Where We Go From Here In Harassment Cases: A Plaintiff Counsel's Perspective

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Introduction[1]

It has often been a difficult environment for plaintiffs in harassment cases – not just in how employers have chosen to defend such litigation but also in the outcome of those cases. Several recent decisions by Federal and State appellate courts, however, offer some hope for aggrieved employees and their counsel in harassment cases.

Although workplace harassment can, and does, occur based on an array of protected classes, sex harassment continues to be the most common form in the employment setting. Similarly, while quid pro quo harassment still afflicts workplaces, actionable conduct – especially beyond the sex-based strain – typically takes the form of hostile environment harassment.

Accordingly, the discussion below focuses mainly on precedent involving hostile environment claims in the sex harassment context. It warrants repeating, however, that the governing analysis in hostile environment cases is essentially the same whether the harassment is based on sex, race, religion, national origin, disability, or another protected class.

I. Prevailing Legal Theories in Hostile Environment Cases

There are two basic theories under which liability can be established in hostile environment cases: (1) the doctrine of vicarious liability, which considers whether a plaintiff employee unreasonably failed to avoid harm because an affirmative defense is available and (2) the doctrine of negligence liability, which focuses on the employer's – not a plaintiff employee's – conduct because no affirmative defense is available.

A. Vicarious Theory Of Liability: The "Easy" Approach For Plaintiffs

By making the employer liable for conduct of its supervisors, the concept of vicarious liability – in theory – makes it less challenging for plaintiffs to hold employers accountable for harassment.[2] Under this analytical approach, an employer can avoid liability if it successfully invokes an affirmative defense established by the United States Supreme Court.[3]

Importantly, an employer has the burden of proof on all 3 fact-intensive elements of the affirmative defense to vicarious liability:
(1) The employer took adequate preventive action;
(2) The employer took adequate corrective action; and
(3) The employee unreasonably failed to avoid harm.[4]

Nonetheless, it has become increasingly uncommon for plaintiffs to prevail under a vicarious theory of liability. Indeed, some courts have essentially ruled as if the existence of an anti-harassment policy or an employee's failure to follow an employer's formal complaint procedure in every respect effectively insulates an employer from vicarious liability. To the detriment of plaintiffs, certain courts also have defined supervisors as only those who actually hire and fire employees – a definition evidently contrary to existing law.[5]

The United States Supreme Court will decide this term who is a supervisor in employment cases going forward and, given the general disposition of the Court, the outlook is not positive for plaintiffs.[6] Even a pro-employer ruling in *Vance*, however, may not have the far-reaching deleterious impact on aggrieved employees that many advocates fear. In particular, given how readily courts have been to rule for employers under the affirmative defense, a negligence theory of liability is already becoming a more frequent path for plaintiffs.

B. Negligence Theory Of Liability: The Better Approach For Plaintiffs?

The employer has no affirmative defense to a plaintiff's claim of harassment under a negligence theory of liability because, under this alternative approach, the question is whether the employer knew or should have known – from the employee's initial report or otherwise – about the harassment and did not take immediate or adequate corrective action.[7]

The United States Supreme Court has long recognized that "the absence of actual notice of the

harassment . . . [does not] result automatically in employer immunity."[8] In other words, either actual or constructive knowledge confers notice of the harassment as well as the duty to take immediate and adequate corrective action.[9]

Accordingly, the Eighth Circuit has consistently held that an employee need not report a second time under the employer's harassment policy or use a second complaint mechanism to put an employer on notice of harassment.[10] The Eighth Circuit has so recognized even when the employee to whom the plaintiff complained about the harassment was the person who was harassing the plaintiff.[11]

Harassment claims prosecuted under a negligence theory of liability may offer more promise for at least 3 reasons. First, as mentioned above, no affirmative defenses to liability exists under this analytic approach. Second, whether an employer was negligent in handling the harassment at issue generally should be a fact question to be decided at trial.[12] Third, other-acts evidence – which, as discussed below in Part II.B, has recently been given greater importance in employment cases – can be especially helpful with proving an employer's failure to act timely and sufficiently after receiving notice of harassment.

