The Promise of the Minnesota Human Rights Act Denied: Krueger v. Zeman Construction Company

Leslie Lienemann
Justin Cummins
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THE PROMISE OF THE MINNESOTA HUMAN RIGHTS ACT DENIED: 
KRUEGER V. ZEMAN CONSTRUCTION COMPANY

Leslie Lienemann and Justin Cummins*

In a case of first impression, the Minnesota Supreme Court has held that a woman who experienced sexual harassment while performing according to the terms of a contract was not protected by the Minnesota Human Rights Act (“MHRA”).1 The case was brought by business owner Pamela Krueger and her corporation, Diamond Dust Contracting, after Krueger was sexually harassed by employees of Zeman Construction Company, a business with which Diamond Dust Contracting had a contract.2 The Minnesota Supreme Court held that only Diamond Dust Contracting, and not Krueger, could sue for harassment because only Diamond Dust Contracting was a signatory to the business contract with Zeman Construction Company.3

The holding of the case is significant because it departs from the basic cannons of statutory construction, as well as from the Minnesota Supreme Court’s long-standing practice of interpreting the MHRA liberally. In other words, the holding ignores both the plain language of the MHRA and the MHRA’s stated purpose. The Minnesota Supreme Court’s analysis in Krueger is purely a case of legislation from the bench. This article explores the policy of the MHRA, the Minnesota Supreme Court’s history of interpreting the MHRA, the Minnesota Supreme Court’s departure from its past holdings as well as from federal discrimination law, and the legal and practical problems created by the Minnesota Supreme Court’s holding in Krueger.

I. The Promise Of The MHRA: Broad Protection And Expansive Construction Toward That End

The MHRA provides broad remedial measures to address discrimination in employment, labor

* Leslie Lienemann is a civil rights and plaintiffs' employment lawyer based in St. Paul, Minnesota; current member, Judicial Nominations Committee of the National Employment Lawyers Association (NELA); current member of the Amicus Committee of the Minnesota Chapter of the National Employment Lawyers Association; past president of Minnesota Chapter of the National Employment Lawyers Association; past President Eighth Circuit affiliate of the National Employment Lawyers Association; J.D., Hamline University School of Law; B.A., Hamline University.

Justin Cummins is a civil rights and employment lawyer based in Minneapolis, Minnesota; Adjunct Professor of Law, University of Minnesota Law School and William Mitchell College of Law; past Chair of the Minnesota State Bar Association's Labor & Employment Law Section; past Officer of the National Employment Lawyers Association's Eighth Circuit and Minnesota Boards; J.D., University of Minnesota Law School; M.A., Hubert H. Humphrey Institute of Public Affairs; B.A., Haverford College.

1 See Krueger v. Zeman Constr. Co., 781 N.W.2d 858 (Minn. 2010).
2 See id.
3 See id.
organizations, education, housing, real property, public accommodations, public services, and business.\(^4\)

The Minnesota Legislature included within the MHRA a statement of its purpose:

It is **the public policy of this state** to secure for persons in this state, **freedom from discrimination**. * * *

* Such discrimination threatens the rights and privileges of the inhabitants of this state and menaces the institutions and foundations of **democracy**.\(^5\)

The Minnesota Legislature included within the MHRA instructions as to how Minnesota courts must interpret and apply the Act: “The provisions of this chapter **shall** be construed liberally for the accomplishment of the purposes thereof.”\(^6\) Minnesota courts have historically reaffirmed fidelity to this obligation and interpreted the MHRA liberally as set forth more fully below.

A. Minnesota Court’s Liberal Interpretation of the MHRA in Sexual Harassment and Similar Cases

Because of the Minnesota Legislature’s directive that the MHRA shall be construed liberally to eliminate discrimination, the Minnesota Supreme Court has in other cases interpreted the MHRA’s language broadly and declined to follow the federal courts’ interpretation of Federal anti-discrimination statutes when doing so would defeat the broad remedial purposes of the MHRA.\(^7\)

For example, before the Minnesota Legislature amended the MHRA to include a definition of sexual harassment, the Minnesota Supreme Court held that sexual harassment was included in the MHRA’s prohibition of sex discrimination.\(^8\) The Minnesota Supreme Court premised its holding on the Minnesota Legislature’s mandate that the Minnesota courts construe the MHRA broadly.\(^9\)

Similarly, the Minnesota Supreme Court declined to adopt in MHRA cases the “same decision” defense that some federal appellate courts had been applying in so-called “mixed motive” cases under Title VII of the Civil Rights Act of 1964, reasoning as follows:

[A]llowing employers to limit or avoid liability based on a same-decision analysis would ‘defeat the broad remedial purposes’ of the [MHRA] by permitting employers, definitionally guilty of prohibited employment discrimination, to avoid all liability for the discrimination provided they can prove that other


\(^5\) Minn. Stat. § 363A.02, subdiv. 1(a) - (b) (emphasis added).

