

A09-1501

State of Minnesota
In Court of Appeals

Trisha Geist-Miller,

Appellant,

v.

Ronald Mitchell and Sun Place Tanning Studios, Inc.,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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STATEMENT OF ISSUES

- I. Whether the Alleged Sexual Harassment Plaintiff Contends Is Sufficiently “Severe and Pervasive” to Constitute a Hostile Work Environment.
- II. Whether Appellant’s Affidavit Which Contradicts Her Deposition Should Be Allowed to Prove Severe and Pervasive.
- III. Whether Respondents Are Entitled to a Defense That the Employer Had a Sexual Harassment Policy and Whether Plaintiff Aailed Herself of It.

STATEMENT OF THE CASE

Appellant first brought this claim as a charge to the Minnesota Department of Human Rights on November 19, 2004. (RA¹ 212.) On March 24, 2005, the Department dismissed that charge. (RA 163.)

Appellant then filed suit in state court in Olmsted County. On June 16, 2006, Respondents removed the case to federal court based on federal questions arising from Appellant's Title VII claims. She was deposed in that action. In response to a summary judgment motion in federal court, Appellant provided an memorandum in opposition to the motion supported by an affidavit alleging all of her claims. She also dismissed all of her claims except for her claims under the Minnesota Human Rights Act ("MHRA"). As a result, on October 20, 2006, the federal court dismissed the Title VII claims and the common law claims with prejudice and remanded the MHRA claims back to Olmsted County. (RA 227.)

On June 26, 2007, the Olmsted County District Court, the Honorable Debra A. Jacobson presiding, dismissed Plaintiff's MHRA claims pursuant to a motion for summary judgment and entered judgment in favor of Respondents. (RA 17.)

This Court affirmed part of the district court decision, holding that Plaintiff had not been retaliated against, nor had she been subjected to *quid pro quo* harassment. This means that Plaintiff's loss of her job was not caused by either alleged sexual harassment or

¹ "RA" refers to Respondent's Appendix.

retaliation for proposing alleged sexual harassment. This Court remanded on two issues. First, the case of *Frieler v. Carlson Marketing Group*, 751 N.W.2d 558, 568 (Minn. 2008), was decided after the district court granted summary judgment. The *Frieler* case reconstituted the test for both a hostile work environment and sexual harassment, and did not require that the employer knew or should have known of the harassment. (Slip Op. at 5, RA 261.) Instead, the defendant is entitled to raise a “defense to liability or damages” under the United States Supreme Court cases of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), (hereinafter referred to as the “*Ellerth/Faragher* defense”). *Id.* at 6. Second, this Court indicated that the district court did not reach the issues as to whether “the harassment was not severe or pervasive enough to support liability.” *Id.*

On remand, the district court, the Honorable Debra A. Jacobson presiding, granted Respondents’ motion for summary judgment on June 18, 2009, finding that the alleged conduct of Respondent Mitchell was not actionable and that Respondents were entitled to the *Ellerth/Faragher* defense. (RA 1.)

This appeal followed.

STATEMENT OF FACTS

Appellant was an employee of Sun Place Tanning Studios. Appellant makes a number of allegations of harassment and discriminatory practices against Sun Place Tanning Studios and its owner, Ronald Mitchell. Although Respondents deny the allegations of sexual harassment against them, for purposes of the motion for summary judgment only, Respondents accepted Appellant's allegations as true so as not to create an issue of material fact.

Appellant worked as a general manager and then a salon manager for Respondent Sun Place Tanning Studios, Inc., from November 1994 through December 3, 2003.

A. Alleged Incidents Appellant Testified to During Her Deposition.

Appellant was deposed on March 2, 2006 for approximately five hours. (AA² 16, 88.) She was asked about all of her allegations.

On August 26, 2003, after drinking with Mitchell in a bar, Appellant was driving home with him when Mitchell suggested they "run away together." Appellant denied that Mitchell touched her at all during this occasion. (Ex. C, Appellant's Depo. at 22-30, RA 28-30.)

On September 17, 2003, Mitchell allegedly told Appellant about a dream that he and Appellant were married and had children. Again, Mitchell did not touch her on this occasion. (*Id.* at 31-32, RA 30.)

² "AA" refers to Appellant's Appendix.

On October 13, 2003, Mitchell allegedly suggested that Appellant and he run away together and he put his arm around her. (*Id.* at 32, RA 30.)

On October 14, 2003,³ Katie Koch, an adjoining business owner, asked Appellant, in front of Mitchell and others, whether Mitchell and Appellant had had sex. (*Id.* at 34-35, RA 31.) Appellant did not object to this statement, nor did she complain about it. (*Id.*) Mitchell then joked, “seeing that we had sex, maybe we should run away and continue having sex?” (*Id.* at 35, RA 31.)

On October 20, 2003, Appellant claims that Mitchell brushed his arm across “my butt.” (*Id.* at 37, RA 32.) Her notes of that day state that it was against her back. (Ex. D, Employee Incident Report dated October 20, 2003, RA 48-49.) The notes also state that “Ron and Sandy were at the office today and both upset.” (*Id.*) Mitchell later put his arm around Appellant and, while discussing business, told Appellant that everything was going to be all right. (Ex. C at 37-41, RA 32-33.) It is important to note that all of this occurred while Mitchell’s wife was in the same room. (*Id.*)

As to other alleged incidents, most notably a yelling match in November allegedly between Mitchell and another co-worker, none of those incidents were of a sexual nature. (*Id.* at 43-46, RA 33-34.) Specifically, the comments that were made at the Deer Creek Racetrack were made not to Appellant or any employee, but was a story Appellant was told

³ Appellant’s exhibit states that the incident occurred on October 14, 2003, but variously stated October 15 in her deposition.

by a co-employee. (*Id.* at 60-62, RA 35-36.) The comments were not made at a company function.

