Supreme Court Says No Pay Can Still Play: Abel v. Abbott Northwestern Hospital is a step forward for employees' rights

By Thomas E. Marshall

The Minnesota Supreme Court's July 2020 opinion in *Abel v. Abbott Northwestern Hospital*[1] represents a win for employees at several levels: through its broad acceptance of the continuing violations theory at the Rule 12 stage of proceedings; by eliminating "compensation" as a necessary element in the definition of "employee" under the Human Rights Act; and in its affirmation of a duty to protect employees and students from known foreseeable conduct. For employers, the lessons are that early motions to dismiss will be carefully scrutinized and bad facts will no longer be excused by Minnesota's highest court.

The facts as pled

The underlying proceedings in the court involved motions to dismiss and for judgment on the pleadings. Accordingly, the facts, as pled, must be accepted as true by the Court.[2] The following facts, accepted as true, tell a sad tale.

Meagan Abel, a St. Mary's University (SMU) graduate student in psychology, needed to complete practicum hours at an accredited institution. Her SMU advisor recommended Allina's clinical psychology program at Abbott Northwestern Hospital. Abel was accepted and began the practicum in September 2015.[3]

According to the allegations of the complaint, Dr. Jeffrey Gottlieb, a clinical psychologist and practicum training director, "regularly engaged in inappropriate and harassing behavior." This behavior included touching, massages, and mimicking sex acts as well as flirtatious behavior. He referred to female students as his "girls" and even referred to Abel, who is of Asian-Indian descent, as "the brown one."[4]

According to the decision, Abel "raised concerns with Allina throughout the practicum experience." Abel also had "similar conversations with" SMU. On December 23, 2015, Allina removed Gottlieb as training director. But he continued to work in the hospital, subject to a no-contact order with students. Nevertheless, after Abel returned from a stress leave, Gottlieb would still make eye contact and threatening gestures toward Abel and other students.

Abel ended her practicum early on May 27, 2016. During oral argument at the Supreme Court, her counsel indicated she had been too afraid to come to work on her last day or even have a going-away party.[5] Gottlieb resigned in June 2016.[6]

With respect to the conduct of SMU, one faculty member instructed Abel to apply to another internship that was associated with Gottlieb and "suck it up." Abel was further told to put her Gottlieb experience behind her. The allegations stated that SMU was well aware of Gottlieb's actions yet still encouraged students to apply for the practicum.[7]

The claims

On May 26, 2017, Abel filed a charge with the Minnesota Department of Human Rights claiming race and sex discrimination in the area of employment against Allina.[8] This charge barely beat the one-year statute of limitations under the Minnesota Human Rights Act (MHRA), leaving her two days (May 26 – 27, 2016) for the facts underpinning her claim.[9] Her lawsuit, which followed on March 2, 2018, added claims of reprisal in employment, education, and public accommodation.[10] She also made a negligence claim.

On March 5, 2018, Abel brought suit against SMU, claiming discrimination in education and public accommodation under the MHRA as well as a negligence claim.

Both defendants moved to dismiss and for judgment on the pleadings. In both the district court and court of appeals (with Judge Klaphake dissenting), the discrimination claims were considered time-barred and, as to negligence, no common law duty was seen to exist as a matter of law.[11]

Abel sought Supreme Court review on the issues of statute of limitations and continuing violation, the necessity of paid consideration to maintain a claim, and the duty of a defendant regarding a foreseeable risk to a plaintiff.

The Minnesota Supreme Court accepted review, considering first the "measuring date" for the discrimination claims under the Human Rights Act. The date of May 26, 2017 was uncontested for the Allina employment discrimination claim. Under the MHRA, the limitations period is one year. Although Abel had not specifically identified claims for education and public accommodation in her charge, she argued these claims should fall within the statute of limitations since they arose from the same facts as the employment claim and Allina certainly had notice of those facts.

The Court declined this approach and followed the determinations of state and federal courts, which have held that the failure to identify the specific area of discrimination precluded a later claim in an area unmentioned in a charge. The Court noted that the MHRA requires each discriminatory practice—whether in employment, education, or public accommodation—be separately identified. Since Abel did not do so, or amend her charge to add those claims, they remained time-barred since they were not formally asserted until the complaint was served, nine months after the charge of discrimination.

Continuing violation

The Court next turned to whether Abel sufficiently alleged an employment discrimination claim. Abel asserted that her claim was one for a continuing violation, which included actions up through her last two days of employment in the practicum.

