Severe or Pervasive: Just How Bad Does Sexual Harassment Have to Be in Order to Be Actionable?

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2 Many thanks to our former colleague, Colin K. Thomsen, Esq., whose work on the piece was central to keeping it up to date and well-written.
INTRODUCTION

When viewed historically, the case law in the area of harassment in general, and sexual harassment in particular, seems to trend, in spurts, from pro-employee to pro-employer. The developments in the last many years show that the pendulum has swung towards the employer, quite emphatically. In particular, many courts are finding reasons to dismiss sexual harassment cases on the basis that the harassment just was not bad enough to be actionable in court. In more technical terms, courts are dismissing cases because the harassment the plaintiff endured was not – in their view – sufficiently “severe” or “pervasive” to merit judicial intervention.

This article examines the question of just how bad harassment has to be before it rises to the level of actionable sexual harassment, with an emphasis on cases considered by the courts of the Eighth Circuit. It examines the historical origins of some key concepts in this area of the law and looks at the evolution of competing strains of thought within the law of workplace sexual harassment. Finally, it attempts to reconcile varying decisions and arrive at some practical tips on what amounts to actionable hostile environment sex harassment.

I. The Law of Workplace Sexual Harassment: Basics and Background

Title VII of the Federal Civil Rights Act of 1964 makes it an unlawful employment practice for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (citing 42 U.S.C. § 2000e-2(a)(1)).

Although not provided for in Title VII itself, through case law, courts have articulated a rough distinction between two types of sexual harassment claims. On one hand, a plaintiff bringing a “quid pro quo” harassment claim seeks to prove that he or she was offered some sort
of advancement or threatened with some sort of adverse action in exchange for acquiescing to unwanted sexual advances. In the classic quid pro quo case, an employee is told that they must perform sexual favors for a supervisor in order to keep their job. On the other hand, a plaintiff bringing a “hostile work environment” claim seeks to prove that the general environment or climate of the workplace was so hostile and offensive that the conditions amounted to sex-based harassment.

A. The Standard

To prove a hostile environment claim the plaintiff must prove that (1) he or she belongs to a protected group; (2) he or she was subject to unwelcome sexual harassment; (3) the harassment was based on sex, (4) the harassment affected a “term, condition, or privilege” of employment; and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.” Moylan v. Maries Cnty., 792 F.2d 746, 749 (8th Cir. 1986) (citation omitted). Moylan is evaluated pre Ellerth and Faragher, when the prima facie case for supervisor harassment changed; the above standard is still used for peer-on-peer or customer/vendor harassment. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2291 (1998).

In Ellerth and Faragher, the United States Supreme Court ruled that employers can be

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1 In states like Minnesota, where harassment is statutorily defined (Minn. Stat. 363A.03, subd. 43), “because of/based on sex” may not be an element of the prima facie case, as it is under Title VII (which has no statutory definition of harassment).

4 The Court adopted the following holding in both Ellerth and Faragher: “An employer is subject to vicarious liability to a victimized, employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. . . . The defense necessarily comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Burlington Industries, Inc. v. Ellerth, 118 S. Ct 2257, 2270 (1998). While employers typically must prove both prongs of the Faragher/Ellerth defense, it should be noted that the Eighth Circuit departed from this rule in McCurdy v. Ark. State Police. Though, the McCurdy precedent is limited to cases of a single instance of sexual assault by a supervisor where the employee promptly reports the assault, and the employer then immediately fires the supervisor. McCurdy v. Ark. State Police, 375 F.3d 762, 774 (8th Cir. 2004). Finally, while the employer liability for supervisor harassment standard in Ellerth and Faragher is significant, this article is primarily focused on what conduct is enough to constitute severe or pervasive harassment.
“vicariously liable” for harassment by supervisors. However, if the harassment did not result in a tangible job action, such as discharge, demotion or undesirable reassignment, the employer can raise an affirmative defense that it exercised “reasonable care” to prevent and correct the harassment, and that the employee unreasonably failed to use its complaint procedure.

To prove the fourth factor - that the harassment affected a “term, condition, or privilege” of employment - a certain threshold must be reached. Behavior that is inappropriate, rude and/or offensive is not always actionable under Title VII, even when it is based on sex, and the Supreme Court has cautioned that Title VII is not meant to provide a “general civility code.” Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998). So, just how bad does it have to be before courts will allow a claim to proceed? According to the United States Supreme Court, in order to be redressable by a court, the harassment must be “sufficiently severe or pervasive” “to alter the conditions of [the victim’s] employment and create an abusive working environment.” Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (U.S. 1986). (emphasis added). To meet this standard, the plaintiff must prove that the harassment was both objectively and subjectively unreasonable, meaning that a reasonable person would find the conduct offensive, and that the plaintiff actually did so. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

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5 See also Frieler v. Carlson Marketing Group, Inc., 751 N.W.2d 558 (Minn. 2008), adopting the Faragher-Ellerth employer liability for supervisor standard to apply to claims brought in Minnesota state courts under the Minnesota Human Rights Act [MHRA].

6 In Stewart v. Rise, Inc. the Court reversed summary judgment of a hostile work environment claim based on application of the Ellerth/Faragher affirmative defense. Although significant in that it recognized a claim of subordinate harassment of a supervisor, the Court warned, “When the plaintiff is a supervisor, and the objected-to conduct originates among her subordinates, a jury may look with great suspicion upon claims that the plaintiff adequately presented her concerns up the chain of command.” Stewart v. Rise, Inc., 791 F.3d 849 (8th Cir. 2015).
B. Subordinate Harassment

Situations can arise where subordinate employees are accused of harassing a supervisor. *Stewart v. Rise* was the first Eighth Circuit case to recognize a claim of subordinate harassment of a supervisor. Stewart, an American-born African American woman alleged that a group of her subordinates, consisting of largely male, Somali-born immigrants, created a hostile work environment. *Stewart v. Rise, Inc.*, 791 F.3d 849, 852 (8th Cir. 2015). Stewart served as supervisor of a branch office for a welfare-services non-profit entity known as Rise in the Twin Cities. *Id.* She claimed several male, Somali-born subordinates created a hostile work environment through sexist, racist, and nationalist comments and through physical violence and intimidation, all due to the fact that Stewart was an American-born African-American woman. *Id.* at 853. They were insubordinate, screamed at her, slammed doors in her face, and said things like “African American women have no value” and “American women were disrespectful because they were not beaten enough,” among other things. *Id.* at 854-55.

The District Court granted summary judgment on the hostile-work-environment claim finding that the alleged incidents were not sufficiently severe or pervasive, characterizing the incidents as isolated, and because Rise was entitled to rely on the *Ellerth/Faragher* defense. *Id.* at 858. The Eighth Circuit Court of Appeals reversed, rejecting the District Court’s application of the *Ellerth/Faragher* defense, finding that Stewart’s annual certifications and failure to pursue a formal written system of grievances are not determinative as a matter of law. *Id.* at 859. The Eighth Circuit stated that the record provides adequate support that Stewart belongs to a protected group, was subjected to unwelcome harassment based on her membership in that group, and that the employer failed to take reasonable action. *Id.* at 859-60. The severity of the harassment and whether Rise knew or should have known of the severe harassment are closer
calls, but the Court felt there were enough questions of fact to reverse. *Id.* at 860.

**C. A Historical Perspective**

The requirement that harassment be “severe” or “pervasive” sprang from early cases. This appellation may originate in *Henson v. Dundee*, a sexual harassment case out of Florida, which held:

For sexual harassment to state a claim under Title VII, it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment. Whether sexual harassment at the workplace is **sufficiently severe and persistent** to affect seriously the psychological well-being of employees is a question to be determined with regard to the totality of the circumstances.

*Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. Fla. 1982) (emphasis added) (citations omitted).

This passage was quoted by the United States Supreme Court just a few years later, which changed the wording, as follows:

Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as “harassment” that affects a “term, condition, or privilege” of employment within the meaning of Title VII. See *Rogers v. EEOC*, supra, at 238 (“mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee” would not affect the conditions of employment to a sufficiently significant degree to violate Title VII); *Henson*, 682 F.2d, at 904 (quoting same). For sexual harassment to be actionable, it must be sufficiently **severe or pervasive** “to alter the conditions of [the victim’s] employment and create an abusive working environment.”

*Meritor*, 477 U.S. at 67. (emphasis added).

Even the highest courts have struggled to articulate what this standard means. In *Harris v. Forklift Sys., Inc.*, the Supreme Court affirmed *Meritor* and attempted to clarify the severe or pervasive rule which, the Court admitted, “is not, and by its nature cannot be, a mathematically precise test.” 510 U.S. 17, 22 (1993). “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances,” the Court continued, in a unanimous decision written by Justice Sandra Day O’Connor. *Id.* at 23. “These may include the frequency
of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Id.*

In a concurrence, Justice Antonin Scalia lamented that the words “‘Abusive’ (or ‘hostile,’ which in this context I take to mean the same thing) does not seem to me a very clear standard-- and I do not think clarity is at all increased by adding the adverb ‘objectively’ or by appealing to a ‘reasonable person[’s]’ notion of what the vague word means.” *Id.* at 24. Scalia voiced approval for the majority’s list of factors, but added that, “since it neither says how much of each is necessary (an impossible task) nor identifies any single factor as determinative, it thereby adds little certitude.” *Id.* “As a practical matter,” Justice Scalia continued, “today’s holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages.” *Id.*

Nonetheless, he wrote, “I know of no alternative to the course the Court today has taken…I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts.” *Id.* at 24-25. Therefore, Justice Scalia joined the majority opinion. *Id.*

To this day, courts still struggle with interpreting this standard. Justice Scalia’s concerns in his *Harris* concurrence proved prescient, with one significant exception. Today, it is not “virtually unguided” juries that are deciding cases – instead, they are being decided by judges, as a matter of law, often reaching irreconcilably disparate results.

