Plenary Monday

Sexual Harassment - New Case Decisions, New and Evolving Prevention & Response Strategies

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Employment Law Institute – May, 2018

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1. INTRODUCTION

Despite the media attention to and public discourse about sexual harassment over the past months, there has been little change in the direction of federal and state case law. These materials set out some of the more significant cases of the last year, with emphasis on federal appellate court decisions and state appellate decisions in the upper Midwest region. Legislative and regulatory developments, which have in some instances been more affected by public attention to sexual harassment, are also presented, with particular attention paid to those jurisdictions and agencies that have imposed new standards for employers – public and private – faced with allegations of workplace harassment. Finally, we address the ways in which media scrutiny and the #MeToo and #TimesUp movements may be affecting employer responses to harassment complaints and may in the future affect case law.

2. CASE LAW DEVELOPMENTS

A. Federal Cases

i. ***Blake v. MJ Optical, Inc.***, 870 F.3d 820 (8th Cir. 2017).

Bobbette Blake worked for MJ Optical. Marty Hegge was vice president, one step above Blake's direct supervisor. For many years, Blake and Hegge had a personable relationship that extended outside the workplace. However, following the funeral of Blake's husband in 1999, Blake alleged that Hegge's conduct created a hostile work environment. Blake alleged that Hegge would frequently slap and grab her buttocks, told her that she "needed to find a man," and once made explicit comments about her nipples. Blake alleged that Hegge would also make disparaging comments about her age. Following an incident during which Hegge became very angry, Blake complained to Mary Hegge, Marty's mother and president of MJ Optical. Blake was sent home with pay, but called the next day to resign, citing Hegge's "noncontrollable" anger. Blake subsequently sued MJ Optical, alleging sex and age discrimination and a hostile work environment in violation of federal and state law. The district court granted MJ Optical's motion for summary judgment and Blake appealed.

The Eighth Circuit affirmed the district court's holding that Blake could not support her discrimination claims because she quit just after complaining to MJ Optical and without giving her employer a chance to remedy the problem. The Eighth Circuit pointed out that Blake continued to work with Hegge for almost 15 years without once complaining to him or anyone else. During those 15 years, Blake and Hegge joked around with one another and occasionally said they loved each other. When Blake finally did complain about how Hegge treated her, she did not mention any of the conduct she claimed created a hostile work environment. The Eighth Circuit found Blake's single complaint to be "too little, too late," and affirmed the district court's grant of summary judgment to MJ Optical.

ii. ***Equal Employment Opportunity Comm'n v. CRST Van Expedited, Inc.***, 277 F. Supp. 3d 1000 (N.D. Iowa 2017).

This case involves the fee award in a class action lawsuit brought by EEOC against large interstate trucking firm for hostile work environment sexual harassment of female long-haul driver in violation of Title VII. The Supreme Court granted certiorari and reversed the Eighth Circuit holding that a litigant must obtain a preclusive judgment on the merits to be a "prevailing party" under Title VII. The Supreme Court held that a prevailing party must be the beneficiary of a "material alteration of the legal relationship of the parties" such that the party had "fulfilled its primary objective." The Supreme Court remanded to the Eighth Circuit, which remanded to the federal district court to evaluate the award of fees to CRST in light of the Supreme Court decision.

District Court Judge Reade ruled that CRST was not required to obtain a preclusive judgment on the merits to be considered a prevailing party for the award of fees, since it had fulfilled its primary objective when certain claims were dismissed as frivolous, unreasonable, or groundless because they were outside the statute of limitations and the EEOC had failed to plead a pattern or practice of discrimination. CRST was also the prevailing party on a claim where there was insufficient evidence to establish severe or pervasive sexual harassment. The district court further ruled that CRST was the prevailing party on dismissed harassment claims from female employees who were aware of and understood the employer's anti-harassment policy and reporting procedures, but failed to utilize them, thus giving CRST no notice or opportunity to remedy.

CRST was awarded fees as to the dismissed claims, but not to fees associated with successful claims, such as those involving women who were told not to read the employer's antiharassment policies and procedures before signing an acknowledgment that they understood them. CRST's request for appellate fees was also denied because the employer failed to establish that the appeal was frivolous, unreasonable, or without foundation. In total, the federal district court re-examined seventy-eight claims dismissed on summary judgment, and preserved fees for all but seven claims and portions of two claims from the court's original fee award. The defendant CRST was ultimately awarded an amount of $1,860,127.36, a significant decrease from the original award of $4,694,442.14.

iii. ***Miller v. Bd. of Regents of Univ. of Minnesota***, No. 15-CV-3740 (PJS/LIB), 2018 WL 659851 (D. Minn. Feb. 1, 2018).

Shannon Miller, Jen Banford, and Annette Wiles were highly successful coaches at the University of Minnesota Duluth ("UMD"). In December 2014, UMD decided not to renew the contracts of Miller and Banford, and Wiles resigned as UMD was about to renew her contract. The three coaches sued UMD, alleging discrimination based their sex (female) and sexual orientation (lesbian), and retaliation for accusing UMD of violating Title IX. They also asserted claims under the Equal Pay Act.

The district court declined to summarize the facts, noting the voluminous filings by the parties and the fact that the facts were largely undisputed, and focused on legal issues.

Although the district court found the coaches' sexual orientation claims to be the strongest, it dismissed those claims because Title VII does not prohibit discrimination on the basis of sexual orientation. The district court also dismissed all of the coaches' state law claims because it lacked jurisdiction since the State of Minnesota was immune from suit under the Eleventh Amendment. (In an aside, the court noted that these stronger claims could have been brought in state court.)