Before these incidents occurred, Appellant contends that Mitchell allegedly said to a co-employee, "I don't care if Trisha is in the back pleasuring herself or if she is up here vacuuming." (*Id.* at 68, RA 37.) Appellant understood that this was a joke and was not something to be taken seriously. (*Id.* at 72-73, RA 38-39.) In fact, Appellant replied to Mitchell, "sarcastically" that that was not a nice thing to say. (*Id.* at 74, RA 39.) In addition, Appellant stated that at some unknown time Mitchell warned another manager not to wear a certain shirt because it made her nipples show. (*Id.* at 109-10, RA 46.)

Other than these incidents, Appellant testified in her deposition that she knew of no other incidents involving Mitchell relating to sexual harassment or sexual behavior. (Ex. C at 67,72, RA 37-38.)

B. Incidents Alleged after Deposition.

Appellant was deposed on March 2, 2006 for approximately five hours. (AA⁴ 16, 88.) She was asked about all of her allegations. On page 10 of Appellant's brief, Appellant contends that she was "confused" by the questions and that she "had additional information." However, this is nowhere in the record. In fact, Appellant did not say this at all. Appellant was asked at one point in her deposition whether there were any other issues of sexual harassment:

⁴ "AA" refers to Appellant's Appendix.

Q: So if I am clear, other than what you've showed us in the exhibits, Mr. Mitchell didn't sexual harass you or make sexual comments or touch you in a sexual fashion between August of 2003 and December of 2003?

A: I don't remember.

(Ex. C at 67, RA 37.)

She provided the same answer when asked later in her deposition about any other incidents that may have occurred anytime. (*Id.* at 72, RA 38.)

When faced with summary judgment, Appellant unleashed several new, more significant incidents.⁵

Appellant's Brief identifies seventeen incidents of alleged sexual harassment. The first five (incidents 1-5 in Appellant's brief at 7-8) were first disclosed in handwritten notes, exhibit 5 attached to an affidavit submitted just prior to the motion for summary judgment. AA 106. These notes were never submitted to Respondent before that time and were completed after the deposition. Interestingly, the only date that is on these were "between 1996 & 1997." AA 106.

⁵ To survive a motion for summary judgment, Appellant must establish the existence of material facts through substantial evidence. *DLH Inc. v. Russ*, 566 N.W.2d 60, 64 (Minn. 1997). A fact is material if it will affect the outcome of the case and the evidence is substantial if it might allow reasonable persons to reach different conclusions. *Id.* at 65. A self-serving affidavit that contradicts damaging deposition testimony cannot serve to support a claim or defense and is insufficient to create a genuine issue of material fact. *Banbury v. Omnitrition Intern., Inc.*, 533 N.W.2d 876 (Minn. App. 1995).

The first incident Appellant identifies was when Mitchell touched her hair and told her she should wear her hair down more often. Appellant has not identified when this alleged event occurred, or whether or not it was a single isolated event from early on in her employment.

The date on incident 5 in Appellant's brief (at 8) is dated February 26, 2003. This refers to an incident report that Appellant chose not to give this court but which was submitted to the district court, exhibit 6 (RA 268-69) In it Mitchell changed the locks on the business office, he gave her a key asking her to protect him. There is nothing sexual about this occurrence. Moreover, in the same not, she documented that Mitchell "hasn't been answering my phone calls – He must be mad . . ." RA 269.

C. Appellant Does Not Demonstrate Through Her Conduct That All the Incidents Were Uninvited or Applied to Her.

The date on incident 5 in Appellant's brief (at 8) is dated February 26, 2003. This refers to an incident report that Appellant chose not to give this court but which was submitted to the district court, exhibit 6 (RA 268-69) In it Mitchell changed the locks on the business office, he gave her a key asking her to protect him. There is nothing sexual about this occurrence. Moreover, in the same not, she documented that Mitchell "hasn't been answering my phone calls – He must be mad . . ." RA 269.

In addition, Appellant identifies two instances where Mitchell spoke to her about their future children together. There were no sexual acts or inappropriate touching alleged in connection with these incidents.

An incident on October 2003 (incident 9, Appellant's brief at 9) when Katie Koch asked if Appellant and Mitchell had slept together, this question was posed by Katie Koch and does not involve any behavior on the part of Mitchell.

Appellant describes on October 15, 2003, (incident 10, Appellant's brief at 9-10) an incident where Mitchell said "seeing that we have had sex, maybe we should run away and continue having sex." Appellant testified that she understood this to be a joke. (Ex. C at 35, RA 31.)

Appellant's testimony on incident 11 (Appellant's brief at 11) was that on October 20, 2003, Appellant claims that Mitchell brushed his arm across "my butt." (*Id.* at 37, RA 32.) Her notes of that day state that it was against her back. (Ex. D, Employee Incident Report dated October 20, 2003, RA 48-49.) The notes also state that "Ron and Sandy were at the office today and both upset." (Ex. C at 35, RA 32.) It is hardly likely that Mitchell would be sexually harassing Appellant while his wife was standing there.

In incident 12 on November 25, 2003, where Mitchell stated "everyone was talking to Sandra Mitchell," (Appellant's brief at 12) was not sexual and Appellant was not present when the comment was made. Nor was she present during incident 13 at the party at Deer Creek Speedway, but was told the story by a friend.

Appellant also testified about incident 15 (Appellant's brief at 11-12), that she understood Mitchell to be joking when he stated "he didn't care if [she] was in the back pleasuring herself so long as she was getting her vacuuming done." (Ex. C at 72-73, RA 38-39.)

