Severe and/or Pervasive: Just How Bad Does Sexual Harassment Have to Be in Order to Be Actionable?[1]

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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 how to assess hostile environment claims.

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 she must perform sexual favors for a supervisor in order to keep her 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.

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*[3], when the prima facie case for supervisor harassment changed; the above standard is still used for peer-on-peer or customer harassment. *Faragher v. City of Boca Raton,* 118 S.Ct. 2275, 2291 (1998). In *Ellerth* and *Faragher,* the Supreme Court ruled that employers can be "vicariously liable" for

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[3] 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." *Ellerth,* 118 S.Ct. at 2270. While employers typically must prove both prongs of the Faragher/Ellerth defense, it should be noted that the Eight Circuit departed from this rule in *McCurdy v. Ark. State Police.* Though, this 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 supervisor standard in *Ellerth* and *Faragher* is significant, the main purpose of this article is primarily focused on what conduct is enough to constitute severe or pervasive behavior.

harassment by supervisors.[4] 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.[5]

Situations can arise where subordinate employees are accused of harassing a supervisor. *Stuart v. Rise* was the first 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 854-855.

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 8th Circuit Court of Appeals reversed, rejecting the District Court's application of

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[4] *See also Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558 (Minn. 2008), adopting the *Faragher-Ellerth* federal standard to apply to claims brought in Minnesota state courts under the MHRA).

[5] In *Stewart v. Rise, Inc.* the Court reversed summary judgment of a hostile work environment claim based on application of the Ellerth/Faragher 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)

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 8th 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 – 860. 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.

With regard to peer-on-peer harassment, 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 redressible 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). 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).

A. 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.
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> *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 up 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" 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 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."
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> *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.

B. *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.,* 300 F.3d 928 (8th Cir. 2002) a female employee

alleged several instances where a male employee engaged in boorish behavior she found offensive. 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 a seven-figure jury verdict and 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.[6] 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. *Id.* at 755. 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,

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[6] Certiorari was denied by the United States Supreme Court.

ran his finger up her spine, told her how pretty she was, and asked her to run off with him. 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. The female employee reported these acts throughout the seven years numerous times and had documented at least sixteen such reports. 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.* at 756. In the last year of the seven-year period there was some form of harassing behavior occurring on an almost daily basis.

The District Court had relied on *Duncan* in its decision in favor of the employer. However, the Eight 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.*

II. Severe & 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 – 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 will 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 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.*, 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. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002). In this case a female employee was raped by a client whose account she managed. She reported the rape to a coworker. The coworker told her not to tell anyone in management. 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 manager as well. The manager 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.* The female employee's manager also continued to ask her about the status of the client's account over the next six weeks.

The female employee filed suit, alleging that the employer's response to the rape created a hostile work environment. The Court of Appeals overturned the District Court's grant of summary judgment for the employer. The 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 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. 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.* at 967.

However, a claim based on sexual assault may fail if assault took place in a context that a court finds not be work work-related. In *Paugh v. P.J. Snappers*, 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 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.*[7]

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 male employee's threatening behavior was presented in support of a hostile environment sexual harassment claim and a retaliation claim. *Brown v. City of Cleveland*, No. 1:03CV2600, 2005 WL 1705761 (N.D. Ohio July 21,

[7] *Ferris v. Delta Airlines*, 277 F. 3d 128 (2nd Cir. 2001) *cert. denied.* 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.

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. 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.* at *1. 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. Services*, 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 was claiming a hostile work environment in violation of Title VII and retaliation. Her claim stemmed from a romantic relationship she had with a coworker. The relationship ended and the male employee was later promoted. The female employee was concerned about working with the male employee and informed company officials about those

concerns. She met the male employee for dinner, where he became angry after learning she contacted company officials. *Id.* at *1. 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 away from work assault and her employers took no action. 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. 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. The plaintiff was not allowed to give a "blow-by-blow" 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 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.

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".

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. 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 *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 pattern of harassment and thus her timely administrative complaint as to the 2000 incidents encompasses all of the incidents. *Id.* at 1050.[8]

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.* 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.* 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

[8] 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.*, 809 F.3d 981 (8th Cir. 2016), the female plaintiff was a long-haul truck driver who worked with a driving partner. *Id.* at 984. 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 984-985. 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 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, *Pirie v. The Conley Group, Inc.*, No. 4:02-CV-40578, 2004 WL 180259 (S.D. Iowa Jan. 7, 2004) the plaintiff's claim failed despite an allegation that she was confined in a room by a male coworker who exposed himself to her. 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. 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 term 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. 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.*

