A Survey Of Recent Developments In The Law: Employment Law

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VII. EMPLOYMENT LAW

A. Employer Liability for Supervisor Sexual Harassment

In its 1997-1998 term, the United States Supreme Court rendered three landmark sexual harassment decisions in the employment area. These cases establish new standards of employer liability for supervisor sexual harassment in Title VII claims. In two closely related decisions, Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth, the Court held that an employer is vicariously liable under Title VII for a supervisor's actionable discrimination of a lower-level employee, regardless of the employer's knowledge of the harassment. Where no tangible employment action is taken, the employer may assert an affirmative defense that looks to the reasonableness of the employer's conduct and the reasonableness of the employee's actions to prevent and avoid harm. These decisions mark the Court's only discussion of the standards of employer liability since it held, in Meritor Savings Bank, FSB v. Vinson, that employer liability is determined by traditional agency principles.

In Faragher, Beth Ann Faragher ("Faragher") worked as an ocean lifeguard with the marine safety division of the City of Boca Raton ("City") from 1985 until she resigned in 1990. In 1992, Faragher brought a civil action against the City and her immediate supervisors, Bill Terry ("Terry") and David Silverman ("Silverman"), alleging that a sexually hostile atmosphere existed at the beach. Faragher alleged that Terry and Silverman subjected her

4. See Faragher, 118 S. Ct. at 2292-93; Burlington, 118 S. Ct. at 2270. The Court handed down both decisions on June 26, 1998. See Faragher, 118 S. Ct. at 2275; Burlington, 118 S. Ct. at 2257.
5. See Faragher, 118 S. Ct. at 2293.
7. See id. at 73.
8. See Faragher, 118 S. Ct. at 2280.
9. See id.
and other female lifeguards to repeated, "uninvited and offensive touching," lewd remarks and gestures, and offensive talk about women. Faragher specifically alleged that Terry told her he would never promote a woman to the rank of lieutenant and Silverman once said to her, "[d]ate me or clean the toilets for a year." Based on these and other allegations, Faragher asserted that Terry and Silverman were agents of the City whose conduct resulted in discrimination in the "terms, conditions, and privileges" of her employment in violation of Title VII.

After a bench trial, the district court concluded that the supervisors' conduct was discriminatory harassment sufficiently serious to alter Faragher's conditions of employment and to create an abusive working environment. The trial court found three bases for imputing liability to the city. First, the severity of the conduct supported an inference that the City knew or should have known about it. Second, Terry and Silverman committed the harassing conduct while they were acting as agents for the city. Finally, Faragher told another supervisor, Robert Gordon ("Gordon"), about the harassment and he did not act upon the information. Therefore, the district court awarded judgment in favor of Faragher.

A panel of the court of appeals for the Eleventh Circuit reversed the judgment against the City. While the panel found that the supervisors' conduct created an "abusive work environment," it held that the City was not liable because Terry and Silverman were not acting within the scope of their employment when they engaged in harassing conduct, and their agency relationship with the City did not facilitate the harassment. It further held that neither the pervasiveness of the harassment nor Gordon's knowledge of it could constitute constructive knowledge by the City.

The court of appeals, sitting en banc, concurred with the

10. Id.
11. Id.
13. See Faragher, 118 S. Ct. at 2281.
14. See id.
15. See id.
16. See id.
17. See id. The court awarded Faragher only one dollar in nominal damages. See id.
18. See Faragher v. City of Boca Raton, 76 F.3d 1155, 1166 (11th Cir. 1996).
19. See id.
20. See id.
panel and rejected Faragher's Title VII claim against the City.\textsuperscript{21} The court determined that: (1) the supervisors' sexual harassment was a "frolic" outside the scope of their employment and for their own personal ends; (2) the City did not aid them in perpetrating the harassment because something more than an agency relationship and improper conduct is required for such a finding; and (3) the City could not be charged with constructive knowledge of the harassment because it was not pervasive enough and it occurred at a remote location.\textsuperscript{22}

The U.S. Supreme Court granted certiorari to address the differing approaches used by the courts of appeals to create standards governing employer liability for hostile environment harassment.\textsuperscript{23} The Court enunciated a new standard for determining employer liability,\textsuperscript{24} reversed the judgment of the Eleventh Circuit, and remanded for judgment in favor of Faragher.\textsuperscript{25} The Court held that an employer is liable to an employee for "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."\textsuperscript{26} The Court further held that an employer may raise an affirmative defense to liability or damages if no tangible employment action is taken.\textsuperscript{27} The two-pronged defense requires an employer to show, subject to proof by a preponderance of the evidence: "(a) that the employer exercised..."
reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.\textsuperscript{28} If an employer takes tangible employment action (such as demotion or reduction in pay), no affirmative defense is available.\textsuperscript{29} In so holding, the Court sought to reconcile the need to impose vicarious liability for abuse of supervisory authority resulting in harm with Title VII's basic policy of encouraging employers to be proactive in creating and using antiharassment policies and grievance procedures.\textsuperscript{30}

The Court first sought to address the appellate court's reliance on a scope of employment analysis. The Court recognized that there are two conflicting lines of cases on vicarious employer liability.\textsuperscript{31} The first line of cases suggests that sexual harassment falls beyond the scope of the employment relationship.\textsuperscript{32} Courts reaching this conclusion have emphasized that "harassment consisting of unwelcome remarks and touching is motivated solely by individual desires and serves no purpose of the employer."\textsuperscript{33} These cases have compared sexual harassment to "frolic and detour" cases that do not impose vicarious liability on the employer.\textsuperscript{34} The appellate court in \textit{Faragher} adopted this view.\textsuperscript{35} The second line of cases holds that the scope of employment is defined broadly enough to include intentional torts that serve no purpose of benefiting the employer.\textsuperscript{36}