Finally, the comment by Mitchell about a female employee's nipples showing through her shirt (incident 16, Appellant's brief at 11-12) was to address what type of dress was inappropriate for work. This is a legitimate concern of a business owner.

D. Appellant Did Not Report Harassment.

In the present case, Sun Place Tanning had a sexual harassment policy. In fact, Appellant herself was involved in the creation of the policy with Sun Place's owners and attorneys. The sexual harassment policy states:

Harassment will not be tolerated. This includes, but is not limited to, slurs, jokes, verbal, graphic, or physical conduct relating to any individuals race, color, sex, religion, national origin, age or disability. This also includes sexual advances, requests for sexual favors, unwelcome or offensive touching and other verbal, graphic, or physical conduct of a sexual nature. Violation of this policy will result in any disciplinary action needing to take place and/or termination. It is the employee's responsibility to bring any harassment complaint or concern to any management, upper management, corporate office, or our human resources department's attention right as it happens. Do not assume the company is aware of any harassment in which it occurs. Our management staff consists of Erin Tyson at our France location, Ty Smith at our Arden Hills location, Ted Burr at our Valley West location, Shelley Gingerich at our Oxboro location, Veronica Standish at our Burnsville location, Angela White at our Apple Valley location, Heather Dabelstein at our Rochester Northwest location, Jennie Fratto at our Rochester South location, and Mandy Henderson at our Rochester Northeast location. The upper management staff includes the General Manager, Trisha Geist-Miller. Our Corporate office and Human resources department includes Jo Heeren and Denys Rain.

(Ex. E, Employee Regulations, RA 50.)

Appellant was not General manager at the time these incident reports were created.

AA 20. The incident reports Appellant refers to were never given to anyone, nor did Appellant tell anyone about them. (Ex. C at 75-78, RA 39-40.) Appellant did not tell Sandra Mitchell about any sexual harassment before she left Respondents' employ. (*Id.* at 85-86, RA 41.) There is no evidence that management knew of any complaints from the Appellant about Mitchell's alleged behavior, or that Appellant ever threatened him with any type of sexual harassment claim or reported this alleged sexual harassment to anyone. (*Id.* at 75-78, RA 39-40.) These notes were never in any files of the company, according to Denys Rain, the office manager. (Ex. F, Rain Depo. at 23-30, RA 56-58.) There is no evidence whatsoever that management knew about these notes. (Ex. G, R. Mitchell Depo. at 97-113, 150-51, RA 61-65, 68.)

STANDARD OF REVIEW

The standard of review on appeal from a grant of summary judgment is well-known to this court. This is a *de novo* determination. *Washington v. Milbank Ins. Co.*, 562 N.W.2d 801, 804 (Minn. 1997). A reviewing court must consider two questions: (1) whether any genuine issues of material fact exist and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990); *Warntnick v. Moss & Barnett*, 490 N.W.2d 108, 112 (Minn. 1992). In this case there is no issue of material fact. Therefore, the only question for this court to consider is whether the district court erred in its application of the law.

ARGUMENT

I. APPELLANT HAS FAILED TO STATE A CLAIM FOR ACTIONABLE HARASSMENT.

Minnesota courts use the *McDonnell-Douglas* analysis to determine whether a violation of the MHRA has occurred. *Hubbard v. United Press Int'l, Inc.*, 330 N.W.2d 428, 441 (Minn. 1983). Under this analysis, the employee has the initial burden of establishing a *prima facie* case of discrimination. *Id.* at FN 12. If the employee establishes a *prima facie* case, the burden then shifts to the employer to articulate a legitimate, non-discriminatory reason for any adverse employment action. *Id.* The employee must then demonstrate that the stated reason is instead a pretext for discrimination. *Id.*

“‘Sexual harassment’ includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature” and is actionable when it substantially interferes with a person’s employment or creates a hostile and intimidating work environment. Minn. Stat. § 363A.03. Not every sexual comment in the workplace becomes sexual harassment. *Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997). *See also Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 967 (8th Cir. 1999) (“Title VII was not designed to create a federal remedy for all offensive language and conduct in the workplace”). “To determine whether actionable sex discrimination exists in a given case, all the circumstances surrounding the conduct alleged to constitute sexual harassment, such as the nature of the

incidents and the context in which they occurred, should be examined.” *Continental Can Co. v. State*, 297 N.W.2d 241, 249 (Minn. 1980). The courts should consider the “nature, frequency, intensity, location, context, duration, and object or target” of the conduct. *Klink v. Ramsey County by Zacharias*, 397 N.W.2d 894, 901 (Minn. App. 1986) (addressing sexual harassment), abrogated on other grounds by *Cummings v. Koehnen*, 568 N.W.2d 418, 420 n. 2 (Minn. 1997).

A plaintiff must also demonstrate that the alleged harassment affected a term, condition or privilege of employment. To do so, a plaintiff must show that the harassment was so severe as to alter her employment and create an abusive working environment. “In order to demonstrate that the harassment affected a term, condition, or privilege of employment, a plaintiff will have to show the harassment was “so severe or pervasive” as to ‘alter the conditions of the [plaintiff’s] employment and create an abusive working environment.’” *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558, 571 (Minn. 2008) quoting *Goins v. West Group*, 635 N.W.2d 717, 726 (Minn. 2001). See also *Klink v. Ramsey County by Zacharias*, 397 N.W.2d 894 (Minn. App. 1986).