II. Important Evidentiary Developments

A hostile work environment exists when a plaintiff shows either that the unwelcome harassment based on a protected class was severe or that it was pervasive and, thus, altered a term or condition of employment.[13]

Yet, both Federal and State courts have periodically referred to the standard as requiring the harassment to be "severe and pervasive" rather than "severe or pervasive." In some instances, the courts appear to have decided cases based on the whether the plaintiff could show that the harassment was both severe and pervasive.[14]

Despite such a challenging legal environment for plaintiffs, several recent developments offer some hope to plaintiffs going forward in harassment cases.

A. Evidence Of Explicit Conduct And Animus Based On A Protected Class Are Not Necessary For A Harassment Claim To Succeed

The United States Supreme Court has held that actionable harassment based on sex goes beyond behavior of a sexual nature: "***harassing conduct need not be motivated by sexual desire*** to support an inference of discrimination on the basis of sex."[15]

Likewise, the Eighth Circuit has consistently rejected the notion that harassment must be explicit and turn on class-based animus:

> 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.[16]

State courts across the nation have ruled similarly.[17]

In a recent sex harassment case, however, the Minnesota Court of Appeals essentially held that the conduct at issue must be overtly sexual to support a hostile environment claim.[18] The Chief Judge of the Court of Appeals authored the opinion, so the decision was especially noteworthy.

Fortunately for plaintiffs everywhere, the Minnesota Supreme Court reversed the Minnesota Court of Appeals in *LaMont* concerning the governing legal standard. In particular, the Minnesota Supreme Court ruled that a hostile environment exits even when the sex-based harassment is not sexual in nature or motivated by sexual desire.[19]

B. Other-Acts Evidence – Including Conduct By Different Supervisors In Different Facilities – Is "Highly Probative" Of Harassment Claims Even When A Plaintiff Is Unaware Of The Other-Acts Evidence

In a landmark harassment case, the Eighth Circuit held as follows regarding other-acts evidence of which the plaintiffs were unaware until the discovery phase of litigation:

> 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.***[20]

The Eighth Circuit's ruling in *Sandoval* reflects a progressive extension of prior precedent and relevant regulations.[21]

Recent Eight Circuit and Minnesota Court of Appeals decisions continue to follow this more liberal approach to other-acts evidence. In *Williams v. Herron*, 687 F.3d. 971,

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[1]An earlier version of this article appeared in the 2012 Labor & Employment Law Institute manual.

[2]See generally Faragher v. Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998).

[3]Id.

[4]Faragher, 524 U.S. at 807-09; Phillips v. Taco Bell Corp., 156 F.3d 884, 888-89 (8th Cir. 1998); See also EEOC Policy Guidance on Vicarious Liability, No. 915.002 (June 18, 1999), § V(C), 1999 WL 33305874 at *8 ("Even the best policy and complaint procedure will not alone satisfy the burden of proving reasonable care if, in the particular circumstances of a claim, the employer failed to implement its process effectively.").

[5]Ellerth, 524 U.S. at 747(holding that the harasser was a supervisor because he could recommend hiring and promoting); EEOC Policy on Vicarious Liability, § III(A)(1), 1999 WL 33305874,*3 (1999) (confirming that a supervisor includes employees with power to recommend discipline); see also Pennsylvania State Police v. Suders, 542 U.S. 129, 144 (2004) (citation omitted) (reiterating that hiring, firing, failing to promote, reassigning employees, and other tangible employment actions are "within the special province of the supervisor."); 29 U.S.C. § 152 (11) ("The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees. . . .").

[6]Vance v. Ball State Univ., U.S., No. 11-556, cert. granted 6/25/12.

[7]See, e.g., Ellerth, 524 U.S. at 758-59, 764-65 (distinguishing between negligence liability, where the affirmative defense is unavailable, and vicarious liability, where the affirmative defense is available); See also Karl v. Burlington Northern 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.").

[8]Faragher, 524 U.S. at 791 (1998) (citation omitted); see also Engel v. Rapid City School District, 506 F.3d 1118, 1123 (8th Cir. 2007) (citations omitted) (reaffirming that an employer is liable for harassment when it "knows or should have known of the conduct, unless it can show that it took immediate action and appropriate corrective action.").

