The Deepening Divide: Minnesota and Federal Employment Laws

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In recent years, legislative enactments and judicial decisions alike have steadily eroded several of the bases upon which federal and state employment discrimination laws in Minnesota were once deemed indistinguishable.

The practice and application of employment law in Minnesota is not as it once seemed. Formerly, attorneys reflexively referred to, and borrowed upon, federal statutes and case law when advising clients on matters involving Minnesota's state employment discrimination laws, and vice versa. In litigation, judges and courts likewise treated statutes and case precedent from federal and state jurisdictions as effectively synonymous when ruling at summary judgment, later when instructing juries, and on appeal. The virtually interchangeable application of these seemingly distinct bodies of employment law became not only practice, but habit, for members of the bar and courts, alike.

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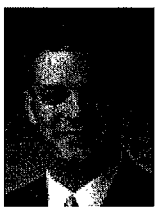

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Those times have changed. Over the past decade or so, legislative enactments and judicial decisions alike have steadily eroded several of the bases upon which federal and state employment discrimination laws in Minnesota were once deemed indistinguishable. The resulting, deepening divide has made it critical for practitioners to reexamine the implications now attendant to advising clients, commencing or defending a lawsuit in this important area of law. This article highlights and discusses many of the key distinctions between federal and state employment discrimination laws in Minnesota, making evident the growing complexity and variability of law practice in this field.

Title VII v. MHRA

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On August 28, 1963, an estimated 200,000 supporters demonstrated in Washington, D.C. in support of the need for national civil rights legislation. That demonstration and other efforts ultimately led to passage of the Civil Rights Act of 1964. Among other things, the act established the Equal Employment Opportunity Commission (EEOC)

damages." and Title VII, a federal law that prohibits discrimination in employment based on race, color, religion, sex, and national origin.[1]

As we in Minnesota know, passage of the federal Civil Rights Act was preceded by enactment of the Minnesota Human Rights Act (MHRA). Originally passed in 1955 and amended thereafter, the MHRA is a state law that applies to Minnesota employers of all sizes. Like Title VII, the MHRA prohibits discrimination in employment on the basis of race, color, religion, sex and national origin.[2] Due to the perceived similarities between the prohibitions on workplace discrimination in both laws, Minnesota courts formerly looked to Title VII law when resolving claims under the MHRA. Likewise, when asked to interpret and enforce the MHRA, federal judges also looked to Title VII precedent, regularly treating the otherwise distinct statutes as effectively coextensive. [3]

The Employer Liability Standard Shifts.

This state of events changed unalterably when, in June 1998, the United States Supreme Court issued tandem decisions in Burlington Indus., Inc. v. Ellerth and Faragher v. City of Boca Raton that forever modified the vicarious liability landscape for supervisor discrimination under Title VII.[4] As before, Title VII litigants must first show the alleged discriminatory conduct was: (1) unwelcome; (2) perpetrated because of protected status (i.e., sex, race, etc.); and (3) sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive working environment. Once this prima facie showing is made, defendants under Ellerth and Faragher can avoid liability only if: (1) the acts did not result in a tangible employment action being taken against the complainant; and (2) the employer proves both elements of a new affirmative defense by showing (a) it exercised reasonable care to prevent against and promptly correct unlawful discrimination; and, (b) the complaining employee unreasonably failed to utilize the corrective opportunities provided by the employer or to otherwise avoid harm.

With respect to discrimination by mere coworkers as opposed to supervisors, the Ellerth and Faragher framework left untouched the Title VII negligence standard requiring that once a prima facie case is made, employers are vicariously liable where they knew or should have known of the unlawful conduct and failed to take prompt, remedial action.

Supervisor v. Coworker Discrimination.

