

# Minnesota Supreme Court Clarifies Standard for Hostile Work Environment Claims under State Law

May 29, 2013

Practices

Litigation

That alleged sexually explicit behavior was directed at both men and women is irrelevant in determining the existence of a hostile work environment under the Minnesota Human Rights Act, the Minnesota Supreme Court has held. *Rasmussen v. Two Harbors Fish Company d/b/a Lou's Fish House et al.*, No. A11-2178 (Minn. May 22, 2013). The Court further ruled that employees need not offer evidence of a loss of pay or benefits to establish a hostile work environment claim. Finally, it held that an employee whose conduct subjects the employer to vicarious liability for hostile work environment sexual harassment claims cannot be held individually liable as an aider and abettor under the MHRA.

## Background

Employees Jaime Rasmussen, Jennifer Moyer and Kathe Reinhold worked for Two Harbors Fish Company, d/b/a Lou's Fish House, and BWZ Enterprises (the "employers"), both of which were owned and operated by Brian Zapolski.

The employees alleged that throughout their employment, Zapolski subjected them to multiple instances of sexually explicit conduct in the workplace, including sexually explicit language, sexual advances, and unwanted touching.

Offended by Zapolski's conduct, the employees eventually resigned and sued the employers for sexual harassment and sued Zapolski, individually, as an aider and abettor, under the Minnesota Human Rights Act.

Although the trial court credited the employees' testimony regarding their work environment, the court, after a bench trial, nevertheless ruled the employers were not liable for sexual harassment for two reasons. First, the conduct was not sufficiently severe or pervasive due to their sex, the trial court said, because Zapolski directed his inappropriate behavior at all employees, including males. Second, the employees' employment was not conditioned on submission in any sexual acts and they did not suffer any adverse employment actions, such as a loss of salary, for refusing to participate. The employees appealed. The court of appeals reversed on the employees' sexual harassment claims. It also ruled that Zapolski could not be held liable as an aider and abettor. The Minnesota Supreme Court granted the parties' cross-petitions for review.

## Applicable Law

The MHRA defines "sexual harassment" as "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct . . . of a sexual nature when . . . that conduct . . . has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment." Minn. Stat. § 363A.03(43)(3). Proof that the alleged harassment was based on an employee's gender is not required to establish a hostile environment claim. *Cummings v. Koehnen*, 568 N.W.2d 418 (Minn. 1997).

## Erroneous Standard Used

The Supreme Court, by a vote of 4-3, ruled the trial court erred in finding the employees failed to prove severe or pervasive harassment.

The employees argued that the trial court erred in finding no hostile environment existed because Zapolski's directed his inappropriate conduct at both men and women. The Supreme Court agreed. It found the trial court incorrectly required the employees to prove that Zapolski's conduct occurred because of their sex, which the MHRA does not require. Rather, the focus should be on whether the conduct viewed

objectively was sufficiently severe or pervasive to have interfered with the employees' employment and whether subjectively the employees perceived their employment environment to be so affected. Consequently, the trial court's decision that the conduct was not severe or pervasive could not stand.

The employees further argued that the trial court erred in rejecting the employees' hostile work environment claims because the employees did not suffer any adverse employment actions. The Court agreed, finding the trial court's ruling "demonstrate[d] a fundamental misunderstanding" of the employees' claim. Proof of economic loss is not required to establish a hostile work environment claim. Accordingly, the Court reversed the judgment in favor of the employers and returned the case to the trial court to reevaluate the case using the proper legal standard.

Turning to the aider-and-abettor claim, the Court concluded that Zapolski could not be held individually liable for aiding and abetting the harassment because he owned the businesses involved and the employers already were vicariously liable for Zapolski's conduct. Holding Zapolski liable for aiding and abetting would "reverse this liability pathway" and improperly make the employers the primary wrongdoer, the Court said. Further, the Court found that holding a sole harasser liable as an aider and abettor of his employer would create individual liability for anyone who perpetrates the harassing conduct. This result was inconsistent with the MHRA's language that only an "employer" is liable for unfair employment practices. Accordingly, the Court affirmed the judgment dismissing the aider and abettor claim against Zapolski.

## Dissent

Three justices concurred in part and dissented in part with the majority opinion. They agreed that Zapolski could not be held liable for aiding and abetting under the MHRA. However, they did not agree with returning the case to the trial court. They thought this was unnecessary as the intermediate appellate court found, and the evidence clearly showed, Zapolski created a sexually hostile work environment. Justice Wilhelmina Wright wrote the Court should have taken this opportunity to clarify the standard of review.

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This case will make it easier for employees to assert sexual harassment claims. Employers, especially small businesses, should consider reviewing their anti-sexual harassment policies, train or retrain employees on the policies, and ensure the policies are enforced.

If you have any questions about this or other workplace developments or need assistance in drafting policies or training, please contact the Jackson Lewis attorney with whom you regularly work.

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