A. Minnesota Courts Look to Federal Cases Interpreting Title VII When Interpreting the MHRA.

Appellant alleges that her causes of action under the Minnesota Human Rights Act (“MHRA”) are broader than those that were asserted under Title VII, and that the Title VII caselaw cited by Respondents is not controlling. “Minnesota courts have regularly construed the MHRA in accordance with Title VII.” *Meads v. Best Oil Co.*, 725 N.W.2d

538, 545 (Minn. App. 2006); *Benassi v. Back & Neck Pain Clinic, Inc.*, 629 N.W.2d 475, 480 (Minn. App. 2001). When interpreting cases under the MHRA, this court gives weight to federal court interpretations of Title VII claims because of the substantial similarities between the two statutes. *Wayne v. MasterShield, Inc.*, 597 N.W.2d 917, 921 (Minn. App. 1999).

This is true today as this court has recently held that federal cases interpreting Title VII are helpful in resolving MHRA sexual harassment claims because the definition of sexual harassment tracks with federal caselaw. *Frieler*, 751 N.W.2d at 568.

B. Appellant Cannot Show the Alleged Harassment was Severe and Pervasive.

Appellant has identified nine instances in her deposition which she uses to support her sexual harassment claim. Importantly, one of the instances occurred outside of Appellant's presence and did not involve her at all.⁶ The other eight instances involve either comments made by Mitchell concerning the Appellant or a single puckering gesture. Appellant has only claimed one instance of allegedly inappropriate touching, where she contends that Mitchell put his arm around her, and an instance of Mitchell brushing against her. This conduct is not sufficiently severe or pervasive to be actionable sexual harassment.

⁶ An employee of Sun Place reported to Appellant that Mitchell was involved in rude behavior at the speedway. See *Statement of Facts*, above.

In the following cases the courts have found the conduct not “severe and pervasive” and therefore, insufficient as a matter of law to constitute actionable sexual harassment. In *Duncan v. General Motors Corp.*, the claimant alleged four or five instances of brief hand touching, a single request for a relationship, a request to draw a planter shaped like a penis, and teasing regarding the Man-Haters club, including hanging a poster indicating claimant was the president of such club and asking her to type the draft of the club’s beliefs. *Duncan v. GMC*, 300 F.3d 928, 934-935 (8th Cir. 2002). The court held that evidence failed to show that the conduct was so severe and extreme as to alter the terms or conditions of employment. *Id.* The court in *Duncan* also cited to a number of other cases where the courts have found the conduct insufficient as a matter of law to constitute sexual harassment:

Numerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here. *See, e.g., Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 872, 874 (5th Cir.) (holding that several incidents over a two-year period, including the comment “your elbows are the same color as your nipples,” another comment that plaintiff had big thighs, repeated touching of plaintiff’s arm, and attempts to look down the plaintiff’s dress, were insufficient to support hostile work environment claim). . . *Adusumilli v. City of Chicago*, 164 F.3d 353, 357, 361-62 (7th Cir. 1998) (holding conduct insufficient to support hostile environment claim when employee teased plaintiff, made sexual jokes aimed at her, told her not to waive at police officers “because people would think she was a prostitute,” commented about low-necked tops, leered at her breasts, and touched her arm, fingers, or buttocks on four occasions. . . *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823-24, 826 (6th Cir.) (reversing jury verdict and holding behavior merely offensive and insufficient to support hostile

environment claim when employee reached across plaintiff, stating “nothing I like more in the morning than sticky buns” while staring at her suggestively; suggested to plaintiff that parcel of land be named “Hootersville,” “Titsville,” or “Twin Peaks”; and asked “weren’t you there Saturday night dancing on the tables?” while discussing property near a biker bar), cert. denied, 522 U.S. 865, (1997); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (holding no sexual harassment when plaintiff’s supervisor asked plaintiff for dates, asked about her personal life, called her a “dumb blond,” put his hand on her shoulder several times, placed “I love you” signs at her work station, and attempted to kiss her twice at work and once in a bar). *Id.*

In *Alagna*, the claimant complained that a co-worker had made over twenty calls to her home to discuss his marital problems and relationships, visited her office frequently and told her that he purposely kept the door open during their visits so that people would not “think things about us,” frequently touched her arm and looked her up and down telling her that he loved her, or that she was “very special.” *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 977-979 (8th Cir. 2003). In addition, the co-worker would wait outside of the claimant’s office and stare at her as she walked by. *Id.* This conduct continued to occur for more than a year. *Id.* The court, however, held that while the conduct was inappropriate, it was “not sufficiently severe or pervasive to satisfy the high threshold for actionable harm.” *Id.* at 980. *See also Ottman v. City of Independence*, 341 F.3d 751, 760 (8th Cir.2003) (concluding the district court erred in finding a triable issue for the jury where the conduct consisted of belittling and sexist remarks on almost a daily basis).

In *Smith v. Ashland, Inc.*, the court recognized that tasteless banter does not amount to sexual harassment. 179 F. Supp.2d 1065, 1068 (D. Minn. 2000). Similarly, the court in *Ferguson v. Michael Foods* held that a supervisor's remarks in calling an employee "his girl" and making several lewd comments regarding women at the company were not harassment and that the comments were merely off-hand in nature. 74 F. Supp. 2d 862, 869 (D. Minn. 1999). Immature and unprofessional comments do not rise to the level of sexual harassment. *Henthorn v. Capitol Communs., Inc.*, 359 F.3d 1021, 1027-1028 (8th Cir. 2004). The court in *Henthorn* reasoned that continuous requests by a co-worker to go out with him were repetitive and annoying but not physically threatening. *Id.* In contrast, pervasive sexual innuendoes combined with repetitive sexual touching continuing over a period of seven years does constitute sexual harassment. *Eich v. Bd. of Regents*, 350 F.3d 752, 755-56 (8th Cir. 2003) (finding conduct sufficiently severe when plaintiff was frequently touched in numerous suggestive ways and was subject to simulated sex acts). The allegations made by Appellant in this action are not severe or pervasive enough to rise to the level of sexual harassment. The incidents identified by the Plaintiff occurred over a short time period of only two to three months, unlike the seven years considered in *Eich*.

