EMPLOYMENT LAW REPORT

Understanding and Applying the Governing Legal Standard in Harassment Cases

By Justin D. Cummins

INTRODUCTION[1]

The conventional wisdom holds that the Eighth Circuit is among the most conservative in the country when it comes to harassment claims. Nonetheless, a careful review of the precedent, including recent decisions, shows that plaintiffs have plenty of compelling authority to back up their claims under Federal law. Given the comparatively more progressive approach to the application of State and Local civil rights provisions, plaintiffs should fare even better in State court.

Effectively selecting and prosecuting harassment cases requires a good understanding of the context in which courts analyze the claims. Accordingly, the discussion below begins with a quick review of the "private attorney general" principle that underlies harassment claims as well an outline of recent rulings under Rule 12 and Rule 56.

I. CHARGING PARTIES AND PLAINTIFFS SERVE AS "PRIVATE ATTORNEYS GENERAL" IN HARASSMENT AND OTHER CIVIL RIGHTS CASES

Aggrieved parties who seek to exercise their civil rights have a special role in upholding the rule of law in the United States. In particular, the United States Supreme Court has long recognized that "Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority.'"[2] Indeed, a plaintiff "not only redresses his [or her] own injury but also vindicate[s] the important congressional policy against discriminatory employment practices."[3]

In furtherance of the "private attorney general" principle, the Minnesota Legislature enacted a treble-damages provision through the Minnesota Human Rights Act ("MHRA").[4] State courts have awarded multiplied compensatory damages to plaintiffs toward that end.[5]

II. THE STANDARDS DEFENDANTS MUST SATISFY TO SUCCEED ON A MOTION TO DISMISS OR FOR SUMMARY JUDGMENT ARE HIGH

Some commentators and practitioners suggest that notice pleading has been abolished by Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). According to that view of the law, Iqbal authorizes Federal courts to grant motions to dismiss freely if a Federal judge thinks the allegations in a lawsuit are not "plausible." An accurate understanding of the actual meaning of Iqbal turns on the understanding of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) – which Iqbal extended to all Federal claims filed in Federal court.

In truth, Twombly confirmed that the United States Supreme Court is still "not requiring heightened fact pleading of specifics. . . ."[6] The United States Supreme Court further underscored the ongoing liberal nature of the pleading standard as follows:

> Of course, a well-pleaded ***complaint may proceed even if*** it strikes a savvy judge that actual proof of the facts alleged is improbable, and "that a ***recovery is very remote and unlikely***."[7]

In a per curiam ruling two weeks after Twombly, the entire United States Supreme Court in Erickson v. Pardus quoted Twombly to reiterate that the liberal notice-pleading standard still governs:

> Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." ***Specific facts are not necessary***; the statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[8]

Iqbal did not purport to overrule or even address the United States Supreme Court's unanimous decision in Erickson. Therefore, the Eighth Circuit recently reiterated in Braden v. Wal-Mart Stores, Inc. that "the ***complaint should be read as a whole***, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."[9] In reversing the district court's grant of summary judgment, the Eighth Circuit in Braden cited Erickson and explained as follows:

> The district court erred in two ways. It ignored reasonable inferences supported by the facts alleged. It also drew inferences in [the defendant's] favor, faulting [the plaintiff] for failing to plead facts tending to contradict those inferences. Each of these errors violates the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party. *Twombly* and *Iqbal* did not change this fundamental tenet of Rule 12(b)(6) practice. . . . Rule 8 does not, however, require a plaintiff to plead "specific facts" explaining precisely how the defendant's conduct was unlawful. Rather, ***it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior***, so long as the facts pled give defendant fair notice of what the claim is and the grounds upon which it rests," [] and allow the court to draw the reasonable inference that the plaintiff is entitled to relief.[10]

State courts takes an equally – if not a more – liberal approach to pleading requirements

when considering a motion to dismiss.[11] Like the standard applicable to a defendant's Rule 12 motion to dismiss, the legal requirements governing a defendant's Rule 56 motion for summary judgment are onerous.[12] Thus, the Eighth Circuit recently reiterated the rigorous standard on Rule 56 motions while reversing summary judgment for the employer:

> Notably, we have repeatedly emphasized that "***summary judgment should be used sparingly*** in the context of employment discrimination and/or retaliation cases where direct evidence of intent is often difficult or impossible to obtain."[13]