\begin{footnotes}
\item[28] \textit{Faragher}, 118 S. Ct. at 2293.
\item[29] See id.
\item[30] See id. at 2292. The rationale is that where a supervisor uses his or her authority to discriminate against an employee and to create a tangible job detriment, such acts are company acts that are attributable to the employer. See id. On the other hand, attributing employer liability in every instance gives employers no incentive to create and enforce antiharassment policies. See id. at 2292-93. The Court's holding sought to reconcile these principles by imposing vicarious liability where there is tangible employment detriment, and allowing the employer an affirmative defense where there is not. See id.
\item[31] See id. at 2286.
\item[32] See id. See, e.g., \textit{Harrison v. Eddy Potach, Inc.}, 112 F.3d 1437, 1444 (10th Cir. 1997) \textit{cert. granted}, 118 S. Ct. 2364 (1998) (noting that sexual harassment is not within the job description of employees at any reputable business); \textit{Andrade v. Mayfair Management, Inc.}, 88 F.3d 258, 261 (4th Cir. 1996) (stating explicitly that sexual harassment is not within the scope of a supervisor's employment).
\item[33] \textit{Faragher}, 118 S. Ct. at 2286-87.
\item[34] See id. at 2287.
\item[35] See id. at 2286.
\item[36] See id. at 2287. See, e.g., \textit{Ira S. Bushey & Sons, Inc. v. United States}, 398 F.2d 167, 171 (2d Cir. 1968) (ruling that the government had vicarious liability for damages to drydock and ship caused by a drunken sailor, even though the sailor's}
\end{footnotes}
The rationales for these decisions vary but include the notion that certain employee acts are foreseeable and that employers must bear the cost of doing business, as well as the idea that employee misconduct can arise from or be related to the employee’s essential duties.\(^{37}\)

The Court rejected the use of a scope of employment versus frolic analysis for two reasons. First, drawing a line between scope and frolic can result in differing outcomes for equally impermissible behavior.\(^{38}\) The Court used the example of a supervisor who racially discriminates to avoid problems with prejudiced employees—presumably an act intended to further the interests of his employer by placating the workforce.\(^{39}\) In contrast, the supervisor in the instant case was motivated by his own sexual interests and not by an interest of serving the employer.\(^{40}\) The former supervisor would be acting within the scope of his employment while the latter would not.\(^{41}\) Second, the lower courts uniformly have held that employer liability for co-worker harassment is judged by a negligence standard, thereby implicitly treating co-worker harassment as outside the scope of employment.\(^{42}\) The Court opined that if scope of employment could create employer liability for actions of the “supervisor” class of employees, it would be just as appropriate for the same standard to apply to the “co-worker” class of employees.\(^{43}\)

Instead, the Court adopted the aided-by-agency relation principle set forth in section 219(2)(d) of the Restatement (Second) of Agency, which provides that an employer:

\[
\text{is not subject to liability for the torts of his servants acting outside the scope of their employment unless... the servant purported to act or speak on behalf of the principal and there was reliance on apparent authority, or he was}
\]

\(^{37}\) See *Faragher*, 118 S. Ct. at 2287.
\(^{38}\) See id. at 2288-89.
\(^{39}\) See id.
\(^{40}\) See id. at 2289.
\(^{41}\) See id.
\(^{42}\) See id.
\(^{43}\) See id.
aided in accomplishing the tort by the existence of the agency relation.

The Court concluded that "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and ... the aided-by-agency-relation principle ... provides an appropriate starting point for determining liability for the kind of harassment presented here." The Court reasoned that supervisors use their position of authority when discriminating and employees are not as able or willing to combat harassment by a supervisor as they are that of a co-worker. Additionally, employers should have an incentive to carefully select, train, and monitor its supervisors. Though there are good reasons for imposing vicarious liability for supervisors who misuse their authority, the Court had to square this rationale with its holding in Meritor that "an employer is not 'automatically' liable for harassment by a supervisor who creates the requisite degree of discrimination ... ". Therefore, the Court adopted an affirmative defense to liability in circumstances where no tangible employment action is taken, even where the supervisor has created an actionable environment.

In the second case, Burlington Industries, Inc. v. Ellerth, the Court's holding was the same as in Faragher, but the issue was different. The issue in Burlington, as framed by the Court, was "whether ... an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions."

Kimberly Ellerth ("Ellerth") brought suit against her former employer under Title VII alleging that sexual harassment by a su-

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44. Id. at 2290 (quoting Restatement (Second) of Agency § 219(2)(d) (1958)).
45. Id.
46. See id. at 2291.
47. See id.
48. Id.
49. See id. at 2292. See also supra notes 27-29 and accompanying text.
51. Id. at 2262.
52. Id.

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pervisor forced her constructive discharge. Ellerth alleged that she quit her sales job of fifteen months after being subjected to repeated sexual harassment by her supervisor, Ted Slowik ("Slowik"). Slowik was not Ellerth’s immediate supervisor, but was a mid-level manager and the vice president of one of five business units within one of Burlington’s divisions. Ellerth worked in a small Chicago office and answered to her colleague, who in turn answered to Slowik in New York.

Ellerth’s allegations included three episodes with Slowik that could be construed to have denied Ellerth tangible job benefits. First, on a 1993 business trip, Slowik made comments about Ellerth’s breasts, told her to ‘‘loosen up” and warned, ‘‘... I could make your life very hard or very easy at Burlington.” Next, in March of 1994, when interviewing Ellerth for a promotion, Slowik rubbed her knee and expressed reservations about her because she was not ‘‘loose enough.” When Slowik later called to award Ellerth the promotion he said, ‘‘you’re gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs.’’ Finally, Ellerth called Slowik to ask permission to use a customer’s logo on a fabric sample. Slowik told her, ‘‘I don’t have time for you right now, Kim—unless you want to tell me what you’re wearing.” Ellerth abruptly ended the conversation, but was forced to call within the next day or two to have her request approved. During this conversation, Slowik denied her request and added something to the effect of, ‘‘are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier.”

Ellerth quit her job shortly thereafter and faxed Burlington a letter explaining the reasons for her resignation but not mentioning the sexual harassment. However, three weeks later, she sent a

53. See id. at 2263.
54. See id. at 2262.
55. See id.
56. See id.
57. See id.
58. Id. (quoting Appellant’s Brief at 156).
59. Id. (quoting Appellant’s Brief at 159).
60. Id. (quoting Appellant’s Brief at 159-60).
61. See id.
62. Id. (quoting Appellant’s Brief at 78).
63. See id.
64. Id. (quoting Appellant’s Brief at 79).
65. See id.
letter explaining that Slowik's sexually harassing conduct forced her resignation. While Ellerth knew that Burlington had a policy against sexual harassment she chose not to report Slowik while she was a Burlington employee.