Recently, in *Takkunen v. Sappi Cloquet LLC*, 2009 WL 1287323 (D.Minn. 2009), the federal district court in Minnesota again discussed this issue while addressing a supervisor's (Began) conduct:

While Began tugged on Takkunen's shorts, ran his fingers through her hair, asked inappropriate questions about her sex life and breasts, and made improper sexual gestures and

invitations, Began's comments were "neither severe nor pervasive enough to create a hostile work environment." *Woodland v. Joseph T. Ryerson & Son, Inc.*, 302 F.3d 839, 844 (8th Cir.2002) (internal quotation marks omitted). Nor was the behavior "sufficiently derogatory or demeaning to permit a finding that [it] altered the terms of [Takkunen's] employment." *Breeding v. Arthur J. Gallagher & Co.*, 164 F.3d 1151, 1159 (8th Cir.1999). Takkunen was not physically threatened and was reasonably able to perform her job responsibilities. While Began may have been "boorish, chauvinistic, and decidedly immature," his actions did not create "an objectively hostile work environment." *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 935 (8th Cir.2002). (RA 238-239.)

Id., RA 238-39.

Moreover, the comments alleged by the Appellant were not physically threatening. Unprofessional or tasteless comments alone are not sufficient to give rise to an actionable claim for sexual harassment. *Smith*, 179 F. Supp.2d at 1068; *Ferguson*, 74 F. Supp. 2d at 869; *Henthorn*, 359 F.3d at 1027-1028. Nor does the frequency of the allegations support a finding of sexual harassment. *See Scusa*, 181 F.3d at 967 (nine incidents were neither individually nor collectively severe and pervasive enough to alter a term, condition or privilege of employment).

The hostile-work-environment cause of action "is limited to extreme work conditions," *Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 579 (8th Cir.1999). For example, in *LeGrand v. Area Resources for Community and Human Services*, the Eighth Circuit determined that the plaintiff did not suffer from severe or pervasive sexual harassment when he was asked to watch pornographic movies with a board member and

“jerk off,” was kissed on the mouth, had his buttocks and thigh grabbed, and experienced a suggestive reach toward, and brush-up against, his genitals. 394 F.3d 1098, 1100-03 (8th Cir.2005). In finding that this behavior was not severe or pervasive, the court noted that “[n]one of the incidents [were] physically violent or overtly threatening.” *Id.* at 1102.

The incidents identified by Appellant in support of her claims of sexual harassment are merely unpleasant conduct and/or rude comments. These instances occurred over a short period of time, and were neither severe nor physically threatening. In addition, Mitchell’s off-hand remarks were not accompanied by constant or repetitive physical touching. There was only one instance of physical touching alleged by the Appellant where Mitchell was alleged to have put his arm around the Appellant’s shoulder. Appellant’s allegations, even if taken as true, have failed to allege an actionable claim of sexual harassment and should therefore be dismissed.

C. Appellant Was Not Subjectively Harassed.

The conduct alleged to be harassing must be sufficient to create a hostile environment, both as it would be viewed objectively by a reasonable person and as it was actually viewed subjectively by the victim. *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840 (8th Cir. 1998).

Appellant does not demonstrate through her conduct that all the incidents were uninvited or applied to her. The date on incident 5 in Appellant’s brief (at 8) is dated February 26, 2003. This refers to an incident report that Appellant chose not to give this court but which was submitted to the district court, exhibit 6 (RA 268-69) In it Mitchell

changed the locks on the business office, he gave her a key asking her to protect him.

There is nothing sexual about this occurrence. Moreover, in the same not, she documented that Mitchell “hasn’t been answering my phone calls – He must be mad . . .” RA 269.

In addition, Appellant identifies two instances where Mitchell spoke to her about their future children together. There were no sexual acts or inappropriate touching alleged in connection with these incidents.

An incident on October 2003 (incident 9, Appellant’s brief at 9) when Katie Koch asked if Appellant and Mitchell had slept together, this question was posed by Katie Koch and does not involve any behavior on the part of Mitchell.

Appellant describes on October 15, 2003, (incident 10, Appellant’s brief at 9-10) an incident where Mitchell said “seeing that we have had sex, maybe we should run away and continue having sex.” Appellant testified that she understood this to be a joke. (Ex. C at 35, RA 31.)

Appellant’s testimony on incident 11 (Appellant’s brief at 11) was that on October 20, 2003, Appellant claims that Mitchell brushed his arm across “my butt.” (Ex. C at 37, RA 32.) Her notes of that day state that it was against her back. (Ex. D, Employee Incident Report dated October 20, 2003, RA 48-49.) The notes also state that “Ron and Sandy were at the office today and both upset.” (*Id.*) It is hardly likely that Mitchell would be sexually harassing Appellant while his wife was standing there.

In incident 12 on November 25, 2003, where Mitchell stated “everyone was talking to Sandra Mitchell,” (Appellant’s brief at 12) was not sexual and Appellant was not present

when the comment was made. Nor was she present during incident 13 at the party at Deer Creek Speedway, but was told the story by a friend.

Appellant also testified about incident 15, that she understood Mitchell to be joking when he stated "he didn't care if [she] was in the back pleasuring herself so long as she was getting her vacuuming done." (Ex. C at 72-73, RA 38-39.)

Finally, the comment by Mitchell about a female employee's nipples showing through her shirt was to address what type of dress was inappropriate for work. This is a legitimate concern of a business owner.

