EMPLOYMENT LAW REPORT

The Supreme Court's Employment Law Trilogy: Legal and Practical Implications

By Justin D. Cummins

INTRODUCTION[1]

In the last year, the Minnesota Supreme Court has addressed a number of employment-related issues in three separate cases. Although those cases do not appear to be linked on their face, a common thread may connect them: the apparent restriction of workplace rights and remedies for employees.

The Minnesota Court of Appeals and Minnesota District Courts have not had substantial opportunity yet to apply the recently decided precedent, so it is not entirely clear whether those cases, in fact, signify a material limitation on employee rights and remedies. Even at this early juncture, however, a few insights may be gleaned from the rulings themselves and the cases that have applied the precedent since.

I. *LEE V. FRESENIUS MED. CARE, INC.*: CONSTRUING EMPLOYEE HANDBOOKS AS CONTRACTS IN CONNECTION WITH REJECTING WAGE CLAIMS

In *Pine River State Bank v. Mettille,* 333 N.W.2d 622, 625-27 (Minn. 1983), the Supreme Court articulated circumstances in which an employee handbook may be a binding contract. In that case, the Supreme Court held an employee handbook is a contractual offer if the terms therein are definite and the handbook is given to the employee.[2] The employee's retention of the handbook constitutes acceptance of the offer, and the continued employment of the employee provides the necessary consideration.[3]

In *Fresenius v. Lee*, 741 N.W.2d 117, 123-24 (Minn. 2007), the Supreme Court relied heavily on the holding in *Pine River* to reject the plaintiff's unpaid-wage claims. The plaintiff in *Fresenius* sought to recover the dollar value of the paid time off she had accumulated while an employee but had not used by the time of her discharge. In that regard, the employee handbook expressly stated an employee is eligible for monetary payment in lieu of paid time off only if the employee resigns with proper notice.[4]

Given the defendant terminated the plaintiff for alleged misconduct, the Supreme Court concluded that the plaintiff had no right to monetary payment in lieu of paid time off.[5] In other words, the plaintiff did not "earn" the money she sought under the governing contract. On that basis, the Supreme Court dismissed the plaintiff's claims for unpaid wages brought pursuant to Minnesota's prompt-payment law, Minn.Stat. § 181.13 in particular.[6] In so ruling, the Supreme Court declared that Minnesota's prompt-payment law is a timing statute dictating only when an employer shall pay compensation owed, not what compensation shall be paid.[7] In short, the plaintiff's claims failed because she had no unpaid wages to recover for purposes of Minn.Stat. § 181.13.[8]

In the only reported employment case citing *Fresenius* to date, the District Court tracked the Supreme Court's analysis to reach the opposite result concerning wage claims also pursued under Minn.Stat. § 181.13.[9] In *Pitner v. Pedersen Ventures, LLC,* the plaintiff successfully recovered unpaid wages because the employment

contract required the defendant to pay the full value of the three-year contract if the defendant terminated the plaintiff without cause and the requisite notice, as had happened there.[10]

The diametrically opposed results in these two highly analogous cases turned on the differences in the language of the employment contracts at issue. Whereas the contract in *Fresenius* imposed conditions precedent on the employee, the contract in *Pitner* imposed conditions precedent on the employer. Accordingly, all parties would be wise to draft, review, and execute employee handbooks and other employment agreements with great care – particularly as those contracts concern when, what, and how much compensation is due.

II. *FRIELER V. CARLSON MKTG. GROUP, INC.*: RECOGNIZING AN AFFIRMATIVE DEFENSE TO HARASSMENT CLAIMS PROSECUTED UNDER A THEORY OF VICARIOUS LIABILITY

Before 2001, the Minnesota Human Rights Act (MHRA), Minn.Stat. §§ 363A.01, *et seq.*, defined sex harassment in the employment context as occurring when "the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action."[11] That language, in effect, only allowed for liability regarding hostile-environment claims under a negligence theory. In 2001, the Minnesota Legislature amended the MHRA to remove the "knows or should know" language. Since then, Minnesota courts have applied various standards in hostile-environment cases, including negligence liability, vicarious liability, and traditional-agency liability.