III. COURTS MUST CONSTRUE FEDERAL CIVIL RIGHTS STATUTES BROADLY, AND STATE AND LOCAL CIVIL RIGHTS PROVISIONS SHOULD BE INTERPRETED EVEN MORE LIBERALLY

The United States Supreme Court has long established that "the district court has not merely the power but the ***duty*** to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[14] In fact, courts have authority under Federal civil rights statutes to address even policies and practices that have a discriminatory effect rather than embody actual discriminatory intent.[15]

State and Local civil rights provisions are often broader in scope and should be construed even more liberally. For example, the MHRA states as follows:

> It is the ***public policy of this state to secure*** for persons in this state, ***freedom from discrimination.*** * * * ***Such discrimination threatens*** the rights and privileges of the inhabitants of this state and menaces ***the institutions and foundations of democracy.***[16]

The Minnesota Supreme Court has "consistently held that the remedial nature of the Minnesota Human Rights Act requires liberal construction of its terms."[17]

Pursuant to the exceptionally liberal interpretation of the MHRA, Minnesota courts do not allow defendants to invoke the affirmative defense and related same-decision analysis in discrimination cases:

> [T]he Minnesota Supreme Court declined to adopt in MHRA cases the same-decision analysis that the federal appellate courts had been applying in mixed-motive cases under Title VII. The court reasoned that ***allowing employers to limit or avoid liability based on a same-decision analysis would "defeat the broad remedial purposes of the [MHRA]*** by permitting employers, definitionally guilty of prohibited employment discrimination, to avoid all liability for the discrimination provided they can prove that other legitimate reasons may coincidentally exist that could have justified the discharge."[18]

The broad construction of the MHRA applies in the harassment context in particular. For example, a plaintiff need not prove the sex harassment is "because of" sex to be actionable.[19] In other words, a plaintiff can prove unlawful harassment occurred without showing "that the harassment resulted in the disparate treatment of one gender or that the conduct was motivated by the harasser's actual sexual interest in the victim."[20]

To the extent State and Local provisions differ from the Federal standard, the more liberal State and Local provisions should control according to the Minnesota Supreme Court.[21]

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IV. THE LAW RECOGNIZES TWO WAYS OF PROVING UNLAWFUL HARASSMENT

Most cases litigated in court involve claims

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of harassment based on sex as opposed to race, national origin, religion, disability, or other protected traits. Consequently, most of the precedent addresses harassment of a sexual nature. The analysis of harassment based on other classes, however, basically follows the same approach to liability: (1) hostile environment harassment and (2) quid pro quo harassment.

Hostile environment harassment can be established through negligence liability or vicarious liability. In other words, there are two analytically distinct bodies of doctrine: (1) the doctrine of negligence liability, which focuses on the employer's – not the plaintiff employee's – conduct because no affirmative defense is available and (2) the doctrine of vicarious liability, which considers whether the employee unreasonably failed to avoid harm because an affirmative defense is available. Under a negligence theory of liability, the question is whether the employer knew or should have known – from the employee's initial report or otherwise – about the harassment.[22]

A. The Statutes And Ordinances Prohibit Hostile Environment Harassment

Federal, State, and Local civil rights provisions outlaw harassment to the extent it creates a "hostile environment." These days, hostile environment claims appear to be the most prevalent, especially outside of the sex context. Indeed, it is difficult to imagine what a quid pro quo claim of, for instance, race harassment would look like.

1. Harassment can be analyzed under the doctrine of negligence liability

Harassment claims prosecuted under a negligence theory typically – but not necessarily – involve harassment by a coworker rather than a supervisor. The elements of a hostile environment claim under a negligence theory are as follows: (1) the plaintiff was a member of a protected group; (2) the plaintiff was subjected to unwelcome harassment; (3) the harassment was because of the plaintiff's membership in the group; (4) the harassment affected a term, condition or privilege of the plaintiff's employment; and (5) the defendant knew or should have known about the harassment but failed to take prompt and effective remedial action.[23]

a. Actionable conduct includes an array of behavior and comments

Notwithstanding what some defenses lawyers argue, a plaintiff need not show the harassing conduct is both severe and pervasive to have an actionable harassment claim.[24] The Eighth Circuit set forth the governing standard more concretely when reversing summary judgment for the employer:

> A worker "need not be propositioned, touched offensively, or harassed by sexual innuendo" in order to have been sexually harassed, however. Intimidation and hostility may occur without explicit sexual advances or acts of an explicitly sexual nature. Furthermore, physical aggression, violence, or verbal abuse may amount to sexual harassment.[25]