The trial court granted Burlington summary judgment on Ellerth's claim that Burlington engaged in sexual harassment, forcing Ellerth's constructive discharge in violation of Title VII. While the trial court found that Ellerth's allegations, if true, would amount to the creation of a hostile work environment by Slowik, it concluded that Burlington neither knew nor should have known about the conduct. The Seventh Circuit Court of Appeals, sitting en banc, reversed the trial court's decision, issuing eight separate opinions and not agreeing on a controlling rationale. The Supreme Court granted certiorari to define the relevant standards of employer liability when a supervisor creates a hostile working environment by making explicit threats to alter a lower-level employee's terms or conditions of employment, but does not fulfill the threat. The Court affirmed the Seventh Circuit's reversal of summary judgment for Burlington and remanded, adopting its holding in Faragher.

The carrying out of threats is known as "quid pro quo" harassment, whereas offensive gestures, remarks and sexual attentions

66. See id.
67. See id. at 2262-63.
68. See id. at 2263; see also Ellerth v. Burlington Indus., Inc., 912 F. Supp. 1101, 1124 (N.D. Ill. 1996).
69. See Burlington, 118 S. Ct. at 2263. The district court identified the quid pro quo element of the hostile environment claim and applied a negligence standard. See id. Ellerth's Title VII and constructive discharge claims were dismissed. See id.
70. See id. The judges agreed that the issue they faced was vicarious liability, not failure to comply with a duty of care. See id. They further agreed that if Slowik's unfulfilled threats to deny Ellerth tangible job benefits were enough to impose vicarious liability on Burlington, Ellerth could recover on her claim. See id. Most of the judges were in accord that Ellerth's claim could constitute a quid pro quo claim even though Ellerth received a promotion and was subjected to no tangible retaliation. See id. However, disagreement arose over the standard for imposing employer liability for such a claim. See id. Six judges agreed upon a vicarious liability standard that would allow Ellerth to recover even though Burlington was not negligent. See id. Two judges would have imposed vicarious liability based upon agency principles. See id. Another judge would have followed state law, and yet another applied a negligence standard. See id. at 2263-64.
71. See id. at 2264; see also supra notes 18-23 and accompanying text (discussing harassing conduct outside the scope of employment).
72. See Burlington, 118 S. Ct. at 2270-71; see also supra notes 24-29 and accompanying text (discussing the Faragher decision).
that are so pervasive as to create a hostile work environment are known as “hostile work environment” harassment. The Court disagreed with the growing body of case law that suggested that employer liability turned largely on whether harassment was “hostile work environment” or “quid pro quo,” and that readily attached employer liability to the latter. The Court ruled that while the distinctions are valid for purposes of establishing actionable conduct under Title VII, the categories “quid pro quo” and “hostile work environment” are not controlling on the issue of vicarious employer liability. While Ellerth framed her cause of action as one of “quid pro quo” harassment, the Supreme Court held that “[b]ecause Ellerth’s claim involves only unfulfilled threats, it should be categorized as a hostile environment claim . . . .” This designation, however, has no impact on the determination of vicarious liability. The Court focused the new inquiry on whether the employee has suffered a tangible employment detriment. Where there has been no tangible employment detriment, the inquiry focuses on the reasonableness of the employer in acting to prevent and correct harassment and the reasonableness of the employee in using available complaint mechanisms and avoiding further harm.

The Court’s decisions in Faragher and Burlington send a clear message to employers and employees alike to act reasonably and responsibly when responding to sexual harassment and discrimination. While, as a matter of law, the absence of an antiharassment policy and grievance procedure is not fatal, employers would be wise to employ a suitable policy to support the first prong of their defense: that the employer used reasonable care to prevent or promptly correct sexual harassment. Likewise, an employee’s failure to avoid harm by utilizing an available grievance procedure is normally sufficient to satisfy the second prong of the employer’s

73. See Burlington, 118 S. Ct. at 2264.
74. See id. at 2264-65. Neither “quid pro quo” nor “hostile work environment” appears in the text of Title VII. See id. at 2264. The Court concluded that because Ellerth’s claim involved unfulfilled threats, it is properly categorized as a hostile environment claim that requires a showing of severe or pervasive conduct. See id. at 2265.
75. See id. at 2265.
76. Id.
77. See id. at 2270.
78. See id.
79. See id.
defense: that the employee unreasonably failed to avoid harm or use the preventive or corrective opportunities provided by the employer.80

In the third case, Oncale v. Sundowner Offshore Services, Inc.,81 the Court held that same-sex sexual harassment in the workplace is actionable under Title VII.82 The petitioner, Joseph Oncale (“Oncale”), worked for Sundowner Offshore Services on an oil platform in the Gulf of Mexico.83 Oncale was a roustabout on an eight-man crew that included John Lyons (“Lyons”), Danny Pippen (“Pippen”), and Brandon Johnson (“Johnson”).84 Lyons and Pippen had supervisory authority.85 Lyons, Pippen, and Johnson frequently subjected Oncale to humiliating sex-related actions such as physical assault of a sexual nature and the threat of rape.86 Oncale reported the harassment to the company’s safety compliance clerk, Valent Hohen, but no remedial action was taken.87 Oncale quit and asked that his pink slip state that he “voluntarily left due to sexual harassment and verbal abuse.”88 In deposition testimony Oncale stated, “I felt that if I didn’t leave my job, that I would be raped or forced to have sex.”89

Oncale filed suit against Sundowner in the United States District Court for Eastern District of Louisiana, alleging discrimination in employment because of his sex.90 Relying on Fifth Circuit precedent, the district court held that because Oncale is a male, he has “no cause of action under Title VII for harassment by male co-workers.”91 On appeal, the Fifth Circuit Court of Appeals affirmed.92 The Supreme Court reversed, holding that “nothing in Title VII necessarily bars a claim of discrimination ‘because of . . . sex’ merely because the plaintiff and the defendant . . . are of the

80. See id.
82. See id. at 1003.
83. See id. at 1000.
84. See id. at 1000-01.
85. See id. at 1001.
86. See id.
87. See id.
88. Id.
89. Id.
90. See id.
91. Id. The district court relied on the Fifth Circuit’s holding in Garcia v. Elf Atochem N. Am., 28 F.3d 446, 451-52 (5th Cir. 1994) in making its decision. See id.
92. See Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998). In affirming the lower court’s judgment, a panel from the court of appeals concluded that Garcia was binding circuit precedent. See id.
same sex." Even though same-sex harassment was not the primary evil that Congress sought to forbid in enacting Title VII, the Court saw no justification in the statute language or its precedent to exclude same-sex harassment from its coverage.