The Supreme Court heard *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558 (Minn. 2008) primarily to decide whether plaintiffs must prove their harassment claims under a negligence theory after the Legislature amended the MHRA in 2001 and, if not, whether, an affirmative defense applies to harassment claims brought under a theory of vicarious liability. Reversing summary judgment in part, the Supreme Court held that a plaintiff need not be limited to proving harassment claims under a negligence theory of liability.[12]

The Supreme Court also ruled, however, that the affirmative defense to vicarious liability (available under Title VII, 42 U.S.C. §§ 2000e, *et seq.*, since *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries v. Ellerth*, 524 U.S. 742, 763-65 (1998)) is now available under the MHRA.[13] Notably, *Frieler* considered and rejected a narrow definition of "supervisor" for purposes of triggering vicarious liability and, instead, defined supervisors to include those who can only recommend "tangible employment decisions."[14]

The legal and practical implications of *Frieler* depend on how broadly or narrowly Minnesota courts construe the *Faragher/Ellerth* affirmative defense. Recent decisions by the Eighth Circuit do not look promising for plaintiffs.[15] Moreover, the additional ruling in *Frieler* that an employee's sexual misconduct must be foreseeable for an intentional tort claim to survive summary judgment also does not bode well for employees.[16] Even in this more challenging environment, however, plaintiffs have recently had success in overcoming the affirmative defense.[17]

In any event, fully understanding the nature and scope of the *Faragher/Ellerth* affirmative defense is more important now than ever, especially because parties litigate employment cases increasingly in State court. Indeed, the first and only reported case to apply *Frieler* has reversed summary judgment because the judgment had been granted due to the plaintiff's failure to show the defendant knew or should have known about the harassment.[18]

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***JUSTIN CUMMINS**, of Miller-O'Brien-Cummins, is Chair of the MSBA's Labor & Employment Section and an Officer of the National Employment Lawyers Association's Eighth Circuit Board. Justin teaches courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.*

The *Faragher/Ellerth* affirmative defense to vicarious liability for the conduct of a supervisor may only be asserted successfully if the employer has not taken tangible employment action against the employee.[19]

As a threshold matter, whether tangible action has been taken "is an ***issue of fact for the jury*** to determine."[20] Tangible employment action involves a significant change in employment status, but it need not have economic consequences.[21] Tangible employment action includes coerced submission to sexual demands to protect an employee's job or the recommendation of tangible employment action if an employee rejects sexual demands.[22]

In any case, an employer has the burden of proof on all three elements of the *Faragher/Ellerth* affirmative defense:

(1) the employer took adequate preventive action;
(2) the employer took adequate corrective action; and
(3) the employee unreasonably failed to avoid harm.[23]

Furthermore, the Eighth Circuit has long recognized that each of the elements of the defense turn on fact-intensive inquiries "best ***left to the finder of fact.***"[24]

In sum, well settled Supreme Court and Eighth Circuit precedent should dictate that the affirmative defense to vicarious liability will not defeat harassment claims under the MHRA at the summary judgment stage. If Minnesota courts construe the affirmative defense expansively, however, the MHRA may provide little meaningful relief regarding harassment claims unless Plaintiffs seek to prove their claims under a theory of negligence liability.

III. *MILNER V. FARMERS INS. EXCH.*: EXPANDING THE AVAILABILTY OF CIVIL PENALTIES TO THE STATE WHILE RESTRICTING THE AVAILABILTY OF ATTORNEY'S FEES AND COSTS TO PLAINTIFFS

In *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608 (Minn. 2008), a class action wage-and-hour case brought under the Minnesota Fair Labor Standards Act (MFLSA), Minn.Stat. §§ 177.21, *et seq.*, the Supreme Court addressed multiple issues of note; the aspects of the decision with the broadest implications concern the civil penalties and attorney's fees/costs. Another important dimension involves the misclassification of employees.

Milner reaffirmed that civil penalties are payable to the State rather than to the plaintiffs who actually litigate a case, and *Milner* evidently increased the availability of civil penalties and injunctive relief by ruling that they can be imposed without an underlying award of compensatory damages. 748 N.W.2d at 616-18. In a subsequent wage-and-hour class action, *Braun v. Wal-Mart, Inc.*, the District Court relied on *Milner* to reject the defendant's argument that the plaintiffs must prove that their remedy at law is inadequate or that an injunction is necessary to prevent additional harm before they can obtain an injunction.[25] *Braun* also is significant because it confirms that punitive damages may be pursued in addition to liquidated damages under the MFLSA.[26]

At the same time the Supreme Court enhanced the ability of the State to recover civil penalties, it also ordered a reduction of the award reimbursing the plaintiffs for attorney's fees and costs incurred, in part, to obtain those civil penalties.[27] The Supreme Court reached that decision by reasoning that the plaintiffs did not obtain compensatory damages in the case.[28] In other words, money actually recovered in relation to the potential for recovery appears now to be a more important consideration now in determining whether a plaintiff will be fully reimbursed for the attorney's fees and costs required to prosecute the legal claims.