One immediately noticeable manner in which Ellerth, Faragher and their progeny differentiate vicarious liability under Title VII from that under the MHRA concerns the focus of the federal law on the alleged discriminator's position. Under Title VII, the applicable vicarious liability framework differs depending on whether the discriminator is a supervisor or merely a coworker. By contrast, under the MHRA and state case law interpreting it, only one liability test exists: employers are vicariously liable for employee discrimination where the employer "knows or should know of the existence of the harassment and fails to take timely appropriate action."[5]

The supervisor/coworker inquiry can become relevant under the MHRA, however, for purposes of determining at what point the employer knew, or should have known, of the harassment. On a case-by-case basis, and apparently based upon agency principles, Minnesota courts have imputed supervisors' knowledge of sexual harassment to the employer, both in situations where the supervisor was the alleged harasser, and where he or she was not.[6] Other Minnesota courts have refrained from imputing knowledge in this manner where the employer possesses and has implemented an objectionable behavior policy that includes an explicit procedure for reporting workplace harassment.[7]

Alter Ego Liability.
In Ellerth, Justice Kennedy found liability "where the agent's high rank in the company makes him or her the employer's alter ego." In Faragher, Justice Souter cited with approval Harris v. Forklift Systems, Inc., in which "the individual charged with creating the abusive atmosphere . . . was indisputably within that class of an employer's organization's officials who may be treated as the organization's proxy."[8]

A dearth of case precedent exists in this emerging area of alternate employer liability. However, federal courts have increasingly read Ellerth and Faragher to hold that "alter ego" employer liability may be levied under Title VII where the plaintiff makes the requisite prima facie case of discrimination, and where the alleged discriminator is of sufficiently high rank to make him or her the company's alter ego. In that situation, the employer is deemed automatically liable without resort to further inquiry, namely, without considering the supervisor or coworker liability frameworks.[9]

These authors know of no Minnesota court that has specifically adopted and applied this new alter ego theory of employer liability to claims under the MHRA. Moreover, the diverging manner in which Title VII and the MHRA have been interpreted in recent years suggests why this may be unlikely. The MHRA, on its face, apparently does not premise liability upon the level of power entrusted by an employer to the alleged discriminator. By contrast, under Title VII, the new "alter ego" theory represents the logical extension of the emphasis on power found in both Ellerth and Faragher. Coworkers, supervisors, and "alter egos" are respectively considered to possess increasing amounts of power and, in turn, corresponding abilities to discriminate and tangibly affect the jobs of others. The inherent trade-off, Ellerth and Faragher guide, is increasing liability exposure for employers based upon the corresponding higher levels of power delegated to company agents. Time will tell whether Minnesota courts will interpret the MHRA similarly.

Discrimination "Because of Sex."
Also in 1998, the United States Supreme Court issued Oncale v. Sundowner Offshore Services, Inc.,10 still another decision that

"claims brought pursuant to the MHRA

differentiated Title VII from the MHRA. Oncale specifically involved a determination of whether same-sex sexual harassment is actionable under Title VII. The Court ultimately ruled such harassment is actionable, provided it is discrimination "because of sex." On this point, the Court ruled the critical issue is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

are subject to a longer statute of limitations period than are claims brought pursuant to Title VII."

The U.S. Supreme Court's decision in Oncale was predated by the Minnesota Supreme Court's 1997 decision in Cummings v. Koehnen,[11] which determined the viability of same-sex sexual harassment claims under the MHRA. In Cummings, the Minnesota Supreme Court held the MHRA protects against same-sex sexual harassment without requiring plaintiffs to prove the harassment occurred "because of sex." Moreover, the Court expressly rejected the argument that to succeed under such a claim, "a plaintiff in a same-gender sexual harassment claim ... must prove that the harassment affects one gender differently ... ."

Though the Oncale and Cummings decisions both concluded same-sex sexual harassment is actionable under Title VII and the MHRA, respectively, the differences between the decisions have implications going far beyond the narrow issue of same-sex sexual harassment. By expressly rejecting the "because of sex" requirement for sexual harassment claimants under the MHRA, Cummings appears to prohibit sexual harassment even by so-called "equal opportunity harassers," or those who sexually harass both men and women in the same workplace. By contrast, under Oncale and Title VII, sexual harassment claims must be "because of sex," which necessarily requires a showing that the alleged discriminator treats the sexes differently. As a result, whereas "equal opportunity" sexual harassment now appears actionable under the MHRA, courts have held it is not actionable under Title VII.[12]

More Familiar Territory. Title VII and the MHRA are also different in several other important ways. Many of these differences are well-pronounced and more uniformly recognized. The following categories of such differences are among the "must-knows" for any Minnesota attorney practicing employment law.