The district court held that Miller had provided sufficient evidence to support her claim for sex discrimination, noting that UMD treated a less-successful male coach more favorably and offered inconsistent and pretextual reasons for terminating Miller. Miller frequent complained about Title IX violations, including a complaint shortly before she was terminated, thus giving rise to a question of material fact on her retaliation claim.

But the district court dismissed Miller's hostile work environment claim, noting that, under *Duncan v. County of Dakota, Neb.,* 687 F.3d 955, 959 (8th Cir. 2012), the Eighth Circuit has a "high threshold" for these claims "and the Eighth Circuit has meant it." [1] The district court found that the conduct cited by Miller, which included getting the cold shoulder from her boss and disputes about removal of an article about her on UMD's website, "was not nearly as serious as the bad behavior experienced by the unsuccessful plaintiffs in *Rickard*, *McMiller*, *Anderson*, *LeGrand*, and *Duncan*." Miller's Equal Pay Act claim was dismissed because she failed to show that a comparable male employee was paid more.

The district court dismissed the discrimination claims brought by Banford because she was offered a comparable contract for a different position but turned it down. The court similarly dismissed Wiles' sexual harassment claim since the matters she labeled as "hostile," such as disputes over her budget, exclusion from meetings and committees, the imposition of charges for wear and tear on her UMD-leased car, and being "treated coldly" by a male superior did not meet the *Duncan* threshold.

The district court granted summary judgment to UMD on all claims except Miller's claims of sexual discrimination and retaliation for raising Title IX concerns.

[Following a nine-day trial in Duluth, the jury awarded Miller $744,832 in lost wages and $3 million for emotional distress.]

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[1] There are two cases of note named *Duncan* which illustrate the Eighth Circuit standard for hostile environment claims. The first is *Duncan v. General Motor Corp.*, 300 F.3d 928, 934 (8th Cir. 2002), in which the court determined a plaintiff had not proven a hostile work environment despite evidence that her supervisor sexually propositioned her, repeatedly touched her, requested she draw an image of a phallic image to show she was qualified for a position, displayed a poster portraying her as "the president and CEO of the Man Hater's Club of America" and asked her to type a copy of a "He-Men Women Hater's Club" manifesto. 300 F.3d at 931-35. The second is *Duncan v. County of Dakota, Neb.,* 687 F.3d 955 (8th Cir. 2012), which collects Eighth Circuit cases to discuss the "high threshold" required for a plaintiff alleging a hostile environment claim. 687 F.3d at 959-60.

iv. ***Pung v. Regus Mgmt. Grp., LLC***, No. CV 16-6 (DWF/DTS), 2017 WL 6550673 (D. Minn. Dec. 21, 2017).

Defendant/employer Regus Management Group, LLC brought a motion for summary judgment on Plaintiff Ginger Pung's claims of sexual harassment and reprisal in violation of Title VII and the Minnesota Human Rights Act.

Pung was the General Manager for Regus, and began a consensual sexual relationship with Scott Ravenscroft, the Area Director and Pung's direct supervisor. The relationship lasted two years and was ended by Pung. Ravenscroft subsequently began criticizing Pung's job performance, and she complained to the director of human resources that his treatment amounted to retaliation and was "borderline harassment." Following an investigation, Ravenscroft was given a warning and Pung's performance-related supervision was shifted to a regional vice president. Pung alleged that Ravenscroft further harassed her in retaliation for her complaint. In early 2015, Pung's employment was terminated as part of a reduction in force. She asserted that her termination was the direct result of Ravenscroft retaliating against her when he put her on a performance improvement plan (PIP) because she went over budget when planning a client holiday party.

The court dismissed Pung's hostile work environment sexual harassment claims because her workplace interactions with Ravenscroft after their consensual relationship ended did not constitute the type of sustained, severe harassment required to support a claim of hostile work environment. The evidence that Ravenscroft and Pung interacted, argued, and that Ravenscroft criticized Pung's work was held insufficient as a matter of law to support a hostile work-environment claim since there was no evidence that Ravenscroft made physical contact with her, used inappropriate language, or made sexual or intimidating comments. The court also found that although Ravenscroft may have been abrupt, critical, and sarcastic at times, this behavior was not so sustained as to rise to the level of an abusive work environment.

On Plaintiff's quid pro quo sexual harassment and Title VII retaliation or reprisal claims, the Court found that Pung had produced evidence that could lead a reasonable juror to conclude that her refusal to continue a sexual relationship with Ravenscroft or her decision to complain to HR about Ravenscroft's alleged harassment factored into his treatment of Pung, but since Regus articulated a legitimate reason for placing her on a PIP (violating work rules) and for her termination (the reduction in force), there were fact issues as to whether these actions were influenced by discriminatory animus on the part of Ravenscroft. The court pointed out that Plaintiff's claims survive Defendant's motion for summary judgment narrowly, since her case rests on a small number of disputed facts and a jury could also reasonably resolve a number of those issues in favor of Defendant.

v. ***Mauller v. Heartland Auto. Servs.***, No. 4:17-CV-02219 JAR, 2018 WL 646029 (E.D. Mo. Jan. 31, 2018).

Jenna Mauller worked at a Jiffy Lube. She alleged two separate instances of sexual harassment: one in which her supervisor, Raphael Doriety, made several sexually suggestive

comments before grabbing her breasts, and a second in which Doriety locked himself and Mauller in his office, blocked the door, twice suggested a quid pro quo for sex, and then approached her with his pants unzipped while requesting "assistance." Mauller left work, reported the incident to police, and did not return. She sued her employer and Doriety, alleging sexual discrimination under Title VII, together with state claims for assault, battery, and false imprisonment.

