Case No. 16-3186

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Brittany R. Tovar,

Plaintiff-Appellant,

v.

Essentia Health; Innovis Health, LLC, dba Essentia Health West; HealthPartners, Inc.; and HealthPartners Administrators, Inc.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
The Honorable Richard H. Kyle, Presiding

APPELLANT'S PETITION FOR REHEARING

GENDER JUSTICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure and Rules 35A and 40A of this Court's local rules, Appellant Brittany R. Tovar ("Appellant") respectfully requests panel rehearing or rehearing *en banc* of the portion of the Panel's May 24, 2017 decision dismissing her Minnesota Human Rights Act ("MHRA") claim. In the alternative, pursuant to Minn. Stat. § 480.065, subd. 3, Appellant respectfully requests certification of the MHRA issue to the Supreme Court of Minnesota.

STATEMENT REGARDING NECESSITY OF *EN BANC* REHEARING

En banc review is appropriate here on a number of grounds.

First, *en banc* review is appropriate because the issue of the scope of MHRA protections is of exceptional importance both to employers and to employees. This question has the same level of importance, and should be resolved similarly, as the question addressed by the Supreme Court in *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (recognizing an associational discrimination claim under Title VII's retaliation provision comparable to Appellant's discrimination claims against her employer).

Second, to the extent the Panel's decision rested on the conclusion that Appellant waived her separate MHRA arguments, the decision contradicts long-standing circuit law (a) setting narrow definitions of waiver, *see, e.g., United States v. Gonzales*, 90 F. 3d 1363, 1369 (8th Cir. 1996); and (b) recognizing the ability of parties to argue in the

alternative, *see e.g. Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 253 (8th Cir. 2012); *Milhauser v. Minco Prods.*, 701 F.3d 268, 270-71 (8th Cir. 2012).

Finally, the Panel decision conflicted with precedent and with comity and federalism norms by neither examining the MHRA question on its own terms nor giving the Supreme Court of Minnesota the opportunity to resolve the question definitively. *See Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 212 (1960) (discouraging federal courts from answering a question of state law where the court could not "make a confident guess how" the state's highest court would resolve the issue); *Lyon Fin. Servs. v. Ill. Paper & Copier Co.*, 732 F.3d 755, 766 (7th Cir. 2013) (finding *sua sponte* certification appropriate for important questions of state law); *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 152 (5th Cir. 2001) (holding that federal courts should not deprive state courts of opportunity to construe own statutes, using interpretive tools, presumptions, and standards they deem proper).

FACTUAL AND PROCEDURAL HISTORY

Appellant Tovar filed this action in January 2016 against her employer, Essentia Health and Innovis Health, LLC, dba Essentia Health West ("Essentia"), and the third-party administrator for her employee health plan, HealthPartners, Inc. and its subsidiary HealthPartners Administrators, Inc. ("HP/HPAI"), after she was denied coverage for her transgender son's transition-related healthcare while he was a beneficiary on her employee plan. (J.A. 1–2, 5.) Her complaint alleged Essentia violated Title VII of the

Civil Rights Act of 1964 and the Minnesota Human Rights Act ("MHRA"), while HealthPartners and HPAI violated the Affordable Care Act ("ACA"). (*Id.* at 2.)

The defendants filed Motions to Dismiss before the district court on March 3, 2016, and on May 11, 2016, the district court dismissed all of Appellant's claims. (J.A. 14, 25; Add. 1.) It dismissed Appellant's claims under Title VII and the MHRA because it ruled Appellant did not fall within the class of plaintiffs that those statutes intended to protect, given that Appellant herself is cisgender, not transgender. (Add. 12–15.) The district court dismissed Appellant's claims against HealthPartners and HPAI, ruling Appellant did not have standing under Article III of the Constitution. (Add. 6.)

On appeal, Appellant argued that the district court erred in dismissing all counts. Appellant's argument regarding the two employment law claims was multi-layered. She began by noting that the issue was the same for both statutes: "Can an employee bring a claim of discrimination under Title VII or the MHRA when the person whose protected status is targeted by the alleged discrimination is not the employee herself, but rather her beneficiary?" (Brief at 39.)

Appellant argued that the answer should be yes for both statutes, in light of the policies underlying both statutes and the well-established body of federal and state cases, nationwide, recognizing "associational discrimination." (Brief at 39-50.)

In making this argument, Appellant recognized that the language of Title VII could be read to the contrary, and she presented arguments why the Court should

nonetheless read the two statutes in harmony, to permit associational discrimination claims like Appellant's. (Brief at 40-42.)