> ***Compensatory and Punitive Damages.*** Perhaps no difference between Title VII and the MHRA is more pronounced than in the area of compensatory and punitive damages. Pursuant to statute, combined awards of compensatory and punitive damages in federal discrimination cases are capped based on the size of the respondent employer's workforce.13 The MHRA could hardly be more different. First, the act provides a very low statutory cap on punitive damages, limiting a claimant's recovery to $8,500 for each occurrence of discrimination. However, the statute contains no limitation whatsoever on the amount of compensatory

damages that may be awarded. Indeed, it provides quite the opposite. Under the MHRA, courts may exercise their discretion to order judgment against the employer for "treble damages," or for damages in an amount "up to three times the actual damages sustained."[14]

Statutes of Limitations and Administrative Remedies. In order to pursue a Title VII discrimination claim, plaintiffs are first required to exhaust their administrative remedies by timely filing a charge of discrimination with the eeoc.[15] On this point, "'[e]xhaustion of administrative remedies is central to Title VII's statutory scheme because it provides the eeoc the first opportunity to investigate discriminatory practices and enables it to perform its roles of obtaining voluntary compliance and promoting conciliatory efforts.'"[16] "To be timely in Minnesota, a charge of discrimination must be filed with the eeoc within 300 days of the discriminatory act."[17] To subsequently litigate a Title VII discrimination claim, potential plaintiffs must commence suit within 90 days after receipt of an eeoc "right-to-sue" letter.[18] That suit can only consist of discrimination claims alleged in the charge of discrimination and any other claims "reasonably related" thereto.[19]

These procedural requirements are not present for claims asserted under the MHRA. First, claims of discrimination asserted pursuant to the MHRA are not subject to an exhaustion-of-administrative-remedies requirement. As a result, Minnesota claimants may immediately commence suit alleging MHRA claims without first filing a charge of discrimination with the Minnesota Department of Human Rights.[20] Second, and equally important, claims brought pursuant to the MHRA are subject to a longer statute of limitations period than are claims brought pursuant to Title VII. Claimants under the MHRA have 365 days from the discriminatory act in which to commence suit or file a charge.[21]

Individual Liability. Another key distinction between claims brought pursuant to Title VII and the MHRA concerns the prospect of individual liability for unlawful employment discrimination. Under Title VII, only an "employer" is subject to liability for unlawful employment discrimination. An "employer" is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current preceding calendar year, and any agent of such a person . . . ."[22] The 8th Circuit Court of Appeals has interpreted this section to mean "supervisors may not be held individually liable under Title VII."[23]

Such is not the case under the MHRA. To the contrary,

the MHRA expressly provides that it is an unfair discriminatory practice for any person to directly, or to attempt to, "aid, abet, incite, compel, or coerce a person to engage in" unlawful discrimination under the statute.[24] Such "aiding and abetting" discrimination subjects individuals in Minnesota to personal liability.[25]

Right to Jury Trial. Still another key distinction between Title VII and the MHRA concerns the right to have claims tried to a jury. Under Title VII, employment discrimination plaintiffs and defendants alike possess the right to demand a jury trial.[26] No such right exists under the MHRA. Instead, though advisory juries may be utilized,[27] the MHRA expressly states "[a]ny action brought pursuant to this chapter shall be heard and determined by a judge sitting without a jury."[28] Interestingly, however, the federal courts have found that the right to a jury trial issue is a procedural question and, therefore, litigants under the MHRA who venue their case in federal court are entitled to a jury trial, even on their MHRA claims. See Kampa v. White Consolidated Indus., Inc., 115 F.3d 585 (8th Cir. 1997).

