

## HUMAN RIGHTS ACT BACKGROUND

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The Minnesota Human Rights Act (HRA) deals with discrimination and sexual harassment among other things. A 2001 law change and recent Minnesota and U.S. Supreme Court cases have created two issues for employers – the defenses for sexual harassment claims and the definition of actual damages.

**Sexual harassment.** The 2001 Legislature deleted the following text from the definition of sexual harassment:

“and in the case of employment, knows or should know of the existence of the harassment and fails to take timely and appropriate action.”

This text defined two defenses that employers could use against claims of sexual harassment. The first defense is the employer did not know or had no reason to know of the alleged harassment. The second defense is that the employer took timely and appropriate action once the alleged harassment was known. The Minnesota Department of Human Rights argued that this text should be deleted to conform to two U.S. Supreme Court cases. The department also testified that it would begin - and Minnesota courts would likely begin - applying federal case law which contained employer defenses.

Under federal case law, there are two types of sexual harassment – supervisor harassment and co-workers harassment. The defenses available to employers for supervisor harassment claims are defined in the *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. V. Ellerth*. These cases indicate an employer is liable for creating a hostile work environment unless the “employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior” and the plaintiff “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” These defenses are not available and an employer is strictly liable for supervisor harassment if the conduct went beyond creating a hostile work environment.

The defenses available under co-worker harassment are defined in *Hall v. Gus Construction Co.* In that case, the employer was found liable for co-worker harassment because management knew harassing activity took place but did not take any action to address it. That rule is consistent with the Minnesota HRA before the language was eliminated.

Some employers initially were comfortable with this change since the clear legislative intent was for the defenses available to them under federal law to apply. However, two subsequent Minnesota court cases have made the availability of the federal defenses suspect. First, the Minnesota Supreme Court in a decision related to the whistleblower statute indicated that it will not look at legislative intent if the statutory language is clear (*Anderson-Johanningmeier v. Mid-Minnesota Women’s Center, Inc.*). Second, the Minnesota Supreme Court in *Ray v. Miller Meester Advertising, Inc.* stated that it does not have to follow federal court decisions because the Minnesota HRA is not similar to federal law with respect to the treatment of sexual harassment. Given these two court decisions, employers are concerned that if a Minnesota court does not look to legislative intent and doesn’t have to follow federal case law, they will be held strictly liable for all types of sexual harassment claims because the defenses are no longer in the statute.

**Definition of actual damages.** The *Ray v. Miller Meester Advertising, Inc.* case considered whether front pay or future damages should be included in actual damages. The Minnesota HRA states that a discriminating employer must pay compensatory damages up to three times the actual damages suffered. There is no definition of actual damages in the HRA. The Minnesota Supreme Court said it was appropriate for front pay to be included in actual damages and it was proper for the court to multiply the amount by two.

There are several problems with this decision for employers. First, the decision departs from federal case law on the issue. The Eighth Circuit Court of Appeals in *Mathieu v. Gopher News Co.* held that front pay awards are not subject to multiplication under the Minnesota HRA. The Minnesota Supreme Court said

that since the HRA is more onerous than federal law, it did not have to follow similar federal court decisions.

Second, as the dissent in the *Miller Meester* case indicates, the majority court relied on tort law to find that front pay is part of actual or compensatory damages. The problem with this analysis is that employment discrimination is not a tort so the body of tort law is not appropriate to resolve the front pay question.

Third, the dissent also states that the Minnesota Supreme Court previously ruled that three steps should be taken to prevent the award of front pay to become overly speculative. One of the steps is to limit front pay to cases in which the plaintiff has not been able to find comparable employment. This is consistent with federal case law which awards front pay as a substitute for reinstatement.

Fourth, the dissent speculates that the majority's interpretation could lead to unreasonably large damage awards and possible bankruptcy for small- or medium-sized defendants. The dissent argues that the Legislature did not intend to potentially bankrupt business.