Accordingly, Appellants claims that she was harassed lie largely in claims she was not a part of or did not subjectively believe were harassing.

D. Appellant's Cases Are Inapposite.

Appellant has not proven that the alleged harassment was severe and pervasive because Appellant has not substantially distinguished the facts of the present case from the controlling caselaw. Under the United States Supreme Court's decision in *Harris v. Forklift Systems, Inc.*, a plaintiff must show a hostile work environment existed through factors such as: the frequency and severity of the conduct; conduct that is physically threatening or humiliating; or that unreasonably interferes with the employee's work performance. 510 U.S. 17, 23, 114 S.Ct. 367, 371 (1993). In the present case, Appellant has only alleged that Respondent Mitchell's conduct amounted to jokes or offhand comments, some of which were not sexual in nature or did not refer directly to the Appellant, and one instance where Respondent put his arm around Appellant. Appellant

therefore has failed to demonstrate that the alleged improper conduct was physically threatening or humiliating, or that it unreasonably interfered with the performance of her work. Because Appellant has failed to demonstrate severe and pervasive harassment under these factors, the court should grant summary judgment.

Appellant cites *Moring v. Arkansas Department of Correction* as authority that a single instance of improper conduct may constitute harassment. However, the facts in *Moring* were singularly egregious: the plaintiff and defendant were away from the workplace on a business trip, the conduct took place inside the plaintiff's hotel room in which the defendant sat on the plaintiff's bed, touched her thigh and attempted to kiss her; the defendant was suggestively clad in only a bathrobe; and the plaintiff's subjective impression was that she was in immediate physical danger, leading her to eventually barricade herself in the room. *Moring v. Arkansas Dept. of Corrections*, 243 F.3d 452, 454-455 (8th Cir. 2001). None of these facts are applicable in this case: Appellant has not alleged that Respondent Mitchell was physically threatening or attempting to use force to coerce sexual favors.

Similarly, Appellant cites *Hathaway v. Runyon* for the proposition that two instances of inappropriate touching were sufficient to constitute a hostile work environment. However, the *Hathaway* court noted that "no single factor is required or determinative" as to whether an environment is hostile. 132 F.3d 1214, 1221 (8th Cir. 1998). In *Hathaway*, the behavior was not limited to the two instances above but also

included eight months of additional inappropriate conduct, such as other employees' staring at the plaintiff and making suggestive growling noises. *Id.* at 1222.

Appellant attempts to rely on the Eighth Circuit's willingness to permit a jury question on the issue of a hostile work environment in *Rorie v. United Parcel Service, Inc.*, 151 F.3d 757 (8th Cir. 1998). However, *Rorie* is distinguishable. The *Rorie* court readily admitted that the instances of the plaintiff's supervisor "frequently" brushing up against the plaintiff, telling her she "smelled good" and patting her on the back, *id.* at 759, were on the "borderline" of conduct constituting harassment. *Id.* at 762. *Rorie* does not describe what "frequently" and, presumably were more numerous times than in the instant case. Furthermore, the court acknowledged its motive for remanding the case was to bring the case in line with the *Ellerth* and *Faragher* decisions from the United States Supreme Court, which permit additional liability defenses to the employer. *Id.* Thus, *Rorie* symbolizes the cases at the end of the spectrum where conduct could be considered borderline harassment: "McFadden frequently told her that she smelled good, patted her on the back, and brushed up against her." *Id.* at 759 This is in excess than what the record shows here. There is more than sufficient case law to establish the Eighth Circuit's intent to not find harassment in isolated instances of inappropriate conduct: compare *Duncan v. General Motors Corp.*, 300 F.3d 928 (8th Cir. 2002) (including citations to controlling case law of other jurisdictions); *Algana v. Smithville R-II Sch. Dist.*, 324 F.3d 975 (8th Cir. 2003); *Ottman v. City of Independence*, 341 F.3d 751 (8th Cir. 2003); *Henthorn v.*

Capitol Communs., Inc., 359 F.3d 1021 (8th Cir. 2004); and *Eich v. Bd. Of Regents*, 350 F.3d 752 (8th Cir. 2003).⁷

Appellant has insufficient authority to demonstrate the alleged behavior in the present case rises to a level of conduct which the courts have deemed to constitute a hostile work environment. Appellant's argument that the "isolated instances amount to a course of conduct" fails because Appellant cannot show that the conduct itself was physically threatening or humiliating, such as in *Moring*, or that it unreasonably interfered with her work performance, as it did in *Hathaway*. Because Appellant cannot show that the alleged conduct created a hostile work environment, this case was appropriately dismissed via summary judgment.

II. APPELLANT MAY NOT CONTRADICT HER DEPOSITION TESTIMONY WITH ADDITIONAL HARASSMENT CLAIMS.

To survive a motion for summary judgment, a plaintiff must establish the existence of material facts through substantial evidence. *DLH Inc. v. Russ*, 566 N.W.2d. 60, 64

⁷ Appellant contends that a quote from *Howard* indicates that all sexual harassment claims should go to the jury. However, this quote is misinterpreted. It does not suggest that claims cannot be disposed of via summary judgment. The quote in *Howard* was only to suggest that "a jury's decision must generally stand unless there is trial error." *Howard*, 149 F.3d at 841. Moreover, this quote is actually from *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir. 1997). It correctly noted that juries must be provided specific guidelines for sexual harassment, not that they have a right to determine all such claims. It states previously in the opinion, "Evidence of conduct that creates a workplace permeated with 'discriminatory intimidation, ridicule, and insult' establishes a hostile environment claim under federal law. Title VII does not, however, create a cause of action for all unpleasant or abusive behavior in the workplace." *Id.*, citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

(Minn. 1997). A fact is material if it will affect the outcome of the case, and the evidence is substantial if it might allow reasonable persons to reach different conclusions. *Id.* at 65. A self-serving affidavit that contradicts damaging deposition testimony cannot serve to support a claim or defense and is insufficient to create genuine issue of material fact. *Banbury v. Omnitrition Intern., Inc.*, 533 N.W.2d 876 (Minn. App. 1995) citing *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir.1983).