The district court applied the *Duncan* standard to the alleged facts and found that "Doriety's harassment was isolated but severe" and concluded that "Doriety's alleged behavior is objectively severe enough to survive dismissal."

However, the court ultimately granted the defendants' motion to dismiss because Mueller did not allege that her employer knew or should have known about the harassment and failed to act, and "[t]he opportunity to remedy harassment is a required element of any hostile-work-environment claim" (citing *Duncan*, 687 F.3d at 959). The court held that because "Plaintiff did not allow Heartland a chance to correct the harassment, the Court cannot infer that Heartland is unwilling or unable to do so" and "Plaintiff has therefore failed to allege facts from which the Court can infer the existence of a hostile work environment." However, the court also granted Plaintiff leave to amend her complaint to cure this defect, and reserved ruling on her state-law claims.

vi. ***Mooneyhan v. Telecommunications Mgmt.*, LLC**, No. 1:16 CV 118 ACL, 2017 WL 5478474 (E.D. Mo. Nov. 15, 2017).

Kimberly Mooneyhan worked part-time as a Sales & Service Associate for Telecommunications Management, LLC, d/b/a NewWave Communications (NewWave), a broadband and cable company. Mooneyhan alleged that she resigned her position because of harassment; NewWave asserts that she was terminated for violations of the attendance policy.

Mooneyhan filed suit against NewWave, alleging sexual harassment and a hostile work environment. Mooneyhan alleged that she was propositioned for sex three times by a male co-worker, was told that it was a male co-worker's fantasy to have a threesome with her and another female employee, a co-worker rubbed her neck, she was cornered in a room and told that there were rumors she was having sex with male coworkers, she had to endure numerous comments about her breasts, a male colleague used reaching for work equipment as an excuse to touch her legs, a co-worker bragged about his ability to please a woman with his surgically split tongue, and she was asked about her pornography-viewing habits.

The district court granted NewWave's motion for summary judgment on all claims. Citing the high threshold of *Duncan*, the district court noted that "[t]he Eighth Circuit has affirmed the grant of summary judgment in favor of the employer based on the plaintiff's failure to meet the fourth element of a hostile work environment claim under similar circumstances," citing cases such as *LeGrand v. Area Resources for Community and Human Servs.*, 394 F.3d 1098, 1100 (8th Cir. 2005) and *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 977-80 (8th Cir. 2003). "Even if the conduct Mooneyhan describes was severe and pervasive enough to be actionable, Mooneyhan has not established that she subjectively perceived her work conditions

were abusive," since Mooneyhan regularly communicated with NewWave management over minor issues during the same time she now alleges she was subjected to abusive harassment, yet she never mentioned the alleged harassment. Instead, Mooneyhan specifically stated in emails that she liked her job and concluded the emails with smiley-face emoticons. The court held that "[w]hen considering the time period in which these communications were sent, they are inconsistent with Mooneyhan's subjective belief that she was experiencing abuse forcing her to quit" and therefore "no reasonable juror could believe that the alleged harassment was so subjectively severe or pervasive as to rise to the level of an actionable hostile work environment." *Id.* at *12.

The district court also held that Mooneyhan failed to establish that NewWave knew or should have known of the alleged harassment, finding that she never sent an email to any NewWave employee complaining about sexual harassment, did not contact any HR representative with a complaint of sexual harassment during her employment, and there was no evidence that she ever invoked NewWave's harassment complaint procedure. As to Mooneyhan's constructive notice argument, the court noted that her complaints of harassment to on-site supervisors, who were found to be co-employees, were "insufficient to put [the employer] on notice of the harassment, especially in light of the extensive anti-harassment policy and procedures it had established," citing *Sandoval v. Am. Bldg. Maint. Indust., Inc.*, 578 F.3d 787, 801 (8th Cir. 2009). Finally, the district court held that Mooneyhan failed to produce sufficient evidence for a reasonable jury to conclude that the alleged harassment "was so broad in scope, and so permeated the workplace, that it must have come to the attention of someone authorized to do something about it," because Mooneyhan was unable to produce any testimony that other employees witnessed any of the alleged instances of harassment. *Id.* at 13.

vii. ***Mullanix v. Union Pac. R.R. Co.***, No. 8:15-CV-446, 2017 WL 5634610 (D. Neb. Nov. 22, 2017).

Jess Mullanix alleged that he was sexually harassed by a manager, William Bowman, while employed by Union Pacific Railroad (UP) in 2014 and 2015. Mullanix claims that after he reported those incidents, UP retaliated against him by changing his position and cutting his pay. Mullanix sued UP for hostile work environment sexual harassment under Title VII, among other claims. The district court granted UP's motion for summary judgment on all of Mullanix's claims.

After laying out the *Duncan* rule, the court "finds that the alleged incidents fail, as a matter of law, to clear the 'high threshold' necessary to establish an actionable case based on a hostile work environment."

> Here, the record indicates that Bowman approached Mullanix in the men's restroom and asked him if he could "piss on demand." Mullanix further alleges that Bowman approached him on three additional occasions over a 6-month period and (1) touched his leg against Mullanix's; (2) followed Mullanix into the restroom; and (3) "stalked" Mullanix as he walked to the parking garage and entered his vehicle. While those encounters may have been uncomfortable for Mullanix, they are not sufficiently severe or pervasive, when considered as a whole, to satisfy the high

threshold for actionable harm. Accordingly, Mullanix's sexual harassment claim fails as a matter of law, and UP's motion for summary as to that claim will be granted. *Id.* at *4.

viii. ***Kaiser v. Gortmaker***, No. 1:15-CV-01030-CBK, 2017 WL 3835683 (D.S.D. Aug. 30, 2017).

