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The Minnesota Supreme Court adopts the federal liability standard for supervisor sexual harassment suits brought under the Minnesota Human Rights Act, rejects the Eighth Circuit's definition of "supervisor" as too narrow, and confirms that when an employee sexually assaults a coworker, the employer will be liable for the assault only if the plaintiff proffers some evidence that the assault was foreseeable.

Midwest Edition

A Littler Mendelson Midwest-specific Newsletter

Minnesota Supreme Court Adopts Federal Sexual Harassment Liability Standard

By: Kerry L. Middleton and Sarah J. Gorajski

The Minnesota Supreme Court has adopted the federal liability standard for sexual harassment suits brought pursuant to the Minnesota Human Rights Act (MHRA). In *Frieler v. Carlson Marketing Group, Inc.*, No. A06-1693 (May 30, 2008), Minnesota's highest court ruled that the liability standard established by the United States Supreme Court ten years ago for Title VII harassment cases in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) also applies to state claims under the MHRA. The case resolves an unsettled question that arose when the Minnesota legislature amended the MHRA in 2001.

Prior to the 2001 amendment, plaintiffs were required to prove that the employer knew or should have known of sexual harassment and failed to take timely and appropriate action. In 2001, the Minnesota legislature removed the "knew or should have known" language from the statutory definition of sexual harassment without giving the courts any guidance on how they were supposed to interpret the revised statute.

In *Frieler*, the court also clarified the legal standard for imposing liability on employers when an employee assaults a coworker. Employers will only be liable for intentional torts when the conduct is foreseeable, and the plaintiff is required to proffer evidence of foreseeability.

The Facts at Issue in *Frieler*

Judy Frieler was a part-time employee of Carlson Marketing Group (CMG) when she learned of an open full-time position in the shipping department. She told Ed Janiak, the shipping department supervisor, that she was interested in the open position. Frieler alleged that after she expressed interest in the position, Janiak sexually harassed her on four occasions after telling her that he wanted to discuss matters related to the opening in his department. On three of the four occasions, Janiak allegedly brought Frieler to a private, locked room in the workplace and grabbed, hugged, groped and pressed against her while making offensive comments. Although CMG had a written sexual harassment policy that contained a complaint procedure, Frieler never reported the alleged harassment to CMG. Instead, she told only coworkers and family members. One of coworkers then insisted that Frieler report Janiak's conduct to her immediate supervisor.

Upon learning of the alleged harassment, CMG placed Frieler on paid leave for a week while it conducted an investigation. Janiak resigned a few days later. Frieler subsequently resigned after her psychologist recommended that she not return to any job at CMG. Frieler sued CMG for, among other things, sexual harassment in violation of the MHRA and assault and battery based on the same conduct.

The trial court granted CMG's motion for summary judgment. The Minnesota Court of Appeals affirmed, holding that Frieler could not establish that CMG knew or should have known of the

alleged harassment. The Minnesota Supreme Court granted review on two issues: (1) whether the federal *Faragher/Ellerth* standard applies to sexual harassment cases under the MHRA; and (2) whether a plaintiff can prove that intentional torts committed by a supervisor in the course of sexual harassment were foreseeable without proffering some proof of foreseeability.

The *Faragher/Ellerth* Standard Applies to MHRA Cases

A divided court voted 4-3 to adopt the federal standard. The court rejected Frieler's argument that in amending the statutory definition of sexual harassment the legislature intended for employers to be strictly liable for all sexual harassment. Instead, the majority interpreted the amendment to mean that the legislature intended for the *Faragher/Ellerth* standard to apply to sexual harassment cases under the MHRA.

The court held that, under the MHRA, an employer is vicariously liable for sexual harassment by a supervisor with immediate (or successively higher) authority over a subordinate employee. However, when no tangible employment action is taken against the employee, the employer may avoid liability by showing: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Who is a Supervisor?

The court also addressed the issue of who is a supervisor for purposes of vicarious employer liability for sexual harassment. In doing so, the court focused on the broad remedial purpose of the MHRA and rejected the Eighth Circuit's definition of "supervisor" as too narrow. Instead, the court adopted the EEOC's relatively broad definition, which provides that an individual is a particular employee's supervisor if he or she has authority to undertake or *recommend* tangible employment decisions affecting the employee or the individual has authority to direct the employee's daily work activities.

Employer Liability for Assault and Battery

Turning to Frieler's assault and battery claims, the court affirmed the trial court's dismissal. Following its own line of cases holding that an employer is vicariously liable for the intentional torts of its employees only when the misconduct is foreseeable, the court ruled that a plaintiff must present some evidence that an employee's intentional misconduct was foreseeable in order to hold the employer liable for the misconduct. Frieler argued that sexual harassment is foreseeable as a matter of law because it is a common problem in American workplaces and that an employer's sexual harassment policy is sufficient to show foreseeability. However, the court rejected both arguments, opining that employers should be encouraged to implement policies and that additional evidence is required. Thus, when an employee sexually assaults a coworker, the employer will be liable for the assault only if the plaintiff proffers some evidence that the assault was foreseeable.

Notably, the court did not address the issue of workers" compensation exclusivity with regard to intentional torts in the workplace. In general, the workers' compensation statutes provide the exclusive legal remedy for employees who are injured in the scope and course of their employment. The workers' compensation forum may be the only means of redress for physical injuries resulting from a workplace assault or sexual harassment. In *Frieler*, the court did not comment on that defense to claims based on coworker assaults. Therefore, it appears that the workers' compensation exclusivity defense remains viable in cases where the plaintiff seeks damages for workplace injuries.

Implications for Employers

Although *Frieler* represents a departure from almost 30 years of sexual harassment case precedent, the decision provides much needed clarity surrounding the 2001 amendment to the MHRA and impacts only those cases in which the harasser is a supervisor. In adopting the federal standard for imposing vicarious liability for supervisor harassment, the court has eliminated one element that plaintiffs previously had to prove. However, it also created a new affirmative defense that will allow employers to avoid liability for harassment by their managers.

Employers may avoid liability by taking appropriate measures to prevent and promptly correct behavior that could be perceived as sexually harassing. Such measures should include, but are not limited to, implementing harassment policies and training, promptly investigating reports of harassment, and taking remedial action to stop further harassment. In addition, employers should establish and disseminate clear, unambiguous complaint procedures for employees who believe they have been subjected to sexual harassment. Employees still have an obligation to avail themselves of corrective opportunities afforded by their employers. Even before Frieler, Minnesota courts often looked to Title VII precedent in determining sexual harassment liability under the MHRA. The formal adoption of the *Faragher/Ellerth* standard is not particularly surprising and should not radically change the legal playing field.

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