in newspaper articles, especially where the article in question presents information that is not intended to establish facts outside the record and is material that the Court could have discovered on its own. See, *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. Ct. App. 2001).

The legislative history (along with the text and legislative intent) behind Section 363A.17 demonstrates that the legislature amended the MHRA in order to escape Section 1981's limited scope and application. Therefore, this Court should reject imposing Section 1981's limit of contractual privity upon the claims of Ms. Krueger.

CONCLUSION

Wherefore Ms. Krueger respectfully requests that this Court reverse the District Court and the Appellate Court's decisions. In reversing, this Court should rule that Ms. Krueger has standing to maintain an action under Section 363A.17(3) and she has the right to recover against Zeman for the independent, injury-in-fact that she suffered as a consequence of Zeman's unlawful discrimination, because of sex, during the performance of a contract.

RESPECTFULLY SUBMITTED,

Date: May 28, 2009

MULLER & MULLER, P.L.L.C.

Andrew P. Muller (No. 32467X)
3109 West 50th Street, No. 362
Minneapolis, MN 55410-2102
(612) 604-5341

JOHN A. KLASSEN, P.A.

John A. Klassen (No. 24434X)
700 Lumber Exchange Building
10 South Fifth Street
Minneapolis, MN. 55402
612-204-4533

ATTORNEYS FOR APPELLANT