Laura Kaiser was hired in 2003 as a Special Agent and was assigned to the Drug Task Force of the South Dakota Division of Criminal Investigation ("DCI") in Aberdeen, South Dakota. Kaiser experienced sexual harassment while training at the academy, and while on the job. She reported sexual harassment by an investigator in 2005; in response, she was told that a complaint would harm her chances of getting a promotion, and she was required to double her case numbers.

For eight years, Kaiser received positive performance reviews. In 2011, she alleged that Brown County Deputy Ross Erickson began making inappropriate comments. Kaiser discussed it with another agent, Mark Black, who broke her confidence and told others what happened. As a result of the strife caused by Black's disclosure, Kaiser was put on a thirty-day work improvement plan, and then demoted and transferred to Pierre against her wishes. Kaiser was the only DCI employee to ever be involuntarily transferred. After filing an EEOC charge, she was disallowed the necessary benefits that allowed her to continue working in Pierre, which resulted in her constructive discharge. Kaiser resigned in 2012.

The district court denied the Defendant's motion for summary judgment, find that Kaiser had established that there were genuine issues of material fact for her reprisal and sexual discrimination claims under Title VII. Kaiser's hostile work environment claim was dismissed for lack of evidence that the DCI knew or should have known about Erickson's conduct. Her discrimination and reprisal claims under the South Dakota Human Relations Act were dismissed for failure to exhaust her administrative remedies.

[On December 15, 2017, a jury awarded Kaiser $1.2 million in damages on her claims of sexual discrimination and reprisal.]

ix. ***Romero v. JBS Packerland Inc.*,** No. 17-C-729, 2017 WL 3273662 (E.D. Wis. Aug. 1, 2017).

Four Hispanic female employees sued JBS Packerland Inc., a meat packing facility in Green Bay, Wisconsin, after they were terminated following their complaint that their work station was under-staffed to be safely operated. The plaintiffs brought federal claims alleging their termination was motivated by race and sex, and that they were retaliated against for their complaints. JBS moved to dismiss under Rule 12(b)(1) and (6) for failure to state a claim.

Giving the plaintiff all inferences to which they were entitled on a motion to dismiss on the pleadings, the district court held that the plaintiffs sufficiently stated a sex discrimination claim against JBS when they alleged that similarly-situated male employees were treated more

favorably. The plaintiffs also sufficiently stated a hostile work environment claim when the alleged that their supervisor, Laredo, "frequently stared at their breasts and buttocks and whistled at them," and "[o]n one occasion, he told Garcia Solorio to take off her coat so he could see her better," and they "assert that Laredo's unwelcome advances toward them were demeaning, highly offensive, and unwelcome and thus created a hostile working environment." The retaliation claims were dismissed because the plaintiffs failed to assert that they complained to anyone about anything other than inadequate staffing. Their race discrimination claims were dismissed because the plaintiffs failed to allege that white employees were treated more favorably.

x. ***Congleton v. Oneida Cty.***, No. 16-CV-412-WMC, 2017 WL 4621117 (W.D. Wis. Oct. 13, 2017).

Plaintiffs Tracy Lynn Congleton and Rita Johnson, both former employees of the Oneida County Sheriff's Department, allege that Keith Fabianski, a fellow jail employee and at times during their respective employment their shift supervisor, subjected them to hostile treatment because of their sex. The court granted summary judgment to defendants on all of plaintiffs' claims except for Congleton's claim against the County under Title VII for a hostile work environment.

The plaintiffs alleged that Fabianski treated them in demeaning and dismissive ways and was much harsher with them than with male employees. Congleton testified at the ERD hearing that while he was supervising her, Fabianski spoke to her in a derogatory manner once or twice a week, and provided examples of Fabianski responding to casual questions with, "What the fuck does it matter to you?" or "Why the fuck do you care?" He would also tell her "shut up" and to stop "fucking interrupt[ing] me," among other purported statements. Congleton also alleged that when Fabianski spoke to her in this manner, he would do so in close proximity, with their toes touching and his finger pointed at her. Congleton feared for her safety and was concerned that Fabianski might physically assault her during these exchanges. The district court determined that Congleton put forth sufficient evidence from which a reasonable jury might conclude that Congleton's sex was at least a motivating factor for differentially adverse treatment, thereby supporting her Title VII hostile work environment claim.

Congleton adequately advised the human resources director, Lisa Charbarneau, of her complaint of harassment based on sex and the names of others who would substantiate her claim. Charbarneau promptly commenced an investigation, but ultimately concluded the Congleton's complaint was unsubstantiated. The district court concludes that a trier of fact might find that the County failed to take adequate steps to prevent the alleged harassment and the mere fact that she conducted an investigation does not insulate the County from liability under Title VII.

Plaintiff Johnson's testimony was far less detailed than Congleton's, and the district court dismissed her claims as lacking sufficient evidence to support a conclusion that the conduct violated Title VII.

xi. ***Jones v. Needham***, 856 F.3d 1284 (10th Cir. May 12, 2017).

This opinion discusses how the labels of hostile environment / quid pro quo sexual harassment are useful to describe the elements of a specific claim but are labels that "originated in the academy" and are not part of the statutes or regulations. Hence, plaintiff is not limited to the specific type of sexual discrimination alleged in an EEOC charge.