\(^6\) Minn. Stat. § 363A.04 (emphasis added).

\(^7\) See Ray v. Miller Meester Adver., Inc.,684 N.W.2d 404, 408-09 (Minn. 2004) (confirming that Minnesota courts reject federal precedent when inconsistent with the MHRA).

\(^8\) See Cont’l Can v. State, 297 N.W.2d 241, 249 (Minn. 1980).

\(^9\) See *id.* at 248.
legitimate reasons may coincidentally exist that could have justified the discharge.  

The Minnesota Supreme Court also refused to adopt the federal court’s definition of sexual harassment under Title VII, which includes a requirement to show that the harassment was “because of sex.”

Prior to the Krueger case, the Minnesota Supreme Court had not addressed the meaning of the business discrimination provision. In Krueger, unfortunately, the above-outlined history of construing the MHRA liberally to fulfill Act’s promise has been disregarded to put it mildly. The approach in Krueger also seems contrary to the clear language of the MHRA itself:

It is an unfair discriminatory practice for a person engaged in trade or business or in the provision of a service . . . to intentionally refuse to do business with, to refuse to contract with, or to discriminate in the basic terms, conditions, or performance of the contract because of a person’s race, national origin, color, sex, sexual orientation, or disability, unless the alleged refusal or discrimination is because of a legitimate business purpose.

II. The MHRA’s Promise Disregarded: Krueger v. Zeman Construction Company

The case of Krueger v. Zeman Construction Company came to the appellate courts as a result of the defendants seeking dismissal under Rule 12. The trial court had held that the Complaint failed to state a claim because the MHRA did not provide a cause of action for the individual, Krueger. The court of appeals affirmed, holding that Krueger could not sue Zeman Construction Company for sexual harassment because she did not have a contractual relationship with Zeman Construction Company.

A. Facts Alleged by Krueger

As presented by the Minnesota Supreme Court, the facts of the case are as follows: Krueger was the sole owner of co-plaintiff Diamond Dust Contracting, engaging in the drywall and sheetrock business.

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11 See Cummings v. Koehnen, 568 N.W.2d 418, 423 (Minn. 1997).

12 Minn. Stat. § 363A.17(3).


14 Id.

15 Id. at 890.

16 See generally Krueger v. Zeman Constr., 781 N.W.2d 858, 860 (Minn. 2010).
Diamond Dust Contracting entered into a contract with Zeman Construction Company to supply materials and labor for a multi-unit residential construction project.\textsuperscript{17} Krueger herself worked on the project.\textsuperscript{18} Krueger alleged that, while she was working on the project, Zeman Construction Company’s managers sexually harassed her, including by doing the following: referring to Krueger as a “cunt” and “fucking bitch”; directing profanity and vulgar gestures toward her family; telling her that cleaning rather than drywalling was the appropriate work for her; following her to the bathroom and leaning on the bathroom door while she was inside; tracking the number of times she used the bathroom; subjecting her to physical intimidation; equipping condominium units with exposed urinals that male construction workers used while she was working in the immediate area; suggesting that she wanted a urinal painted pink for her use; ordering her to get on her hands and knees and clean up drywall material that had fallen on the protective floor covering; and laughing at her when she began to cry at the humiliation directed at her.\textsuperscript{19} Krueger alleged that she reported the conduct to Zeman Construction Company on several occasions, but Zeman Construction Company did not take corrective or remedial action.\textsuperscript{20}

**B. The Minnesota Supreme Court’s Holding: A Contractual Relationship Between the Plaintiff(s) and the Defendant(s) Required Before the MHRA Will Apply**