**D. Duncan and Eich: Two points on a wide spectrum**

In the span of just a year, the Eighth Circuit Court of Appeals decided two hostile work environment sexual harassment cases that are extremely difficult to reconcile against each other. First, in *Duncan v. General Motors Corp.*, a female employee alleged several instances where a
male employee engaged in “boorish” behavior she found offensive. 300 F.3d 928 (8th Cir. 2002). She claimed the male employee propositioned her during an offsite meeting at a local restaurant. *Id.* at 931. She also claimed that the male employee made her work on his computer, which had a screen saver of a naked woman. *Id.* The male employee unnecessarily touched her hand and kept a child’s pacifier that was shaped like a penis in his office. *Id.* The male employee also asked the female employee to type a document entitled “He-Men Women Hater’s Club” that included statements such as “sperm has a right to live” and “all great chiefs of the world are men.” *Id.* at 932.

Nonetheless, the Eighth Circuit Court of Appeals overturned her seven-figure jury verdict, held that the female employee failed to prove a prima facie case of sexual harassment and overturned the District Court’s entry of judgment in favor of the female employee. *Id.* at 933. The Court concluded that the female employee failed to show the alleged harassment was so severe or pervasive as to alter a term, condition, or privilege of her employment. *Id.* at 934. The Court explained employees have a “high” threshold to meet in order to prove an actionable harm; courts will evaluate the “frequency of the conduct, its severity and whether it is physically threatening or humiliating.” *Id.* The Court held that the female employee failed to show that the workplace occurrences were objectively severe and extreme. *Id.*

Just a year later, the Eighth Circuit Court of Appeals distinguished *Duncan* in a similar case. In *Eich v. Board of Regents*, a female employee alleged continuous sexual harassment over a period of seven years. 350 F.3d 752, 755 (8th Cir. 2003). She specifically claimed that two male employees, one of whom was her supervisor, instigated the acts of harassment. She said one of the male employees brushed up against her breasts, frequently ran his fingers through her hair, rubbed her shoulders, ran his finger up her spine, told her how pretty she was, and asked her

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\(^7\) Certiorari was denied by the United States Supreme Court.
to run off with him. *Id.* He also stood behind her and simulated a sexual act, grabbed her leg and attempted to look down her blouse. *Id.* She said that the other male employee made comments about her body, hair and face, commented on her chest size, rubbed his hand up and down her legs and rubbed or pressed up against her when they talked. *Id.* The female employee reported these acts throughout the seven years numerous times and had documented at least sixteen such reports. *Id.* at 756. She reported the conduct to the male employee’s supervisor, the employer’s director of human resources and the employer’s affirmative action/equal employment opportunity officer. *Id.* In the last year of the seven-year period there was some form of harassing behavior occurring on an almost daily basis. *Id.*

The District Court had relied on *Duncan* in its decision in favor of the employer. However, the Eighth Circuit Court of Appeals found that the facts alleged by the female plaintiff were sufficient to show that the harassment was severe or pervasive, as well as objectively hostile. The Court of Appeals distinguished *Duncan* and said that if the court is to rely on *Duncan*, it must “rely solely upon what the *Duncan* majority’s opinion reflects as being the facts of the case.” *Id.* at 760. The facts in the *Eich* case were different because the plaintiff “experienced more than the mere touching of the hand.” *Id.* at 761. The plaintiff in *Eich* was “subjected to a long series of incidents of sexual harassment in her workplace which went far beyond ‘gender related jokes and occasional teasing.’” *Id.*

**E. “Boorish” Behavior Does Not Necessarily Support a Successful Hostile Work Environment Sexual Harassment Claim, Even in the Ninth Circuit**

Although some of the most egregious and shocking cases come from outside of the Ninth Circuit, the Ninth Circuit is not wholly unfamiliar with the “boorish” distinction. However, the majority of the cases within the jurisdiction of the Ninth Circuit do not use the term “boorish” to
describe conduct which does not amount to actionable sexual harassment. Nevertheless, the word is still used along with other characterizations such as, “horseplay,” “teasing” and “flirting.” As one court put it, “[t]he requirement that actionable conduct be severe or pervasive is ‘crucial’ in that it prevents ordinary socializing in the workplace, horseplay, simple teasing or flirtation from becoming prohibited sexual discrimination … Title VII does not provide a remedy for boorish behavior or bad taste.” *Torres v. Borrego*, No. Civ. 04-248 *15 (D.N.M. 2005) (citation omitted).

While the focus of this piece is primarily on the federal courts, in the Eighth Circuit in particular, we also address what is severe or pervasive enough to state a claim for hostile environment sexual harassment in Washington State Court. As is true in many jurisdictions (including Minnesota), success in Washington State Court for plaintiff-employees is much higher in claims for sexual harassment than when pursuing such a claim in federal court. That is, while the federal courts appear to be quick to dismiss a case on summary judgment, Washington State Court case law suggests that they are more reluctant to award summary judgment in favor of defendant-employers.

In fact, in one case, the Washington Court of Appeals actually used evidence of conduct described as “boorish” as its basis to reverse the district court’s grant of summary judgment in favor of the defendant-employer. As such, it is important for employers to keep in mind that the safety net that federal case law has provided them for cases brought in

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8 This is evidenced by our original electronic case law search for the term “boorish” in the Ninth Circuit, which only turned up seven cases.

9 See *Stolt v. Annie Wright School*, 138 Wash. App. 1028 (2007) (holding that intimidating telephone calls and public ridicule was sufficient to raise a genuine issue of material of fact that the plaintiff was harassed); *Campbell v. State*, 118 P.3d 888 (Wash. Ct. App. 2005) (holding that offensive emails singling out the plaintiff and evidence that the plaintiff being yelled at and mocked in front of others was sufficient evidence to create a genuine issue of material fact that the plaintiff was harassed).

10 *Adams v. Able Building Supply Inc.*, 57 P.3d 280 (Wash. Ct. App. 2002) (holding that evidence of a supervisor’s uncontrollable temper, random and unpredictable episodes of verbal abuse, and public humiliation towards all employees was sufficient evidence for a jury to decide whether the exhibitions merely reflected a gruff management style or were sufficiently severe and pervasive to alter the conditions of employment).
federal court may not be there to protect them in state courts, including in Washington.

II. Severe or Pervasive: One Standard With Two Parts (And Many Interpretations)

Comparing *Duncan* to *Eich*, the only thing that is clear about this area of the law is that results may vary wildly. However, a modicum of certainty begins to emerge if one thinks of this standard – severe and/or pervasive\(^\text{11}\) – as a sliding scale test containing two parts, severity and pervasiveness. The severity test looks at how offensive, threatening or inappropriate the acts were (whether subjectively, objectively, or both). The pervasiveness test looks at how many incidents occurred compared to a given length of time. Because the two components are effectively treated as elements of a sliding scale, a strong showing on one aspect may make up for a weak showing on the other.

However, this general observation is subject to a caveat that in many cases, pervasiveness is much more important than severity. Put another way, and as demonstrated in the cases described below, a plaintiff who alleges a larger number of harassing incidents is generally more likely to survive summary judgment than one who alleges a relatively smaller number of specific instances, even if those specific acts are severe.

A. Severity Cases

Here we examine cases in which a plaintiff alleged a comparatively small number of very serious incidents in bringing their sexual harassment claim.

In theory, even a single incident of extremely severe conduct is enough to support a hostile environment claim. To state a claim based on a single incident (or relatively few incidents) the conduct must generally involve violence or a serious threat of violence; however even then, few cases resolve in favor of the employee. Cases that “only” involve offensive

\(^{11}\) These authors intentionally used the word “and” here, even though the legal standard is severe or pervasive. As a practical matter, as the case law set forth herein demonstrates, courts are effectively, at times, requiring both severe and pervasive.
touching are even less likely to succeed.

i. Sexual Assault

An employee who is sexually assaulted in the course of their employment may be able bring a viable sexual harassment claim. For example, in *Little v. Windermere Relocation, Inc.*, a Ninth Circuit case, an employer was found liable for a hostile work environment claim based on their response, or lack thereof, to a female employee’s rape by a male client. 301 F.3d 958 (9th Cir. 2002). In this case, a female employee was raped by a client whose account she managed. *Id.* at 964. She reported the rape to a coworker, but the coworker told her not to tell anyone in management. *Id.* However, within nine days, the female employee did report the rape to the Vice President designated in the company’s harassment policy as a complaint-receiving manager. *Id.* at 965. The Vice President told her that she should try and put it behind her and she should stop working on the client’s account. *Id.* The female employee reported the rape to her own immediate supervisor as well, who advised her to tell the President. *Id.* The President said that he didn’t want to hear about the rape, that the female employee would have to respond to his attorneys and immediately restructured her salary in such a way that resulted in an immediate pay reduction. *Id.* When the female employee protested, she was terminated. *Id.*

The female employee filed suit, alleging that the employer’s response to the rape created a hostile work environment. *Id.* at 966. The Ninth Circuit Court of Appeals overturned the District Court’s grant of summary judgment for the employer. *Id.* at 944. The Ninth Circuit Court of Appeals explained that “rape is unquestionably among the most severe forms of sexual harassment” and that “being raped is, at minimum, an act of discrimination based on sex.” *Id.* at 967-68. The Ninth Circuit Court of Appeals also found that having out-of-office meetings with potential clients was a required part of the job and thus the rape occurred while in the course and
scope of employment. *Id.* at 967. Additionally, the company’s “failure to take immediate and effective corrective action allowed the effects of the rape to permeate [the female employee’s] work environment and alter it irrevocably.” *Id.*