Bryan "Shane" Jones was employed by Needham Trucking, LLC, and alleged he was fired because he would not have sex with Julie Needham, his direct supervisor and a shareholder of the business. Jones completed an intake questionnaire with the EEOC which included details of the quid pro quo on an attached sheet which apparently never made it to the EEOC. The EEOC assisted Jones with drafting a charge form that alleged he was subject to "sexual remarks" by Needham but did not mention the alleged sexual advances. After the EEOC issued a right-to-sue letter, Jones filed suit, alleging both hostile environment and quid pro quo forms of sexual harassment. The district court granted Needham's motion to dismiss, holding that Jones had failed to exhaust his administrative remedies for the quid pro quo claim.

The Tenth Circuit reversed the district court, finding the allegations in the charge form specific enough to prompt an investigation that would have uncovered "what the sexual remarks were, why Mr. Jones was fired, and whether the two events were connected." 856 F.3d at 1291. "Needham's argument relies on a complete bifurcation between the two forms of sexual harassment . . . . Rather, they are shorthand descriptors to delineate different ways in which sexual harassment can occur." *Id.*

xii. ***Sexual Orientation Cases***

The Circuit Courts are in the process of addressing the issue of whether sexual orientation or transgender status are protected categories under Title VII. The trend is to recognize that discrimination based on how a person varies from societal assumptions about sexuality or gender violates Title VII. This matters to sexual harassment law because, in those jurisdictions which recognize sexual orientation discrimination as a sub-category of sex discrimination, harassment on the basis of sexual orientation will be actionable.

The Seventh Circuit became the first federal circuit to hold that discrimination on the basis of sexual orientation violated Title VII. *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc). The court noted that "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" *Hively,* 853 F.3d at 350. In *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018), the Second Circuit held that sexual orientation discrimination violates Title VII. Transgender and transitioning status were held to violate Title VII by the Sixth Circuit in *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018).

The Eleventh Circuit has recently held that sexual orientation is <u>not</u> a protected category, relying on binding precedent from 1979. *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

Horton v. Midwest Geriatric Mgmt., 4:17 CV 2324 JCH, 2017 WL 6536576 (E.D. Mo. Dec. 21, 2017) is on appeal to the Eighth Circuit. This case addresses the problem of cross-jurisdictional differences in discrimination law. A married gay man from Illinois was turned down for a job in Missouri on the basis of his sexual orientation – a protected class in Illinois but not in Missouri. The Federal District Court for the Eastern District of Missouri dismissed his discrimination claims. Sixteen attorneys-general have filed an amicus brief supporting the plaintiff's position.

B. Minnesota Cases.

i. ***Bliss v. Cent. States Insulation Wholesale, Inc.***, No. A16-1443, 2017 WL 2332726 (Minn. Ct. App. May 30, 2017), review denied (Aug. 22, 2017). [Unpublished Opinion]

Jacquelyn Bliss sued her former employer, CSI, alleging sexual harassment, a hostile work environment by her supervisor, C.P., and constructive discharge in violation of the Minnesota Human Rights Act. Bliss alleged that C.P. showed her pornography on company computers and made sexual remarks about her and another female employee. C.P. admitted viewing pornography, receiving pornographic emails from customers, and forwarding pornographic emails to male customers and a male employee, but denied using company computers or sending pornographic emails to any women. The only other woman in the workplace, D.S., denied witnessing sexual harassment by C.P. and stated that Bliss herself brought up sexual matters in the workplace. Following a four-day trial, the jury returned a verdict in favor of CSI.

The Court of Appeals noted that the case was close at trial but found no errors. The appellate court affirmed the district court's exclusion of evidence of pornographic images and emails recovered from C.P.'s computer that were not seen by Bliss, stating that Bliss had failed to show relevancy to her claims. The appellate court also rejected Bliss' argument that the admission of evidence of an earlier sexual harassment lawsuit filed by Bliss against a previous employer was improper character evidence, an objection she did not make at trial. Bliss admitted that she had the same attorney for both lawsuits, that the earlier lawsuit was going on during the entire time that she worked at CSI, and that she did not ask her attorney for advice about what to do about the harassment by C.P. The Court of Appeals noted that the settlement amount of Bliss' previous lawsuit, which was almost $9,000 higher than Bliss's 2011 salary, was relevant character evidence because it provided an alternative theory on why Bliss left her employment.

The appellate court affirmed the denial of Bliss' motion *in limine* to exclude evidence about her romantic relationship with a coworker, finding it relevant to the credibility of her hostile work environment allegations against C.P. Finally, the appellate court affirmed the district court's order awarding CSI $3,500 in disbursements for computer forensic fees incurred by CSI for the forensic examination of C.P.'s computer, which was performed in response to Bliss's discovery demands for the images and e-mails that Bliss used in pretrial proceedings and as a trial exhibit repeatedly and in closing argument.

C. Cases from Other States.

i. ***Cote v. Derby Ins. Agency, Inc.*,** No. 16-0558, 2017 WL 3283862 (Iowa Ct. App. Aug. 2, 2017), aff'd, No. 16-0558, 2018 WL 1224522 (Iowa Mar. 9, 2018).

Patricia Dorn was the sole shareholder and president of Defendant Derby Insurance Agency (Derby), an S corporation. Joanne Cote worked for Derby from 1998 until 2014. In 2014, she sued Derby and Kevin Dorn (Dorn), the husband of Patricia, alleging sexual discrimination based on a hostile work environment under ICRA, as well as the torts of intentional infliction of emotional distress and assault.