The majority opinion begins with the conclusion that the MHRA is unambiguous and the statement that “if the statutory language is clear, we must give effect to the plain meaning . . . [i]n such circumstances, statutory construction is neither necessary nor permitted.”\textsuperscript{21} Despite reaffirming that the statute was \textit{unambiguous}, the Minnesota Supreme Court then did not give the words of the statute their plain and ordinary meaning. Instead, the Minnesota Supreme Court looked outside the MHRA to determine what the term “performance of contract” means in the context of the MHRA prohibition of discrimination in the performance of the contract.\textsuperscript{22} The Minnesota Supreme Court cited to \textit{Black’s Law Dictionary} for a definition of “performance,” which defined the term to mean “successful completion of a contractual duty.”\textsuperscript{23} The Minnesota Supreme Court then reasoned that only the person or entity who could be held liable for failure to perform the contractual duty would have a cause of action for discrimination in the performance of a contract.\textsuperscript{24} While a corporate entity might use employees to perform work required under a contract, according to the Minnesota Supreme Court, those employees have no rights or obligations under the contract and no cause of action for discrimination in the performance of the contract.\textsuperscript{25}

\textsuperscript{17} Id.

\textsuperscript{18} Id.

\textsuperscript{19} \textit{Krueger}, 781 N.W.2d at 866 (Anderson, J., dissenting).

\textsuperscript{20} \textit{Krueger}, 781 N.W.2d at 860.

\textsuperscript{21} Id. (citing Minn. Stat. § 645.16 (2008); Am. Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001)).

\textsuperscript{22} See id. at 863.

\textsuperscript{23} Id. at 864.

\textsuperscript{24} Id.

\textsuperscript{25} Id.
The majority opinion acknowledges that “[d]iscriminatory treatment of Diamond Dust’s employees is a violation of the statute.” It then stated, “Diamond Dust, as Zeman admits, has a claim under the statute.” Nonetheless, the Minnesota Supreme Court held that Krueger’s claim has no validity.

Although Diamond Dust may sue for sexual harassment of Krueger by Zeman Construction Company, Krueger remarkably may not. The Minnesota Supreme Court justified its holding as follows:

If we accept Krueger’s theory in this case, then there is virtually no limit on the persons who can sue when sex discrimination affects the performance of a contract. Under Krueger’s theory, every woman employed by Diamond Dust could have an individual cause of action because of Zeman’s conduct. . . . [I]f we read an individual cause of action into section 363A.17(3), we would be unable to articulate a clear limit on viable claims under the statute. Essentially, anyone who claims to have been harmed by discrimination in the performance of a contract would be “aggrieved” and could have standing to sue

The Minnesota Supreme Court did not even attempt to rationalize its limitation of the MHRA’s provisions. The Minnesota Supreme Court gave no explanation for why holding that “anyone who claims to have been harmed by discrimination in the performance of a contract would be ‘aggrieved’ and could have standing to sue” would be an inappropriate construction of the MHRA, particularly in light of the broad language and the Minnesota Legislature’s instruction to construe the MHRA liberally to eradicate discrimination. Simply put, the Minnesota Supreme Court disregarded the Minnesota Legislature’s mandate in a remarkable display of judicial activism.

C. Minnesota Supreme Court Dissent: The Plain Language of the MHRA Does Not Require A Contractual Relationship

Three justices dissented from the majority opinion in Krueger. Justice Paul Anderson wrote the dissenting opinion, in which Justices Page and Meyer joined. The foundation of the dissenting opinion, and the crux of the dispute between the dissenting and majority opinions, lies in the nature of the Minnesota Supreme Court’s goal. The job of the Minnesota Supreme Court in construing a statute is to ascertain the Minnesota Legislature’s intent in crafting the statute. When the plain meaning of the statute is clear, Minnesota courts must apply its plain meaning. Accordingly, the dissenting opinion would hold as follows:

26 Id.

27 Id.

28 Id.

29 Id. at 864-65.

30 See Minn. Stat. § 645.16 (1941).

By its plain language section 363A.17(3) forbids discrimination against a person in the performance of a contract on the basis of sex. Here, it is uncontested that Krueger alleged sufficient discrimination on the basis of sex by Zeman during the performance of a contract to which Zeman was a party. Section 363A.17(3) does not require more.\textsuperscript{32}