The Court cautioned that its ruling does not expand Title VII into a civility code for the American workplace. Title VII does not prohibit all harassment, but only "discriminat[ion] . . . because of . . . sex." In addition, Title VII forbids only harassment so offensive as to alter the "terms, conditions, or privileges" of the victim's employment.

In assessing the objective severity of the harassment, courts should look to "the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" Particular attention should be paid to the "social context" in which the behavior occurs. The Court gave the example of the environment of a professional football player. The coach slapping the player's buttocks as he runs onto the field may not be actionable, while the same conduct experienced by the coach's secretary (male or female) in the office might be. Looking to the social context should enable fact finders to decipher actionable discrimination from mere teasing or roughhousing.

B. Employer Liability for Sexual Harassment of an Employee by a Non-Employee

Addressing a question of first impression, the Minnesota Court of Appeals, in Costilla v. State, held that an employee may bring an action under the Minnesota Human Rights Act ("MHRA") against an employer for sexual harassment by a non-employee, if the employer is aware of the harassment yet fails to take timely and appro-

93. Id. at 1001-02. The Court did not rule on the merits of Oncale's claim, but remanded for further proceedings consistent with its decision. See id. at 1003.
94. See id. at 1002.
95. See id.
96. Id.
97. See id. at 1002-03.
98. Id. at 1003 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).
99. Id.
100. See id.
101. See id.
propriate action. This expansive interpretation of the MHRA is consistent with the broad remedial purpose of the statute as well as federal rules and decisions interpreting the scope of Title VII.

Maria Costilla ("Costilla") worked with urban Hispanic farmers and seasonal migrant farm workers as a state monitor advocate with the Minnesota Department of Economic Security ("DES"). Costilla was required to work closely with Herman Acosta ("Acosta"), the federal regional monitor advocate employed by the U.S. Department of Labor. Together, the two attended professional training sessions and reviewed sites in rural locations where overnight stays were required.

Costilla alleged that between 1992 and 1995, Acosta engaged in sexually harassing behavior including sexual advances, requests for kisses, touching, and grabbing, as well as inappropriate comments. In June 1993, while working in Moorhead, Minnesota, Acosta grabbed Costilla, attempted to kiss her, and wanted to get into her hotel room. Costilla telephoned a co-worker in St. Paul, Beverly Friendt ("Friendt"), to talk about the incident, and Friendt reported it to supervisor Ronald Threatt, who took no action. During a November 1993 trip to Chicago, Acosta commented to Costilla about her losing her virginity and publicly made inappropriate comments about the nature of their relationship. Costilla again telephoned Friendt who reported the incident to the DES's affirmative action officer, Linda Sloan ("Sloan"). Sloan reported Acosta's behavior to his supervisor, promised Costilla she would not have to be alone with Acosta, and helped arrange for Costilla to see a counselor.

Despite Sloan's actions, Acosta's inappropriate behavior to-
ward Costilla persisted.\textsuperscript{114} In February 1994, Costilla told Sloan that Acosta was calling her at her home and making sexual remarks.\textsuperscript{115} Sloan again called Acosta's supervisor and was given assurances that the problem would be resolved.\textsuperscript{116} During an April 1994 training session conducted by Acosta, he told an inappropriate sexual story about Costilla and a male co-worker.\textsuperscript{117} Sloan called Acosta's supervisor for the third time and it was agreed that Acosta would write a letter of apology to all training participants.\textsuperscript{118} Costilla never received a letter and the harassing behavior continued until June 1995, when a DES commissioner sent a letter to the federal regional administrator about Acosta's conduct.\textsuperscript{119}

In January 1996, Costilla sued the state, claiming sexual harassment under the MHRA, breach of contract or promissory estoppel, and emotional distress damages.\textsuperscript{120} The district court granted the state's motion for summary judgment on all claims, and Costilla appealed as to her sexual harassment and emotional distress claims.\textsuperscript{121}

On appeal, the Minnesota Court of Appeals faced the question of whether the MHRA allowed a cause of action against an employer for failing to protect an employee from harassment by a non-employee.\textsuperscript{122} Giving an expansive reading to the MHRA, the court held that the MHRA requires an employer to protect an employee from non-employee harassment under certain circumstances.\textsuperscript{123} In making its ruling, the court relied on the Equal Employment Opportunity Commission ("EEOC") Guidelines, decisions from other jurisdictions, and the broad remedial intent of the MHRA to eradicate discrimination from the workplace.\textsuperscript{124}

First, the court observed that the U.S. Supreme Court has ap-

\begin{flushleft}
\textsuperscript{114} \textit{See id.}
\textsuperscript{115} \textit{See id.}
\textsuperscript{116} \textit{See id.}
\textsuperscript{117} \textit{See id.}
\textsuperscript{118} \textit{See id. at 589-90.}
\textsuperscript{119} \textit{See id. at 590.} Specifically, the letter insisted Acosta's conduct be fully investigated. \textit{See id.} The U.S. Department of Labor subsequently assigned a new federal monitor advocate to the Minnesota region. \textit{See id.}
\textsuperscript{120} \textit{See id.} In October of 1996, Costilla brought a separate claim against Acosta and the U.S. Department of Labor. \textit{See id.}
\textsuperscript{121} \textit{See id.}
\textsuperscript{122} \textit{See id. at 590-91.}
\textsuperscript{123} \textit{See id. at 591.}
\textsuperscript{124} \textit{See id. at 591-92.}
\end{flushleft}
proved the use of EEOC guidelines in sexual harassment cases. The guidelines specifically recognize that an employer can be liable for the sexual harassment of an employee by a non-employee. Second, the court found that historically, Minnesota courts have sought guidance from federal Title VII cases when construing the MHRA. Several federal courts have held a cause of action to exist against an employer for sexual harassment conducted by a non-employee under Title VII. Finally, the court concluded that to effect the MHRA's broad remedial purpose, the MHRA should be construed liberally. Accordingly, the court concluded that the MHRA imposes a broad duty on employers to protect employees from sexual harassment, including harassment by non-employees.