However, a claim based on sexual assault may fail if the assault took place in a context that a court finds not be work-related. In *Paugh v. P.J. Snappers*, an Ohio case, a male employee raped a female job applicant. *Paugh v. P.J. Snappers*, No. 2004-T-0029, 2005 WL 407592 (Ohio App. Feb. 18, 2005). The female applicant went to a restaurant and bar to apply for a job. *Id.* at *1. She consumed alcohol with the male manager and discussed possible employment. *Id.* The male manager made advances on the applicant and rubbed her shoulders. *Id.* The female job applicant went to the restroom and returned to the bar and continued drinking her drink. *Id.* The female applicant’s next memory is waking up the following morning in the male manager’s bedroom. *Id.* A rape kit later revealed that more than one man’s semen was found in her. *Id.*

The Court presumed the female job applicant was an employee for purposes of the summary judgment motion, but held that the plaintiff failed to establish that the male manager’s “conduct of making advances and rubbing her shoulders at the restaurant qualifies as sufficiently severe or pervasive to affect the terms, conditions, or privileges of her employment.” *Id.* at *5. Drugging and raping the employee were actions “outside the scope of his employment” and therefore the Court excluded them from its analysis. *Id.* The Court based its conclusion on the fact that the rape took place off-premises and outside of work hours; further, the Court declared that there was “no evidence” that the manager’s actions “were intended to facilitate or promote the business purposes of appellee.” *Id.* at *4. Thus, the Court concluded the employer could not be held liable for either hostile environment or quid pro quo sexual harassment. *Id.*

The Second Circuit has taken a different approach to the issue of off premises rape. In
Ferris v. Delta Airlines, a male flight attendant while on a layover between flights raped a female flight attendant. 277 F.3d 128 (2nd Cir. 2001) cert. denied. The District Court granted summary judgment to Delta Airlines because the male flight attendant had no supervisory authority over the female flight attendant and because there was no evidence that Delta had encouraged flight attendants to visit each other’s rooms. Thus, the District Court held, the rape did not occur in the work environment.

The Court of Appeals for the Second Circuit reversed. Id. at 135. The Court of Appeals found that “the circumstances that surround the lodging of an airline’s flight crew during a brief layover in a foreign country in a block of hotel rooms booked and paid for by the employer are very different from those that arise when stationary employees go home at the close of their normal workday.” Id. The Court explained that most flight attendants do not have family or friends, or their own residences, in places where they have brief layovers in foreign countries. Most flight attendants stay in a block of hotel rooms reserved and paid for by the airline. The airline also provides ground transportation from the airport to the hotel. Even though the airline might not directly tell its employees what to do during the layover, “the circumstances of the employment” tend to result in flight attendants socializing in each other’s hotel rooms as a matter of course. Id. Off premises rape could form the basis of a sexual harassment claim, where the rape took place in a hotel booked by the company for employee use.

ii. Physical Assault

A claim involving physical assault may survive a motion to dismiss or summary judgment. For example, in Brown v. City of Cleveland, a case from the Northern District of Ohio, a male employee’s threatening behavior was presented in support of a hostile environment sexual harassment claim and a retaliation claim. No. 1:03CV2600, 2005 WL 1705761 (N.D.
Ohio July 21, 2005). A female employee complained that a male employee was making comments such as “I am sick of working with this f—ing bitch” and that she complained to her supervisor. *Id.* at *1*. The female employee also alleged that the male employee called her a “piece of sh—” and a “psycho” during a meeting, and she filed an Incident Report with the City, alleging workplace violence after the meeting. *Id.* The female employee also claimed that the male employee stated, “[W]hy don’t you wear lipstick? Why don’t you wear makeup? Why don’t you dress like a lady?” *Id.* The City discharged the female employee after the same male employee that the plaintiff claimed was acting in a threatening manner claimed that she almost hit him with a truck. The female employee later filed suit alleging sexual harassment based on a hostile work environment theory and retaliatory discharge.

The Court held that the female employee had successfully set forth a prima facie case of retaliation by alleging she was fired after complaining of sexual harassment. *Id.* at *4*. The City tried to claim that there was no connection between the plaintiff’s discharge and her complaints of sexual harassment because she complained of workplace violence in her last complaint, not sexual harassment. *Id.* The Court found that while the plaintiff’s last complaint before her discharge was of workplace violence, she had complained about sexual harassment “at a time both near to, and intertwined with” the workplace violence complaints. *Id.*

In *Griffin v. Delage Landen Fin. Servs.*, a case from the Eastern District of Pennsylvania, evidence of a physical assault was part of the plaintiff’s claim of sexual harassment. No. 04 CV 5352, 2005 WL 3307535 (E.D. Pa. Dec. 5, 2005). A female employee made a claim of hostile work environment in violation of Title VII and retaliation. *Id.* at *1*. Her claim stemmed from a romantic relationship she had with a coworker. *Id.* The relationship ended and the male employee was later promoted. *Id.* The female employee was concerned about working with the
male employee and informed company officials about those concerns. *Id.* She met the male employee for dinner, where he became angry after learning she contacted company officials. *Id.* The female employee alleges that the male employee followed her home, verbally abused her, warned her to find another job and physically assaulted her. *Id.* The female employee claims she complained about the off premises assault and her employer took no action. *Id.* She also alleged that the male employee subsequently created a hostile work environment that the company refused to address. *Id.*

The female employee wanted to admit evidence of the physical assault at trial as part of her sexual harassment and retaliation claim. *Id.* at *1-2.* She claimed that her pre-assault notice to the company of her concerns about the male employee gave them notice to prevent the threat from the male employee. *Id.* at *3.* The Court held that the physical assault evidence was relevant, and thus admissible, but only for purposes of establishing a factual context for the plaintiff’s meetings with company officials. *Id.* The Court explained that evidence of the assault would help the jury to understand the relationship between the female and male employee, the nature of the break-up and how those events might have led to a hostile work environment or retaliation. *Id.* However, the Court limited testimony about the graphic aspects of the assault. *Id.* The plaintiff was not allowed to give a “blow-by-blow” description of the assault. *Id.* at *4.* She also was not allowed to show color photographs of her bruises from the assault since the parties stipulated that she received medical treatment for her injuries. *Id.* at *3.* The Eastern District of Pennsylvania Court concluded that evidence of the assault could only be used to explain how the plaintiff believes her break-up with the male employee and subsequent assault led to retaliation by the employer. *Id.* It was not allowed as part of the evidence supporting the sexual harassment claim. *Id.*
In a case out of the Ninth Circuit, *EEOC v. NEA-Alaska*, a number of female employees complained of threatening behavior by a male employee. 422 F.3d 840 (9th Cir 2005). The female employees specifically alleged numerous episodes where the male employee would shout in a loud and hostile manner at female employees. *Id.* at 843. The female employees alleged that the shouting was frequent, profane, public and occurred with little or no provocation. *Id.* The female employees alleged that the verbally threatening behavior was accompanied by a hostile physical element as well. *Id.* The female employees said that the male employee regularly came up behind them silently, stood over them and watched for no apparent reason. The female employees also alleged that the male employee lunged at one of them and shook his fist at her. *Id.* The District Court granted summary judgment finding that no reasonable jury could conclude that the physically threatening acts could be sexual harassment because they were not “because of sex”. *Id.* at 842.

The Ninth Circuit Court of Appeals reversed the District Court’s grant of summary judgment to the employer, holding that there was sufficient evidence to conclude that the alleged harassment was both because of sex and sufficiently severe enough to support a hostile work environment claim. *Id.* at 847. The Court found that physically hostile acts do not need to be overtly sexual or gender-specific in content to constitute sexual harassment. *Id.* at 844. The Court explained that one way of claiming sexual harassment is to compare how the alleged harasser treated members of both sexes. *Id.* If the male employee sought to drive women out of the organization so that men could fill their positions, the harassment would be “because of sex.” *Id.* For example, if “an abusive bully takes advantage of a traditionally female workplace because he is more comfortable when bullying women than when bullying men” his motive could be “because of sex” just as much as if his motive involved sexual frustration, desire, or
simply a motive to exclude women from the workplace.” *Id.* at 845.

iii. **Physical Assault or Threats Used in Conjunction with a Sexual Harassment Claim in Order to Extend Time Limits**

Physical assault or threats can extend time limits in a sexual harassment case. For example, in a case out of Iowa, *Bunda v. Potter*, a female employee complained of sexual harassment and unwanted physical sexual contact over a period of three years. 369 F. Supp. 2d 1039 (N.D. Iowa 2005). The female employee specifically complained of her male supervisor grabbing her buttocks, rubbing up against her, and pinching her buttock. *Id.* at 1043. The female employee complained to supervisors at work in late 1998, early 1999 and 2000. *Id.* The female employee alleged the male employee’s behavior was all part of a “continuing violation” of harassment and thus her timely administrative complaint as to the 2000 incidents encompasses all of the incidents of the “continuing violation” including the earlier incidents. *Id.* at 1050.12

The Court found that a lengthy hiatus between the incidents of harassment does not prevent a successful sexual harassment claim if the harassing acts are part of the same unlawful employment practice. *Id.* at 1052. The Court specifically found, in this instance, the harasser was the same male employee and the harassment was generally of the same “nature” even though only some of the harassment involved physical contact. *Id.* at 1052-53. The Court added that it could not “imagine that continuous sexual harassment by the same harasser could be construed not to be part of the same unlawful practice, simply because the harasser might be wise enough to change the nature of his harassment periodically from physical to verbal harassment.” *Id.* at 1053. The Court denied the defendant’s summary judgment motion on the plaintiff’s claims of hostile environment sexual harassment and retaliation. *Id.* at 1062.

iv. **Physical Confinement & Limited Options for Avoidance**

12 Allegations of physical threats and assaults will undoubtedly be used in the future by employees to try to extend the period during which evidence of a “continuous” pattern of harassment is admissible.
A case involving relatively few incidents may be more likely to succeed where the facts involve physical confinement or a situation in which the plaintiff cannot avoid the harassing conduct. For example, in *Nichols v. Tri-Nat’l Logistics, Inc.*, the female plaintiff was a long-haul truck driver who worked with a driving partner. 809 F.3d 981, 984 (8th Cir. 2016). On their first ride together, the male partner asked if she was interested in a romantic relationship, and then exposed himself to her while she was driving. *Id.* The plaintiff immediately reported the incident. *Id.* Nonetheless, the defendant company told her to “endure it” at least until another driver could be found. *Id.* Therefore, the plaintiff was forced to spend the next several days with the harasser, who continued to proposition her, leaned over her unnecessarily and exposed himself to her again. *Id.* at 984-85. The plaintiff continued to complain to the company, telling them his actions made her feel “abused, scared and degraded.” *Id.* at 985.