The dissent disagreed with the majority opinion’s holding that the statute requires a contractual relationship between the discriminator and the person suffering from discrimination because the statute does not mention a contractual-relationship requirement.\textsuperscript{33} The dissent observed that the MHRA contains a provision setting forth who may make a claim for discrimination—citing Section 363A.28, which states that an aggrieved person may bring a claim under the statute.\textsuperscript{34} The dissent cited to the Minnesota Supreme Court’s prior holding in \textit{Potter v. LaSalle Court Sports & Health Club} that “the act of discrimination itself constitutes sufficient injury for the law to provide a remedy, in the absence of statutory language requiring more.”\textsuperscript{35}

Further, the dissent reiterated that the MHRA addresses both the question of who can be sued for discrimination, as well as who can bring the claim, defining them differently.\textsuperscript{36} In that regard, the dissent highlighted the flaw in the majority opinion. In particular, the majority holds that the words “terms” and “conditions” and the phrase “performance of the contract” in Section 363A.17(3) indicate that both the perpetrator and the victim of the discrimination must be parties to the contract.\textsuperscript{37}

The dissent disagreed with the majority, reasoning that the use of the words “terms” and “conditions” and the phrase “performance of the contract” allow claims to be brought only \textit{against} a party to a business contract.\textsuperscript{38} Those words, however, according to the dissent, say nothing about the victim of the discrimination.\textsuperscript{39} The dissent would hold that Section 363A.17(3) identifies only what conduct is unlawful discrimination, and does not address who may pursue a claim for injury (which is the purpose of the “aggrieved” person language contained in Section 363A.28).

The dissent further observed that the majority opinion, contrary to the Minnesota Legislature’s express direction to construe the MHRA broadly, interpreting the business discrimination provision narrowly.\textsuperscript{40} The dissent concluded that “[i]mposing a contractual-relationship requirement creates a gap in the law such that

\textsuperscript{32} Krueger, 781 N.W.2d at 867 (Anderson, J., dissenting).
\textsuperscript{33} Id.
\textsuperscript{34} See id.
\textsuperscript{35} Id. (citing Potter v. LaSalle Court Sports & Health Club, 384 N.W.2d 873, 875 (Minn. 1986)).
\textsuperscript{36} Krueger, 781 N.W.2d at 867 (Anderson, J., dissenting).
\textsuperscript{37} See id. at 867-68.
\textsuperscript{38} Id. at 868-69.
\textsuperscript{39} See id. at 868.
\textsuperscript{40} See id.
some persons are subject to discrimination in the workplace without a remedy against the discriminating parties and some businesses are able to discriminate with impunity."\textsuperscript{41}

**D. Effect of the ruling in Krueger v. Zeman Construction Company**

The promise of the MHRA is that any person aggrieved by a violation of the Act may bring a civil action.\textsuperscript{42} It is this very promise that the Minnesota Supreme Court openly thwarts\textsuperscript{43} The majority opinion specifically states that it will not permit a construction of the MHRA under which every victim of discrimination may sue for discrimination, even after paying lip service to the provisions of the MHRA that require liberal construction and enable any person aggrieved by a violation of the Act to pursue a case.\textsuperscript{44}

Reading the plain language in Section 363A.17 of the MHRA leads to only one conclusion – a business may not discriminate in the terms, conditions, or performance of a contract because of a person’s sex, race, national origin, color, or disability.\textsuperscript{45} There is an obvious reason for this language; while legal entities like corporations or partnerships may sue and be sued, these entities do not have a race, national origin, color sex, or disability.\textsuperscript{46} Only people have these immutable characteristics. Therefore, this provision cannot be read to prohibit only discrimination among actual parties to a business contract. To do so would restrict the provision to apply only in situations in which a business entity is contracting with an individual, and not to situations in which a business entity is contracting with another business entity. This is a tortured reading of the statute.

Consider the following examples.\textsuperscript{47} (1) corporation A refuses to enter into an independent contractor relationship with Abbey because she is a woman, and A believes women are not capable of performing the job; (2) partnership B refuses to enter into a business contract with Abbey, Inc. because Abbey, Inc. is owned by a woman and B believes women are not capable of performing the job; and (3) company C refuses to enter into a business contract with Abbey, Inc. because all of Abbey, Inc.’s employees are women and C believes women are not capable of performing the job. Under the MHRA the term “person” is defined to include partnership, association, corporation, legal representative, trustee, trustee in bankruptcy, receiver, and the State and its departments, agencies, and political subdivisions.\textsuperscript{48}

\textsuperscript{41} Id. at 869.

