

Minnesota Supreme Court Follows Federal Standard for Supervisor's Sexual Harassment Liability

The Minnesota Supreme Court clarified the state law surrounding employer liability for hostile environment sexual harassment in the workplace in its recent four to three decision in *Frieler v. Carlson Marketing Group, Inc.* The *Frieler* Court rejected a strict liability standard for all cases of supervisor harassment and adopted the federal standard set forth in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton* for imposing vicarious liability for supervisor harassment. The *Frieler* decision, issued in May, impacts only those cases in which the harasser is a supervisor.

In adopting the federal standard, the Court eliminated one element that Minnesota plaintiffs previously had to prove and recognized a new affirmative defense that will allow Minnesota employers to avoid liability for harassment by their managers in some situations:

Elimination of one element

The Court addressed a 2001 amendment to the Minnesota Human Rights Act (MHRA) which deleted the "knows or should know" language from the statutory definition of hostile environment harassment. The *Frieler* Court held that a plaintiff bringing a claim under the MHRA for sexual harassment by a supervisor need not prove that his or her employer knew or should have known about the sexual harassment and failed to take timely and appropriate action. The Court further decided that an

employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate, or successively higher, authority over a victimized employee. In addressing who is deemed a supervisor for purposes of vicarious liability, the Court noted the broad remedial purpose of the MHRA and adopted the Equal Employment Opportunity Commission's definition of supervisor, which states that an individual is a supervisor if he or she has authority to undertake or recommend tangible employment decisions affecting an employee or has the authority to direct the employee's daily work activities.

The *Frieler* Court also clarified that the standard for imposing liability on employers when an employee assaults a coworker is that employers will only be liable for intentional torts when the conduct is foreseeable. The plaintiff is required to present evidence that an employee's intentional misconduct was foreseeable in order to hold the employer liable for the misconduct. The court did not address whether the workers' compensation law is the exclusive legal remedy for employees who are injured in the course and scope of their employment.

Creation of new affirmative defense

In cases where no tangible employment action, such as discharge, demotion or undesirable reassignment is taken against an employee who is subjected to an actionable hostile work environment,

the Court recognized that employers may avoid liability if they take appropriate measures to prevent and promptly correct behavior that could be perceived as sexually harassing. Such measures should include, but are not limited to:

- implementing harassment policies and training,
- requiring employees to immediately report conduct which violates the company's policies,
- promptly investigating reports of harassment, and
- taking remedial action to stop further harassment.

Employers are advised to establish and disseminate clear, unambiguous complaint procedures for employees who believe they have been subjected to sexual harassment and for the employer to appropriately investigate and respond to all such complaints. Based on this decision, employers are also advised to carefully consider the responsibilities given to "lead" employees who may well be deemed to be supervisors if they influence employment decisions and daily work activities.

For assistance in reviewing and/or drafting discrimination and harassment policies and these complaint procedures, or if you have questions about the Court's decision, please contact [Stacey DeKalb](mailto:Stacey_DeKalb), Chair of Lommen Abdo's Employment Practices Group, at 612 336-9310 or stacey@lommen.com, or any of the Lommen Abdo attorneys with whom you usually work.