Critically, though, Appellant also recognized the possibility that the two statutes could be interpreted differently, in light of the difference in statutory language. Before the District Court, Appellant had argued, "[Essentia's] argument ultimately depends solely on the text of Title VII and does not therefore apply to the MHRA." J.A. at 216. Her brief on appeal included separate sections for Title VII and the MHRA. In the MHRA section, she incorporated all of the policy and caselaw arguments laid out in the preceding Title VII section (Brief at 50), and then noted that there was a "pertinent difference between the two statutes" which lies "in the statutory language itself, since unlike Title VII, the MHRA does not contain any language defining discrimination as being linked to an employee's own protected characteristic." (*Id.* (citing Minn. Stat. § 363A.08, subd. 2(3)).) In light of this difference, Appellant argued, "the district court's interpretation of the MHRA is even less supported than its interpretation of Title VII." (*Id.*) Thus, Appellant's MHRA argument was an argument in the alternative: Appellant emphasized that both statutes should be interpreted to permit her claims. But she also asserted that even if the Court agreed with the District Court's reading of Title VII, it could still rule for Appellant on her MHRA claim, given the difference in statutory language.

This Court, in a May 24, 2017, decision upheld the district court on Appellant's Title VII and MHRA claims, but ruled the district court erred in dismissing her ACA claim.[1] This Court found that both parties, as well as the district court, "applied the same analysis" to Title VII and the MHRA. *Tovar v. Essentia Health*, No. 16-3186, 2017 WL 2259632 at 5 (8th Cir. May 24, 2017). The Court found that Appellant had "not argued that the statutes are substantively different with respect to the issues presented in this case." *Tovar* at 5 (citing *United States v. Wearing*, 837 F.3d 905, 910 n.6 (8th Cir. 2016) (per curiam) which held that arguments not sufficiently developed in an opening brief are waived). Then, the Court treated the MHRA and Title VII as subject to the same interpretation, holding that a plain reading of Title VII left Appellant and her son outside of its protections and case law does not contradict that reading. *Id.* at 5–9. The decision did not mention or analyze the "pertinent difference" in statutory language that Appellant had highlighted. *Id.*

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[1] Appellant does not seek rehearing on this Court's holding regarding the claims against HealthPartners, Inc. and HPAI.

ARGUMENT

I. This Court Should Rehear the Panel's Determination that Essentia's Discrimination Was Permissible Under the MHRA

En banc review is appropriate here because the scope of MHRA protections is of exceptional importance both to employers and to employees. Employers need to know whether they are, in fact, permitted to discriminate against employees with respect to their benefits, as long as the reduction in benefits is based on a characteristic of the employee's beneficiary. Employees whose employee benefits may be reduced have an equally strong interest in this issue. *Cf. Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011) (addressing similar issue regarding associational discrimination).

En banc review is also appropriate here to correct the Panel's erroneous reliance on a waiver finding. The Panel found that Appellant had "not argued that the statutes are substantively different with respect to the issues presented in this case." *Tovar* at 5 This finding is not supported in the record. The Panel's finding on waiver cannot meet the standards laid out by this circuit, *see, e.g., United States v. Gonzales*, 90 F. 3d 1363, 1369 (8th Cir. 1996), in light of the clear discussion in Appellant's opening brief of her MHRA claim and the potential differences between her Title VII and MHRA claims. Appellant did not waive her argument that the MHRA could be interpreted differently, and more generously for employees, than Title VII. *En banc* review is also appropriate

in order to uphold parties' right to present arguments in the alternative. *See, e.g., Johnson v. MFA Petroleum Co.*, 701 F.3d 243, 253 (8th Cir. 2012); *Milhauser v. Minco Prods.*, 701 F.3d 268, 270-71 (8th Cir. 2012).

Even if Appellant had waived the issue, this Court should address it. A court may consider an issue that it determines was waived, especially if the court determines it to be in the interest of justice. *Parmenter v. Fed. Deposit Ins. Corp.*, 925 F.2d 1088, 1093–94 (8th Cir.1991) (considering an argument raised for the first time in a reply brief where "the interests of justice" required a remand to the district court to address the question raised). It is in the interest of justice for this Court to consider the appropriateness here of "rel[ying] on federal law interpreting Title VII in interpret[ing]. . . the MHRA." *Tovar* at 5 (quoting *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 796 (Minn. 2013)). The original decision departs from the Minnesota Supreme Court's precedent in beginning with statutory language first then analyzing whether Title VII's interpretation would be a proper interpretation of the MHRA. *See, e.g., Ray v. Miller Meester Advert., Inc.*, 684 N.W.2d 404, 408 (Minn. 2004) ("There are significant differences between the MHRA and Title VII.") *Cummings v. Koehnen*, 568 N.W.2d 418, 422 n.5 (Minn. 1997) (declining to apply the federal rule "because the MHRA is not similar to Title VII in its treatment of sexual harassment"), *State by Beaulieu v. RSJ, Inc.*, 552 N.W.2d 695, 702 (Minn. 1996) (noting the MHRA's similarities with Title VII but declining to apply the same rule to state law because the Minnesota legislature did not use language similar to the language

found in Title VII), *Frieler v. Carlson Mktg. Group*, 751 N.W.2d 558, 569 (Minn. 2008) (citing differences in the language of the MHRA and Title VII and conducting an analysis about whether it is appropriate to use Title VII's interpretation to guide the court); *see also Hodges v. Northwest Airlines, Inc.*, 990 F.2d 1030, 1032 (8th Cir. 1993) (declining to apply Title VII deadlines to an MHRA claim).