\textsuperscript{42} See Minn. Stat. § 363A.28, subdiv. 1.

\textsuperscript{43} See Krueger, 781 N.W.2d at 866.

\textsuperscript{44} See id. at 865.

\textsuperscript{45} See Minn. Stat. § 363A.17(3).

\textsuperscript{46} See id.

\textsuperscript{47} These examples were presented to the Court by amicus curiae Minnesota Chapter of the National Employment Lawyers Association.

\textsuperscript{48} See Minn. Stat. § 363A.03, subdiv. 30.
In the first example, corporation A is a business who has discriminated against a “person” (Abbey) because of her sex. Clearly, in this example, A has violated the MHRA, and Abbey is an aggrieved “person” who has the right to file a claim for violation of the Act.\(^49\)

In the second example, partnership B is a business who has discriminated against a “person” (Abbey and Abbey, Inc.) as that term is defined by the MHRA, because of Abbey’s sex.\(^50\) In this example, B has violated the MHRA by refusing to contract with Abbey, Inc. because of a person’s sex.\(^51\) It would make no sense to say that B did not discriminate against Abbey when she is the person whose sex was the basis of the discrimination. It would also defy logic to conclude that B did not discriminate against Abbey, Inc. because Abbey, Inc. is also a “person” as defined by the Act who has been aggrieved by a violation of the Act due to the sex discrimination against Abbey (which resulted in Abbey, Inc. being deprived of business).

In the third example, company C has violated the Act as well. C is a business who has discriminated against a “person” (Abbey, Inc. and its female employees) as that term is defined by the MHRA because of Abbey, Inc.’s employees’ sex.\(^52\) In this example, C has violated the MHRA by refusing to contract with Abbey, Inc. because of a person’s sex.\(^53\) It would make no sense to say that C did not discriminate against Abbey, Inc.’s female employees when they are the people whose sex was the basis of the discrimination. It would also defy logic to conclude that C did not discriminate against Abbey, Inc., because Abbey, Inc. is a “person” as defined by the Act who has been aggrieved by a violation of the Act due to the discrimination against Abbey Inc. for the sex of the employees (which resulted in Abbey, Inc. being deprived of business).

Without explaining how it draws the conclusion, the majority opinion in \textit{Krueger} acknowledges that “[d]iscriminatory treatment of Diamond Dust’s employees is a violation of the statute.”\(^54\) The majority opinion then states, however, that it will not permit the victims of discrimination to have a cause of action because the Minnesota Supreme Court cannot conceive of a limit which it finds suitable.\(^55\) That position is striking because setting a limit to statutory language is the sole prerogative of the Minnesota Legislature.

Had the Minnesota Legislature intended to limit aggrieved parties under the business discrimination provision to the formal parties to a contract, it could have done so. The Minnesota Legislature did not, however, and the Minnesota Supreme Court should not have read limiting language into the business discrimination provision. The MHRA specifically provides that “[a]ny person aggrieved by a violation of this chapter may bring a civil action.”\(^56\) Clearly, use of the defined term “person” includes both individual

\(^{49}\) See Minn. Stat. § 363A.28, subdiv. 1.

\(^{50}\) See Minn. Stat. § 363A.03, subdiv. 30.

\(^{51}\) See Minn. Stat. § 363A.17(3).

\(^{52}\) See Minn. Stat. § 363A.03, subdiv. 30.

\(^{53}\) See Minn. Stat. § 363A.17(3).

\(^{54}\) See Krueger, 781 N.W.2d at 864.

\(^{55}\) See id.