After she was fired, purportedly for performance issues, the plaintiff sued, but the trial court granted summary judgment in favor of the company. *Id.* The Eighth Circuit Court of Appeals reversed, finding that genuine issues of material fact existed as to whether the plaintiff found the driver’s actions subjectively offensive. *Id.* at 986. In particular, the Eighth Circuit focused on the plaintiff’s allegations that she had immediately reported the exposure incident and remained in the truck only because she had no other choice while driving long-distance. *Id.*

However, in an Iowa case, *Pirie v. The Conley Group, Inc.*, the plaintiff’s claim failed despite an allegation that she was confined in a room by a male coworker who exposed himself to her. No. 4:02-CV-40578, 2004 WL 180259 (S.D. Iowa Jan. 7, 2004). In that case, the plaintiff female employee complained of one incident where she was alone with a male coworker during a shift together as security officers. *Id.* at *1. The female employee said that the male employee engaged in inappropriate sexual banter, discussing his sex life and asked about her
intimate relations. *Id.* The female plaintiff said that this inappropriate banter lasted for one hour. *Id.* During this time, the male employee’s banter focused on the size of his penis and he repeatedly offered to display it for her. *Id.* The female plaintiff declined many times, but the male employee turned out the lights and unzipped his pants and displayed his penis to her. *Id.* at *2.*

The District Court found that this incident was not severe or pervasive enough to alter the terms or conditions of the plaintiff’s employment. *Id.* at *13.* The Court explained that there is no bright-line test to determine whether or not an environment is sufficiently hostile, but said some of the factors that ought to be considered are the frequency and severity of the conduct, whether it was physically threatening and whether or not it unreasonably interfered with an employee’s work performance. *Id.* at *7.* The Court also said, “The standards for judging hostility of the work environment are demanding,” in order to make sure Title VII does not become a “general civility code.” *Id.*

The Court found that the behavior of the male employee went beyond sexual banter and innuendos. *Id.* at *10.* However, in order for behavior to be sexual harassment, there usually needs to be more than one incident. *Id.* A single incident can be sufficient for a sexual harassment claim, but generally it must include either violence or the serious threat of violence. *Id.* The Court concluded the incident was not sexual harassment, as it lasted approximately one hour and “consisted of inappropriate sexual banter, and, ultimately, in the three-minute penis display.” *Id.* at *13.* The Court noted that the male employee did not demand the female employee perform any sexual act or any sexual favors. *Id.*

Contrarily, in *Jenkins v. University of Minnesota,* a female graduate student was subject
to sexual harassment by her male colleague\textsuperscript{13} (a scientist from the U.S. Fish and Wildlife Service), who was working with the plaintiff on a research project as effectively her mentor and supervisor. 838 F.3d 938 (8\textsuperscript{th} Cir. Oct 3, 2016). In June and July of 2011, Jenkins and her male colleague, Swem, embarked on two 17-day research trips to the isolated Colville River, a remote field location in arctic Alaska almost completely uninhabited by humans. \textit{Id.} at 942. Almost immediately, Swem began telling sexually explicit jokes, asking Jenkins personal questions about her dating life, and telling stories of prior sexual encounters and relationships with previous graduate students. \textit{Id.} He took pictures of her buttocks, bathed in the river and encouraged her to do the same. \textit{Id.} Additionally, during a break in the trip while in Fairbanks, Swem invited Jenkins to lunch under the pretense of discussing logistics of returning to the Coville River, even though it quickly became apparent that the trip was already planned. \textit{Id.} He complimented her physical appearance and told her he was interested in a romantic relationship with her. \textit{Id.} He joked that they should bring only one tent for the next trip and that she was welcome in his tent anytime. \textit{Id.} He also told her that she could just sit in his lap and kiss him if she ever wanted a relationship with him. \textit{Id.} The Court found that the behavior was “severe or pervasive enough to create an objectively hostile or abusive work environment” when the totality of the circumstances are taken into consideration. \textit{Id.} at 945. The Court explained,

\begin{quote}
The geographic isolation of the conduct is of paramount importance. Actions that might not rise to the level of severe or pervasive in an office setting take on a different character when the two people involved are stuck together for twenty-four hours a day with no other people – or means of escape – for miles around.
\end{quote}

\textit{Id.}

Nevertheless, in this rare instance (at least in federal courts in the Eighth Circuit) where the Court ruled in favor of the plaintiff and asserted that her male colleague’s behavior was

\textsuperscript{13} “Swem’s actions took place while he was cloaked with authority provided to him by the University . . . as a mentor and supervisor for Jenkins.” \textit{Jenkins v. University of Minnesota}, 131 F. Supp. 3d 860, 875 (D. Minn. 2015).
severe or pervasive enough to be considered sexual harassment, Jenkins was only awarded $1 in damages by the jury.

v. Offensive Touching

Likewise, cases that “only” involve one or a few instances of offensive touching are not likely to succeed.

For example, the plaintiff in Jones v. U.S. Gypsum was a male supervisor who worked at a plant that manufactured drywall. 2002 WL 32125501 (Iowa Workers Comp Com’n May 16, 2002). In his sex discrimination complaint, the plaintiff alleged that a female coworker struck him in the groin on a single occasion. Id. at *1. The defendant employer brought a motion to dismiss for failure to state a claim on the basis that the plaintiff’s allegation was neither sufficiently severe nor pervasive to amount to actionable sexual harassment. Id. The District Court disagreed, reasoning that the allegations in the complaint amounted to sexual assault which, the court noted, had been found to be actionable on the basis of a single incident by other courts. Id. at *4.

However, the same court dismissed the case on a motion for summary judgment. Jones v. U.S. Gypsum, 126 F. Supp. 2d 1172 (N.D. Iowa 2000). Discovery had revealed more of the context surrounding the incident; after the male plaintiff was heard to complain that the company was trying to get rid of older employees, the female coworker, with whom he had previously been on congenial terms, told him that she “would show him what she would do with a fifty year-old man” and then grabbed his left testicle and penis. Id. at 1174. Immediately after the plaintiff complained about the incident, the company investigated his allegation, disciplined the female employee by putting her on a four-day unpaid leave, and transferred her to another shift where she would not work with the plaintiff. Id. at 1175. Because the employer’s response to
the plaintiff’s complaint was reasonable, the District Court granted summary judgment, leaving unanswered the question of whether or not the bad actor’s behavior sufficed for a hostile work environment claim. *Id.* at 1180.

Similarly, the plaintiff in *Musolf v. J.C. Penney Co.*, saw her hostile work environment claim dismissed at summary judgement where she alleged only three incidents of unwanted hugs from a coworker. 2013 WL 5596421 (D. Minn. Oct. 11, 2013), *aff’d*, 773 F.3d 916 (8th Cir. 2014). The plaintiff in that case was a “loss prevention” manager at a retail store. *Id.* at *1. After a series of upsetting confrontations with customers, a coworker attempted to comfort the plaintiff by touching her shoulder, rubbing her back and giving her a hug. *Id.* at *2. The plaintiff informed a superior that she found the coworker’s actions offensive and he was subsequently disciplined. *Id.* Granting summary judgment to the employer, the District Court found that the three incidents were not actionable, in part because they occurred “in connection with stressful events and in the absence of any overt sexual or vulgar undertones.” *Id.* at *6.

**vi. Verbal Harassment**

Some cases only involve verbal harassment. In *LaMont v. Ind. Sch. Dist. #728*, a female custodian sued the School District claiming that she had been subjected to a hostile work environment based on sex. 814 N.W.2d 14 (Minn. 2012). The Minnesota Court of Appeals affirmed the District Court holding that the MHRA does not protect individuals from a hostile work environment based on sex unless the conduct falls within the definition of “sexual harassment” in the MHRA. *Id.* at 16. The Minnesota Supreme Court concluded that a cause of action for hostile work environment based on sex is actionable under the MHRA, but affirmed the grant of summary judgment to the employer because LaMont’s allegations were insufficient to state a claim of hostile work environment. *Id.*
The head custodian, a man named Miner, told a male employee that he did not want any women on his crew. *Id.* at 17. Miner told LaMont, “I have no intention of ever asking you anything,” and described a coworker’s wife as, “not bad,” stating that, “[women] have their place. You’ve got to keep them in their place,” and said that the only place for women is in the “kitchen and bedroom.” *Id.* On one occasion, LaMont warned Miner not to “screw up” his back while lifting a heavy object, in response, Miner stated, “The only screwing I do is with my wife.” *Id.* Miner also said, “There is a time and a place for women and Elk River High School is not the time or the place.” *Id.* Additionally, Miner treated female custodians differently in regard to how and when they could take their breaks and how female custodians could communicate (not allowing them to speak to the men or each other). *Id.* The District Court concluded that the conduct was not sufficiently severe or pervasive to support LaMont’s claim; the Minnesota Court of Appeals and Supreme Court agreed, concluding that Miner’s statements and conduct were not sufficiently hostile or abusive. *Id.* at 24.