125. See id. In Meritor Savings Bank, F.S.B. v. Vinson, 477 U.S. 57, 65 (1986), the Supreme Court announced that courts and litigants may properly rely on the EEOC guidelines for guidance. 126. See Costilla, 571 N.W.2d at 591. The EEOC guidelines read:

An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases, the Commission will consider the extent of the employer's control and any other legal responsibility, which the employer may have with respect to the conduct of such non-employees.


127. See Costilla, 571 N.W.2d at 591; see also Danz v. Jones, 263 N.W.2d 395, 398-99 (Minn. 1978) (stating that Title VII cases are instructive and may be used in interpreting the MHRA).

128. See Costilla, 571 N.W.2d at 591; Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 756 (9th Cir. 1997) (holding that an employer may be liable for harassment of employee by patrons where employer either ratifies or acquiesces in harassment by not taking immediate or corrective action); Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982) (noting that non-employee strangers can create a sexually hostile working environment); EEOC v. Sage Realty Corp., 507 F. Supp. 599, 608 (S.D.N.Y. 1981) (holding employer liable for sexual harassment of employee by public where employer required an employee to wear a sexually revealing costume).

129. See Costilla, 571 N.W.2d at 592. See, e.g., Cummings v. Koehnen, 568 N.W.2d 418, 421-23 (Minn. 1997) (holding the MHRA should be liberally construed to include same-sex sexual harassment); Continental Can Co. v. State, 297 N.W.2d 241, 248-49 (Minn. 1980) (holding that a liberal construction of the MHRA makes co-employee sexual harassment actionable).

130. See Costilla, 571 N.W.2d at 592.
C. Age Discrimination

The Eighth Circuit Court of Appeals recently held that an employee who takes early retirement due to an internal reorganization may not sue for age discrimination under the federal Age Discrimination in Employment Act ("ADEA"). The U.S. Supreme Court denied certiorari, leaving the appellate court's ruling undisturbed.

In Johnson v. Runyon, a former postal employee brought an age discrimination action against the U.S. Postal Service ("USPS"). Charles Johnson ("Johnson") began working for the USPS in 1960 when he was twenty years old. In 1992, when Johnson was fifty-two years old, he held the position of USPS tour superintendent that involved supervising approximately 400 employees. The USPS underwent a major reorganization that abolished all tour superintendents and other management positions. As part of the reorganization, the USPS offered Johnson and other qualifying employees early retirement packages. Johnson had until November 20, 1992, to accept or decline the package.

On November 13, 1992, Johnson was told that he, like other qualified employees, would be considered for the newly created Manager of Distribution Operations ("MDO") positions. The MDO positions were higher-level positions that required skills in addition to those required for the tour superintendent positions. On November 18, 1992, Michael Mautzek ("Mautzek"), the manager responsible for promoting employees to the MDO positions, candidly told Johnson that he would not be selected because he lacked the requisite skills. Mautzek testified that he also told

134. Johnson, 137 F.3d at 1082.
135. See id.
136. See id.
137. See id. Preceding this reorganization, it was felt that upper management was unsatisfied with the employees of the department in which Johnson worked on account of their age. See id.
138. See id.
139. See id.
140. See id.
141. See id.
142. See id.
Johnson that he would still have a position with USPS and would not suffer any decrease in pay if he chose not to accept the early retirement package.\textsuperscript{143} Johnson testified that although he never intended to retire early, he accepted the early retirement package.\textsuperscript{144} In December 1992, persons aged thirty-six to forty-eight were selected for the MDO positions.\textsuperscript{145}

Johnson sued the USPS, alleging violations of the Age Discrimination in Employment Act.\textsuperscript{146} The district court concluded that Johnson failed to present prima facie evidence of discrimination and dismissed the complaint with prejudice.\textsuperscript{147} The Eighth Circuit affirmed the district court’s ruling.\textsuperscript{148}

Prima facie evidence of age discrimination is demonstrated by a showing that:

\begin{enumerate}
  \item plaintiff is within the protected age group,
  \item plaintiff met applicable job qualifications and the legitimate expectations of the employer,
  \item despite these qualifications, plaintiff suffered a discharge or other adverse employment action, and
  \item in the reduction in force context, the plaintiff must produce some additional evidence that age was a motivating factor in the termination.\textsuperscript{149}
\end{enumerate}

The court of appeals agreed with the district court that Johnson failed to show adverse employment action because he chose to retire rather than await the outcome of the reorganization.\textsuperscript{150}

Absent adverse employment action, a plaintiff may recover upon a showing of constructive discharge.\textsuperscript{151} "[C]onstructive discharge occurs when an employer renders the employee’s working conditions intolerable, forcing the employee to quit."\textsuperscript{152} The court

\begin{footnotes}
\textsuperscript{143} See id.
\textsuperscript{144} See id.
\textsuperscript{145} See id.
\textsuperscript{146} See id.
\textsuperscript{147} See id.
\textsuperscript{148} See id. at 1083.
\textsuperscript{149} Id. at 1082 (citing Hopper v. Hallmark Cards, Inc., 87 F.3d 983, 988 (8th Cir. 1996) and Herrero v. St. Louis Univ. Hosp., 109 F.3d 481, 483-84 (8th Cir. 1997)).
\textsuperscript{150} See id. at 1082.
\textsuperscript{151} See id. at 1082-83.
\textsuperscript{152} Id. at 1083 (quoting Delph v. Dr. Pepper Bottling Co. of Paragould Inc., 130 F.3d 349, 354 (8th Cir. 1997) and Kimzey v. Wal-Mart Stores, Inc., 107 F.3d

http://open.mitchellhamline.edu/wmlr/vol25/iss3/12
rejected Johnson's claim of constructive discharge, finding that
Johnson failed to demonstrate that a reasonable person in his situa-
tion would have found the working conditions intolerable.\textsuperscript{153} The
Eighth Circuit affirmed the judgment of the district court, conclu-
ding that Johnson failed to show an adverse employment action
within the meaning of the ADEA.\textsuperscript{154}

In light of Johnson, employees offered early retirement options
resulting from corporate cutbacks or reorganizations might think
twice about accepting such retirement packages if they believe the
employer's true motivation is age discrimination. Unless the em-
ployer had made working conditions "intolerable," awaiting the
outcome of such reorganizations is necessary to show the adverse
employment action required to make out a claim under the ADEA.