\(^{56}\) See Minn. Stat. § 363A.28, subdiv. 1.
and other legal entities, and use of that defined term in the business discrimination provisions permits suit by any person or entity who has been negatively affected by the discrimination.\textsuperscript{57}

In \textit{Krueger}, the discrimination occurred in the performance of the contract.\textsuperscript{58} Discrimination in the performance of the contract is a violation of the MHRA in the same way that discrimination in the terms or conditions of the contract is a violation of the Act.\textsuperscript{59} Sexual harassment is included within the definition of discrimination.\textsuperscript{60} Krueger alleged that she was sexually harassed in the performance of the contract.\textsuperscript{61} Krueger was performing work in furtherance of the contract between Zeman Construction Company and Krueger’s company.\textsuperscript{62} The contract required Krueger to provide labor – in the form of “persons” – to perform work for Zeman Construction Company.\textsuperscript{63} During her performance of this work, Zeman Construction Company discriminated against Krueger by repeated acts of sexual harassment affecting the basic terms, conditions, and performance of her work under the contract.\textsuperscript{64} Krueger clearly should have a remedy for this under the MHRA.

In a case interpreting 42 U.S.C. § 1981 (“Section 1981”), which prohibits discrimination in contracts based upon race, the United States Court of Appeals for the Third Circuit would seem to support the \textit{Krueger} decision at first glance.\textsuperscript{65} In \textit{Danco, Inc. v. Wal-Mart Stores, Inc.}, the Third Circuit reasoned, “[a] corporation ordinarily carries out its activities through its employees, and work-site racial discrimination against Danco’s employees could amount to racial discrimination against Danco causing damage to the company.”\textsuperscript{66} Because of the limited language of Section 1981, however, the Third Circuit held in \textit{Danco} that the individual did not have a cause of action.\textsuperscript{67}

The expansive language of the MHRA, however, does provide a cause of action for the individual. Section 1981 is drafted to “give” people the right to make and enforce contracts.\textsuperscript{68} In contrast, Section 363A.17 of the MHRA prohibits certain discrimination, specifically discrimination by businesses on the basis of a

\begin{footnotesize}
\textsuperscript{57} See Minn. Stat. § 363A.17(3).

\textsuperscript{58} See \textit{Krueger}, 781 N.W.2d at 860.

\textsuperscript{59} See Minn. Stat. § 363A.01 \textit{et seq.}

\textsuperscript{60} See Minn. Stat. § 363A.03, subdiv. 13.

\textsuperscript{61} See \textit{Krueger}, 781 N.W. 2d at 860.

\textsuperscript{62} See \textit{id.}

\textsuperscript{63} See \textit{id.}

\textsuperscript{64} See \textit{id.}

\textsuperscript{65} See \textit{Danco, Inc. v. Wal-Mart Stores, Inc.}, 178 F.3d 8 (1st Cir. 1999).

\textsuperscript{66} Id. at 15-16.

\textsuperscript{67} See \textit{id.}

\textsuperscript{68} See 42 U.S.C. § 1981.
\end{footnotesize}
person’s race, color, national origin, sex, sexual orientation, or disability. In other words, Section 363A.28 of the MHRA provides a cause of action for any person aggrieved by the discrimination.

The public policy underlying the business discrimination section of the MHRA is clear. The Minnesota Legislature intended not only to prohibit discrimination in employment by employers, but also to prohibit discrimination when it occurs in the context of business relations. Historically, discrimination has existed in the business world, which has resulted in disparate business opportunities for women and people of color. This is the public policy underlying State and Federal programs seeking to retain women and minority-owned businesses for government contracts. The MHRA is not this type of a program, but its prohibition against discrimination in business serves the same purpose.

The policy is clear – the MHRA is in place to stop discrimination in all of its forms in the workplace – whether the perpetrator is an employer, a customer, or another business. It is well settled that the scope of discriminatory prohibition covers more than the “terms” and “conditions” in the narrow contractual sense. The phrase “terms and conditions” of employment was meant to “strike at the entire spectrum” of disparate treatment which includes “requiring people to work in a discriminatorily hostile or abusive environment.” In short, an inclusive reading of Section 363A.17 is supported by the remaining sections of the MHRA, the stated purpose of the Act, and prior interpretation by Minnesota courts.

The Minnesota Supreme Court’s holding means that Krueger, as a sole proprietor performing under her own contract, is denied the right to take action against the business responsible for blatant, ongoing, and prohibited sexual harassment against her in the workplace. Further, beyond the sole proprietor, any person who is performing work as an employee under a business-to-business contract is now denied the protections of the MHRA.

The Minnesota Supreme Court’s holding decimates the stated purpose of the MHRA, effectively resulting in a “rubber stamp” for businesses to discriminate without liability as long as they limit their harassment or other conduct outlawed by the MHRA to people who perform contract work but are not actually a signatory to the contract. This is not the reading intended by the Minnesota Legislature, whose stated purpose under the MHRA is to secure for “persons” freedom from discrimination.

