

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota, by Jayne B.  
Khalifa, Acting Commissioner,  
MOTION

Department of Human Rights,

REPRISAL

Complainant,

V.

Michael Skwarek,

Respondent.

ORDER GRANTING

FOR SUMMARY JUDGMENT  
ON A CLAIM OF

AND DENYING MOTIONS  
FOR SUMMARY JUDGMENT  
ON OTHER GROUNDS

The above-captioned matter is pending before the undersigned Administrative Law Judge pursuant to a Complaint and a Notice and Order for Hearing filed with the Office of Administrative Hearings on July 30, 1987. Carl M. Warren, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, has appeared on behalf of the Complainant. Barry A. Sullivan, of Stockman, Sullivan & Sadowski, Attorneys at Law, 299 Coon Rapids Boulevard, Suite 105, Coon Rapids, Minnesota 55433, has appeared on behalf of the Respondent.

On January 13, 1988, the Respondent filed a Motion for Summary Disposition and written arguments in support of its Motion. Further written arguments were filed by both parties. The record closed on March 10, 1988, when the last filing with respect to the Motion was made.

Based upon all the files, records and proceedings herein, and for the reasons set forth in the Memorandum attached hereto,

IT IS HEREBY ORDERED:

1. That the Respondent's Motion for Summary Judgment on the Complainant's reprisal charge is GRANTED.

2. That the Respondent's Motions for Summary Judgment on the Complainant's aiding and abetting charge is DENIED.

Dated this 3rd day of March, 1988.

JON L. LUNDE  
Administrative Law Judge

MEMORANDUM

The Charging Party in this case, Susan A. Larsen, f/k/a Susan A. Smith, was formerly employed by Benson Optical Company (Benson Optical). On March 14, 1985, the Charging Party filed two separate charges of discrimination with the Minnesota Department of Human Rights (Department). One charged Benson Optical Company with violations of Minn. Stat. 363.03, subds. 1(2)(C) and 7(1). It alleged that she was sexually harassed by the Respondent, its store manager, (Skwarek) and was the victim of an illegal reprisal after she notified Benson Optical's management personnel of Skwarek's harassment. The other charge was made against the Respondent, Michael Skwarek, under Minn. Stat. 363.03, subds. 6(1) and 7(1). Respondent was charged with aiding and abetting Benson Optical in the discrimination and reprisal. In June 1986, Benson Optical entered into a conciliation agreement with the Charging Party. The agreement provided, in part, as follows:

3. The charging party and the department hereby waive, release, and covenant not to sue the respondent with respect to any matters which were filed with the department by the Charging Party subject to performance by the respondent of the promises and representations contained herein.
4. This agreement is a final decision of the department, is enforceable in the district courts of Minnesota pursuant to Minnesota Statutes 363.091, and settles all matters contained in the above-entitled charge of discrimination.
5. The Respondent agrees to pay charging party the lump sum of \$1,000 as a full negotiated settlement of this matter.
6. Pursuant to Minnesota Statutes 363.031, this agreement does not purport to waive claims arising out of acts or practices which occur after the execution of this waiver and release. This agreement constitutes full settlement of a charge filed with the Department, and is valid and final upon execution and cannot be rescinded by the Charging Party after it is signed.

The conciliation agreement executed by the Charging Party and Benson Optical refers to Case No. E12810-RSS/RP5-4S and EEOC No. 076850597. The case number on the conciliation agreement is the same as the case number on the charge made against Benson Optical Company and is different from the case number assigned to the charge filed against Skwarek.

On July 29, 1987, after the conciliation agreement between the Charging Party and Benson Optical was executed, the Complainant commenced a contested

case against Respondent, charging him with having aided and abetted Benson Optical Company in violation of Minn. Stat. 363.03, subd. 6, and a reprisal in violation of Minn. Stat. 363.03, subd. 7. The Respondent has moved for summary disposition on the grounds that he cannot be charged as an aider and abettor, that he cannot be charged with a reprisal, and that the release of Benson Optical released the Respondent by operation of law. Each of those arguments are separately addressed below.