In *Rasmussen v. Two Harbors Fish Co.*, however, there was a different result for female employees alleging mostly verbal harassment. 832 N.W.2d 790, 791 (Minn. 2013). Rasmussen, Moyer, and Reinhold alleged that Two Harbors Fish Company and BWZ Enterprises violated the MHRA based on sexual harassment perpetrated by Zapolski, the sole owner of both entities. *Id.* Zapolski asked Rasmussen about her sexual preferences, told her about his sexual preferences and dreams, called her pet names, used very explicit language in the workplace, told sexual stories at work, made sexual comments about female customers, made a joke about his penis size, showed her pornographic pictures (including comparing the pictures to Rasmussen), and asked her to watch a pornographic DVD. *Id.* at 792. Zapolski also touched Rasmussen on the posterior on at least two occasions. *Id.* Moyer and Reinhold were subjected to similar verbal
harassment, and Moyer was touched at least once when Zapolski grabbed her by the waist. *Id.* at 793.

The District Court dismissed the employees’ claims finding the conduct did not rise to a sufficiently severe or pervasive level to be actionable under the MHRA. *Id.* at 794. The employees appealed, and the Minnesota Court of Appeals reversed, concluding that the District Court erred in its finding. *Id.* The Minnesota Court of Appeals ruled in favor of the employees and directed the District Court on remand to enter judgment in favor of each of the employees and address the question of damages. *Id.* at 794-95. The employer appealed the Minnesota Court of Appeals’ decision on the merits to the Minnesota Supreme Court. *Id.* at 792. The employees cross-appealed, challenging a ruling that Zapolski is not liable as an aider and abettor under the MHRA.\(^{14}\) *Id.* The Minnesota Supreme Court agreed that Zapolski is not individually liable, but determined that the District Court erred in (1) its reliance on the fact that Zapolski’s inappropriate behavior was also directed at men, and (2) its reliance on the fact that the employees did not suffer adverse employment actions. *Id.* at 792, 798-99. The case was remanded for further proceedings. *Id.* at 798.

**B. “Pervasiveness” Cases**

Next, we will examine cases where courts seem to have focused on the number or frequency of events, more so than their severity, in examining whether the claimed harassment is actionable.

**i. How Many Times to be “Pervasive”?**

As an initial matter, how many times must an employee endure harassing conduct before it becomes sufficiently “pervasive” to be actionable? Again, courts have stayed away from bright-line rules and results are all over the map.

\(^{14}\) There is no individual liability for sexual harassment under Title VII.
As described above, in *Duncan*, 10 incidents of lewd behavior over a three-year period were not enough. *Duncan*, 300 F.3d at 933. In *LeGrand v. Arch*, the Eighth Circuit Court of Appeals held that three incidents did not meet the threshold, even though they were arguably more severe than the conduct alleged in *Duncan*. 394 F.3d 1098 (8th Cir. 2005). In *LeGrand*, the male plaintiff alleged that a board member of the organization he worked for (who was also a priest) had harassed him on three separate occasions when he (1) asked the plaintiff to watch pornographic movies and “jerk off” with him; (2) told the plaintiff that he would move up in the organization if he performed sex acts on him, then grabbed the plaintiff’s buttocks, reached for his genitals and kissed him on the mouth; and (3) grabbed the plaintiff’s thigh. *Id.* at 1100. Nonetheless, citing *Duncan*, the Court held that the severe or pervasive standard had not been met because the conduct amounted to “three isolated incidents…over a nine-month period.” *Id.* at 1102-03. The Court also held that none of the incidents were “physically violent or overtly threatening.” *Id.* at 1102. Therefore, summary judgment in favor of the employer was upheld. *Id.* at 1103.

On the other end of the spectrum, in the South Dakota case *Kopman v. City of Centerville*, an employee who endured 2-3 sexually inappropriate comments every week for 14 months did meet the threshold. 871 F. Supp. 2d 875, Fn. 5 (D.S.D. 2012).

However, the manner in which a court chooses to conceptualize the number of incidents can be decisive. In *Anderson v. Family Dollar Stores of Ark., Inc.*, the plaintiff alleged that over the course of a five-week training period, her supervisor would rub her shoulders, back or hands, cupped her chin in his hand, tried to flirt with her and on one occasion told her, “I can make or break you.” 579 F.3d 858, 860 (8th Cir. 2009). After the training period was over he continued to harass her; when she called him to discuss a workplace issue the supervisor told her she ought
to be with him where he was, in a Florida motel room, “in bed with me with a Mai Tai and kicking up.” *Id.* During another work-related call he told her, “I’ll deal with it, baby doll,” and on another occasion referred to her as “honey.” *Id.* at 861. Finally, when the employee complained to him about a workplace injury, the supervisor “grabbed her arm, pulled her back to the storeroom, pushed her once, and in a mean tone asked, ‘Are you going to work with me? Are you going to be nice? Are you going to fit into my group? . . . [N]ow you’re telling me your back is hurt? . . . [Y]ou’re just nothing but trouble . . . You’re just not going to be one of my girls, are you?’” and then fired her. *Id.*

Nonetheless, the Eighth Circuit Court of Appeals held that the supervisor’s conduct, while “ungentlemanly” was not severe or pervasive enough to survive summary judgment. *Id.* at 862-63. In reaching this decision the Court summarized the plaintiff’s allegations in a way that arguably downplayed both the frequency of the harassment as well as its severity, as follows:

[The supervisor’s] conduct of rubbing Anderson’s shoulders or back at times during her training session, calling [the plaintiff] “baby doll” during a telephone conversation (J.A. at 217), accusing her of not wanting to be “one of my girls” (*id.* at 234), his one-time, long-distance suggestion that she should be in bed with him and a Mai Tai in Florida, and the insinuation that she could go farther in the company if she got along with him, simply were not severe, pervasive or demeaning enough to have altered a term, condition, or privilege of her employment.

*Id.* at 862.

Similarly, in *McMiller v. Metro*, an employee who “only” alleged three incidents saw her hostile environment claim dismissed on summary judgment even though those three incidents involved unwelcome kissing, confinement and assault by a supervisor. 738 F.3d 185 (8th Cir. 2013). In the first incident, the plaintiff’s supervisor put his arm around her shoulders and kissed her; the plaintiff immediately told him his conduct was offensive. *Id.* at 186. Second, a month later, the supervisor entered the plaintiff’s office and again tried to put his arm around her. *Id.*
Third, a few months later the supervisor called the plaintiff into his office, then locked the door behind her. *Id.* at 186-87. The supervisor then ordered her to come to him and remove an ingrown hair from his chin; the plaintiff refused. *Id.* at 187. The supervisor then became irate and told her, “You know I can terminate you.” *Id.* The following then transpired:

[The plaintiff] became upset and moved toward the office door. As [she] touched the doorknob, [the supervisor] placed his hand on her right wrist, removed her hand from the door, turned her toward him, put his arms on her shoulders and neck, and kissed her on the side of her face and forehead. [The plaintiff] attempted to remove [the supervisor’s] arms, but found that [he] had placed her “in a locked position.” [The supervisor] told [the plaintiff] that he was “not going to let anything happen to you while you are on this job.” [The plaintiff] replied that she was “not worried” because she felt she was learning and following instructions. The encounter ended.

*Id.*

Nonetheless, because the plaintiff had “only” alleged three incidents, the Eighth Circuit Court of Appeals held that her hostile work environment claim failed the “severe or pervasive” test. *Id.* at 189.

**ii. Counting to Zero: What Counts as an “Incident” and Does it Matter?**

As demonstrated in several of the cases above, courts may downplay an employee’s claim by contextualizing allegations that are described as happening in a particular time and place as mere isolated incidents rather than examples of larger patterns of conduct. Arguably, this is precisely what the Eighth Circuit Court of Appeals warned courts not to do in *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997). In that case, the female plaintiff alleged that a male co-worker struck her buttocks on two occasions. *Id.* at 1217. After the second incident he never touched her again, but instead switched to snickering at her, and making suggestive noises when in her presence. *Id.* Another coworker joined in with the verbal harassment, which

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15 Perhaps ironically, the court found that the plaintiff had raised a triable issue in regards to her quid pro quo claim, in part because of the supervisor’s comment that he could prevent the plaintiff from being terminated, which he made while assaulting her in his locked office. *Id.* at 189.
occurred off and on over a period of eight months. *Id.* at 1222. A jury awarded the plaintiff $75,000.00 in compensatory damages, but the trial court threw the verdict out on a motion for judgment as a matter of law. *Id.* at 1220. The trial court reasoned that only the two acts of unwanted conduct amounted to harassment based on sex; but even assuming that the verbal harassment was part of the same course of conduct, the harassment was not objectively offensive. *Id.*

The Eighth Circuit reversed, noting that while the jury could have reasonably concluded the verbal harassment was not related to the unwanted contact, its verdict in the plaintiff’s favor was adequately supported. *Id.* at 1222. Further, the Court reasoned that “A work environment is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it into a series of discrete incidents.” *Id.* “Although the District Court correctly stated that the inference had to be drawn that the pattern of conduct presented in this case was all related,” the Court continued, “it did not proceed to review the sufficiency of the evidence in that light.” *Id.* Therefore, reversal was warranted because these questions had been properly considered by the jury. *Id.*

The reasoning used in *Hathaway* has been applied infrequently. For example, in *Houck v. ESA, Inc.*, the plaintiff alleged that her supervisor sent her two sexually inappropriate text messages and a pornographic email. 2014 BL 163808, *1 (D.S.D. June 12, 2014). He stopped once she asked him to, but he continued to make sexually suggestive remarks in her presence such as “Mmm, nice breasts” as well as sexual comments about his girlfriend, who also worked for the company. *Id.* The court denied summary judgment on her hostile work environment claim, even though it was undisputed that the harasser had only sent her three sexual images and even though the record was “unclear” as to how frequent he made sexually-charged remarks. *Id.*
at *7. The trial court ruled that the ambiguity created a question of fact that had to be decided by a jury. *Id.* at *8.

iii. The Time Elapsed Between Incidents and the Plaintiff’s Reaction May Affect the Analysis.