[9]See, e.g., Diaz v. Swift-Eckrich, Inc., 318 F.3d 796, 800-01 (8th Cir. 2003) (reversing summary judgment for the employer because the person to whom the plaintiff complained about harassment "apparently had the authority to discipline employees."); Sims v. Health Midwest Physician Services Corp., 196 F.3d 915, 919-20 (8th Cir. 1999) (citation omitted) (reversing summary judgment for the employer, reasoning that when "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.").

978 (8th Cir. 2012), the Eighth Circuit affirmed the judgment for the plaintiff. In rendering its decision, the Eighth Circuit reasoned that ***"this court has long held harassment directed towards other [employees] is relevant and must be considered."***[22]

Similarly, in *Rasmussen v. Two Harbors Fish Co.*, 817 N.W.2d 189, 202 (Minn. Ct. App. 2012), the Minnesota Court of Appeals reversed the district court's judgment for the employer at the close of trial. Contrary to the trend in many Federal and State courts, the Minnesota Court of Appeals ruled that the conduct at issue was sufficient to create a hostile environment despite minimal touching and other physical conduct by the harasser.[23] That multiple employees experienced similar treatment seemed to drive the analysis that yielded the reversal of judgment for the employer.[24] Note, however, that the Minnesota Supreme Court recently agreed to review this decision by the Minnesota Court of Appeals.

III. Emerging Legal Strategies and Litigation Tactics for Plaintiffs

Despite the recent positive developments, it remains a difficult environment for plaintiffs in harassment cases in both Federal and State court.[25]

Therefore, plaintiff counsel would be wise to consider retooling their strategies and tactics in harassment cases, including the following:

1. Focus pre- and post-suit discovery more on uncovering the full-range of disparate-treatment evidence based on a protected class, not just on conduct that is overtly sexual, racial, and so forth;

2. Focus pre- and post-suit discovery more on uncovering all potential other-acts evidence that will provide further context and legal significance to the disparate treatment of the plaintiff(s); and
3. Focus pre- and post-suit discovery more on uncovering all evidence of workplace-related authority possessed by the harasser(s) and any employee(s) to whom the plaintiff(s) complained about the harassment to bolster the case for employer notice regarding the harassment.

Depending on the outcome of pre-suit discovery, plaintiff counsel should also consider whether pursuit of retaliatory harassment claims makes sense.[26]

Retaliatory harassment claims could provide fertile ground because the United States Supreme Court has expanded and aggressively enforced anti-retaliation protections in recent years.[27]

Given the acceleration of corporate consolidation as well as the dynamics of the ongoing Great Recession, plaintiff counsel should aggressively investigate – both pre- and post-suit – if 2 or more companies are actually an integrated enterprise or joint employer. Whether one company has sufficient control of another entity to be liable for harassment claims turns on a four-factor standard first adopted by the Eighth Circuit in *Baker v. Stuart Broad. Co.*, 560 F.2d 389, 392 (8th Cir. 1977) and reaffirmed emphatically by *Sandoval*, 578 F.3d at 792-93: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership or financial control. A jury ordinarily should decide whether an entity possesses enough control to be an employer.[28]

Significantly, "Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority.'"[29] Consequently, the Eighth Circuit and nearly every other Circuit as well as the United States Equal Employment Opportunity Commission define "employer" broadly:

> "Title VII of the Civil Rights Act of 1964 is to be accorded a liberal construction in order to carry out the purposes of Congress. . . ." ***In particular***, "[s]uch ***liberal construction*** is also to be ***given to the definition of 'employer.'***"[30]

Because approximately 75 percent of employment cases nationally, on average, are dismissed at the summary judgment stage, plaintiff counsel must also continue to emphasize the fact-intensive nature of harassment claims that should preclude summary judgment for the employer. In that regard, the United States Supreme Court and the Eighth Circuit have held that "[t]he question whether particular conduct was indeed unwelcome will turn largely on credibility determinations ***committed to the trier of fact.***"[31]

In addition, the Eighth Circuit has repeatedly reaffirmed that, "once 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.***"[32]

Conclusion

Although plaintiffs still encounter substantial obstacles when pursuing harassment claims, several recent developments should enable plaintiffs to have more success going forward. In particular, under both Federal and State law, harassing conduct need not be explicit or turn on class-based animus in order to be actionable. Moreover, other-acts evidence is now deemed to be "highly probative" regarding both the existence of harassment and an employer's notice thereof. These evidentiary advances should enable plaintiff counsel to use more effectively the strategies and tactics outlined above to prosecute harassment claims.