## Aiding and Abetting

The sexual harassment charge made against Benson Optical was based on the actions of its store manager, Michael Skwarek, the Respondent. In the Complaint, Respondent is charged with aiding and abetting Benson Optical in committing sexual harassment in violation of Minn. Stat. 363.03, subd. 6. With respect to aiding and abetting, the statute states:

Subd. 6. Aiding and Abetting and Obstruction. It is an unfair discriminatory practice for any person:

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

The Respondent argues that Benson Optical was not "engaged" in any practices forbidden by the Human Rights Act and that its liability under Chapter 363 was, therefore, strictly vicarious. Since the Respondent was the person who "engaged" in the allegedly forbidden practices, he argues a charge cannot be made against him because a person, by definition, cannot aid and abet one's self. In the Respondent's view, Benson Optical's vicarious liability for the Respondent's alleged conduct is the sole legal basis for liability. Therefore, in his view, he cannot be additionally and separately liable for the same conduct. To hold otherwise, it is argued, would be to allow a complainant double recovery for a single wrong. The Department argues, on the other hand, that Respondent aided Benson optical in its sexual harassment of the Charging Party by perpetrating the harassment against her. In the Complainant's view, the Minnesota Human Rights Act must be liberally construed to accomplish its purposes. It argues that if the Department cannot charge Respondent as an aider and abettor, the scope of the aiding and abetting provisions of the Act will be greatly narrowed and the Department's ability to accomplish the stated purposes of the Act will be impeded. Hence, in the Complainant's view, summary judgment is inappropriate. As is discussed below, the Respondent's arguments must be rejected.

The statute makes it an unfair discriminatory practice for any person "[i]ntentionally to aid, abet, incite, compel, or coerce a person to engage in any of the practices forbidden by this chapter." In determining the meaning of the statute, it is appropriate to consider judicial principles governing criminal liability through accessorial conduct. National Organization for Women v. Buffalo Courier-Express, Inc., 17 Misc. 2d 917, 337 N.Y.S.2d 608, 610-11 (S. Ct. Erie County 1972). For purposes of the criminal law, an aider and abettor has been defined as:

. . . one who is present actually or constructively, aiding

and abetting in the commission of the felony; one who so far participates in the commission of a crime as to be present for the purpose of assisting therein, if necessary; one who gives aid and comfort, or who either commands, advises, instigates, or encourages another to commit a crime; one who aids and abets the actual commission of a felony by some degree of assistance or encouragement, whether or not

present at the place of perpetration; a person who, by being present, by words or conduct, assists or incites another to commit the criminal act.

22 C.J.S., Criminal Law, sec. 85, pp. 250-51 . In this case, the forbidden practices the Respondent is charged with having aided and abetted are the acts he committed. One cannot be an aider and abettor of himself in the commission of a crime. Morgan v. United States, 159 F.2d 85 (10th Cir. 1947); 22 C.J.S., Criminal Law, 85, n. 49.10. Under this rule, an employee who is charged with perpetrating sexual harassment could not be chargeable also with having aided and abetted the sexual harassment he perpetrates.

The Complainant argues, however, that Benson Optical, not the Respondent, is the person who was aided and abetted. The question, then, is whether an employee can be charged with aiding and abetting an employer for acts of the employee that are imputed to the employer under the respondeat superior doctrine. The respondeat superior doctrine holds an employer liable for the torts of its employees even though no fault personally rests on the employer. Pettit Grain & Potato Co. v. Northern P. Ry., 227 Minn. 225, 35 N.W.2d 127, 135 (1948). Generally speaking, under the doctrine the liability of an employer and an employee for the employee's wrongful acts is regarded as joint and several. Kisch v. Skow, 305 Minn. 328, 233 N.W.2d 732, 734 (1975); 57 C.J.S., Master and Servant, 579 at 351. Each party is responsible for the whole. Gronquist v. Olson, 242 Minn. 119, 64 N.W.2d 159, 164 (1954). Although the employer and the employee are jointly and severally liable, they are not necessarily considered to be joint tort-feasors. 57 C.J.S., Master and Servant 579 at 351.

The rule that employers and employees are jointly and severally liable for the employee's torts is reflected in Title VII of the Civil Rights Act of 1964. It prohibits discriminatory employment practices by employers and their agents.<sup>2</sup> Under the Civil Rights Act, an employer's supervisors are considered to be agents and they are liable for the sexual harassment they perpetrate. See, e.g., Hendrix v. Fleming Companies, 650 F. Supp. 301 (W.D. Okl. 1986); Vegh v. General Electric Co., 34 F.E.P. Cases 135 (E.D. Pa. 1983). On the other hand, Section 363.03, subd. 1(2), which governs discriminatory

employment practices in Minnesota, only mentions employers. However, unlike the federal Civil Rights Act, the Human Rights Act contains a prohibition against aiding and abetting any person to engage in forbidden practices. The parties have not cited to any legislative history that explains these differences, but the Legislature's decision to add a prohibition against aiding and abetting by any person--instead of a prohibition directed only to agents--evinces an intention to enlarge the scope of the Human Rights Act over its federal counterpart. Holding the Respondent liable for his actions is consistent with such an intent.