Furthermore, a plaintiff may be able to demonstrate that the work environment is sufficiently hostile by offering evidence of a single incident.[26]

According to well settled United States Supreme Court precedent, courts must evaluate the harassment claims in light of the full record:

> Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances'. . . ."[27]

Toward that end, the Supreme Court and the Eighth Circuit construe the continuing violations doctrine broadly.[28]

Other-acts evidence also plays a pivotal role in the analysis. After carefully analyzing the governing precedent, the Eighth Circuit recently held as follows regarding other-acts evidence of which the plaintiffs were unaware:

> ***Irrespective of whether a plaintiff was aware*** of the other incidents, the evidence is ***highly probative of the type of workplace environment she was subjected to*** and whether a reasonable employer should have discovered the sexual harassment.[29]

In any event, the Eighth Circuit has clearly established, "[o]nce there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely ***in the hands of the jury***."[30] Moreover, the United States Supreme Court and the Eighth Circuit have established that, "[t]he question whether particular conduct was indeed unwelcome will turn largely on credibility determinations ***committed to the trier of fact***."[31]

b. An employer can be put

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on notice of the harassment numerous ways

The United States Supreme Court has long established an employer need not have actual knowledge to be on notice about the harassment at issue.[32] Either actual or constructive knowledge confers notice.[33]

The Eighth Circuit recently emphatically reaffirmed that harassment allegedly experienced by other employees – of which a plaintiff was unaware – is directly relevant to whether the defendant possessed notice about the alleged harassment of the plaintiffs:

> ***Irrespective of whether a plaintiff was aware*** of the other incidents, the evidence is ***highly probative of*** the type of workplace environment she was subjected to and ***whether a reasonable employer should have discovered the sexual harassment.***[34]

Furthermore, the Eighth Circuit has long recognized, "[i]f the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable."[35] Consequently, the Eighth Circuit has reversed judgment for the employer, in part, because complaints to the direct supervisor may have conferred notice about the harassment.[36]

Significantly, a complaint to the supervisor(s) engaging in the harassment also is a report of harassment that puts the defendant on notice of the problem.[37] The Eighth Circuit recently reaffirmed that an employee need not make a second report or use a second complaint mechanism to put the employer on notice about harassment:

> An employer has actual notice of harassment when sufficient information either comes to the attention of someone who has the power to terminate the harassment, or it comes to someone who can reasonably be expected to report or refer a complaint to someone who can put an end to it.[38]

Other Circuits have joined the Eighth Circuit in rejecting the requirement of a second report and the use of a second complaint mechanism before an employer will have notice of harassment.[39]

c. Corrective action must be prompt and effective

The Eighth Circuit has consistently taken a case-by-case approach to evaluating whether a defendant has taken the requisite remedial action.[40] Even when an employer responds immediately and adequately to an initial harassment report, such action "does not discharge the employer's responsibility to respond properly to subsequent reports of offending conduct by the harasser."[41] In addition, "[t]o show that a hostile work environment has continued after an employer's remedial action, a plaintiff need not prove an entire accumulation of harassing acts, amounting to a new and free-standing hostile environment claim."[42]

Generally under well recognized Eighth Circuit precedent, whether a defendant took prompt and effective corrective (and preventive) action is a fact-bound issue for a jury to decide.[43] That long-standing point of law in harassment jurisprudence follows the well settled precedent in negligence cases more broadly.[44]

2. Harassment can be analyzed under the doctrine of vicarious liability

When a supervisor engages in the challenged harassment, the defendant can be liable under the alternative theory of vicarious liability. The elements of a hostile environment claim under a vicarious theory are as follows: (1) the plaintiff was a member of a protected group; (2) the plaintiff was subjected to unwelcome harassment; (3) the harassment was because of the plaintiff's membership in the group; and (4) the harassment affected a term, condition or privilege of the plaintiff's employment.[45] What amounts to actionable hostile environment conduct here is the same as for under a negligence theory.

a. Supervisors have the power to take tangible employment action or to recommend it

Supervisors include those who can recommend or carry out discipline or other changes to employment terms or conditions.[46] Employees who appear to have supervisory authority may also be supervisors under Title VII and Minnesota law.[47] Whether the harasser is a supervisor for purposes of establish vicarious liability could be a fact question that precludes summary judgment.[48]

b. Employers have an affirmative defense only to vicarious liability claims, and employers carry the burden of persuasion on each of the three elements of the defense

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In vicarious liability cases, defendants can assert the Faragher/Ellerth affirmative defense. With respect to each of the three elements, however, defendants always retain the burden of proof.