[10]Weger v. City of Ladue, 500 F.3d 710, 721 (8th Cir. 2007) (citation omitted) ("When an employer has a clear and published policy that outlines the procedures an employee must follow to report suspected harassment and the complaining employee follows those procedures, actual notice is established."); See also Howard v. Winter, 446 F.3d 559, 569 (4th Cir. 2006) (reversing summary judgment for the employer because the plaintiff's conversation with a human resources staffer might have put the employer on notice); Loughman v. Malnati Organization Inc., 395 F.3d 404, 408 (7th Cir. 2005) (reversing summary judgment for the employer by rejecting the argument that the plaintiff "should have reported the incidents to more senior managers when they happened."); Swinton v. Potomac Corp., 270 F.3d 794, 805 (9th Cir. 2001), cert. denied 535 U.S. 1018 (2002) (citations omitted) (affirming judgment for the plaintiff because the person to whom the plaintiff complained had "an official or strong de facto duty to act as a conduit to management for complaints about work conditions."); Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 118 (3rd Cir. 1999), cert. denied 528 U.S. 1074 (2000) (holding that the plaintiff need not make a second report or use a second complaint mechanism "because her immediate supervisor, who was responsible for preventing and redressing harassment pursuant to the [the employer's] own policy, was on notice of the harassment."); Distasio v. Perkin Elmer Corp., 157 F.3d 55, 64-65 (2nd Cir. 1998) ("We reject this attempt to shift the company's failure to respond onto the plaintiff's shoulders. When a plaintiff reports harassing misconduct in accordance with company policy, she is under no duty to report it a second time before the company is charged with knowledge of it."); Williamson v. City of Houston, 148 F.3d 462, 467 (5th Cir. 1998) (citation omitted) (affirming the jury verdict for the plaintiff because "[a]n employer cannot use its own policies to insulate itself from liability by placing an increased burden on a complainant to provide notice beyond that required by law.").

[11]Ogden v. Wax Works, Inc., 214 F.3d 999, 1007 (8th Cir. 2000) (ruling that 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) (reasoning that the employer had notice because, in part, the plaintiffs complained to the supervisor who was sexually harassing them); see also Hurley, 174 F.3d at 104, 118 (holding that complaints to the harassing supervisor put the employer on notice of the sex harassment); Jenson v. Eveleth Taconite Co., 130 F.3d 1287, 1301 (8th Cir. 1997), cert. denied 524 U.S. 953 (1998) (affirming judgment against the employer because first-line supervisors had actual knowledge of the sex harassment).

[12]See, e.g., Phillips, 156 F.3d at 889 (emphasis added) (reversing summary judgment for the employer because whether the employer took timely and sufficient action is "best ***left to the finder of fact***."); see also 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***.").

[13]Faragher, 524 U.S. at 786-87 (reaffirming that the severe-or-pervasive standard governs); Ellerth, 524 U.S. at 752 (same); Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 78 (1998) (same); Harris v. Forklift Systems, 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).

[14]See generally EEOC v. CRST Van Expedited, Inc., 679 F.3d 657 (8th Cir. 2012).

[15]Oncale, 523 U.S. at 80 (emphasis added) (reversing summary judgment for the employer); see also EEOC v. National Educ. Ass'n, 422 F.3d 840, 845 (9th Cir. 2005) (reversing summary judgment for the employer because "[t]he district court erred in holding that the 'because of . . . sex' element of the action requires that the behavior be either 'of a sexual nature' or motivated by 'sexual animus.'").