The Complainant argues that while employees are not directly accountable to the prohibition against employment discrimination, which is directed at

for purposes of the Minnesota Human Rights Act, a "person" includes partnerships and corporations. Minn. Stat. 363.01, subd. 7.

242 L.S.C. 2000e(b) (1986).

employers and not employees, they may be held liable for their role in the discrimination as aiders and abettors. It relies upon *Anderson v. Pistner*, 148 Ill. App. 3d 616, 499 N.E.2d 566 (1986). That case supports the Complainant's position. It involved charges of age discrimination brought by former employees of Wards against Mobil Oil Company and several employees Mobil hired to run Wards after Mobil purchased Wards. It was alleged that Mobil decided to get rid of older Wards employees after Wards was purchased, and that its personnel implemented that policy by terminating them. The court held that the employees who implemented Mobil's discriminatory policy could be charged as aiders and abettors under a state fair employment practices act. Under the criminal law, Mobil was the aider and abettor because it commanded the discriminatory acts its employees took. Nonetheless, the employees were held to be Mobil's aiders and abettors for purposes of a state act prohibiting discriminatory employment practices. The Pistner case supports the proposition that when employees are the perpetrators of discrimination in employment they may be charged with aiding and abetting. The same conclusion was reached in *Flower v. K-Mart Corporation and James Barber, Managerial Employee of K-Mart Corporation*, Court File No. C3-84-50723, slip op. (Dist. Ct., 10th Judicial Dist., March 6, 1987). In *Flower*, an assistant manager named Barber sexually harassed a female employee under his supervision for a long period of time. Barber's supervisors were aware of the harassment but took virtually no steps to stop it. In fact, to some extent they participated in it. The court found that Barber had aided and abetted K-Mart in discriminating against the female employee and held Barber jointly and severally liable with K-Mart for the damages Flower sustained. The *Flower* case also establishes that the perpetrator of sexual harassment can be charged as an aider and abettor.

The Respondent argues that the *Flower* case is inapplicable because K-Mart was not found liable for harassing Flower but for knowing about the harassment and failing to stop it. That is not an accurate characterization. K-Mart was found to have harassed Flower because it failed to stop the harassment that was occurring. Upon its failure to do so, all Barber's acts were imputed to it. Even if that is not the case, the Respondent has failed to explain how the factual differences that do exist are material. The Respondent may be suggesting that an employee cannot be liable for harassment unless the employer is chargeable with some separate wrongdoing--such as the failure to stop harassment that is taking place. That may be true in cases involving

co-workers or those who do not have the requisite authority to act. See, e.g., *Continental Can Co., Inc. v. State*, 297 N.W.2d 241 (Minn. 1980); *State v. Roberts v. Sports and Health Club, Inc.*, 365 N.W.2d 799, 803 (Minn. Ct. App. 1985). However, when a manager or supervisor is guilty of harassment, the manager's or supervisor's knowledge and failure to act are imputed to the employer. *McNabb v. Cub Foods*, 352 N.W.2d 378, 383 (Minn. 1984); *Tretter v. Liquipack International, Inc.*, 356 N.W.2d 713, 715 (Minn. Ct. App. 1984). Hence, when a supervisor engages in harassment no other wrongful participation by the employer need be shown (such as the failure of some higher-level employee to prevent it). Any other conclusion would produce bizarre results. For example, if Mobil Oil had not adopted a discriminatory policy when it purchased Wards, but a supervisory employee decided on his own to terminate older Wards employees, that supervisor would not be liable for aiding and abetting, if the Respondent's argument is accepted, because Mobil would not be chargeable with any separate wrongdoing. Hence, if Respondent's argument were accepted, supervisory employees who implement discriminatory policies at the command of an employer would be liable as aiders and abettors, but supervisory employees who implement discriminatory policies on their own, and who are not

at risk of losing their jobs for noncompliance, would not be chargeable as aiders and abettors. Such a result makes no sense. Therefore, the Administrative Law Judge is persuaded that a supervisory employee may be charged with aiding and abetting even if the employer (through another employee) has not participated in the supervisor's wrongdoing. In other words, the supervisor is chargeable with aiding and abetting whenever he engages in conduct for which the employer is liable.