If a defendant does not prove both of the first two elements – that it promptly took both the necessary preventive action and the necessary corrective action – the affirmative defense cannot succeed.[49] Similarly, if a defendant does not prove the third element – that a plaintiff unreasonably failed to avoid harm – the affirmative defense will fail on that separate basis.[50]

A defendant cannot prove the third element simply by establishing a plaintiff never complained about the harassment. Inaccessible points of contact for making complaints, threats of retaliation, unnecessarily intimidating or burdensome procedures, or the perception that the complaint process is ineffective each could provide a reasonable basis for not reporting unlawful conduct.[51]

In other words, an employee does not have to demonstrate her conduct was reasonable concerning use of the employer's preventive or corrective procedures; rather, the defendant retains the burden of proving the employee's failure to avoid harm, if there was any such failure, was unreasonable.[52]

In recently reversing summary judgment, Judge Richard Posner of the Seventh Circuit reiterated that the adequacy of a defendant's harassment policies and procedures depends, in part, on the following:

> the capabilities of the class of employees in question. If they cannot speak English, explaining the complaint procedure to them only in English would not be reasonable. * * * Here as elsewhere in the law ***the known vulnerability of a protected class has legal significance.***[53]

The lack of sufficient preventive measures and the lack of sufficient corrective action each separately defeat the affirmative defense.[54] The United States Supreme Court and the Eighth Circuit have ruled the affirmative defense also fails when a plaintiff used the defendant's complaint procedure.[55] In any event, the Eighth Circuit has long that the three elements of the affirmative defense turn on fact-intensive inquiries "best ***left to the finder of fact.***"[56]

B. The Statutes And Ordinances Prohibit Quid Pro Quo Harassment

Quid pro quo harassment occurs – and, thus, the Faragher/Ellerth affirmative defense cannot apply – when a supervisor takes tangible employment action against an employee typically in the context of making sexual advances.[57]

Tangible employment action involves a significant change in employment status, but it need not have economic consequences.[58] Therefore, tangible employment action in the Eighth Circuit includes coerced submission to sexual demands to protect an employee's job or the recommendation of tangible employment action if an employee rejects sexual demands.[59] Other jurisdictions have followed this approach in the Eighth Circuit.[60] Generally, whether tangible action has been taken "is an ***issue of fact for the jury*** to determine."[61]

CONCLUSION

Defendants have potentially numerous defenses to harassment claims at their disposal. Although plaintiffs face significant challenges in pursuing harassment claims, savvy plaintiff counsel can enhance the likelihood of success by developing legal strategies and implementing litigation tactics that account for the nuances of, and differences between, Federal and State harassment law.

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[1] An earlier version of these materials was distributed to attendees of the Minnesota State Bar Association's CLE for attorneys and investigators with the United States Equal Employment Opportunity Commission, the Minnesota Department of Human Rights, and local civil rights enforcement agencies.

[2] N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980) (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 416-17 (1978)); see also Burlington North and Santa Fe Ry. Co. v White, 548 U.S. 53, 67 (2006) ("Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints. . . .").

[3] Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); see also McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 358 (1995) (citing Alexander with approval).

[4] Phelps v. Commonwealth Land Title Ins. Co , 537 N.W.2d 271, 277 (Minn. 1995).

[5] See, e.g., Ray v. Miller Meester Adver., Inc., 684 N.W.2d 404, 407-08 (Minn. 2004).

[6] 550 U.S. at 570.

[7] Twombly, 550 U.S. at 556 (citation omitted) (emphasis added); see also Neitzke v. Williams, 490 U.S. 319, 327 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations.").