[16]Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1379 (8th Cir. 1996) (citations omitted) (reversing summary judgment for the employer); see also Fuller v. Fiber Glass Systems, LP, 618 F.3d 858, 864 (8th Cir. 2010) (citations omitted) (emphasis added) (upholding the jury verdict for the plaintiff because she experienced racial harassment "***even if the conduct was not inherently racial***."); Carter v. Chrysler Corp., 173 F.3d 693, 701 (8th Cir. 1999) (citations omitted) (reversing summary judgment for the employer because "[h]arassment alleged to be because of sex need not be explicitly sexual in nature."); Hall, 842 F.2d at 1014 (citation omitted) (emphasis added) (affirming judgment for the plaintiffs because "[w]e have ***never held that sexual harassment*** or other unequal treatment of an employee or group of employees that occurs because of the sex of an employee ***must***, to be illegal under Title VII, ***take the form of sexual advances or*** of other incidents with clearly sexual overtones.").

[17]See, e.g., Payne v. Children's Home Society of Washington, Inc., 892 P.2d 1102, 1105 (Wash. App. Div. 3, 1995) (citation omitted) ("When gender-based harassment is not of a sexual nature, but is a term or condition of employment, it too unfairly handicaps the employee against whom it is directed and creates a barrier to sexual equality in the workplace. A court-imposed requirement that the conduct be explicitly sexual to be actionable would be contrary to the purpose of [the statute]."); see also generally City of San Antonio v. Cancel, 261 S.W.3d 778 (Tex. Ct. App. 2008); Speedway SuperAmerica, LLC, v. Dupont, 933 So.2d 75 (Fla. App. 5 Dist. 2006); DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13 (R.I. 2005); Nava v. City of Santa Fe, 103 P.3d 571 (N.M. 2004); Hampl v. Food Ingredients Specialists, Inc., 729 N.E.2d 726 (Ohio 2000); Willis v. Wal-Mart Stores, Inc., 504 S.E.2d 648 (W. Va. 1998); McIntyre v. Manhattan Ford, Lincoln, Mercury, Inc., 669 N.Y.S.2d 122 (N.Y. Sup. Ct. 1997); Alphonse v. Omni Hotels Management Corp., 643 So.2d 836 (La. App. 4 Cir. 1994); Accardi v. Superior Court, 21 Cal.Rptr.2d 292 (Cal. App. 2 Dist. 1993); Lehman v. Toys R Us, Inc., 626 A.2d 445 (N.J. 1993); Huch v. McCain Foods, 479 N.W.2d 167 (S.D. 1991).

[18]LaMont v. Independent Sch. Dist. No. 728, 2011 WL 292131, *2 (Minn. Ct. App. 2011)

[19]LaMont, 814 N.W.2d at 19 ("[W]e agree with [the plaintiff] that the [Minnesota Human Rights Act] permits a hostile work environment claim based on sex, separate and apart from its prohibition of sexual harassment that creates a hostile work environment.").

[20]Sandoval, et al. v. Am. Bldg. Maint. Indus., Inc., et al., 578 F.3d 787, 802, 803 rhrg. and rhrg. en banc denied 578 F.3d 787 (8th Cir. 2009) (reaffirming that other-acts evidence is "highly relevant to prove the sexual harassment was severe. . . .").

[21]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) (upholding 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."); see also Sprint/United Management Co. v. Mendelsohn, 552 U.S. 379, 388 (2008) ("The question whether evidence of discrimination by other supervisors is relevant . . . is fact based and depends on many factors. . . ."); Clark County School Dist. v. Breeden, 532 U.S. 268, 270 (2001) (quoting Supreme Court cases) ("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". . . .'"); Hurley, 174 F.3d at 111 (affirming judgment for the plaintiff because the harassment of third-parties – of which the plaintiff was unaware – was probative of the plaintiff's claims); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) (emphasis in original) ("One of the critical inquiries in a hostile ***environment*** claim must be the environment. Evidence of a general work atmosphere therefore – as well as evidence of specific hostility directed toward the plaintiff – is an important factor in evaluating the claim."); 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.").