Cote alleged a pattern of Dorn exposing his genitals to female employees at the insurance company since 2005. Cote alleged that Dorn made a habit of standing next to her desk with "an obvious erection in his pants." She assumed that he wanted her to see his erection because he "had no reason" to come into her work area and stood with his groin "close to her face." This conduct continued over several years, including incidents when Dorn's pants were unzipped and "gaping open."

The district court denied defendant's motion for summary judgment; the Supreme Court granted defendants' petition for interlocutory appeal and transferred the case to the Court of Appeals.

Derby asserted that the ICRA did not apply because Derby regularly employed fewer than four individuals, not counting Patricia Dorn's family members. The Court of Appeals found the word "employer" in Iowa Code § 216.6(6)(a) to be ambiguous, and after a detailed statutory analysis, concluded that an incorporated employer cannot have "family members" for purposes of the statute subsection, and therefore Derby was subject to the ICRA.

Derby asserted that Cote's claims were time-barred, but the Court of Appeals found sufficient evidence of a pattern of conduct that extended into the requisite time period. The Court of Appeals also affirmed the district court's ruling that "a reasonable jury could find that the repeated showing of an erection, covered or uncovered, to a female coworker is the type of outrageous conduct" sufficient to support a claim for intentional infliction of emotional distress. But the Court of Appeals held that the district court erred in denying summary judgment on the assault claim, since Cote did not alleged Dorn touched her inappropriately, and the sole physical contact between Dorn and Cote occurred only when Cote accidentally touched Dorn's penis.

The Iowa Supreme Court granted further review on the "family member" exception, and affirmed, holding that as a matter of first impression, a corporation does not have "family members" which may be excluded from four-employee threshold for application of the ICRA.

ii. ***Haskenhoff v. Homeland Energy Solutions, LLC***, 897 N.W.2d 553 (Iowa 2017).

This is a 100-page opinion with a plurality of justices concurring with the result, but with two separate minority opinions with 4 justices concurring in part and dissenting in part.

Plaintiff Tina Haskenhoff worked as a lab manager at defendant HES's ethanol plant. She was repeatedly harassed by her immediate supervisor, Kevin Howes, HES's operations manager, who repeatedly made sexual comments directed at Haskenhoff, including speculating on having sex with her, and referring to her breasts as "them puppies" or "the twins." Haskenhoff's co-employees also engaged in inappropriate conduct.

Plaintiff reported the incidents to the plant manager, but subsequently stated she did not want the investigation to continue. Nine months later, after plaintiff overheard Howes made comments about her marrying for money, she left work early in disgust. She reported this incident and others after Howes had threatened to write her up for insubordination. Plaintiff quit her job six weeks after she was presented with a performance improvement plan addressing her conduct on the day she walked out.

Haskenhoff filed a civil action alleging sexual harassment and retaliation under the Iowa Civil Rights Act (ICRA). The jury trial spanned three weeks. HES objected to the jury instructions, arguing that it improperly defined the standard for negligence for harassment by a coworker and failed to properly set forth the standard for causation on a retaliation claim. The district court overruled these objections, and the jury returned a verdict for Haskenhoff on her claims of negligence and retaliation, awarding $1.4 million in damages for backpay, emotional distress, and future emotional distress.

On appeal, the Iowa Supreme Court held that the defendant employer could be held liable on a direct negligence theory for hostile work environment based on supervisor harassment, but the employee plaintiff must demonstrate the employer failed to take prompt and appropriate remedial action to end harassment. The appellate court held that Haskenhoff did not establish as a matter of law that HES failed to take prompt and appropriate action because on two occasions she complained to management about harassment, and on both occasions, management took action to stop the harassment. Thus, it was a question for the jury whether HES failed to take prompt and appropriate remedial action.

The appellate court held that the district court erred in failing to instruct jury that Haskenhoff was required to show that HES failed to take prompt and appropriate remedial action following notice. The appellate court held that this error prejudiced the employer and HES was entitled to a new trial.

For her retaliatory discharge claim, the appellate court held that it was a question for the jury whether Haskenhoff was subject to adverse employment action given that the performance improvement plan alone did not cause her material harm either within the workplace or outside of it, she was never suspended, her work hours or pay were not reduced, and her duties and status remained unchanged. The appellate court found that even though the timing of the plan and allegations giving rise to it were suspect, the district court erred by instructing the jury the performance improvement plan was an adverse employment action as a matter of law.

The appellate court held that an employer need not really want the employee to quit to support constructive discharge claim for purposes of a discrimination or retaliation claim under

the ICRA, and it is enough that the employee's resignation was a reasonably foreseeable consequence of the insufferable working conditions created by the employer.

Finally, the appellate court held that the district court acted within its discretion when it admitted expert evidence on the requirements and standards for effective sexual harassment programs and what a reasonable company would do under the circumstances, but that expert testimony that opined that specific conduct violated the ICRA was inadmissible.

Because of the errors in jury instructions, the Iowa Supreme Court reversed the district court judgment and remanded the case for new trial.

3. LEGISLATIVE DEVELOPMENTS

A. Introduction

Federal and state elected officials have begun introducing legislation to address public outrage over high-profile claims of sexual harassment. One particular area of concern is the effect of nondisclosure agreements (NDAs) on the ability of abusers to escape negative consequences of their actions and put others at risk in the workplace. There are also public policy concerns about restricting employees' rights to speak out about harassment in the workplace.