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[8] 551 U.S. 89, 93 (2007) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
[9] 588 F.3d 585, 594 (8th Cir. 2009) (citing Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322-23 (2007)) (emphasis added).
[10] Id. at 594 (citations omitted) (emphasis added); see also Fed.R.Civ.P. 8(d)(1) ("Each allegation must be simple, concise, and direct. No technical form is required."); 8(e) ("Pleadings must be construed so as to do justice.").
[11] See, e.g., Donnelly Bros. Constr. Co., Inc. v. State Auto Property and Casualty Ins. Co., 759 N.W.2d 651, 660 (Minn.App. 2009) (citing Roberge v. Cambridge Coop. Creamery Co., 67 N.W.2d 400, 402 (Minn. 1954)) ("Minnesota is a notice-pleading state that does not require absolute specificity in pleading, but rather requires only information sufficient to fairly notify the opposing party of the claim against it.").
[12] See, e.g., Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 150 (2000) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)) (reversing judgment for the employer because "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.").
[13] Torgerson v. City of Rochester, __ F.3d __, 2010 WL 2010996, *7 (8th Cir. 2010) (emphasis added) (collecting Eighth Circuit cases); see also Whitson v. Stone County Jail, 602 F.3d 920, 924 (8th Cir. 2010) (citation omitted) (emphasis added) (reversing summary judgment in a civil rights case because "[t]he defendants have simply ***not established an absence of a genuine issue*** of material fact, which, as the moving party, is their burden.").
[14] Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); (citations omitted) (emphasis added).
[15] See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).
[16] See Minn.Stat. § 363A.02, Subd. 1(a)-(b) (emphasis added).
[17] Frieler v. Carlson Marketing Group, Inc., 751 N.W.2d 558, 572 (Minn. 2008) (citation omitted).
[18] Friend v. Gopher Co., Inc., 771 N.W.2d 33, 39 (Minn.App. 2009) (citing Anderson v. Hunter, Keith, Marshall & Co., Inc., 417 N.W.2d 619, 626-27 (Minn. 1988)) (emphasis added).
[19] Cummings v. Koehnen, 568 N.W.2d 418, 422 (Minn. 1997).
[20] Id. at 421.
[21] See, e.g., Ray, 684 N.W.2d at 408-09 (confirming that Minnesota courts reject federal precedent when inconsistent with the MHRA).
[22] See, e.g., Burlington Indus. v. Ellerth, 524 U.S. 742, 758-59, 764-65 (1998) (distinguishing between negligence liability, where the affirmative defense is unavailable, and vicarious liability, where the affirmative defense is available).
[23] Diaz v. Swift-Eckrich, Inc., 318 F.3d 796, 800 (8th Cir. 2003).
[24] Faragher v. Boca Raton, 524 U.S. 775, 786-87 (1998) (reaffirming the "severe-or-pervasive" standard governs); Ellerth, 524 U.S. 752 (same); Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78 (1998) (same); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (same); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (same); Wright v. Rolette County, 417 F.3d 879, 885 (8th Cir. 2005) (same); Baker v. John Morrell & Co., 382 F.3d 816, 828 (8th Cir. 2004) (same).
[25] Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1379 (8th Cir. 1996) (citations omitted); see also Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999) (citations omitted) (reversing summary judgment because "[h]arassment alleged to be because of sex need not be explicitly sexual in nature.").
[26] See, e.g., Pierce v. Rainbow Foods Group, Inc., 158 F.Supp.2d 969, 973 (D.Minn. 2001) (denying summary judgment because the supervisor touched the plaintiff in a sexual way once); EEOC Policy Guidance on Sex Harassment, No.: 915.050 (March 19, 1990), § (C)(2), 1990 WL 1104701, *9 (1990) (reiterating that one incident may violate Title VII).
[27] Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 270 (2001) (quoting United States Supreme Court cases); see also Sprint/United Mgmt. Co. v. Mendelsohn, 128 S.Ct. 1140, 1147 (2008) (remanding for trial and reaffirming the highly probative value of other-acts evidence); 29 C.F.R. § 1604.11(b) (promulgating that the fact-finder shall "look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.").
[28] Nat'l Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 118 (2002) (affirming judgment for the plaintiff and holding the plaintiff could recover for harassment occurring outside of the limitations period). Indeed, the Eighth Circuit has long construed the broad continuing violations doctrine liberally: "[i]n order for the charge to be timely, the employee need only file a charge [within the relevant time period] of any act that is part of the hostile work environment." Jensen v. Henderson, 315 F.3d 854, 859 (8th Cir. 2002) (citation omitted) (reversing summary judgment for the employer); see also Hathaway v. Runyon, 132 F.3d 1214, 1222 (8th Cir. 1998) (citation omitted) (reversing judgment for the employer and reaffirming that "exposure to harassing conduct need not have been continuous. . . .").
[29] Sandoval, et al. v. Am. Bldg. Maint. Indus., Inc., et al., 578 F.3d 787, 802, rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009) (emphasis added) (holding other-acts evidence is "***highly relevant*** to prove the sexual harassment was severe. . . ."); see also Williams v. Conagra Poultry Co., 378 F.3d 790, 794 (8th Cir. 2004) (affirming judgment for the plaintiff based, in part, on coworkers' testimony about their harassment complaints of which the plaintiff was unaware because "the testimony made more credible [the plaintiff's] testimony about the environment that he was exposed to."); Howard v. Burns, 149 F.3d 835, 838 (8th Cir. 1998) (citation omitted) (affirming judgment for the plaintiff and reiterating, "[w]e have considered harassment of employees other than the plaintiff to be relevant to show pervasiveness of the hostile environment.").
[30] Eich v. Bd. of Regents, 350 F.3d 752, 761 (8th Cir. 2003) (citation omitted) (emphasis added);