A "continuing violation" tolls the statute of limitations "where a pattern of discriminatory conduct constitutes a sufficiently integrated pattern to form, in fact, a single discriminatory act."[12] To prove this, Abel would have to demonstrate a series of related acts, one or more of which fell within the limitations period, or demonstrate a discriminatory system both before and during the limitations period.[13] The

Court wrote: "[t]he critical question is 'whether any present violation exists' within the statute of limitations period."[14] Abel argued that what she experienced at Allina was "part of a series of related acts of discrimination by combining the two methods of proof." The Court found the allegations sufficient to withstand a motion to dismiss based on Abel's description of the various related acts perpetrated by Gottlieb in person or through his colleagues at Allina, including her last two days of work. Abel, in other words, plausibly alleged a continuing violation and Allina did not meet its burden of demonstrating the claim was outside the statute of limitations. As noted by Justice Lillehaug during oral argument, the allegations may not be enough to ultimately withstand summary judgment, but the case is at a different stage of the proceedings.[15] The claims for education and public accommodation, relating back to March 2, 2017 (one year before the complaint), were clearly time-barred, as Abel had been out of the practicum for several months by that time.[16]

During the arguments, as noted above, Abel's counsel argued that the actions caused Abel not to go into work. The Court made an interesting comment, citing *Sigurdson* to note that "the proper focus is upon the time of the discriminatory acts, not upon the time at which the consequences of the acts became most painful." It added, again citing *Sigurdson*, "[b]ut if a mere continuing effect will extend the limitation period, the statute of limitations would be effectively emasculated." While the Court applied the continuing violations theory in what some may consider a broad manner, the Court did not alter existing Minnesota precedent. Acts, not effects, still control the limitations period. Whether there really are "acts" that occurred in Abel's last two days of work may well ultimately determine this action. Fortunately, Abel pled such acts occurred and the Supreme Court considered that sufficient at this early stage of the proceeding through the continuing violation argument.

The Court affirmed the dismissal of the claims against SMU, as the allegations about her past practicum did not show a continuing violation. The practicum ended a year before her complaint against SMU and while Abel's "continuing consequences... may be significant… this is insufficient to extend her claim."[17]

An employee does not need to be paid

The next issue for consideration was Abel's unpaid status in the practicum. Allina argued that this meant she could not be considered an employee for purposes of an employment discrimination claim. The Court considered helpful the approaches taken in Title VII cases and decided to employ a "hybrid" test. The Court first looked at common agency principles, including the employer's right to control the means and manner of performance.

Considering federal courts, which have gone both ways on whether compensation should be a requirement, the Minnesota Supreme Court remarked, relying on its recent *Kenneh* decision, that the MHRA has historically "provided more expansive protections to Minnesotans than federal law."[18] Accordingly, the Court declined to find a compensation requirement as a prerequisite for a discrimination claim since it is not specifically mandated by the statutory language. The Court went even further, stating that reliance on common law agency principles alone would be "unnecessarily restrictive in light of the liberal construction we must afford the [MHRA]." Under the Court's new hybrid test, the employment relationship "is construed in light of general common-law concepts, taking into account the economic realities of the situation."[19] A court should use the economic realities of the work situation to decide whether the worker "is likely to be susceptible to the discriminatory practices Title VII was designed to eliminate." No single factor is dispositive.

Chief Justice Gildea, joined by Justice Anderson in a well-supported dissent, maintained the "common sense view" that compensation has long been an essential requirement for an employment discrimination claim and would have eliminated Abel's MHRA claim.[20] Even applying the hybrid test now pronounced by the Court, Chief Justice Gildea would not have found Abel an employee. She reasoned that Abel had a discrimination claim, albeit for education—not employment—discrimination. Unfortunately, she did not timely plead the claim and the majority should not be undermining the MHRA's protections for employees to create a new and unbounded rule of law to save Abel's claim. In other words, at least from Allina's point of view, bad facts have made bad law.

The majority, however, looked at the whole. Despite the absence of compensation, Abel applied for the practicum and Allina selected her to take part. In her role she accessed human resources and information technology departments. She provided services to Allina and Allina billed and received compensation for Abel's work. For those reasons, the majority considered her an employee.[21]

Duty of foreseeable risk to a foreseeable plaintiff

The Court then turned to the negligence claims. Allina and SMU both denied they owed a duty of care for the actions of a third party. The Court noted two exceptions: "when there is a special relationship between a plaintiff and a defendant and the harm to the plaintiff is foreseeable"; and "when the defendant's own conduct creates a foreseeable risk of injury to a foreseeable plaintiff." Abel argued both circumstances applied to her. The Court did not use the special relationship test for either Allina or SMU. Instead it considered only the second exception.

Allina argued that passive non-action, or nonfeasance, does not result in a duty of care being owed. But the Court found that the alleged facts demonstrated active misconduct or malfeasance, not passive inaction. Allina ran the practicum and made Gottlieb the supervisor of the program. Allina fielded student complaints, exercised control, removed Gottlieb from the program, and initiated the no-contact order. Moreover, it was "objectively reasonable" for Allina to assume Gottlieb's misconduct against Abel would occur. Certainly, as a student in Gottlieb's class, she was a foreseeable plaintiff.