In *Jenkins v. University of Minnesota*, a female graduate student was subject to sexual harassment by her male colleague. 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. *Jenkins v. University of Minnesota*, 838 F. 3d 938 (8th Cir. Oct. 3, 2016). 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. *Id.* at 942. Additionally, Swem invited Jenkins to lunch under the pretense of discussing logistics of the upcoming trip, even though it quickly became apparent that the trip was already planned. *Id.* He complimented her physical appearance and told her he was interested in a romantic relationship with her. He joked that they should bring only one tent for the next trip and that she was welcome in his tent anytime. *Id.* He also told her that she could just sit in his lap and kiss him if she ever wanted a relationship with him. *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. *Id.* at 945. Noting that, "The geographic isolation of the conduct is of paramount importance. *Id.* 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." *Id.* Nevertheless, in an instance where the Court ruled in favor of the plaintiff and asserted that her male colleague's behavior was severe or pervasive enough to be considered sexual harassment, Jenkins was only awarded $1 in damages. *Jenkins v. The University of Minnesota et al*, No. 13-CV-1548 (D. Minn, 2017).

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 for at a plant that manufactured drywall. 2000 BL 1209 (N.D. Iowa Jan. 21, 2000). 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.*, 2013 WL 5596421 (D. Minn. Oct. 11, 2013), *aff'd*, 773 F.3d 916 (8th Cir. 2014) saw her hostile work environment claim dismissed at summary judgement where she alleged only three incidents of unwanted hugs from a co-

worker. The plaintiff in that case was "loss prevention" manager at a retail store. *Id.* at *1. After a series of upsetting confrontations with customers, a co-worker 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.* A female custodian sued the School District claiming that she had been subjected to a hostile work environment based on sex. *LaMont v. Ind. Sch. Dist.* #728, 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" has back while lifting a heavy object, in response, Miner stated, "The only screwing I do is with my wife."

Id. Miner also stated, "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. *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. Rasmussen, Moyer, and Reinhold alleged that Two Harbors Fish Company and BWZ Enterprises violated the MHRA based on sexual harassment based on sexual harassment perpetrated by Zapolski, the sole owner of both entities. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W. 2d 790, 791 (Minn. 2013). 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 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 court of appeals reversed, concluding that the district court erred in its finding. *Id.* The 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 794-795. The employers appealed the 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. *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, 798-799. The case was remanded for further proceedings. *Id.* at 798.

Sexual harassment law appears to have swung way too far and this trend is inconsistent with Minnesota public policy. It is the public policy of this state to secure for persons in this 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 and 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 reminds 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 reminds 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, 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 points out that when the record permits only one resolution of factual issue, a remand to the district court is

unwarranted.[9] *Id.* at 804. Justice Wright opined that the employees were entitled to prevail on their claims, "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.* Minnesota must cease this trend toward a higher standard in order to uphold its own public policy.

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 this issue.

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 over the map.

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*, 394 F.3d 1098 (8th Cir. 2005) 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*. 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

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[9] Citing *Pullman Standard v. Swint*, 456 U.S. 273, 292, 102 S. Ct. 1781, 72 L.Ed.2d 66 (1982); *see also Williams v. New Orleans S.S. Ass'n*, 688 F.2d 412, 416 (5th Cir. 1982).

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 and pervasive standard had not been met because the conduct amounted to "three isolated incidents...over a nine-month period." *Id.* at 1102-1103. 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 *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 862-863. 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*, 738 F.3d 185 (8th Cir. 2013), 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. 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 186-187. 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[10] 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 co-worker joined in with the verbal harassment, which occurred off and on over a period of eight months. *Id.* at 1222. A jury awarded the plaintiff $75,000 in compensatory damages, but the trial court threw it 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.*

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[10] 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.

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 pornogrpahic 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 *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 *Clark v. UPS, Inc.*, two female plaintiffs complained about the sexually harassing behavior of a supervisor at work. *Clark v. UPS, Inc.*, 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. 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. 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 *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.[11] Finally, the male employee's

[11] 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,

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. *Reeves v. C.H. Robinson Worldwide, Inc.*, 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 claim 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 "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.

CONCLUSION

Minnesota has a public policy to uphold. Sexual harassment law appears to have sung 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 Minnesota's public policy. The Eighth Circuit has certainly developed some broad guidelines regarding what conditions may help demonstrate levels that constitute severe or pervasive behavior, but in the process, the "severe or pervasive" bar as it currently stands is set so high that it has made it increasingly more difficult to prove the merits of a case in relation to this vague precedent. It is time for the pendulum to swing back in favor of Minnesota's public policy.

> *It is the public policy of this state to secure for persons in this state, freedom from discrimination... in employment because of ...sex.* Minn. Stat. § 363A.02, subd. 1(a).