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see also Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 811 (11th Cir. 2010) (en banc) (reversing summary judgment for the employer because "words and conduct that are sufficiently gender-specific and either severe or pervasive may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff."); Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 605 (2nd Cir. 2006) (citation omitted) (emphasis added) (vacating summary judgment because "hostile work environment claims present 'mixed question[s] of law and fact' that are '***especially well-suited for jury determination***.'").

[31] Quick, 90 F.3d at 1378 (paraphrasing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986)) (emphasis added); Burns v. McGregor Elects. Indus., Inc., 989 F.2d 959, 963 (8th Cir. 1993) (reversing the ruling that the plaintiff could not find sexual comments in the workplace unwelcome because she posed nude in a magazine).

[32] Faragher, 524 U.S. at 791 (1998) (citation omitted) (reaffirming "the absence of actual notice of the harassment . . . [does not] result automatically in employer immunity.").

[33] Jenkins v. Winter, 540 F.3d 742, 749-50 (8th Cir. 2008) (reversing summary judgment for the employer); Diaz, 318 F.3d at 800 (same).

[34] Sandoval, 578 F.3d at 802 (holding other-acts evidence is "***highly relevant*** to prove . . . that [the employer] had constructive notice."); see also Faragher, 524 U.S. at 791 (confirming an employer may be liable when it has constructive knowledge of the harassment); Williams, 378 F.3d at 794 (citation omitted) ("Evidence of the extent of the hostile environment was thus probative on the matter of managerial motives."); Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 111 (3rd Cir. 1999), cert. denied 528 U.S. 1074 (2000) (citation omitted) (emphasis added) (affirming judgment for the plaintiff and reiterating that "[e]vidence of other acts of harassment is ***extremely probative*** as to whether . . . [the employer] knew or should have known that sexual harassment was occurring despite the formal existence of an anti-harassment policy.").

[35] Sims v. Health Midwest Physician Servs. Corp., 196 F.3d 915, 919-20 (8th Cir. 1999) (citation omitted) (reversing summary judgment for the employer).

[36] Id. at 919-21; see also Diaz, 318 F.3d at 801 (reversing summary judgment because the person to whom the plaintiff complained about harassment "apparently had the authority to discipline employees.").

[37] Ogden v. Wax Works, Inc., 214 F.3d 999, 1007 (8th Cir. 2000) (affirming judgment for the plaintiff and reaffirming the plaintiff reported harassment "when she told her supervisor [] to stop his offensive conduct."); Hall v. Gus Const. Co., Inc., 842 F.2d 1010, 1012, 1018 (8th Cir. 1988) (affirming judgment for the plaintiff and reasoning the employer had notice because, in part, the plaintiffs complained to the supervisor who was harassing them); see also Gorzynski v. Jetblue Airways Corp., 596 F.3d 93, 105 (2nd Cir. 2010) (vacating summary judgment for the employer because "there may be reasons why the plaintiff failed to complain to those other than the harasser, who are listed as available. And in such cases, a genuine issue of fact may be raised as to whether it was reasonable not to pursue other options."); Hurley, 174 F.3d at 104, 118 (holding that complaints to the harassing supervisor put the employer on notice of the harassment).

[38] Sandoval, 578 F.3d at 802 (citations omitted); see also Diaz, 318 F.3d at 801 (reasoning "a fact-finder could conclude that it was reasonable for [the plaintiff] to believe that [her supervisor] had a duty to report the harassment to others in the company."); Sims, 196 F.3d at 920-21 (citation omitted) (concluding the "information of the harassment had 'come to the attention of' someone who is reasonably believed to have a duty to pass on the information. . . .").