The first five (incidents 1-5 in Appellant's brief at 7-8) were first disclosed in handwritten notes, exhibit 5 attached to an affidavit submitted just prior to the motion for summary judgment in federal court. AA 106. These notes were never submitted to Respondent before that time and were completed after the deposition. Interestingly, the only date that is on these were "between 1996 & 1997." AA 106.

Appellant's Affidavit contradicts her deposition testimony.⁸ At her deposition, Appellant was questioned extensively about the alleged harassment she claimed occurred. At several points, Appellant was asked whether she knew of any other harassing incidents other than those to which she had testified. She did not. *See, e.g.* Ex. C at 66-67, RA 37. Appellant now produces an affidavit listing numerous other incidents. This is not a simple case of clarifying testimony, but a blatant case of adding testimony.

⁸ As argued in Respondent's original memorandum, a self-serving affidavit that contradicts damaging deposition testimony cannot serve to support a claim or defense and is insufficient to create genuine issue of material fact. *Banbury v. Omnitrition Intern., Inc.*, 533 N.W.2d 876 (Minn. App. 1995). *See DLH Inc. v. Russ*, 566 N.W.2d. 60, 65 (Minn. 1997).

It should be noted that Appellant's Affidavit was drafted in March 2007, in the face of Respondent's first motion for summary judgment. In other words, she utilized it to manufacture additional claimed incidents of harassment when she realized that the incidents she had recounted did not amount to sexual harassment.

In *Camfield*, the Eighth Circuit offered the following rationale:

If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own earlier testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Camfield Tires, Inc. v. Michelin Tire Corp., 719 F.2d 1361, 1365 (8th Cir.1983); accord *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir.1991) ("party may not * * * create a material issue of fact by submitting an affidavit disputing his own prior sworn testimony"); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir.1975) (inconsistent statements of party did not create genuine issue of fact).

A subsequent affidavit may, however, raise a factual issue where the deposition itself reveals confusion or mistake; such an affidavit is not inherently inconsistent with the deposition, but rather seeks to explain it. *Camfield*, 719 F.2d at 1364-65.

This is not a case, as Appellant suggests, of simply clarifying testimony. In her deposition, Appellant did not suggest that in addition to the nine incidents of alleged harassment, there were other instances in which she could not recall, for example: the

time, place, or some minor detail requiring clarification. This is the wholesale invention of a number of incidents that almost double her original count which she had documented.

On page 10 of Appellant's brief, Appellant contends that she was "confused" by the questions and that she "had additional information." However, neither this word nor any intimation of it is in the record. In fact, Appellant did not say this at all. Appellant was asked at one point in her deposition whether there were any other issues of sexual harassment:

Q: So if I am clear, other than what you've showed us in the exhibits, Mr. Mitchell didn't sexual harass you or make sexual comments or touch you in a sexual fashion between August of 2003 and December of 2003?

A: I don't remember.

(Ex. C at 67, RA 37.)

She provided the same answer when asked later in her deposition about any other incidents.

(*Id.* at 72, RA 38.) Instead, Appellant now alleges after the deposition and when faced with summary judgment many more significant incidents and severe allegations.⁹

Nor is this a case where Appellant had to refresh her recollection by looking at documents. The instances that were recounted in her deposition were well-documented,

⁹ Appellant also suggests that she provided additional allegations in her deposition correction sheet. However, she was not "correcting" her deposition but, instead, adding new allegations. Nonetheless, these allegations appear to be between "1996-1997." (AA 121.) Unlike the deposition, these are unsworn allegations. Only until Appellant being faced with summary judgment did she make these specific allegations that directly contradicted her sworn testimony.

and these were all of the documents that have ever been produced by Appellant to date. The other incidents could not have come from any other documents because Appellant has produced no documents to support her new recollections. This is indeed a case where Appellant's adding of incidents is not merely clarifying her previous testimony, but adding to and changing her testimony.

Accordingly, Appellant's Affidavit should be rejected as simply an attempt to avoid summary judgment.

III. RESPONDENT IS ENTITLED TO THE *ELLERTH/FARAGHER* DEFENSE.

The *Ellerth/Faragher* defense is stated by the Minnesota Supreme Court as follows:

[T]he employer may raise an affirmative defense to liability or damages if it proves by a preponderance of evidence:

- (1) That the employer exercised reasonable care to prevent and correct promptly any sexual harassment behavior, and
- (2) That the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm otherwise.

Frieler, 751 N.W.2d at 568, citing *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

An employer generally has this defense available where it has a sexual harassment policy which instructs an employee to report sexual harassment, and the employee fails to report sexual harassment. "[P]roof that an employer had promulgated an antiharassment

policy with complaint procedure is not necessary in every instance,” *Id.*, but “distribution of a valid antiharassment policy provides compelling proof that [an employer] exercised reasonable care in preventing and promptly correcting sexual harassment.” *Weger v. City of Ladue*, 500 F.3d 710, 719 (8th Cir. 2007) (internal quotation marks and citations omitted). *See also Adams v. O'Reilly Automotive, Inc.*, 538 F.3d 926, 929 (8th Cir. 2008).