B. Federal: The Tax Cuts and Jobs Act

The Tax Cuts and Jobs Act (TCJA) was passed by Congress on December 22, 2017. Tucked into its 1097 pages was a provision that resulted in the creation of 26 U.S.C. § 162(q):

(q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE

No deduction shall be allowed under this chapter for—

(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or

(2) attorney's fees related to such a settlement or payment.

This provision was effective immediately, even for settlements that occurred prior to this date.

This amendment to the tax code was originally proposed by Senator Bob Menendez (D-N.J.), who stated that his intent was to prevent taxpayers from subsidizing the cost to corporations of sexual harassment and sexual abuse settlements. The bill as passed, however, applied also to victims of sexual harassment or abuse. The effect of eliminating these deductions may be limited in scope, and there are many unanswered questions about its application

Section 162(q) does not apply to the settlement of sexual discrimination claims absent a claim of harassment or abuse, nor to settlement of harassment claims based on other protected categories (race, age, religion, etc.). It applies only to settlements with for-profit businesses. See *Comm'r v. Groetzinger*, 480 U.S. 23, 35 (1987).

What does "related to sexual harassment or sexual abuse" mean? May a party deduct legal costs not related to the settlement or payment? May a settlement agreement include a nondisclosure agreement for other claims? May the payment be allocated to specific claims?

The biggest impact may be on corporations which will need to calculate whether silence about sexual harassment or sexual abuse is worth any tax consequences of imposing a NDA. Ironically, the TCJA gave these same corporations large tax cuts in other areas.

C. Federal – Mandatory Arbitration

In December of 2017, a bipartisan group of Senators introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017. This proposed legislation would require employers and employees to litigate sexual harassment claims and invalidate any pre-dispute arbitration agreement that covers sexual harassment as defined by Title VII.

D. State: Selected Legislation

i. NDAs – enacted legislation

New York: Legislation prohibiting employers from including NDAs in sexual harassment claim settlements unless it is the complainant's preference.

Washington: Legislation barring NDAs as a condition of employment or to limit the ability to publicly disclose or discuss sexual harassment or sexual assault.

ii. NDAs – proposed legislation

Arizona: The Legislature passed a bill allowing victims of sexual assault and sexual harassment who signed NDAs to break their contracts under certain circumstances. (Has not yet been signed by Gov. Doug Ducey.)

California: Proposed legislation would prohibit NDAs in settlements of claims for sexual harassment, sexual assault, or sex discrimination, unless requested by a claimant.

Massachusetts: Bill introduced that would bar NDAs and forced arbitration agreements in discrimination, harassment and retaliation settlements.

Minnesota: Bill introduced that would require public disclosure of all harassment settlements paid out by the Legislature, executive branch, or any local unit of government.

New Jersey: Bill introduced which would prohibit nondisclosure provisions related to claims under the New Jersey Law Against Discrimination.

Pennsylvania: Gov. Tom Wolf issued a proposal that would ban mandatory non-disclosure agreements in cases of sexual harassment or assault. It would protect all employees regardless of the size of the employer.

Vermont: Proposed legislation passed by the House would prohibit employers from requiring NDAs in sexual harassment settlements.

iii. Other Discrimination Issues – enacted legislation

California: A bill signed into law in October of 2017 expands on California's mandatory sexual harassment training, which requires employers with 50 or more employees to provide two hours of sexual harassment training for supervisors every two years. The new law regulates the content and manner of the sexual harassment training; for example, the trainers must be qualified, the training must be "interactive," and must cover a broad range of topics, including harassment of LGBT employees and methods for preventing abusive conduct.

New York: New laws passed (1) requiring a written policy addressing sexual harassment prevention and requiring annual training for any entity bidding on a state contract for goods or services; (2) prohibiting employers from requiring employees to arbitrate sexual harassment claims; (3) requiring all employers to adopt a sexual harassment prevention guide and policy that is at least as protective as a model policy created by the state Division of Human Rights; (4) protecting non-employees from sexual harassment in the workplace; and (5) requiring individuals found personally liable for sexual harassment to reimburse the public for money awarded to a plaintiff.

Washington: Legislation enacted ordering the Human Rights Commission to develop model policies and best practices to prevent workplace sexual harassment.

iv. Other Discrimination Issues – proposed legislation

California: Proposed legislation would increase the statute of limitations for discrimination actions from one to three years. Another bill would create anti-retaliation protection for legislative employees or lobbyists who make sexual harassment complaints against legislators.

Florida: Bill introduced that would outlaw sexual harassment by legislators, candidates for public office, agency employees and lobbyists.

Indiana: Bill introduced that would require annual sexual harassment prevention instruction to members of the general assembly.

Pennsylvania: Gov. Wolf proposed several changes to state law, including: (1) requiring employers to provide training to prevent discrimination and harassment; (2) amending the PA Fairness Act to prohibit discrimination based on sexual orientation or gender identity or expression; (3) extending the statute of limitations for whistleblowers and victims of discrimination from 180 days to two years; (4) allowing plaintiffs to seek punitive damages for

workplace discrimination; (5) requiring defendants to pay a successful plaintiff's attorneys fees in sexual harassment actions.

Vermont: The House passed a bill that prohibits sexual harassment settlement agreements from barring an employee from working for an employer or related entity, and expands sexual harassment laws to cover independent contractors.

4. REGULATORY AND AGENCY DEVELOPMENTS

A. EEOC

i. 2017 Enforcement Guidance on Unlawful Harassment

The EEOC stopped taking public comments on the proposed Enforcement Guidance on Unlawful Harassment (Proposed Guidance) earlier this year, and the revised Proposed Guidance is awaiting approval by the Office of Management and Budget at the White House. The Proposed Guidance would replace one last updated in the 1990's.