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ADA v. MHRA

Although the pace at which the nation acknowledged federal civil rights in employment under Title VII was glacial, the national conscience with respect to employment rights of the disabled evolved even slower. Not until 1990 did the United States Congress pass the Americans with Disabilities (ada) Act, Title I of which applies to disability discrimination in employment. The ada expressly makes it unlawful for employers to discriminate in employment on the basis of an individual's disability, and also provides an affirmative duty for employers to "reasonably accommodate" the known disabilities of employees, subject to certain exceptions.[29] Like Title VII, the ada applies to employers with 15 or more employees.[30]

Remarkably, Minnesota's prohibition of disability discrimination in employment preceded federal passage of the ada by nearly 20 years. Today, like the ada, the MHRA expressly prohibits discrimination in employment on the basis of disability, and similarly provides an affirmative duty for covered employers to "reasonably accommodate" the known disabilities of employees, subject to exception. Due to the similarities between both laws' governance of decisions affecting disabled employees in the workplace, Minnesota courts have regularly looked to ada law when resolving disability discrimination claims under the MHRA. Federal judges likewise looked to ada precedent when interpreting disability discrimination claims under the MHRA, treating both laws as effectively synonymous.[31]

Notable distinctions exist between the ada and MHRA. The following

is a nonexhaustive but illustrative list of those differences as they affect the employment rights of Minnesota's disabled.

Defining Covered Employers.
As stated, the ada and its requirements apply only to employers with 15 or more employees. This standard exists with respect to both the ada's prohibition against disability discrimination and its directive that employers provide reasonable accommodation for employees with known disabilities. The MHRA's reasonable accommodation requirement likewise applies only to employers with 15 or more employees.[32] However, the MHRA parts company with the ada with respect to employers covered by the prohibition against workplace discrimination based on disability, extending its prohibition to include employers with one or more employees.[33]

The practical effect of this difference between covered employers under Title VII and the MHRA is more complicated than it should be. For purposes of defining the class of protected individuals, the MHRA first provides that a "disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment."[34] Next, the MHRA makes clear that to be protected under the statute, the individual must also be "qualified," or someone "who, with reasonable accommodation, can perform the essential functions required of ... the job in question ... ."[35]

At first blush, this definition seems internally inconsistent. Though employers with fewer than 15 employees are not required to reasonably accommodate disabled workers under the MHRA, they cannot discriminate with respect to employment terms, fire, or refuse to hire on the basis of disability. However, to qualify for this latter protection, the complainant must be someone who, with reasonable accommodation, can perform the job in question. The question is begged: how can an employer of fewer than 15 be prohibited from discriminating against disabled people who, with reasonable accommodation, can perform the job, when the employer has no duty to provide reasonable accommodation?

The answer is simpler than it appears. Under both the ada and MHRA, reasonable accommodation is required only of employers with 15 or more employees. The ada also forbids discrimination based on disability for employers of that same size. For employers with fewer than 15 employees, the MHRA diverges from the ada, prohibiting discrimination on the basis of disability where the individual in his or her unaccommodated state can perform the essential functions of the position at issue.

"Material" and "Substantial" Limitations. A more subtle difference exists between the ada and MHRA with respect to each statute's definition of disability. The ada's definition includes those with "a physical or mental impairment that substantially limits one or more of the major life activities of such individual."[36] The MHRA's definition

includes those with "a physical, sensory, or mental impairment which materially limits one or more major activities."[37] Both the Minnesota Supreme Court and Minnesota's Federal District Court have confirmed the "materially limits" standard under the MHRA is "less stringent" than the ada's "substantially limits" criterion.[38]

Shifting Burdens of Proof.

One final notable distinction between the ada and MHRA concerns which party, plaintiff or defendant, bears the burden of proof with respect to a specific showing apparently required by both statutes. To state a prima facie case of disability discrimination under either the ada or MHRA, precedent guides that claimants must establish: (1) they are disabled within the meaning of either statute; (2) they are qualified to perform the essential functions of the job with reasonable accommodation; and (3) they suffered an adverse employment action such that an inference of discrimination may be drawn.[39] A claimant's failure to meet this prima facie burden regularly results in summary judgment in favor of the employer.

A closer, more precise reading of the MHRA casts serious doubt on whether summary judgment is appropriate under this prevailing analysis where the claimant fails to make his or her second prima facie showing. Specifically, the express language of the MHRA draws into question which party claimant (employee) or respondent (employer) really possesses the burden of proof on this second prima facie element. Though caselaw interpreting the statute places this burden on claimants, the MHRA's express language provides, "[i]f a respondent contends that the person is not a qualified disabled person, the burden is on the respondent to prove that it was reasonable to conclude the disabled person ... could not have met the requirements of the job ... ."[40] Read literally, this provision effectively reads out the entire second element of a claimant's prima facie showing, instead making it the employer's burden to defeat an apparent presumption that disabled claimants are qualified for the position at issue. Practitioners should consequently be alert when offering advice, and in litigation when arguing at summary judgment or trial.