In a case out of Alabama, *Simmons v. Mobile Infirmary Medical Center*, a male employee touched a female employee’s breasts four to five times, put his hands on her hips and pressed her body against his once and pulled his chair up next to hers and touched her leg with his leg. 391 F. Supp. 2d 1124, 1128 (S.D. Ala. 2005). A federal District Court in Alabama found that the conduct alleged was not objectively severe or pervasive enough to alter the terms or conditions of the plaintiff’s employment, in part because the incidents that the plaintiff complained about occurred over five years of working together with the male employee. *Id.* at 1132-33. Additionally, the Court noted that the plaintiff failed to complain or protest the alleged harassment when it was occurring. *Id.* at 1134. The Court reasoned that since she did not complain or protest at the time of the harassment it suggested she did not perceive the conduct as offensive at the time. *Id.*

In the Sixth Circuit case *Clark v. UPS, Inc.*, two female plaintiffs complained about the sexually harassing behavior of a supervisor at work. 400 F.3d 341 (6th Cir. 2005). The first female employee, Knoop, alleged that the male supervisor told sexual jokes in front of her, twice placed his vibrating pager on her upper thigh and asked what she was wearing under her overalls. *Id.* at 344. The second female employee, Clark, claimed that the male supervisor asked if she wanted chips and then placed the bag in front of his crotch, told her she did a good job in his dream, showed her an email depicting two cartoons in a sexual act, and placed his vibrating pager on her waist/thigh as he passed her in the hall. *Id.* at 345-46.

On review of the grant of the employer’s motion for summary judgment, the Sixth Circuit
Court of Appeals found that Knoop’s allegations were isolated instances and not enough to amount to an “ongoing” situation and the employer was entitled to summary judgment. *Id.* at 352. However, the Court held that the employer was not entitled to summary judgment with respect to the second plaintiff because she presented more of an “ongoing pattern of unwanted conduct and attention” by the male supervisor. *Id.* The Court specifically noted that the second plaintiff alleged seventeen incidents of harassment in total and that it was a “closer case” with respect to her claim. *Id.* The Court overturned the District Court’s grant of summary judgment for the employer with respect to only the second plaintiff’s claim. *Id.*

**iv. Severity and Pervasiveness May be Weighed Against Each Other.**

In the Illinois case, *Lara v. Diamond Detective Agency*, a male employee made comments such as “look at the tits on her” and told a female employee that her “tits looked nice in that sweater.” *Lara v. Diamond Detective Agency*, No. 04 C 4822, 2006 WL 87592, *1* (N.D. Ill. Jan. 9, 2006). The male employee attempted to peer down the same female employee’s shirt to see her breasts, asked her out on a date and would make comments about how she smelled on a daily basis. *Id.* at *2*. The Court found that the female employee had not alleged any behavior that rose to the level of an objectively hostile work environment. *Id.* at *3*. The Court said that in order for a plaintiff to succeed on a hostile work environment claim the plaintiff had to show that the workplace is “hellish.” *Id.* at *4*. The Court then held that no reasonable jury could find that the behavior of the male employee was objectively hostile “such that it rose to the level of being hostile or offensive, let alone being ‘hellish’.” *Id.*

The Court specifically analyzed the three incidents alleged by the plaintiff. The Court found that the male employee’s attempt to look down the female employee’s shirt was no worse than a poke to the buttocks or unwanted touches or attempted kisses, conduct which is not
actionable in the Seventh Circuit. *Id.* The male employee’s comments about another female’s breasts were considered a second-hand comment because it was not directed at the plaintiff; rather, it was merely said in the plaintiff’s presence. *Id.* at *5.16 Finally, the male employee’s daily comments about how the plaintiff smelled might have been frequent, but the Court found that it was not severe, physically threatening, did not interfere with the plaintiff’s work performance and was not of a sexual nature. *Id.*

By contrast, in *Reeves v. C.H. Robinson Worldwide, Inc.*, the Eleventh Circuit Court of Appeals held that a plaintiff *can* bring a claim for hostile work environment based on “sex specific” language even when the language is not directed at the plaintiff. No. 07-10270, 2008 WL 184882 (11th Cir. April 28, 2008). In *Reeves*, the plaintiff, a transportation sales representative, brought a sexual harassment claim based on a hostile work environment against her employer, C.H. Robinson Worldwide. *Id.* at *2. The plaintiff alleged that throughout the course of her employment she was subjected to a sexually derogatory environment. Specifically, she alleged that her coworkers used words like “bitch,” “cunt,” and “whore,” albeit in reference to other women, on a daily basis. *Id.* The District Court entered summary judgment in favor of the defendant-employer on the grounds that, because the allegations were not directed at plaintiff, the harassment was not “based on” the plaintiff’s sex. *Id.* at *6.

In reversing the District Court, the Eleventh Circuit Court of Appeals reasoned that “sex specific” language can be considered to be “based on” sex so as to support a claim for sex harassment hostile work environment even when the language does not target the plaintiff. *Id.* at *9. In its reasoning, the Court stated that the sex specific words such as “bitch,” “whore,” and

16 The logic in *Lara* may be inconsistent with the United States Supreme Court’s February 28, 2008 decision in *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008) (finding “me-too” evidence is admissible, depending on the circumstances). According to the Supreme Court, the question whether evidence of discrimination by other supervisors is relevant in an individual [discrimination] case is fact-based and depends on many factors, including how closely related the evidence is to the plaintiff’s circumstances and theory of the case.
“cunt,” may be more degrading to women than men. *Id.* at *10. In addition to holding that words not directed at the plaintiff herself can support a sex harassment hostile work environment claim, the Court further held that although such terms may not be sufficiently “severe,” the conduct may be pervasive, or frequent, enough to have unreasonably interfered with her job performance. *Id.* at *19.

C. The Rub – A Very High Standard

i. The Eighth Circuit’s Extremely High Bar

In February, 2018, United States District Judge Patrick J. Schiltz issued his opinion for a case in which three women alleged that they experienced a hostile work environment, among other claims, on account of their sex and sexual orientation while employed as coaches at the University of Minnesota Duluth (UMD). *Miller v. Bd. of Regents of the Univ. of Minn.*, No. 15-CV-3740 (PJS/LIB), 2018 WL 659851 (D. Minn. Feb. 1, 2018). Schiltz’ opinion is short on factual detail; he explains,

> The Court will not attempt to summarize the facts. As noted, the parties’ briefs are voluminous, and they describe dozens of emails, phone calls, conversations, meetings, actions, and decisions. The parties have already waited a long time for UMD’s motions to be decided, and a detailed recitation of the facts would serve little purpose. The acts are described in the briefs and are largely undisputed. The Court will assume familiarity with those facts and will mention particular facts only as necessary to explain the basis of its rulings.

*Id.* at *2.

The Court held that plaintiffs Miller, Banford, and Wiles did not have sufficient evidence to avoid summary judgment on their claims of hostile work environment because they could not meet the “high threshold” of the Eighth Circuit. *Id.* at *5.17 They could not meet the requirement

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17 The Eighth Circuit has often described this as a “high threshold,” *Duncan v. County of Dakota*, 687 F.3d 955, 959 (8th Cir. 2012), and, as Judge Schiltz notes, “the Eighth Circuit has meant it.” For example, the Eighth Circuit affirmed the dismissal of a hostile-environment claim in *Rickard v. Swedish Match North America, Inc.*, 773 F.3d 181, 183 (8th Cir. 2014), even though the supervisor grabbed and squeezed the employee’s nipple while stating “this
that the conduct was so severe or pervasive as to create an objectively hostile work environment. *Id.* at *6. Summary judgment was granted in favor of UMD on all three plaintiffs’ claims except for Miller’s claim that UMD discriminated against her on the basis of sex and retaliated against her for raising Title IX complaints when UMD decided not to renew her contract. *Id.* at *14.*