As to SMU, the Court reminded all that on considering a motion for judgment on the pleadings, the Court considers only the facts alleged in the complaint, accepting them as true, and drawing all inferences in favor of the nonmoving party.[22]

For the same reasons as Allina, the Court found the facts alleged against SMU were "far from 'passive inaction.'" Rather than protect Abel, the SMU faculty actively encouraged her placement with Gottlieb and told her to remain despite the discrimination and harassment. She would be a foreseeable plaintiff, as SMU was aware of Gottlieb's prior conduct.

Chief Justice Gildea dissented, troubled that Abel only argued the "special relationship" below and did not even raise the foreseeable plaintiff theory in her petition for review. Based on past precedent that appellate courts do not consider issues unheard below, the Court should have passed on the issue. Even so, she did not consider the allegations against either Allina or SMU misfeasance, and so no duty existed.

As to MHRA preemption, because of the stage of the litigation, the Court felt such a decision to be premature and chose not to give more attention to the issue.

Conclusion

In 2020, the Minnesota Supreme Court has certainly indicated its willingness to allow discrimination plaintiffs to have their day in court.

The bad facts of the Abel case, as alleged, are troubling, and Abel did beat the statute of limitations by two days. At this early stage of litigation, the Court believed she should be given the opportunity to develop her case and made her an employee, despite the lack of compensation. Frankly, besides the issue of compensation, the Court carefully comported existing law to the alleged facts as it should at this initial stage of the proceedings. As the facts develop in discovery, it will be interesting to see if Abel, as her counsel suggested at oral argument, did not actually go to work on May 26 and 27, 2016. If so, we will find out at summary judgment if "acts" or "effects" will control and whether her discrimination claim is timely. This case may again find itself in the Supreme Court.

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Notes

[1] 947 N.W.2d 58 (Minn. 2020).

[2] "The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc*., 663 N.W.2d 550, 553 (Minn. 2003).

[3] *Abel*, 947 N.W.2d at 65.

[4] *Id.* Additional allegations stated that when Gottlieb learned Abel had reported past incidents of racial discrimination, he told her he would never have let her join the program. He also "fostered a climate of isolation and dependence" and told students "that others at the clinic did not want them there…, and that it was only by virtue of his power and influence that the practicum program continued." He allegedly told students "that obeying him was integral to their continued participation in the practicum and future paid employment."

[5] http://www.mncourts.gov/SupremeCourt/OralArgumentWebcasts/ArgumentDetail.aspx?vid=1382

[6] *Abel*, 947 N.W.2d at 67.

[7] *Id.*, at 66. An SMU faculty member told Abel "Dr. Gottlieb was culturally incompetent" and "that she had advised St. Mary's to discontinue sending students to work with him." Abel learned other students experienced similar race- and sex-based discrimination and that SMU "counseled them on how to 'get through' it." The faculty member told Abel she knew of "at least three previous students who had been sexually and racially harassed."

[8] *Id.*, at 67.

[9] Minn. Stat. §363A.28, subd. 3(a). A claim must be brought "within one year after the occurrence of the practice."

[10] *Abel*, 947 N.W.2d at 67.

[11] *Id*. *See also Abel v. Abbott Northwestern Hospital, et al.*, 2019 WL 4745372 (Minn. App. 2019) (unpublished).

[12] *Id.*, *citing Hubbard v. United Press Int'l, Inc*., 330 N.W.2d 428, 440 n.11 (Minn. 1983).

[13] *Id*., at 70-71, *citing Smith v. Ashland, Inc*., 250 F.3d 1167, 1172 (8th Cir. 2001).

[14] *Id*., at 71, *citing Sigurdson v. Isanti County*, 448 N.W.2d 62, 67 (Minn. 1989).

[15] Supra note 5.

[16] *Abel*, 947 N.W.2d at 73.

[17] *Id*., at 73. During oral argument the arguments discussed the United States Supreme Court case of *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061 (2002). This decision is not mentioned at all in *Abel*. The results however, appear to be the same. *See Morgan*, 536 U.S. at 117-18, 122 S. Ct. 2074-75 (2002).

[18] *Id.,* at 75, *citing Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 229 (Minn. 2020).

[19] *Id*., *citing Wilde v. County of Kandiyohi*, 15 F.3d 103, 105 (8th Cir. 1994).

[20] *Id*., at 81-83.

[21] *Id*., at 76.

[22] *Id*., at 79, *citing Zutz v. Nelson,* 788 N.W.2d 58, 61 (Minn. 2010).