\textbf{D. The Public Policy Requirement in Whistleblower Cases}

Minnesota's whistleblower statute protects employees who
make reports of actual or suspected violations of federal or state law
by their employer.\textsuperscript{155} In \textit{Hedglin v. City of Willmar},\textsuperscript{156} the Minnesota
Supreme Court declined to decide whether the whistleblower stat-
ute requires that a violation implicate public policy to come under
its protection.\textsuperscript{157} The \textit{Hedglin} court found that the employer's mis-
conduct, including falsification of attendance records and driving
fire trucks while intoxicated, implicated state law and therefore fell
within the plain language of the statute.\textsuperscript{158}

In \textit{Hedglin}, three former firefighters, Joseph Hedglin ("Hedg-
lin"), Bradley Lundquist ("Lundquist"), and Robert Grove
("Grove"), filed a civil action against the City of Willmar ("Will-
mar") and its former fire chief, Douglas Lindblad ("Lindblad"),
under the whistleblower statute.\textsuperscript{159} The complaint alleged that
Lindblad and Willmar unlawfully retaliated against Hedglin, Lund-
quist and Grove, after they reported misconduct by the fire de-
partment to Willmar city officials.\textsuperscript{160} The misconduct reported in-

\begin{flushleft}
\textsuperscript{153.} See id.
\textsuperscript{154.} See id.
\textsuperscript{156.} 582 N.W.2d 897 (Minn. 1998).
\textsuperscript{157.} See id. at 901.
\textsuperscript{158.} See id. at 902.
\textsuperscript{159.} See id. at 898.
\textsuperscript{160.} See id.
\end{flushleft}
cluded driving fire trucks and attending fire calls while intoxicated, as well as the assistant chief’s falsification of roll call sheets showing that he was present for calls he did not attend.161

The Kandiyohi County District Court granted Willmar’s motion for summary judgment, ruling that the statute did not protect the reports because: (1) the harassment of Hedglin, Lundquist, and Grove predated their reports of misconduct; and (2) falsifying roll call sheets was a matter of internal management that did not implicate the public policy requirement of the whistleblower statute.162 On appeal, the Minnesota Court of Appeals reversed, concluding that: (1) the falsification of roll call sheets constituted the illegal taking of public funds, reports of which are protected by the whistleblower statute; and (2) a jury could find that the harassment of Hedglin, Lundquist, and Grove continued as a result of their reports of misconduct.163 The Minnesota Supreme Court granted review to determine whether the reports of misconduct were protected under the whistleblower statute.164

The supreme court began its analysis by discussing the judicially created public policy exception to the at-will employment doctrine.165 The public policy exception has allowed an employee to maintain a wrongful discharge claim against an employer if the conduct reported “violated clearly mandated public policy.”166 In contrast, reports of internal policy violations having no impact on the public interest would not be protected by this common law exception.167 Before the enactment of the whistleblower statute, the Minnesota Court of Appeals approved the public policy exception in Phipps v. Clark Oil & Refining Corp.168 However, since the legislature enacted the whistleblower statute in 1987, Minnesota courts have not resolved whether the statute should be interpreted to require that a reported violation implicate public policy.169

161. See id. at 898-900.
162. See id. at 900.
163. See id. at 900-01. The court of appeals ruled that the falsification of roll call sheets constituted an illegal taking of public funds because the falsification resulted in payment to a firefighter for calls he did not attend. See id.
164. See id. at 901.
165. See id.
166. Id.
167. See id.
168. See id. (discussing Phipps v. Clark Oil & Ref. Corp., 396 N.W.2d 588, 592 (Minn. Ct. App. 1986)). Before the Minnesota Supreme Court issued an opinion in Phipps, the legislature enacted the whistleblower statute. See id.
169. See id. at 901. The statute, which does not explicitly require a violation of
Lindblad and Willmar urged that at least two Minnesota decisions have interpreted the whistleblower statute as requiring a violation of “clearly mandated public policy.” The court rejected their argument and declined to expand its interpretation of the whistleblower statute to require a violation of public policy.

While the court noted that its decision in *Williams v. St. Paul Ramsey Medical Center, Inc.*, contained dictum concerning “protection of the general public,” it concluded that even applying the dictum to the case at bar would not defeat the claim because Hedglin’s reports were made for the protection of the general public.

An employer shall not discharge, discipline, threaten, otherwise discriminate against, or penalize an employee regarding the employee’s compensation, terms, conditions, location, or privileges of employment because: (a) the employee . . . in good faith, reports a violation or suspected violation of any federal or state law or rule adopted pursuant to law to an employer or to any governmental body or law enforcement official . . . .

**Minn. Stat. § 181.932, subd. 1(a) (1998).**

170. *Hedglin*, 582 N.W.2d at 902. Lindblad and Willmar relied on the appellate courts’ decisions in *Vonch v. Carlson Cos.*, 439 N.W.2d 406 (Minn. Ct. App. 1989) and *Williams v. St. Paul Ramsey Medical Center, Inc.*, 551 N.W.2d 483 (Minn. 1996). See id. The court rejected their argument for two reasons. See id. First, in *Vonch*, the court of appeals found that reported internal travel and expense discrepancies were only internal improprieties. See id. at 903. Therefore, the court affirmed summary judgment for the employer. See id. In the court’s conclusion it made clear that the public policy exception was intended to protect the public and not individual employees. See id. However, the whistleblower statute was not yet enacted when the violations were reported or when the employee was discharged. See id. Thus, the court in *Hedglin* stated that *Vonch* may not be used to analyze claims brought specifically under the statute. Id. Second, while *Williams* addressed a claim brought under the whistleblower statute, the court merely held that “a plaintiff who brings a claim under the Human Rights Act is barred from also bringing a claim under the whistleblower statute.” Id. (citing *Williams*, 551 N.W.2d at 483). Although it discussed protection of the public in dictum, the court made no holding concerning a public policy requirement. See *Hedglin*, 582 N.W.2d. at 903. Therefore, this decision was also inapplicable to the *Hedglin* case. See id.

171. See id.

172. 551 N.W.2d 483 (Minn. 1996).

173. *Hedglin*, 582 N.W.2d at 903 (citing *Williams*, 551 N.W.2d at 484 n.1).