Practically speaking, the narrow reading of Section 363A.17 of the MHRA also places a worker at the mercy of the contracting business. For instance, if Contractor A harasses or discriminates against certain workers of Contractor B, Contractor B may decline to hire those individuals or may refuse to take action under the MHRA for fear of losing future contracts. The employees, consequently, can either accept the discriminatory treatment or work elsewhere – they have no right to take any action against the perpetrator.

69 See Minn. Stat. § 363A.17, subdiv. 3.

70 See Minn. Stat. § 363.28, subdiv. 1.


73 See Minn. Stat. § 363A.01 et seq.
III. The Departure From Clear Statutory Language And Settled Minnesota Precedent By Krueger v. Zeman Construction Company Is At Odds Even With Federal Case Law

Historically, the Minnesota Supreme Court has recognized that the Minnesota Legislature crafted the MHRA using language that is broader than analogous federal statutes. As mentioned at the outset, the Minnesota Supreme Court has established that – in furtherance of the remedial purposes of the MHRA – the generally broader State standard should control when state and federal standards differ. In Krueger, however, the Minnesota Supreme Court did the opposite; it adopted an approach that so narrows the reach of the MHRA that it is now more restrictive than the federal approach.

A brief review of the standards for sexual harassment cases under federal precedent highlights just how far the Minnesota Supreme Court in Krueger strayed from the requirement that the MHRA be construed broadly. There are numerous examples of the federal courts recognizing that the intent of statutes prohibiting discrimination must be viewed with an understanding of how workplace environments typically operate. This can be seen from the fact that the United States Supreme Court recognized that sexual harassment is a form of discrimination and is actionable under federal law despite the absence of any federal statutory terminology including harassment as a form of discrimination. In addition, a plaintiff need not show the harassing conduct is both severe and pervasive to have an actionable harassment claim. The Eighth Circuit set forth the governing standard more concretely when reversing summary judgment for the employer:

A worker “need not be propositioned, touched offensively, or harassed by sexual innuendo” in order to have been sexually harassed, however. Intimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. Furthermore, physical aggression, violence, or verbal abuse may amount to sexual harassment.

Indeed, a plaintiff may be able to demonstrate that the work environment is sufficiently hostile by offering

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74 See Ray, 684 N.W.2d at 408-09 (confirming that Minnesota courts reject federal precedent when inconsistent with the MHRA).

75 Id.


77 See id.


79 Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999) (citations omitted) (reversing summary judgment because “harassment alleged to be because of sex need not be explicitly sexual in nature”); see also Quick v. Donaldson Co., 90 F.3d 1372, 1379 (8th Cir. 1996) (citations omitted).
evidence of a single incident.\textsuperscript{80}

Further, according to well-settled United States Supreme Court precedent, courts must evaluate the harassment claims in light of the full record. Toward that end, the United States Supreme Court and the Eighth Circuit construe the “continuing violations” doctrine liberally in sexual harassment cases – ruling that an environment can be held to be discriminatory even when the events are spread out over long periods of time.\textsuperscript{81}

Federal courts have also broadly permitted employees to use evidence of other acts of discrimination to show a hostile environment. After carefully analyzing the governing precedent, the Eighth Circuit recently held as follows regarding other-acts evidence of which the plaintiffs were unaware:

Irrespective of whether a plaintiff was aware of the other incidents, the evidence is highly probative of the type of workplace environment she was subjected to and whether a reasonable employer should have discovered the sexual harassment.\textsuperscript{82}

In addition, federal courts have recognized the reality of the workplace environment in considering the question of when an employer will be held to have notice of harassment. The Eighth Circuit has long held, “[i]f the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable.”\textsuperscript{83}

Consequently, the Eighth Circuit has reversed judgment for the employer, in part, because complaints to

\textsuperscript{80} See, e.g., Pierce v. Rainbow Foods Group, Inc., 158 F. Supp. 2d 969, 973 (D. Minn. 2001) (denying summary judgment because the supervisor touched the plaintiff in a sexual way once); EEOC Policy Guidance on Sex Harassment, No. 915.050, 1990 WL 1104701, at *9 (March 19, 1990) (reiterating that one incident may violate Title VII).