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Milner is further important because it holds that the misclassification of employees, standing alone, does not violate the MFLSA.[29] The Supreme Court considered principally the language of the MFLSA to determine that an employer has no liability for misclassifying an employee – unless the employee has sustained cognizable damages due to the misclassification – because there is no substantive requirement to classify employees properly.[30]

CONCLUSION

It is too early to say for certain, but the three most significant Supreme Court decisions in employment law over the past year seem to signal a narrowing of the rights and remedies available to plaintiffs in employment cases. The extent to which that becomes a reality depends on the advocacy of plaintiff and defense counsel and the related application of the precedent by lower courts.

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[1] A version of this article also appears in the 2008 Labor & Employment Law Institute manual. The author would like to thank Tim Louris, a law clerk with Miller O'Brien Cummins, PLLP, for his research assistance.

[2] *Pine River*, 333 N.W.2d at 626.

[3] *Pine River*, 333 N.W.2d at 626-27.

[4] *Fresenius*, 741 N.W.2d at 124.

[5] *Id.*

[6] *Fresenius*, 741 N.W.2d at 124-30.

[7] *Fresenius*, 741 N.W.2d at 125.

[8] *Id.*

[9] *Pitner v. Pedersen Ventures, LLC*, 2007 WL 4861445, Findings of Fact, Conclusions of Law, and Order for Judgment (Minn.Dist.Ct. 2007).

[10] 2007 WL 4861445, *4.

[11] *See* Minn.Stat. § 363.01, Subd. 10(a)(3).

[12] *Frieler*, 751 N.W.2d at 570-71.

[13] *Id.*

[14] 751 N.W.2d at 571-73.

[15] *See, e.g., Adams v. O'Reilly*, __ F.3d __, 2008 WL 3540588, *4-5 (8th Cir. 2008) (upholding summary judgment because the employer had an effective sex harassment policy and distributed it to employees, so it could not have been on notice about the harassment of the plaintiff).

[16] 751 N.W.2d 583.

[17] *See, e.g., Jenkins v. Winter*, __ F.3d __, 2008 WL 4006799, *7-8 (8th Cir 2008) (reversing summary judgment because a question of fact existed about whether the employer had constructive knowledge of the supervisor's conduct); *E.E.O.C. v. Restaurant Co.*, 490 F.Supp.2d 1039, 1049 (D.Minn. 2007) (denying the motion for summary judgment).

[18] *Geist-Miller v. Mitchell*, 2008 WL 3898207, *2-3 (Minn.App. 2008).

[19] *Faragher*, 524 U.S. at 808 (reversing summary judgment); *Ellerth*, 524 U.S. at 763-65 (affirming reversal of summary judgment); *Frieler*, 751 N.W.2d at 570-71 (reversing summary judgment).

[20] *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 928 (8th Cir. 2004) (citation omitted) (emphasis added).

[21] *Kimbrough v. Loma Linda Development*, 183 F.3d 782, 734 (8th Cir. 1999); *see also Faragher*, 524 U.S. at 808; *Ellerth*, 524 at 763-65.

[22] *Escobar v. Swift and Co.*, 494 F.Supp.2d 1054, 1060 (D.Minn. 2007) (citing *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995)) (denying summary judgment and reiterating tangible employment action includes making "submission to the unwelcome advances [] an express or implied condition [of employment]. . . .").

[23] *Faragher v. Boca Raton*, 524 U.S. at 807-09 (1998); *Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888-89 (8th Cir. 1998) (reversing summary judgment); *Frieler*, 751 N.W.2d at 571.

[24] *Phillips*, 156 F.3d at 889 (emphasis added).

[25] 2008 WL 2596918, Findings of Fact, Conclusions of Law, and Order (Minn.Dist.Ct. 2008).

[26] *Braun*, 2008 WL 2596918, p. 8.

[27] *Milner*, 748 N.W.2d at 622-23.

[28] *Id.*

[29] 748 N.W.2d at 613-15.

[30] *Id.*