[39] See, e.g., Howard v. Winter, 446 F.3d 559, 569 (4th Cir. 2006) Loughman v. Malnati Org. Inc., 395 F.3d 404, 408 (7th Cir. 2005); Swinton v. Potomac Corp., 270 F.3d 794, 805 (9th Cir. 2001), cert. denied 535 U.S. 1018 (2002); Hurley, 174 F.3d at 118; Distasio v. Perkin Elmer Corp., 157 F.3d 55, 64-65 (2nd Cir. 1998); Williamson v. City of Houston, 148 F.3d 462, 467 (5th Cir. 1998).

[40] Engel v. Rapid City Sch. Dist., 506 F.3d 1118, 1126 (8th Cir. 2007); see also Karl v. Burlington N. R. Co., 880 F.2d 68, 76 (8th Cir. 1989) (citations omitted) ("It is well established . . . that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.").

[41] Engel, 506 F.3d at 1125.

[42] Id. at 1124.

[43] Phillips v. Taco Bell Corp., 156 F.3d 884, 889

(8th Cir. 1998) (emphasis added) (reversing summary judgment because whether the employer took prompt and effective action is "best ***left to the finder of fact***.").

[44] Thieman v. Johnson, 257 F.2d 129, 132 (8th Cir. 1958) (emphasis added) ("Negligence is generally a question of fact to be ***determined by the jury***."); see also Ellerth, 524 U.S. at 758-59, 764-65 (distinguishing between negligence liability and vicarious liability).

[45] Baker, 382 F.3d at 828.

[46] Ellerth, 524 U.S. at 747 (determining the harasser was a supervisor – even though he was "not amongst the decision-making or policy-making hierarchy" – because he could recommend hiring and promoting); Grozdanich v. Leisure Hills Health Center, Inc., 25 F.Supp.2d 953, 973 (D.Minn. 1998) (denying summary judgment and reiterating that an employee who can recommend discipline is a supervisor); EEOC Policy on Vicarious Liability, § III(A)(1), 1999 WL 33305874,*3 (1999) (confirming that a supervisor includes employees with power to recommend discipline).

[47] Faragher, 524 U.S. at 807-08 (concluding the harasser was a supervisor, despite having no authority to hire or fire, because he assigned and oversaw the plaintiff's daily work); Ellerth, 524 U.S. at 759 (reiterating that liability can be established by showing the harasser acted with apparent authority)

[48] Todd v. Ortho Biotech, Inc., 175 F.3d 595, 598 (8th Cir. 1999) (indicating that supervisory status may be a fact question); see also Phelan v. Cook Count, 463 F.3d 773, 783-84 (7th Cir. 2006) (reversing summary judgment so a jury can decide the fact dispute about whether the harasser is a supervisor).

[49] Faragher, 524 U.S. at 808-09 (ruling the employer could not establish the affirmative defense because it had failed to publicize its policies, its policies lacked reasonable complaint procedures, and it failed to monitor supervisory personnel); Weger v. City of Ladue, 500 F.3d 710, 719 (8th Cir. 2007) (citations omitted) ("The first element of the affirmative defense imposes two requirements on employers, they must have (1) exercised reasonable care to prevent harassment (the "prevention prong") and (2) promptly corrected any harassment that did occur (the "correction prong").").

[50] Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765; Phillips, 156 F.3d at 888.

[51] EEOC Policy on Vicarious Liability, § V(D)(1)(a)-(c), 1999 WL 33305874 at *16-17; see also Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

[52] Id.; Phillips, 156 F.3d at 888; Restaurant Co., 490 F.Supp.2d at 1049.

[53] EEOC v. V & J Foods, Inc., 507 F.3d 575, 578 (7th Cir. 2007) (citations omitted) (emphasis added). In other words, harassment policies and practices "must be reasonable and what is reasonable depends on 'the employment circumstances.'" Id. at 578 (quoting Faragher v. 524 U.S. 777, 778 (1998)); see also Wilson v. Tulsa Junior College, 164 F.3d 534, 541-42 (10th Cir. 1998) (affirming judgment for the plaintiff because the defendant's harassment policy was not suitable to the plaintiff's circumstances).