The Proposed Guidance includes a restatement of the law on sexual harassment, applying interpretations from case law and giving examples of typical situations. It gives a detailed explanation of the EEOC's position on the components of a hostile work environment claim: (1) protected categories and causation; (2) hostile work environment threshold; and (3) liability. The EEOC makes clear that it considers discrimination on the basis of gender identity, sexual orientation, sex stereotyping, pregnancy, and childbirth to be discrimination on the basis of sex. The Proposed Guidance offers details on what conduct would be considered severe or pervasive, and confirms that the conduct must be both subjective and objectively hostile. Also included is a detailed discussion of liability standards applicable to allegations of harassment against proxies, supervisors, and non-supervisors.

Perhaps most interesting is the attention given in the Proposed Guidance to preventative steps employers should be taking. Specifically, the Proposed Guidance recommends that anti-harassment training should be: promoted and supported by senior leaders; repeated on a regular basis; provided to employees at all levels; tailored to the specific organization and employees; conducted by qualified, live, interactive trainers; and routinely evaluated by the participants and revised as needed. If approved, the detailed recommendations as to how an employer should craft effective and comprehensive policies and procedures to prevent sexual harassment will no doubt be the topic of much litigation.

ii. Increases in funding

The federal spending bill signed by the President on March 23, 2018, included a $16 million increase in funding for the EEOC, the first budget increase in eight years during which the EEOC experienced flat budgets, staffing cuts, and hiring freezes. The EEOC now has $379.5

million to spend during the remainder of fiscal 2018. EEOC Acting Chair Victoria Lipnic has stated that the agency will use the increase to emphasize harassment prevention.

iii. Trends

In early February 2018, EEOC Acting Chair Victoria Lipnic reported that the Commission has seen four times the number of visitors to its website since October of 2017, but that there has as yet been no surge in actual charges of discrimination.

There have been a number of significant EEOC sexual harassment class action settlements recently:

- $100,000 settlement in October 2017 with Clougherty Packing, LLC on behalf of a class of female employees alleging sexual harassment;
- $75,000 settlement in November 2017 with Trans Ocean Seafoods, Inc. on behalf of three female employees who complained of persistent, sexually explicit comments by a male coworker;
- $340,000 settlement in January with restaurant chain Indi's Fast Food Restaurant, Inc. on behalf of 15 former female employees, some of whom were teenagers, who alleged sexual harassment; and
- $550,000 settlement in January with the GEO Group, Inc., on behalf of a class of female staffers allegedly harassed at private correctional facilities in Arizona.

B. Federal Judiciary Workplace Conduct Working Group

Following recent sexual harassment allegations involving federal judges, many expressed concern that the judicial councils investigating these allegations lost jurisdiction over the investigation when the alleged harasser resigned from the bench. In addition, a group of nearly 700 former and current law clerks signed a letter requesting action on the issue of harassment in the judiciary.

Chief Justice Roberts established the Federal Judiciary Workplace Conduct Working Group in part to address these concerns. The Working Group will review existing policies and procedures, update existing handbooks, collect information on best practices, and make sure proper procedures are in place to protect federal judicial employees at all levels from sexual harassment. In addition, the federal judiciary will, for the first time, track and publicly release data on sexual harassment complaints against judges.

5. #MeToo AND #TimesUp IN LAW AND PRACTICE

Notwithstanding the legislative and regulatory developments and proposals described above, the significant media attention to and increased societal awareness of sexual harassment in the workplace has not changed the definition of prohibited activities, the basis of employer liability, or the legal analysis applied to harassment-related claims.

Claims of discrimination in the form of sexual harassment are still subject to the familiar *McDonnell Douglas* shifting burdens analysis. To be actionable, harassing behavior must still be of a sexual nature, unwelcome or uninvited, and sufficiently "severe and pervasive" to substantially interfere with a victim's work environment. Courts continue to wrestle with what behavior is bad enough to qualify as actionable behavior, and what responsive action is required to block employer liability in co-worker harassment cases.

If the #MeToo and #TimesUp movements have increased the number of victims prepared to pursue legal remedies, those victims have yet to show up on agency and court dockets. They may begin to do so in 2018. Other possible results of #MeToo and #TimesUp could be:

- Legislative changes that lengthen the statute of limitations for harassment claims.
- Legislative changes designed to create personal liability for harassers.
- Legislative changes designed to increase available damages for victims.
- The imposition of more and more significant equitable relief in harassment cases.
- Larger damage awards.
- Earlier and more effective intervention by employers faced with harassment allegations or reports of inappropriate behavior, resulting in fewer charges and lawsuits.
- Earlier and more frequent settlements.
- Greater willingness of witnesses to report harassment and provide information in investigations.
- Altered perceptions of "severe and pervasive," "unwelcome," and "timely and appropriate," resulting in different applications of law to fact.
- Altered credibility assessment of victims.

Writing for the *New York Times* on February 4, 2018, Catherine A. MacKinnon observed:

> Many survivors [of sexual harassment] realistically judged reporting pointless. Complaints were routinely passed of with some version of 'she wasn't credible' or 'she wanted it.'…[I]t typically took three to four women testifying that they had been violated by the same man in the same way to even begin to make a dent in his denial. That made a woman, for credibility purposes, one-fourth of a person.
> …

> But it is #MeToo, this uprising of the formerly disregarded, that has made untenable the assumption that the one who reports sexual abuse is a lying slut, and that is changing everything already. Sexual harassment law prepared the ground, but it is today's movement that is shifting gender hierarchy's tectonic plates.

https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html