Holding an employee liable as an aider and abettor to discriminatory acts of the employee that are imputed to the employer is consistent with the plain language of Section 363.03, subd. 6. The statute prohibits any person from intentionally aiding or abetting any other person "to engage in any of the practices forbidden by this chapter." The meaning and scope of the statute has not been addressed by the Minnesota courts and the cases that have arisen under similar language in other state acts 3 have not involved employees. See, e.g., Commonwealth Human Rel. Com'n. v. Transit Cas. Ins. Co., 340 A.2d 624 (Pa. Comwlth. 1975).

The word "engage" means, among other things, to be involved or to participate in. Webster's Third New International Dictionary, p. 751 (1986). An employer, such as a corporation like Benson Optical, can only participate or be involved in forbidden practices through its officers, agents and employees. It follows that an employer is aided and abetted "to engage" in a forbidden practice whenever an employee's discriminatory acts are imputed to the employer. The Respondent's acts clearly aided and abetted Benson Optical's participation in his discriminatory acts.

Respondent argues that it is illogical to hold a perpetrator liable for aiding and abetting. In his view, a person cannot be the perpetrator and the aider and abettor of the same conduct. That argument has some merit--especially in a criminal context--but it must be rejected here. While Respondent is a perpetrator in fact, he is not a perpetrator at law. Under the Human Rights Act, employers--usually artificial persons--are considered to be the perpetrators of the acts of their employees even though the employer itself is incapable of acting as a matter of fact. Likewise, the employee who takes the action, in fact, is treated as an aider and abettor at law. Due to the vicarious liability of the employer, strict criminal law principles pertaining to accessorial conduct are simply inapplicable. Cf., U.S. v. Hewitt, 55 F. Supp. 272, aff'd, 150 F.2d 82 (5th Cir. 1945), aff'd, 328 U.S.

189 (1946).

Respondent also argues that since he and Benson Optical are treated as one person for purposes of establishing Benson's Optical's liability for sexual harassment, he cannot be the aider and abettor of the same conduct that establishes Benson Optical's liability, citing State v. Sports and Health Club, Inc., 370 N.W.2d 844 (Minn. 1985). That argument is not persuasive. Although Respondent's acts, like the discriminatory acts of other supervisory employees, are imputed to the employer for purposes of establishing an employer's liability, they are not treated as one. State v. Sports and Health club, Inc., supra; cf. Walters v. President and Fellows of Harvard college,

3See 43 Penn. Stat. 955(e) (1988) and Section 296-6. of the New York Executive Law.

616 F. Supp. 471 (D. Mass. 1985). The Human Rights Act clearly prohibits an employee from aiding and abetting. That is a substantive prohibition that requires consideration of the employee's acts. Furthermore, the Sports and Health Club decision does not hold that an employee whose acts establish an employer's liability cannot be charged with aiding and abetting. The court only held that an individual found liable as an "employer" under 363.03, subd. 1(2) could not be liable as an aider and abettor also under 363.03, subd. 6. In this case, Respondent has not been charged as an "employer" but only as an aider and abettor.<sup>4</sup>

Finally, the Respondent argues that permitting the Complainant to proceed will permit double recovery for a single wrong. Although there may be a single injury to the victim of sexual harassment, the Human Rights Act does not limit an injured party to recovery from the employer only. An employee who aids and abets the employer is jointly and severally liable. When liability is joint and several, an injured person has a cause of action against all persons who are liable. Moreover, permitting an action against the Respondent will not necessarily result in a double recovery. The Respondent has presented no evidence that it will and it seems unlikely given the nominal payment the Charging Party received from Benson Optical.

In sum, it is concluded that an employee who engages in discriminatory acts that are imputable to an employer is chargeable with aiding and abetting the employer to engage in a forbidden practice for purposes of Section 363.06(1). Therefore, Respondent's Motion for Summary Judgment on the grounds that Respondent is not chargeable under that statute must be denied.

Is An Employee chargeable with Reprisals Under Section 363.07?

The Respondent is also charged with a violation of Minn. Stat. 363.03, subd. 7. The statute, pertaining to reprisals, states:

It is an unfair discriminatory practice for any employer, labor organization, employment agency, public accommodation, public service, educational institution, or owner, lessor, lessee, sublessee, assignee or managing agent of any real property, or any real estate broker, real estate sales person or employee or agent thereof to intentionally engage in any reprisal against any person because that person:

(1) Opposed a practice forbidden under this chapter or has filed a charge, testified, assisted, or participated in any matter in an investigation, proceeding or hearing under this chapter; \* \* \*

<sup>4</sup>Although Section 363.03, subd. 1(2) is limited to employers, Professor

Auerbach believes that it should include agents. Auerbach, The 1967 Amendments to the Minnesota State Act Against Discrimination and the Uniform Law Commissioners' Model Anti-Discrimination Act, 52 Minn. L. Rev. 231, 235-36 (1967). See also, Patrowich v. Chemical Bank, 63 N.Y.S.2d 541, 473 N.E.2d 11, 13 (1984). The Sports and Health Club decision supports the view that persons other than employers may be liable under Subdivision 1(2). However, Respondent has not argued that he should have been charged as an employer.