[54] Faragher, 524 U.S. at 808-09 (ruling the employer could not successfully assert the affirmative defense because the defendant failed to monitor supervisory personnel); Ogden, 214 F.3d at 1007 (affirming jury verdict for the plaintiff because the defendant minimized the plaintiff's complaints and performed a cursory investigation, thereby failing to prove the first elements of the affirmative defense); Plaetzer v. Borton Automotive, 2004 WL 2066770, *8 (D.Minn 2004) (JRT/JSM) (citations omitted) (denying summary judgment because "[s]imply forcing all new employees to sign a policy does not constitute 'reasonable care.' The employer must take reasonable steps in preventing, correcting and enforcing the policy."); see also Arrieta-Colon v. Wal-Mart Puerto Rico, Inc., 434 F.3d 75, 87 (1st Cir. 2006) (affirming the employer was not entitled to an affirmative defense because the employer lacked a meaningful policy and did not take adequate remedial action concerning complaints); Frederick v. Spring/United Management Co., 246 F.3d 1305, 1314-15 (11th Cir. 2001) (reversing summary judgment because of flaws in the employer's publication of its policy); Wilson v. Tulsa Junior College, 164 F.3d 534, 541 (10th Cir. 1998) (affirming judgment for the employee and ruling that the defendant's complaint procedure was inadequate because the alternative contact for complaints, the human resources director, was not available at night or at the worksite); Distasio, 157 F.3d at 65 (holding that the supervisor's failure to relay the complaint up the chain of command showed the defendant's corrective measures were inadequate).

[55] Faragher, 524 U.S. at 807 (ruling that using an employer's complaint procedure precludes the last element); Ellerth, 524 U.S. at 765 (same); Phillips, 156 F.3d at 888 (reversing summary judgment); see also Sims, 196 F.3d at 920 (citing Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996), cert. denied 519 U.S. 1110 (1997)) ("Notification of sexual harassment to an employer need not come solely from the victim of the harassment for knowledge to be imputed to the employer.").

[56] Phillips, 156 F.3d at 889 (emphasis added); see also EEOC v. Restaurant Co., 490 F.Supp.2d 1039, 1049 (D.Minn. 2007) (holding that the presence of the defendant's anti-harassment policy in all break rooms and orientation materials created a jury question on the first element and the plaintiff's long delay in complaining of the harassment "is a factual dispute [on the harm-avoidance element] appropriately decided by the jury.").

[57] Faragher, 524 at 808; Ellerth, 524 U.S. at 763-65.

[58] Kimbrough v. Loma Linda Development, 183 F.3d 782, 734 (8th Cir. 1999) (affirming judgment for the plaintiffs because the denial of extra work hours was a tangible employment action); see also Faragher, 524 at 808; Ellerth, 524 at 763-65.

[59] Escobar v. Swift and Co., 494 F.Supp.2d 1054, 1060 (D.Minn. 2007) (citing Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995)) (denying summary judgment and reiterating that tangible employment action includes making "submission to the unwelcome advances [] an express or implied condition [of employment]. . . .").

[60] EEOC Policy Guidance on Vicarious Liability, No. 915.002 (June 18, 1999), § III(A)(2), 1999 WL 33305874 at *5 (1999) (confirming that tangible employment action occurs when a supervisor recommends such action or the employee submits to the sexual demand of a supervisor to protect her job); see also Holly D v. California Institute of Technology, 339 F.3d 1158, 1169 (9th Cir. 2003) (quoting Burlington Industries v. Ellerth, 524 U.S. 742, 763 (1998)) (vacating summary judgment and reasoning that "[c]onditioning an employee's continued employment upon submission to sexual demands is not one of those 'circumstances where the supervisor's status makes little difference.' It directly involves the supervisor's ability to impose upon the employee the ultimate employment penalty-discharge-or to confer on her the ultimate employment benefit-the retention of her job."); Jin v. Metropolitan Life Ins. Co., 310 F.3d 84, 94 (2nd Cir. 2002) (vacating judgment for the employer because the plaintiff alleged the supervisor "used his authority to impose on [the plaintiff] the added job requirement that she submit to weekly sexual abuse in order to retain her employment" and that "[i]t was [the supervisor's] empowerment by [the defendant] as an agent who could make economic decisions affecting employees under his control that enabled him to force [the plaintiff] to submit to his weekly sexual abuse.").

[61] MacGregor v. Mallinckrodt, Inc., 373 F.3d 923, 928 (8th Cir. 2004) (citing Kim v. Nash Finch Co., 123 F.3d 1046, 1061-62 (8th Cir. 1997) and Davis v. City of Sioux City, 115 F.3d 1365, 1369 (8th Cir. 1997)) (affirming judgment for the plaintiff) (emphasis added).

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