Which "Whistle" To "Blow"?

The concept of "whistleblowing" generally describes situations wherein an employee in good faith reports, testifies about, or refuses to perform employment activities in violation of law and/or contrary to public policy. Prior to 1987, no state statutory protections existed ensuring that employers could not retaliate against whistleblowers. Things changed in 1987 when whistleblower legislation was introduced to the Senate, later passed and was made law. Today, as amended, the whistleblower statute protects the qualifying activities of whistleblowing employees in Minnesota.[41] The applicable statute of limitations for claims brought pursuant to Minnesota's whistleblower statute is two years from the act or occurrence constituting the alleged retaliation or whistleblower statute violation.[42]

Over the years, several different types of whistleblower claims have effectively been lifted out of Minnesota's whistleblower statute,

requiring that relief be sought only under different state or federal laws. Most recently, in 2000, the United States Congress passed an amendment to the Federal Aviation Act, entitled the Wendell H. Ford Act, which promises to irreversibly alter the landscape of whistleblower protection in Minnesota for both aviation industry employees and employers. The Ford Act contains comprehensive federal whistleblower protection for employees in the aviation industry, defining and prohibiting actions taken against airline employees who provide information to the employer or federal government relating to the alleged violation of any order, regulation, or standard of the Federal Aviation Administration. The amendment also contains a comprehensive complaint procedure through the Federal Department of Labor for the filing, investigation, resolution and review of claims alleging whistleblower discrimination.43 Notably, the applicable statute of limitations for whistleblower claims under the Ford Act is 90 days from the alleged unlawful act.

Prior to passage of the Ford Act, courts nationwide disagreed about whether the Federal Aviation Act expressly or impliedly preempted state law whistleblower claims brought by those employed in the aviation industry.44 This seeming ambiguity was recently clarified in Botz v. Omni Air Int'l.45 Decided by Judge David Doty, the Botz decision holds that the FAA, as amended by the Ford Act, now expressly preempts certain whistleblower claims brought pursuant to Minnesota law by aviation employees residing in this state. Botz has been appealed to the 8th Circuit Court of Appeals; if affirmed, the decision will deepen the growing divide between federal and state employment laws in Minnesota.

Conclusion

In sum, the deepening divide between federal and state employment laws in Minnesota continues to grow. As a result, the wary Minnesota employment law practitioner must necessarily educate him or herself on the issues raised by these very important differences.

Notes

1 42 U.S.C. ¤ 2000e-2(a)(1).
2 Minn. Stat. ¤ 363.01 et seq.
3 See e.g., Anderson v. Hunter, Keith, Marshall & Co., *417 N.W.2d 619, 623 (Minn. 1988).* See also Heitala v. Real Estate Equities/Village Green, *998 F. Supp. 1065, 1068 (D. Minn. 1998).*
4 *Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998);* Faragher, *524 U.S. 775, 118 S. Ct. 2275 (1998).*
5 *Minn. Stat. ¤ 363.01, subd. 41(3).*
6 *See e.g.,* Giuliani v. Stuart Corp., *512 N.W.2d 589, 595 (Minn. App. 1994)* (citing McNabb v. Cub Foods, *352 N.W.2d 378, 383 (Minn. 1984);* Kay v. Peter Motor Co., Inc., *483 N.W.2d 481, 484-85 (Minn. App. 1992).*
7 See Weaver v. Minnesota Valley Labs Inc., *470 N.W.2d 131, 134-35 (Minn. App. 1991);* Heaser v. Lerch, Bates & Assocs., Inc., *467 N.W.2d 833, 835 (Minn. App. 1991).*