A reprisal includes, but is not limited to, any form of intimidation, retaliation, or harassment. It is a reprisal for an employer to do any of the following with respect to an individual because that individual has engaged in the activities listed in clause (1) or (2): refuse to hire the individual, depart from any customary employment practice; transfer or assign the individual to a lesser position in terms of wages, hours, job classification, job security, or other employment status; or inform another employer that the individual has engaged in the activities listed in clause (1) or (2).

The plain language of the statute is inapplicable to the Respondent. The only employees covered by the statute are the employees of real estate brokers. Any reprisal undertaken by an employee, must be pursued against that employee's employer. An action against the employee under Subdivision 7 is not authorized.

The Complainant argues that the words "real estate broker, real estate salesperson or employee or agent thereof" cover the Respondent. That clearly is not true. The words "employee or agent thereof" modify only the last antecedents--real estate brokers or sales persons. The quoted words do not modify the words "employer" or the other persons previously mentioned. That this is true is reflected in Section 363.03, subd. 2(2), which also uses the quoted words. Consequently, the Complainant's reprisal charge against the Respondent must be dismissed.

Does-the Conciliation Agreement with Benson Optical Release the Respondent?

The Respondent argues that if he and Benson Optical are jointly and severally liable for the Charging Party's damages, they are, at law, joint tort-feasors. Since it is the general rule that the release of one tort-feasor releases them all, the Respondent argues that the Charging Party's conciliation agreement with Benson Optical released the Respondent from all liability. Therefore, the Respondent argues that the Complaint against him must be dismissed.

Although the Respondent and Benson Optical are properly considered to be jointly and severally liable for the damages, if any, sustained by the Charging Party, it does not follow that they are joint tort-feasors. See, e.g., 57 C.J.S., Master and Servant, 579, p. 351, n. 44. Assuming, however, that Benson Optical and the Respondent are joint tort-feasors, the Charging Party's conciliation agreement with Benson Optical Company does not necessarily release the Respondent. A release may, depending on its terms, have the effect of extinguishing a right of action. Thus, where one person commits a tort and is primarily liable and the liability of another is derivative or secondary, as where it arises under the doctrine of respondeat superior, the releasor's acceptance of satisfaction from one discharges the other as well, as in the case of employers and employees. 76 C.J.S., Release, sec. 50, P. 689; Serr v. Biwabik Concrete Aggregate Co., 202 Minn. 165, 278 N.W.

355 (1938). However, a covenant not to sue does not constitute a satisfaction but merely an agreement not to enforce an existing cause of action against the party to the agreement. Although a covenant not to sue may operate as a release between the parties to the agreement, it will not release a claim

against another joint tort-feasor not joined in the agreement.  
Gronquist v.

Olson, 242 Minn. 119, 64 N.W.2d 159, 164 (1954). Whether a particular instrument is a release and discharge or a covenant not to sue is a question

of fact. It requires a consideration of the intention of the parties to the

release instrument and whether the injured party has in fact received full compensation for the injury sustained. See, e.g., Gronquist v. Olson, supra; Couillard v. Charles T. Miller Hospital, 253 Minn. 418, 92 N.W.2d 96 (1958).

It is not essential that a party reserve the right to sue other tort-feasors

to avoid having a covenant not to sue construed as a release. Joyce v. Massachusetts Real Estate Co., 173 Minn. 310, 217 N.W. 337 (1928).

In this case, the Administrative Law Judge is not persuaded, as a Matter of law, that the conciliation agreement executed by the Charging Party and Benson Optical Company was intended to be a release of any claims she had against the Respondent. The agreement itself refers only to the charge filed against Benson Optical Company and there is no evidence that the Charging Party has received full compensation for her injury. Although the Charging Party is only entitled to one recovery for the damages, if any, that she sustained, a fact question exists whether the nominal payment she received from Benson Optical Company constitutes full compensation. Consequently, summary judgment is not appropriate and the Respondent's Motion to Dismiss on that ground must be denied.

J.L.L.