In support of Miller’s hostile work environment claim, she stated that she was excluded from a strategic planning committee by Athletics Director Josh Berlo, yet it was undisputed that several women were asked to join the committee, including Banford. *Id.* at *4. The Court determined that while Miller’s exclusion from the committee may be evidence that Berlo was hostile to Miller, it is not evidence that Berlo was hostile to her on account of her sex. *Id.* at *9. Miller also complained generally that she was treated coldly or completely ignored by Berlo, and

is a form of sexual harassment,” and even though the supervisor took a towel from the employee, rubbed it on his crotch, and gave it back to the employee. The Eighth Circuit also affirmed the dismissal of a hostile-environment claim in *McMiller v. Metro*, 738 F.3d 185, 186-87 (8th Cir. 2013), even though the supervisor put his arms around the employee’s shoulders and kissed the side of her face and then later called the employee into his office, locked the door, and, when the employee tried to escape, “placed his hand on her right wrist, removed her hand from the door, turned her toward him, put his arms on her shoulders and neck, and kissed her on the side of her face and forehead.” The *McMiller* court found that the employee did not have a viable hostile-environment claim in light of the high bar set by prior Eighth Circuit decisions, some of which it described as follows:

In *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002), the court determined that a plaintiff had not proved a hostile work environment with evidence that a supervisor sexually propositioned her, repeatedly touched her hand, requested that she draw an image of a phallic object to demonstrate her qualification for a position, displayed a poster portraying the plaintiff as “the president and CEO of the Man Hater’s Club of America,” and asked her to type a copy of a “He-Men Women Hater’s Club” manifesto. *Id.* at 931-35. In *Anderson v. Family Dollar Stores of Arkansas, Inc.*, 579 F.3d 858 (8th Cir. 2009), where a supervisor had rubbed an employee’s back and shoulders, called her “baby doll,” “accus[ed] her of not wanting to be ‘one of [his] girls,’” suggested once in a long-distance phone call “that she should be in bed with him,” and “insinuat[ed] that she could go farther in the company if she got along with him,” this court ruled that the evidence was insufficient to establish a hostile work environment. *Id.* at 862. And in *LeGrand v. Area Resources for Community and Human Services*, 394 F.3d 1098 (8th Cir. 2005), the court ruled that a plaintiff who asserted that a harasser asked him to watch pornographic movies and to masturbate together, suggested that the plaintiff would advance professionally if the plaintiff caused the harasser to orgasm, kissed the plaintiff on the mouth, “grabbed” the plaintiff's buttocks, “brush[ed]” the plaintiff's groin, “reached for” the plaintiff's genitals, and “briefly gripped” the plaintiff's thigh, had not established actionable harassment. *Id.* at 1100-03.

*McMiller*, 738 F.3d at 188-89. "Overall, the jury did not find Miller’s complaints about mistreatment to be petty, after hearing all of the evidence about her surviving claims at an eight (8) day jury trial in March, 2018. The jury awarded Miller $3.74 million dollars."
cited various disputes with Berlo and others including the removal of an article about her from UMD’s website. *Id.* at *11*. The Court held that the evidence in the record does not enable Miller to clear the high threshold of proving that she experienced misconduct that was so severe or pervasive that it affected a term, condition, or privilege of her employment. *Id.* at *6*. The court also noted that there is no evidence that the various “slights” suffered by Miller interfered with her ability to perform her job considering Miller wanted to remain at UMD and contends she was performing admirably at the time her contract was not renewed. *Id.*

The Court referred to Banford’s complaints regarding an alleged hostile work environment as bordering on “petty”. *Id.* at *9*. Banford complained about fights over budgets, fights over equipment, and fights over field usage, the location of her office, and how to address certain issues involving certain student athletes. *Id.* The most serious conduct Banford alleged is a statement Bob Nygaard, Assistant Athletics Director for Communications, made to Kelly Wheeler, the hockey team’s Sports Information Director. *Id.* Nygaard told Wheeler that he would have punched Banford in the face if he had seen her after certain media reports. *Id.* The Court held that this isolated threat made outside of Banford’s presence “falls far short” of the bad behavior experienced by the plaintiffs in prior cases who had their hostile-environment claims dismissed and granted UMD’s motion for summary judgment on her hostile work environment claim. *Id.*

Wiles stated in support of her claim for hostile work environment that disputes over her budget, exclusion from meetings and committees, the imposition of charges for wear and tear on her UMD-leased car, being “treated coldly by Berlo” and Berlo declining Wiles’s invitation to a coming out day luncheon were hostile actions. *Id.* at 11. District Court Judge Schiltz noted that Berlo gave Wiles an extremely positive performance review in 2014 and that this was difficult to
square with her claim. *Id.* at 10. The Court held that the conduct she cited fell short of the type of conduct needed to support a hostile-environment. *Id.* at 11.

**ii. Minnesota State Law Cases are Invaded by the Eighth Circuit’s Standard. All States Should Consider Whether Their Standards are Also Invaded by Federal Juris Prudence.**

In December of 2017, Judge Mel I. Dickstein surmised that, “[o]ur courts need to revisit the issue of what facts constitute those “sufficiently severe or pervasive [acts] to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).” *Kenneh v. Homeward Bound, Inc.*, No. 27-CV-17-391, at 8 (Dist. Ct. Minn. Dec. 5, 2017). A woman named Assata Kenneh was employed as a Program Resource Coordinator at defendant’s nonprofit organization that operates homes for the disabled. *Id.* at 1. Kenneh alleged that a maintenance worker employed by defendant, Mr. Johnson, committed the following acts which created a hostile work environment:

1. Johnson offered to cut Kenneh’s hair at his or her apartment;

2. While fixing a stuck drawer in Kenneh’s desk, Johnson told her to remain seated because he likes “beautiful women and beautiful legs”;

3. Johnson accompanied Kenneh to a vending machine where he told her that he would “eat her” because he likes to “eat women” implicitly proposing oral sex;

4. Johnson pulled up next to Kenneh at a gas station and asked what she did in her spare time and where she was headed; and

5. Johnson repeatedly referred to plaintiff as “beautiful” or “sexy.”

*Id.* at 2.

Kenneh requested a transfer to a flex position to avoid further interactions with Johnson. *Id.* at 3. Kenneh maintains that she was then terminated, defendant maintains that it accepted plaintiff’s resignation. *Id.* Defendant moved the Court for summary judgment, asserting that plaintiff’s allegations, even if true, do not meet the legal standards for sexual harassment and
reprisal under the Minnesota Human Rights Act ("MHRA"). *Id.*

The District Court decided that Kenneh’s allegations do not constitute an objectively hostile work environment because the facts taken in the light most favorable to the plaintiff were neither so pervasive nor so egregious as to alter the terms of her employment. *Id.* at 10. Kenneh’s facts do not satisfy the legal requisite to an action for a violation of the MHRA based on sexual harassment. *Id.* Judge Dickstein wrote, “… the facts in the present case, however obnoxious and unacceptable, do not expose the employer to liability under the high bar set by current case law … until our courts articulate a different standard under which workplace conduct may be evaluated, the conduct alleged in the present case, however objectionable, does not constitute pervasive, hostile conduct that changes the terms of employment and expose an employer to liability under the Minnesota Human Rights Act.” *Id.* at 11.

Kenneh appealed the District Court’s decision, arguing that the District Court erred by applying the incorrect legal standard and failing to make inferences in her favor, and that the Court should abandon the “severe or pervasive” standard for hostile-work environment claims. *Kenneh v. Homeward Bound, Inc.*, No. A18-0174, 2019 WL 178153 (Jan. 14, 2019). The Minnesota Court of Appeals disagreed with Kenneh, affirming the District Court’s decision. The Appellate Court noted that in order to establish that the harassment affected a term, condition, or privilege of employment, Kenneh must show that the harassment was “so severe or pervasive” as to alter the conditions of employment and create a hostile work environment. *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2001). The Court quoted the Minnesota Supreme Court in *Goins*:

> the objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so. In ascertaining whether an environment is sufficiently hostile or abusive, and one that the victim did in fact perceive to be so. In ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at the totality of the circumstances, including the
frequency of the discriminatory conduct; its severity; whether it is physically
threatening or humiliating, or a mere offensive utterance; and whether it
unreasonably interferes with an employee’s work performance.

Id. (quotations and citations omitted). Kenneh argued on appeal that the District Court failed to
consider the totality of the circumstances and impermissibly relied on comparing the alleged
counter to prior cases. Kenneh at 2.

The Court noted that it addressed what conduct constitutes actionable harm in Geist-
Miller v. Mitchell, 783 N.W.2d 197, 203 (Minn. App. 2010). In Geist-Miller, an employee’s
allegations primarily involved “inappropriate sexual banter and [the] unsuccessful pursuit of a
relationship,” which the Court does not consider to be severe or pervasive harassment. The
employer’s attempt to kiss Geist-Miller and instances in which he touched her hair and leg were
“more severe than the inappropriate remarks, but still did not amount to actionable harm. Id.
at 204. An appellant’s assertions that conduct makes her uncomfortable, embarrassed, and upset
are insufficient to establish that harassment was severe or pervasive. Id.

The Court held that Kenneh’s allegations against Johnson related primarily to
inappropriate remarks and gestures, which is not actionable sexual harassment. Kenneh at 3. In
regard to Kenneh’s argument that the court should abandon the severe or pervasive standard for
sexual harassment, the Court acknowledges it is correct that the statutory definition of “sexual
harassment” does not include the “severe or pervasive” standard, but wrote that, “… this court is
bound by supreme court precedent and does not have the authority to abandon a standard
established by the supreme court. See Tereault v. Palmer, 413 N.W.2d 283, 286 (Minn. App.
1987) (‘[T]he task of extending existing law falls to the supreme court or the legislature, but
does not fall to this court.’), review denied (Minn. Dec. 18, 1987). Accordingly we decline to
abandon the severe-or-pervasive standard.” Id.
D. Claims Against State Government Bodies

A February 2, 2019 Associated Press article reported that since 2017, at least ninety state lawmakers have been accused of sexual misconduct and at least twenty-four have resigned, been removed from office, or faced discipline or other repercussions because of the allegations of sexual misconduct against them.\(^{19}\) When considering how to draft sexual harassment policies or how to strengthen existing sexual harassment policies for statehouses, and when drafting new legislation, it is important to consider how the courts apply the severe or pervasive standard.