Since this Court's decision rejected an interpretation of Title VII that would harmonize the differences in the two statutes, it is necessary for the Court to separately analyze the text of the MHRA to determine if it is similar to the provision of Title VII in dispute. Given the remedial nature of the statute, and the textual differences, it is not similar enough, and therefore, this Court's decision marks a departure from precedent.

In *Cummings*, the Minnesota Supreme Court found it incorrect to apply the Title VII standard for harassment to the plaintiff's claim under the MHRA, because "Title VII prohibits only sex discrimination, 42 U.S.C. § 2000e-2(a)(1), while the MHRA specifically prohibits sexual harassment." 568 N.W.2d at 422 n.5. Here, Title VII prohibits discrimination by an employer against an employee "because of such individual's . . . sex" while the MHRA simply prohibits discrimination "because of . . . sex." Therefore, these statutes are not similar enough to justify automatic application of federal rules to the state statute.

The provisions of the MHRA are to be "construed liberally" to accomplish the anti-discrimination purposes of the statute. Minn.Stat. § 363A.04 (2010). Therefore, to

interpret the MHRA to allow employers to provide fewer benefits to mothers of transgender children than to mothers of cisgender children would conflict with this purpose.

II. In the Alternative, This Court Should Certify to the Minnesota Supreme Court the Statutory Interpretation Question This Case Presents

Should this Court decline to reconsider its decision to interpret the MHRA as the same as Title VII in this instance, it should exercise its power to certify questions to the Minnesota Supreme Court in order to resolve this statutory interpretation question on a state statute. The Supreme Court of Minnesota "may answer a question of law. . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this state." Minn. Stat. § 480.065, subd. 3.

The question presented here regarding the scope of the MHRA meets these requirements. First, it is a question of law. Second, the answer determines whether Appellant's claim may move forward under state law, as it was the reason Appellee's motion to dismiss was granted. Third, to appellant's knowledge, no state appellate court has ruled definitively on this issue.

While it is unusual for a court to certify a question to state court after a final decision, given the novelty of this question and the potentially-wide-reaching effects of this decision, it is important to ensure the interpretation is correct. *Perkins v. Clark*

Equipment Co., Melrose Div., 823 F.2d 207, 210 (8th Cir. 1987); *see also Lyon Fin. Servs. v. Ill. Paper & Copier Co.*, 732 F.3d 755, 766 (7th Cir. 2013) (permitting *sua sponte* certification). Arguably, given the dearth of MHRA case law on the issue, there is no way here to "make a confident guess how" Minnesota's highest court would resolve this issue. *Clay v. Sun Insurance Office, Ltd.*, 363 U.S. 207, 212 (1960); *see also Allstate Ins. Co. v. Serio*, 261 F.3d 143, 152 (5th Cir. 2001) (same). Therefore, Appellant requests, as an alternative to a rehearing *en banc*, that this question be certified to the Minnesota Supreme Court.

CONCLUSION

For the reasons set forth herein, Appellant Tovar respectfully requests that this Court reconsider its interpretation of the MHRA and hold that the MHRA, consistent with caselaw on associational discrimination, bars employers from discriminating against employees based on the protected characteristics of their beneficiary. Alternatively, Appellant Tovar respectfully requests that this Court certify the question regarding the scope of the MHRA to the Minnesota Supreme Court.

CERTIFICATE OF COMPLIANCE

Certificate of compliance with the type-volume limitation, the typeface requirements, and the type style requirements of Fed. R. App. P. 32(a) and with the technical requirements of 8th Cir. R. 28A(h):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because it contains 2724 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been produced using a proportionally spaced typeface using 14-point Garamond font, using Microsoft Word, 2010 Version.

3. The digital version of this brief filed herewith has been scanned for viruses and to the best of my knowledge, is virus-free.

Dated: June 7, 2017

s/ Jill R. Gaulding

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CERTIFICATE OF SERVICE FOR DOCUMENTS FILED USING CM/ECF

I hereby certify that on June 7, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Dated: June 7, 2017

s/ Jill R. Gaulding

Jill R. Gaulding