[22]Id. at 976 (citing 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); see also Watson v. CEVA Logistics U.S., Inc., 619 F.3d 936, 943 (8th Cir. 2010) (reversing summary judgment for the employer, in part, because "slurs and other incidents evidencing racial animus were directed at co-workers in the same protected group.").

[23]Rasmussen, 817 N.W.2d at 199-202.

[24]Id. at 201 (citations omitted) ("[A]ll of these employees quit jobs that they testified they otherwise liked – and that they needed – because of [the supervisor's] actions. *** The sheer quantity and quality of his sexual conduct goes well beyond mere boorish or chauvinistic behavior.").

[25]See, e.g., CRST, 679 F.2d at 687 (affirming that highly offensive sexual propositioning, repeated boasting of past sexual exploits, and vulgar sexual remarks by the plaintiffs' respective "Lead Driver" while performing overnight/cross-country trucking duties with the plaintiffs did not establish a hostile environment); LaMont, 814 N.W. 2d. at 22-24 (ruling that multiple offensive remarks to the plaintiff, the prohibition of the plaintiff and other female employees from speaking in the workplace, the segregation of the plaintiff and other female employees in the workplace, and the requirement that only the plaintiff and other female employees obtain permission before taking a break in the workplace was insufficient to create a hostile environment).

[26]See generally Jensen v. Potter, 435 F.3d 444 (3rd Cir. 2006) (recognizing that the employee who raised a complaint of harassment or discrimination is a "protected employee" who can bring a retaliatory harassment claim against her employer under Title VII for subsequent offensive and negative treatment by her supervisors or coworkers); see also Minn. Stat. § 363A.15.

[27]See, e.g., Thompson v. North Amer. Stainless, LP, 131 S.Ct. 863, 868 (2011) (holding, in a unanimous opinion announced by Justice Scalia, that adverse action against a third party can support a retaliation claim by the plaintiff); Crawford v. Metropolitan Government of Nashville, 129 S. Ct. 846, 849 (2009) (ruling that Title VII's anti-retaliation provision protects employees from retaliation when employees merely participate in an employer's internal investigation of a potential Title VII violation); Gomez-Perez v. Potter, 553 U.S. 474, 478-79 (2008) (essentially reading an anti-retaliation provision, in an opinion authored by Justice Alito, into the Age Discrimination in Employment Act); Burlington North and Santa Fe Ry. Co. v. White, 548 U.S. 53, 69 (2006) ("We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters.").

[28]Boire v. Greyhound Corp., 376 U.S. 473, 481 (1981).

[29]N.Y. Gaslight Club, Inc. v. Carey, 447 U.S. 54, 63 (1980) (citation omitted).

[30]Sandoval, 578 F.3d at 792-93; (quoting Baker v. Stuart Broad. Co., 560 F.2d 389, 391 (8th Cir. 1977)) (emphasis added); see also Torres-Negron v. Merck & Co., Inc., 488 F.3d 34, 42 (1st Cir. 2007); Kang v. U. Lim America, Inc., 296 F.3d 810, 815 (9th Cir. 2002); Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999); Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761, 763-64 (5th Cir. 1997); Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235, 1241 (2nd Cir. 1995); Johnson v. Flowers Industries, Inc., 814 F.2d 978, 981-82, n.1 (4th Cir. 1987); Armbruster v. Quinn, 711 F.2d 1332, 1338 (6th Cir. 1983), abrogated on other grounds 546 U.S. 500 (2006); see also 42 U.S.C. § 2000e-1(c)(1), (3) (codifying reliance on the Baker factors for determining whether a domestic company will be liable for Title VII violations by a foreign company).

[31]Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1378 (8th Cir. 1996); (paraphrasing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986)) (emphasis added); Burns v. McGregor Electronics Industries, 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]Eich v. Board of Regents, 350 F.3d 752, 761 (8th Cir. 2003) (citation omitted) (emphasis added); see also Schiano v. Quality Payroll Sys., Inc., 445 F.3d 597, 605 (2nd Cir. 2006) (citation omitted) (emphasis added) (vacating summary judgment for the employer because "hostile work environment claims present 'mixed question[s] of law and fact' that are '***especially well-suited for jury determination***.'").