On June 18, 2019 an Indiana State Rep. named Mara Candelaria Reardon filed a civil lawsuit in federal court against the Indiana Attorney General Curtis Hill Jr. and the State of Indiana along with three other female General Assembly employees.\(^{20}\)

The women claim Hill touched their backs and/or buttocks without consent during an event last year at an Indianapolis bar. The women allege they were subject to sexual harassment, gender discrimination and retaliation by the state and Hill, as well as battery, sexual battery, defamation and invasion of privacy by the attorney general alone.

_Id_. Based on what we discussed in this article, depending on the frequency and severity of the alleged behavior, this case may or may not survive summary judgment. If these plaintiffs were subjected to Hill’s bad behavior only one time at that event, their case is not likely to survive summary judgment based on those facts. If it does, and the plaintiffs prevail, the tax payers of Indiana could be indirectly responsible for monetary damages. The plaintiffs moved forward with a civil lawsuit hoping that it will deter any future conduct of a similar nature. _Id_.

In February of 2019 two legislative interns from Oregon filed a lawsuit alleging that former state Sen. Jeff Kruse “…routinely sexually harassed women at the Capitol and created a


sexually hostile work environment for many years, beginning well before the time period when he sexually harassed plaintiffs … Not a single member of legislative leadership, human resource management, or a single senator can likely claim ignorance to that history.”\textsuperscript{21} As such, the plaintiffs named Senate President Peter Courtney, Legislative Counsel Dexter Johnson, Legislative HR Director Lore Christopher, and the state of Oregon in addition to Sen. Kruse. \textit{Id.}

Both interns were law students, and their combined allegations included that: Kruse allegedly called one intern “little girl,” “[his] baby lawyer” and “sexy;” he told her that her husband was lucky and asked about her sex life; he placed his hands on her thighs and his head on top of hers while she sat at her desk; he subjected her to sexual banter, frequent hugs, and lingering touches; Kruse hugged and squeezed the other intern so tight that she could not move; he put his hand on her shoulders, talked to her nose-to-nose, subjected her to sexual banter, massaged her shoulders, and shared private inappropriate details about her. \textit{Id.} In the “me-too” era, this type of behavior has been declared inappropriate by society and as a matter of public policy. But is this the type of behavior that is severe or pervasive enough to constitute a hostile work environment in the Courts? Would the Courts consider it to be “hellish”? Based on the case law discussed herein, perhaps not.

However, luckily for the plaintiffs, an investigation was conducted by the Oregon Bureau of Labor and Industries (BOLI) into their allegations as well as the allegations of six other women.\textsuperscript{22} BOLI found the harassment was severe and pervasive due to the numerous reports from 2013 – 2015, that the leadership knew or should have known, and leadership accepted the


\textsuperscript{22} Nigel Jaquiss, \textit{Legislative Leaders Agree to Pay Sexual Harassment Victims More than $1 Million}, WILLAMETTE WEEK (March 5, 2019), https://www.wweek.com/news/2019/03/05/legislative-leaders-agree-to-pay-sexual-harassment-victims-more-than-1-million/.
culture and failed to take meaningful and appropriate corrective action. *Id.* The Oregon Legislature (read the taxpayers of Oregon) agreed to pay $1.32 million to the eight women who were sexually harassed while they worked in the Legislature. *Id.* Additionally, the Legislature is required to establish an Equity Office to receive and investigate complaints and the two former interns will drop their lawsuit. *Id.*

In a July, 2017 case out of Iowa, Kirsten Anderson was awarded $2.2 million by a jury after filing a complaint alleging a toxic work environment caused by sexual harassment.23 The Senate Republican Caucus terminated Anderson the same day she submitted a memo accusing her male supervisors of ignoring a “boys’ club” culture that fostered rampant sexual harassment and expressing concerns about the work environment. *Id.* The jury determined that the Senate Republican Caucus and the State violated workplace harassment, discrimination and retaliation laws after hearing testimony about a “locker room” environment where women endured taunts and quips about their sex lives, Anderson was shown a nude picture of Kim Kardashian, summoned for a “hot chick report” when an attractive woman walked by outside, and use of the “c-word” when talking about women. *Id.* The jury award was subsequently reduced to $1.75 million as part of a settlement: $1.045 million went to Anderson, and $705,000.00 went to her lawyer’s law firm. *Id.* Once again, Iowa tax payers were on the hook for the payment. *Id.* Additionally, the Iowa Senate will now have mandatory training sessions to address sexual harassment and hostile work environment. *Id.*

In an effort to relieve the burden of the cost of these cases on the tax payers, the U.S. Congress decided in December of 2018 to make members pay out of pocket for some settlements

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and court judgments relating to sexual harassment. The new rule, in part, shifts liability from the tax payer to the member while maintaining a cap of $300,000 on liability for that member when a court assesses damages, but no cap when cases end in settlements. Id. The Treasury Department will still make the initial payments to victims and members are required to repay the government. Id. Additionally, all settlements and awards will be made public at the time of the settlement and an annual review will be released to the public. Id.

Also in 2018, the State of New York updated its sexual harassment law. The law went into effect October 9, 2018, and applies to all employers regardless of how many employees are employed, and to all employees whether they are paid or unpaid as well as non-employees, and the law applies regardless of immigration status. New York’s new sex harassment law includes, in part, the following: prohibition of nondisclosure provisions in any employment or settlement agreements that in any way relate to sexual harassment; prohibition of the use of mandatory arbitration provisions in employment or related agreements that relate to claims of sexual harassment; all employers must provide a sexual harassment prevention policy to all of its employees, and must continue to do so on an annual basis; all employers must provide sexual harassment prevention training on an annual basis to all of its employees; and the new law expands the protection of the employee against sexual harassment by “non-employees” and makes the employer liable for acts of sexual harassment by contractors, subcontractors, vendors, consultants, and other persons providing services if the employer is aware of the behavior and does nothing to address it. Id.


Then, in June of 2019, New York State passed legislation (bill NY A7083 (19R)/NY S3817 (19R) amending its anti-discrimination and anti-harassment laws. The amended law eliminates the severe or pervasive standard all together. \textit{Id.} Now, harassment on the basis of any protected characteristic is unlawful “regardless of whether such harassment would be considered severe or pervasive.” \textit{Id.} New York City eliminated the “severe and pervasive” standard in 2005, and New York State used that as guidance in its decision to lower the burden of proof for state law discrimination, harassment and retaliation claims. \textit{Id.} The law will prospectively only require an employee to show that alleged harassment or retaliation rises above the level of “petty slights and trivial inconveniences.” \textit{Id.} Among other changes, the amended law also eliminates the availability of the 	extit{Faragher/Ellerth} defense to employers, so, the fact that an employee “did not make a complaint about the harassment to such employer shall not be determinative of whether such employer shall be liable.” \textit{Id.}

One of the authors of this article has worked for the past few years on Minnesota’s effort to pass a bipartisan reformation to its sexual harassment law. The goal is to clarify the definition of sexual harassment in the law to specify that sexually offensive behavior does not need to be outrageously “severe or pervasive” in order for it to be subject to litigation. Most recently, Rep. Kelly Moller sponsored bill HF10, which was passed by the House on March 21, 2019 by a vote of 113-10.\footnote{Tim Walker, \textit{House passes bill that would change legal definition of sexual harassment, MINNESOTA HOUSE OF REPRESENTATIVES} (Mar. 21, 2019 5:43 PM), https://www.house.leg.state.mn.us/SessionDaily/Story/13812.} HF10 was not taken to the Floor of the Minnesota State Senate.

\textbf{CONCLUSION}

Sexual harassment law appears to have swung way too far, trending toward requiring an incredibly high standard to prove that statements and conduct are severe or pervasive enough to

warrant actionable harassment. This is contrary to public policy.

In Minnesota for example, it is public policy to secure for persons in the state, freedom from discrimination … in employment … because of sex. Minn. Stat. § 363A.02, subd. 1(a)(2010). Justice Page dissented to the majority opinion in *LaMont*. *LaMont* at 24. Justice Page found Miner’s statements and conduct to be sufficiently severe or pervasive to survive summary judgment because they would affect LaMont’s terms, conditions, or privileges of employment; they occurred over a period of months; and were directed at LaMont because she was a woman. *Id.* at 25. In his dissenting opinion, Justice Page reminded us that the majority opinion relies on conclusions of several other courts, including federal courts, which set a very high standard for setting out a claim of hostile work environment and sex discrimination. *Id.* However, he reminded us that the relevant law in *LaMont* is Minnesota law, and the conclusion of the court is inconsistent with Minnesota’s stated public policy. *Id.*

Justice Wright seems to agree with Justice Page; she dissented as to the majority’s decision in *Rasmussen* in regard to remanding the employees’ hostile work environment claims to the District Court. *Rasmussen* at 802. The remand was based on errors in law, but Justice Wright pointed out that when the record permits only one resolution of factual issue, a remand to the District Court is unwarranted.28 *Id.* at 804. Justice Wright opined that the employees were entitled to prevail on their claims noting, “If the conduct at issue in this case does not unmistakably violate the MHRA, I shudder to consider both the degrading conduct that any employee must endure in a Minnesota workplace and the unreasonably burdensome actions she must take to prove that her workplace was hostile so as to vindicate her legal right to be free from a hostile work environment.” *Id.* State legislators should seriously consider addressing this

federal case law trend toward a higher standard in order to uphold each state's public policy against harassment.