174. See id. The footnote in *Williams* reads:

The popular title of the [whistleblower statute] connotes an action by a neutral—one who is not personally and uniquely affronted by the employer’s unlawful conduct but rather one who “blows the whistle” for the protection of the general public or, at the least, some third person or...
The facts in *Hedglin* did not require the court to reach the issue of whether Minnesota's whistleblower statute contains a public policy requirement.\(^{175}\) Therefore, it declined to do so.\(^{176}\) While the court acknowledged the public policy language used in *Williams*, it emphasized that the language constituted no part of its holding and gave no hint about how it would rule should the court be confronted with the public policy issue in the future.\(^{177}\) The question of whether Minnesota's whistleblower statute requires a violation that implicates public policy remains ripe for further litigation.

**E. Tortious Interference With a Noncompete Agreement**

The Minnesota Supreme Court recently held that third party interference with a noncompete agreement "is a tort for which damages are recoverable."\(^{178}\) The court's decision in *Kallok v. Medtronic, Inc.*\(^{179}\) made clear that an injured employer may recover its attorney's fees and costs notwithstanding the general rule that attorneys fees are not recoverable in tort litigation.\(^{180}\)

In 1979, Dr. Michael J. Kallok began his employment with Medtronic as a senior staff engineer.\(^{181}\) As a Medtronic engineer, Kallok engaged in the design and development of leads for defibrillator and electrocardiogram sensing.\(^{182}\) Medtronic required Kallok to sign a standard noncompete agreement in 1979, and a revised agreement in 1981.\(^{183}\) As Kallok's career advanced, he became a

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\(\)persons in addition to the whistleblower. Were it otherwise, every allegedly wrongful termination of employment could, with a bit of ingenuity, be cast as a claim pursuant to [the statute].

*Williams*, 551 N.W.2d at 484 n.1.

175. *See Hedglin*, 582 N.W.2d at 903.

176. *See id.*

177. *See id.*


179. 573 N.W.2d 356 (Minn. 1998).

180. *See id.* at 363-64 (stating that the third-party exception to the general rule applied because a third party's tortious interference required litigation to enforce a legitimate agreement).

181. *See id.* at 358. Kallok earned a Ph.D. in biomedical engineering from the University of Minnesota. *See id.*

182. *See id.*

183. *See id.* The revised 1981 agreement, stated in relevant part:

[F]or two (2) years after termination of employment he/she will not directly or indirectly render services (including services in research) to any person or entity in connection with the design, development, manufac-
senior manager and was invited to take part in Medtronic's Management Incentive Plan. As a participant, Kallok received increased responsibilities, benefits and access to Medtronic's confidential information. In exchange for these benefits, Kallok was required to sign noncompete agreements that placed additional restrictions on his employment.

On November 21, 1995, Kallok resigned his employment with Medtronic and informed the company that he was accepting a position with Angeion Corporation, a direct competitor of Medtronic. Medtronic informed Kallok that if he began employment with Angeion he would breach his covenant not to compete with

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*tissue, marketing, or sale of a Competitive Product that is sold or intended for use or sale in any geographic area in which Medtronic actively markets a Medtronic Product or intends to actively market a Medtronic Product of the same general type or function. It is expressly understood that the employee is free to work for a competitor of Medtronic provided that such employment does not include any responsibilities for, or in connection with, a Competitive Product as defined in this Agreement for the two-year period of the restriction.

*See id.* at 359.

*See id.*

*See id.* Kallok signed the noncompete agreements, known as “Medtronic Management Riders,” in 1986, 1989, and 1993. *See id.* The last agreement that Kallok signed stated in pertinent part:

For a period of one (1) year after termination of my employment with Medtronic, I will not directly or indirectly render services for the benefit of any person or organization (including myself) engaged in the design, development, manufacture, marketing or sale of a product or service which was being designed, developed, manufactured, marketed or sold by Medtronic during the last year of my employment, or with respect to which Medtronic has acquired confidential business information, unless: (i) I did not have any involvement or responsibility in connection with the competitive product or service while at Medtronic and did not have access to confidential business information regarding the competitive product or service; or (ii) such other person or organization is a diversified operation and my responsibilities do not include any activities in connection with the design, development, manufacture, marketing, or sale of a competitive product or service.

*See id.*

Both Minnesota companies, Medtronic manufactures medical devices including cardiovascular equipment, and Angeion manufactures cardiac medical devices. *See id.* at 358. The companies are direct competitors in the manufacture of implantable cardioverter defibrillators and the management of tachyrhythmia (rapid irregular heartbeats). *See id.* at 358.

Angeion and Kallok brought a declaratory judgment action against Medtronic to determine Kallok’s rights under the noncompete agreements. Medtronic counterclaimed against Kallok for breach of contract and injunctive relief, and against Angeion for tortious interference with the employment contract.

The district court upheld the employment agreements and enjoined Kallok from working for Angeion for one year. Additionally, the district court concluded that Angeion had tortiously interfered with Kallok’s employment contract and was therefore liable to Medtronic for attorney fees and other incurred expenses. On appeal, the Minnesota Court of Appeals affirmed the grant of an injunction, but reversed the trial court’s finding that Angeion tortiously interfered with Kallok’s employment, as well as the award of damages to Medtronic. The appellate court reasoned that Minnesota courts “have been loathe to recognize liability for the tortious interference of a contract in the employment noncompete

188. See id. at 357.
189. See id. at 360. In 1995, Kallok arranged a meeting with Whitney McFarlin, Angeion’s CEO and a former Medtronic vice president. See id. at 359. During their first meeting in May 1995, McFarlin told Kallok that Angeion had no suitable openings. See id. The pair had other discussions culminating in a September 20, 1995, meeting at which McFarlin asked Kallok if he would be interested in a position as Angeion’s vice president of research. See id. The position involved tachyarrhythmia research, among other projects. See id. Kallok expressed interest, but continued his employment at Medtronic as he and McFarlin continued discussions. See id. Sometime before October 18, 1995, Kallok told McFarlin of the employment agreements he had signed with Medtronic. See id. On October 18, 1995, McFarlin sought the advice of outside counsel to determine whether Kallok would be prohibited from working for Angeion. See id. Counsel told McFarlin that because they represented Medtronic in an unrelated matter, a conflict of interest existed preventing them from thoroughly researching the issue. See id. McFarlin pressed counsel for an opinion and proceeded to tell counsel that within the past two years, Kallok did not work in the tachyarrhythmia area at Medtronic or have access to confidential information. See id. Based only on this information, counsel told McFarlin that Kallok’s employment with Angeion would not be in violation of his agreements with Medtronic. See id. After this discussion, McFarlin offered Kallok the position. See id.
190. See id.
191. See id.
192. See id. at 357-58.
193. See id. at 358.
194. See id.
195. See id. at 361.
agreement realm."