8 Ellerth, 118 S. Ct. at 2267; Faragher, 118 S. Ct. *at 2284 (citations omitted).*
9 See e.g., Mallinson-Montague v. Pocrnick, *224 F.3d 1224, 1232-33 (10th Cir. 2000);* Johnson v. West, *218 F.3d 725, 730 (7th Cir. 2000).*
10 *523 U.S. __, 118 S. Ct. 998 (1998).*
11 *568 N.W.2d 418 (Minn. 1997).*
12 Compare Breitenfeldt v. Long Prairie Packing Co., Inc., *48 F. Supp. 2d 1170, n. 2 (D. Minn. 1999);* Brennan v. Metropolitan Opera Ass'n, Inc., *192 F.3d 310 (2nd Cir.1999);* Holman v. State of Indiana, *24 F.Supp.2d 909, 916 (N.D. Ind.1998);* Butler v. Ysleta Independent School Dist., *161 F.3d 263, 270 (5th Cir. 1998).*
13 *42 U.S.C. ¤ 1981a(b)(3).*
14 *See Minn. Stat. ¤ 363.071, subd. 2.*
15 *See 42 U.S.C. ¤ 2000e-5(b)(c) and (e).*
16 Shannon v. Ford Motor Co., *72 F.3d 678, 684 (8th Cir.1996)* (quoting Williams v. Little Rock Mun. Water Works, *21 F.3d 218, 222 (8th Cir.1994)).*
17 Woodson v. Int'l Brotherhood of Elec. Workers Local 292, *974 F. Supp. 1256, 1259 (D. Minn. 1997) (citing 42 U.S.C. ¤ 2000e-5(e)(1)).*
18 See *42 U.S.C. ¤ 2000e-5(f)(1).*
19 See Williams, *21 F.3d at 222.*
20 See *Minn. Stat. ¤ 363.06, subd. 1.*
21 See *Minn. Stat. ¤ 363.06, subd. 3.*
22 *42 U.S.C. ¤ 2000e(b).*
23 Bonomolo-Hagen v. Clay Central-Everly Community Sch. Dist., *121 F.3d 446, 447 (8th Cir. 1997) (citing Spencer v. Ripley County State Bank, 123 F.3d 690, 691-92 (8th Cir. 1997) (per curiam)).*
24 See *Minn. Stat. ¤ 363.03, subd. 6.*
25 See Ulrich v. City of Crosby, *848 F. Supp. 861 (D. Minn. 1994).*
26 See *42 U.S.C. ¤ 1981a(c).*
27 See Kelly v. City of Minneapolis, *581 N.W.2d 372 (Minn. App. 1998).*
28 *Minn. Stat. ¤ 363.14, subd. 2.*
29 See *42 U.S.C. ¤ 12112.*
30 See *42 U.S.C. ¤ 12111(5)(A).*
31 See e.g., Snow v. Ridgeview Medical Center, *128 F.3d 1201, 1209 n. 5 (8th Cir. 1997).*
32 See *Minn. Stat. ¤ 363.03, subd. 1(6).*
33 See *Minn. Stat. ¤ 363.03, subd. 1(2); Minn. Stat. ¤ 363.01, subd. 17.*
34 *Minn. Stat. ¤ 363.01, subd. 13.*
35 See *Minn. Stat. ¤ 363.01, subd. 35 (emphasis added).*
36 See *42 U.S.C. ¤ 12102(2)(A) (emphasis added).*
37 *Minn. Stat. ¤ 363.01, subd. 13 (emphasis added).*
38 See Sigurdson v. Bolander & Sons, *532 N.W.2d 225, 2287 (Minn. 1995); see also Breitenfeldt, 48 F. Supp. 2d at 1177 n. 4.*
39 See Cornman v. N.P. Dodge Management Company, *42 F. Supp. 2d 1066, 1069-70 (D. Minn. 1999) (citations omitted); Hubbard v. United Press Int'l, Inc., 330 N.W.2d 428, 442 (Minn.1983).*
40 See *Minn. Stat. ¤ 363.01, subd. 35.*
41 See *Minn. Stat. ¤ 181.932.*
42 See Larson v. New Richland Care Ctr., *538 N.W.2d 915 (Minn. App. 1995).*

43 See *49 U.S.C. ¤ 42121(a) and (b).*
44 Compare Marlow v. AMR Services Corp., *870 F. Supp. 295 (D. Haw. 1994) with Espinoza v. Continental Airlines, 80 F. Supp. 2d 297 (D.N.J. 2000).*
45 *Civil File No. 00-CV-2277, 2001 wl 256282 (Jan. 19, 2001).*