An employer generally has this defense available where it has a sexual harassment policy which instructs an employee to report sexual harassment, and the employee fails to report sexual harassment. In the present case, Sun Place Tanning had a sexual harassment policy. In fact, Appellant herself was involved in the creation of the policy with Sun Place’s owners and attorneys. The sexual harassment policy states:

Harassment will not be tolerated. This includes, but is not limited to, slurs, jokes, verbal, graphic, or physical conduct relating to any individuals race, color, sex, religion, national origin, age or disability. This also includes sexual advances, requests for sexual favors, unwelcome or offensive touching and other verbal, graphic, or physical conduct of a sexual nature. Violation of this policy will result in any disciplinary action needing to take place and/or termination. It is the employee’s responsibility to bring any harassment complaint or concern to any management, upper management, corporate office, or our human resources department’s attention right as it happens. Do not assume the company is aware of any harassment in which it occurs. Our management staff consists of Erin Tyson at our France location, Ty Smith at our Arden Hills location, Ted Burr at our Valley West location, Shelley Gingerich at our Oxboro location, Veronica Standish at our Burnsville location, Angela White at our Apple Valley location, Heather Dabelstein at our Rochester Northwest location, Jennie Fratto at our Rochester South location, and Mandy Henderson at our Rochester Northeast location. The upper management staff includes the General Manager, Trisha Geist-

Miller. Our Corporate office and Human resources department includes Jo Heeren and Denys Rain.

(Ex. E, Employee Regulations, RA 50.)

As for the second part of the defense, Appellant “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807, 118 S.Ct. 2275.

A showing that an employee failed to avail herself of a proper complaint procedure “will normally suffice to satisfy the employer’s burden under the second element of the defense.” *Id.* at 807-08, 118 S.Ct. 2275. Appellant created numerous pieces of documentation about alleged sexual harassment, but she provided them to no one. She did not report it. Thus, Respondent is entitled to this defense and is entitled to summary judgment based on the fact that Appellant failed to properly report the alleged sexual harassment.

This court, in determining no *quid pro quo* harassment occurred, shows that there was no tangible loss (ie. termination, etc.) Slip op. at 7-8. Appellant instead suggests the defense is not available where the alleged harasser is an owner or officer of the company. Appellant’s reliance on the discussion in *Faragher* regarding absolute liability for a corporate officer or owner is dicta and is not part of the holding. The dicta that Appellant cites discusses when a person within the employer is a “proxy” of the employer. *Id.* at 790-91. However, it further stated that any supervisor is also a “proxy” of the employer. *Id.* Thus, the difference between an owner and supervisor vanishes. In fact, the holding

specifically includes supervisors with immediate or “successively higher authority over the employee.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (parenthesis omitted). Thus, the employer is allowed the defense when any of its “proxies” are alleged to have committed harassment, from line supervisors up.

Respondent is allowed the *Ellerth/Faragher* defense. Appellant must admit that Sun Place had a reasonable sexual harassment policy and that it provided multiple persons for employees to contact with complaints. At the time of the alleged sexual harassment, Appellant complained to no one. Accordingly, Respondent is provided a complete defense in that it could not investigate the claimed harassment because it was not reported.

Appellant does not deny this scenario. Appellant may instead contend that because she would be complaining against an owner of the company, that her complaints would be fruitless. Such claims, however, do not have precedent. At the time of the alleged sexual harassment, the company was owned by two persons, Ronald Mitchell and Sandra Mitchell. In addition, there were managers in the company to whom Appellant could have complained.

Two undisputed facts show that she could have complained to Sandra Mitchell. The first fact is that the reason for Appellant’s termination was Appellant’s refusal to cut off communication with Mrs. Mitchell long after the alleged harassment ended. (Affidavit of Ron Mitchell, RA 73.¹⁰) Second, Appellant, in fact, complained to Sandra Mitchell after

¹⁰ This affidavit was provided to the court with the first memorandum.

she was terminated. (Appellant's Depo. at 107-08, RA 92.¹¹) While she did not complain to Mrs. Mitchell about alleged harassing behavior, she had no problem complaining to Mrs. Mitchell about the circumstances of her termination.¹²

Moreover, she could also have complained to persons below the Mitchells, for example Jo Heeren and Denys Rain. (Ex. E, RA 50.)

Accordingly, Appellant's claim that she could not have complained is unavailing.¹³ The plain truth is that there was a sexual harassment policy which she was instrumental in creating. She could have complained to one of the co-owners Mrs. Mitchell, for example, or to any person in management, such as Heeren or Rain, but she chose not to do so. Accordingly, the *Ellerth/Faragher* defense should bar Appellant's claims.

¹¹ She never complained to Mrs. Mitchell during the time of the alleged harassment. (Appellant's Depo. at 86, RA 41.) She also states she complained to Denys Rain, but that was not about the incidents in 2003. She simply states she discussed "things Ron said" prior to 2001. (AA 68-70.)

¹² One would think that complaining to a wife about her husband's alleged sexual harassment would be the most effective complaint of all. However, she did not make this complaint.

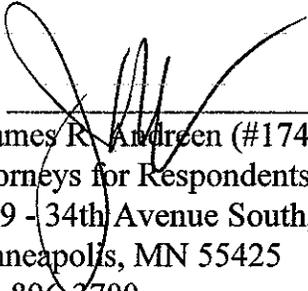
¹³ Her claim that she reported it to herself in an attempt to avoid this result is specious. There is no provision for reporting the harassment to oneself in order to avoid the defense nor would any court accept such a claim (and Appellant cites no authority that supports such a concept). This is because that idea of reporting is to avoid keeping the evidence to oneself and to allow the company to eliminate the harassment. Therefore, reporting to someone else is paramount.

CONCLUSION

For the reasons set forth above, the judgment of the district court should be affirmed.

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