The Minnesota Supreme Court reversed, upholding the tortious interference claim against Angeion and the district court's award of damages to Medtronic. The supreme court reasoned that established Minnesota law permits recovery for tortious interference with a valid noncompete agreement. The court also found it well established that a third party's tortious interference with a contract may result in liability for damages as well as injunctive relief. Combining this reasoning, the court held that "if a noncompete agreement is deemed valid and if the elements of tortious interference are established, interference with the noncompete agreement by a third party is a tort for which damages are recoverable."

Holding that a third party's tortious interference with a valid employment agreement gives rise to a claim for damages, the court next examined whether Medtronic stated a claim for tortious interference with contract. The court cited five elements that must be established to state a cause of action for tortious interference with contract: "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) intentional procurement of its breach; (4) without justification; and (5) damages."

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196. Id.
197. See id. at 358.
198. See id. at 361. The court cited Walker Employment Services, Inc. v. Parkhurst, 300 Minn. 264, 271, 219 N.W.2d 437, 441 (1974), and Bennett v. Storz Broadcasting Co., 270 Minn. 525, 533, 134 N.W.2d 892, 898 (1965), for the proposition that noncompete agreements that serve a legitimate employer interest and are no broader than necessary to protect that interest are enforceable. See id. To determine whether a noncompete agreement is enforceable, the court balances the interest of the employer in protection from unfair competition with the right of the employee to earn a living. See Walker, 300 Minn. at 271, 219 N.W.2d at 441; see also Bennett, 270 Minn. at 535-36, 134 N.W.2d at 899-900 (stating that disputes arising from restrictive clause provisions should not always be determined by examining the contract; rather, each case must be determined on its own facts while maintaining a reasonable balance between the interests of the employer and employee). Where the balance weighs in favor of the employer's interest, the noncompete agreement is enforceable. See, e.g., Alsida, Inc., v. Larson, 300 Minn. 285, 294-95, 220 N.W.2d 274, 279-80 (1974) (stating that the restraints must be reasonably necessary to protect the employer's business and provide a legitimate business purpose to be valid).
199. See Kallok, 573 N.W.2d at 361 (citing Nordling v. Northern States Power Co., 478 N.W.2d 498, 505 (Minn. 1991) and Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 266, 214 N.W. 754, 756 (1927)).
200. Id. at 362.
201. Id.
202. Id. (quoting Kjesbo v. Ricks, 517 N.W.2d 585, 588 (Minn. 1994)).
The court affirmed the district court's finding that Medtronic established all five elements of tortious interference.\(^{203}\)

First, Kallok entered a valid contract with Medtronic.\(^{204}\) Second, Angeion knew about the noncompete agreement before it hired Kallok.\(^{205}\) Third, Angeion procured breach of the contract by meeting with Kallok numerous times to discuss employment opportunities at Angeion and by offering Kallok a vice president position with the company.\(^{206}\)

The fourth element was established by proving that Angeion's interference with the contractual relationship was not justified.\(^{207}\) Angeion argued that it acted in good faith by consulting with outside counsel before hiring Kallok and by taking the initiative to seek judicial review.\(^{208}\) However, the court faulted Angeion for failing to provide its attorneys with complete information concerning Kallok's position and responsibilities at Medtronic.\(^{209}\) The court believed that had Angeion been completely candid with its attorneys, it probably would have understood that hiring Kallok was in breach of his agreements with Medtronic.\(^{210}\) Therefore, the court concluded that Angeion's inquiry into Kallok's noncompete agreements with Medtronic was not reasonable and, therefore, without justification.\(^{211}\)

The final element required to establish a claim of tortious interference is proof of damages.\(^{212}\) Angeion argued that the American rule prevents a party from recovering attorney fees and other expenses incurred in litigation in the absence of a specific contract or statutory authority.\(^{213}\) However, the court held that the district

\(^{203}\) See id. at 362-63.
\(^{204}\) See id. at 362.
\(^{205}\) See id.
\(^{206}\) See id. at 362-63.
\(^{207}\) See id.
\(^{208}\) See id. at 362. The defendant has the burden of proving justification. See id. If a plaintiff proves that the "defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual relations and rights of the parties," tortious interference is not justified. Swaney v. Crawley, 154 Minn. 263, 265, 191 N.W. 583, 584 (1923). The court concluded that Angeion did not completely inform its outside counsel about the nature of Kallok's employment background or the noncompete agreements with Medtronic. See Kallok, 573 N.W.2d at 362.
\(^{209}\) See Kallok, 573 N.W.2d at 362.
\(^{210}\) Id.
\(^{211}\) See id. at 362-63.
\(^{212}\) See id. at 363.
\(^{213}\) See id. (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240,
court properly applied the third-party litigation exception to the American rule. This exception permits the court to award attorneys' fees as damages if "the defendant's tortious act thrusts or projects the plaintiff into litigation with a third party." The court concluded that but for Angeion's tortious interference with Medtronic's employment agreements with Kallok, Medtronic would not have been forced into court to protect its rights. Therefore, the third-party litigation exception to the American rule was properly applied, allowing Medtronic to recover attorney's fees and other expenses incurred in defending its rights against Kallok.

After Kallok, it is clear that employers' efforts to recruit and make employment offers to prospective employees who are subject to noncompete agreements may result in liability for damages. Hiring employers should exercise care in ascertaining the nature of any such noncompete agreements and allow for thorough inquiry before extending employment offers.

Kimberly Ross

271 (1975) (declining to award attorney's fees without statutory authorization) and Barr/Nelson, Inc. v. Tonto's, Inc., 336 N.W.2d 46, 53 (Minn. 1983)).
214. See id. at 363-64.
215. Id. at 363.
216. See id.
217. See id. at 363-64.