\textsuperscript{81} Nat’l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 118 (2002) (affirming judgment for the plaintiff and holding the plaintiff could recover for harassment occurring outside of the limitations period). Indeed, the Eighth Circuit has long held, “[i]f the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable.” Jensen v. Henderson, 315 F.3d 854, 859 (8th Cir. 2002) (citation omitted) (reversing summary judgment for the employer); see also Hathaway v. Runyon, 132 F.3d 1214, 1222 (8th Cir. 1998) (citation omitted) (reversing judgment for the employer and reaffirming that “exposure to harassing conduct need not have been continuous”).

\textsuperscript{82} Sandoval, et al. v. Am. Bldg. Maint. Indus., Inc., et al., 578 F.3d 787, 802, \textit{rhrg. and rhrg. en banc denied} 578 F.3d 787 (8th Cir. 2009) (holding other-acts evidence is “highly relevant to prove the sexual harassment [is] severe”); see also Williams v. ConAgroPoultry Co., 378 F.3d 790, 794 (8th Cir. 2004) (affirming judgment for the plaintiff based, in part, on coworkers’ testimony about their own harassment complaints, and this “ testimony made more credible [the plaintiff’s] testimony about the environment that he was exposed to”); Howard v. Burns, 149 F.3d 835, 838 (8th Cir. 1998) (citation omitted) (affirming judgment for the plaintiff and reiterating the court considers “harassment of employees other than the plaintiff to be relevant to show pervasiveness of the hostile environment”).

the direct supervisor may have conferred notice about the harassment. The Eighth Circuit recently reaffirmed that an employee need not make a second report or use a second complaint mechanism to put the employer on notice about harassment:

An employer has actual notice of harassment when sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it.

Other circuit courts have joined the Eighth Circuit in rejecting the requirement of a second report and the use of a second complaint mechanism before an employer will have notice of harassment.

This body of federal law reflects the federal courts’ general understanding that Congress intended federal statutes prohibiting discrimination to be interpreted in light of the realities encountered by workers in their work environments and, moreover, that Congress intended to provide a remedy to the actual victims of discrimination. The Minnesota Supreme Court’s holding in *Krueger* does just the opposite: the Minnesota Supreme Court has intentionally limited the reach of the MHRA to take away protection and remedies codified by the Minnesota Legislature.

### IV. Conclusion

The *Krueger* holding is not only a departure from the Minnesota Supreme Court’s long-standing commitment to effectuate the MHRA’s promise to ensure freedom from discrimination, it reflects striking judicial activism that limits the application of the MHRA in spite of the Act’s clear language to the contrary.

The practical effect of *Krueger* on Minnesota employees is that it leaves them without remedy when they are discriminated against while performing work under a business contract. The ruling also will likely discourage the hiring of women and people of color by companies who do business in industries in which discrimination flourishes. In sum, *Krueger* exemplifies the potential problems that may be created when judges legislate from the bench in clear contravention of unambiguous statutory language, codified policy, and settled precedent.

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84 Id. at 919-21; see also Diaz v. Swift-Eckrich, Inc., 318 F.3d 796, 801 (reversing summary judgment because the person to whom the plaintiff complained about harassment “apparently had the authority to discipline employees”).

85 See Sandoval, 578 F.3d at 802 (citations omitted); see also Diaz, 318 F.3d at 801 (reasoning “a fact-finder could conclude that it was reasonable for [the plaintiff] to believe that [her supervisor] had a duty to report the harassment to others in the company”); Sims, 196 F.3d at 920 (citation omitted) (concluding the “information of the harassment had ‘come to the attention of’ someone who is reasonably believed to have a duty to pass on the information”).

86 See, e.g., Howard v. Winter, 446 F.3d 559, 569 (4th Cir. 2006); Loughman v. Malnati Org., 395 F.3d 404, 408 (7th Cir. 2005); Swinton v. Potomac Corp., 270 F.3d 794, 805 (9th Cir. 2001), cert. denied 535 U.S. 1018 (2002); Hurley, 174 F.3d at 118; Distasio v. Perkin Elmer Corp., 157 F.3d 55, 64-65 (2d Cir. 1998); Williamson v. City of Houston, 148 F.3d 462, 467 (5th Cir. 1998).