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RACE-BASED HOSTILE WORK ENVIRONMENT CLAIMS IN FEDERAL AND MINNESOTA COURTS: A HISTORICAL PERSPECTIVE ON THE DEVELOPMENT OF THE "SEVERE OR PERVASIVE" STANDARD

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I. INTRODUCTION

The two primary statutes that protect Minnesotans against race-based harassment[1] in the workplace are the Minnesota Human Rights Act ("MHRA"), enacted in 1955, and Title VII of the Civil Rights Act of 1964. Since their enactment, courts have seemingly narrowed their protections and applied increasingly stringent standards. One such standard is the "severe or pervasive" standard, a federal case created measure used to determine whether workplace harassment in a given case is actionable.

The Minnesota Supreme Court, however, recently diverged from this trend in *Kenneh v. Homeward Bound, Inc.*[2] In *Kenneh*, a sex harassment case decided in 2020, the Court "clarif[ied] how the severe or pervasive standard applies to claims arising under the Human Rights Act."[3] In so doing, the court appears to have guided lower courts to apply a less stringent standard to MHRA claims than federal courts apply to Title VII claims.[4] Though *Kenneh* addressed sex harassment, it is expected to affect race harassment jurisprudence because race and sex claims are analyzed under the same framework.

This Article is the first of two companion articles. Its companion examines potential impacts of the *Kenneh* decision on MHRA race harassment claims and examines whether race and sex harassment claims should continue to be analyzed interchangeably and, if they are, how the *Kenneh* principles may apply to race claims.[5] This Article provides an important backdrop for that analysis through an examination of the history of harassment law and the severe or pervasive standard from the enactment of the Minnesota Human Rights Act to the present day.

Specifically, this Article will show how federal courts first recognized harassment as a form of discrimination in the context of race and how that concept was mostly developed in the context of sex harassment, including the creation of the severe or pervasive standard. Then, it will show how this standard became a seemingly insurmountable hurdle for plaintiffs to clear in the federal courts. Because Minnesota courts often relied on "analogous" federal Title VII cases, it was not long before Minnesota courts were relying on federal cases and the severe or pervasive

[1] Harassment, hostile environment harassment, and hostile work environment are used interchangeably herein.
[2] Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222 (Minn. 2020).
[3] *Id.* at 231.
[4] *Id.* at 222.
[5] Frances Baillon & Michelle Gibbons, *The Minnesota Supreme Court's Not-So-Severe "Severe or Pervasive" Standard: Potential Impacts of* Kenneh v. Homeward Bound, Inc. *on Race Harassment Claims Under the Minnesota Human Rights Act*, 49 MITCHELL HAMLINE L. REV. (forthcoming 2023).

standard sometimes at the expense of the plain language and purpose of the MHRA.

II. STATUTORY MEASURES ADDRESSING RACE HARASSMENT

In Minnesota, race harassment claims are primarily alleged under the Minnesota Human Rights Act[6] and Title VII of the Civil Rights Act of 1964.[7] A review of the history and development of these statutory measures provides important context for understanding the case law that interprets and applies them.

A. State Statute—The Minnesota Human Rights Act

The Minnesota Human Rights Act ("MHRA" or "the Act") was enacted in 1955.[8] From its inception, the Act declared that it is the public policy of Minnesota for persons in the state to be free from discrimination in employment.[9] It described discrimination as a threat to "the rights and privileges of the inhabitants of this state and [a] menace [to] the institutions and foundations of democracy."[10] The Act also mandated its provisions be construed liberally to accomplish its stated purpose: to free the workplace of discrimination.[11]

The MHRA declares it an unfair practice for an employer to discriminate based on race. In 1955, the Act read:

> It is an unfair employment practice . . . for an employer, because of race, color, creed, religion, or national origin, (a) to refuse to hire an applicant for employment; or (b) to discharge an employee; or (c) to discriminate against an employee with respect

[6] MINN. STAT. §§ 363A.01–.50 (2021).
[7] 42 U.S.C. §§ 2000e–2000e-17. In some situations, these claims are alleged under Section 1981 of the Civil Rights Act of 1866, enacted shortly after the Civil War to vindicate the rights of former slaves. 42 U.S.C § 1981. Section 1981 ensures that "all persons . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, [and] give evidence . . . as is enjoyed by white citizens." 42 U.S.C. §1981(a). Section 1981, like Title VII, does not define harassment, but prohibits it in employment and applies the same standards used in Title VII claims. *See* Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1050 (8th Cir. 2002). To the extent a Section 1981 claim is alleged along with a Title VII claim in any case cited in this article, only Title VII will be cited and discussed, as the analysis is approximately the same.
[8] Minnesota State Act for Fair Employment Practices, ch. 516, 1955 Minn. Laws 802 (H.F. No. 778), *amended by* State Anti-Discrimination Act, ch. 428, 1961 Minn. Laws 641 (H.F. No. 867) *and* Minnesota Human Rights Act, ch. 729, 1973 Minn. Laws 2158 (H.F. No. 377).
[9] MINN. STAT. § 363.12 (1957) ("As a guide to the interpretation and application of this act, be it enacted that the public policy of this state is to foster the employment of all individuals in this state in accordance with their fullest capacities, regardless of their race, color, creed, religion, or national origin, and to safeguard their rights to obtain and hold employment without discrimination.") (current version at MINN. STAT. § 363A.02, subdiv. 1(a)(1) (2021)).
[10] *Id.* (current version at MINN. STAT. § 363A.02, subdiv. 1(b) (2021)).
[11] *Id.* § 363.11 (current version at MINN. STAT. § 363A.04 (2021)).

> to his hire, tenure, compensation, terms, upgrading, conditions, facilities or privileges of employment.[12]

The term "discriminate" was defined to include "segregate or separate."[13] For the first twenty-five years, the MHRA did not include the term "harassment." In 1980, the Minnesota Supreme Court recognized that sex harassment is a form of discrimination.[14] The court relied, in part, on federal race harassment cases in recognizing this claim.[15] Two years later, the legislature amended the MHRA to define sexual harassment[16] and included the term within the definition of "discriminate."[17]

B. Federal Statute—Title VII

Federal claims for race harassment are typically alleged under Title VII of the Civil Rights Act of 1964.[18] The Civil Rights Act of 1964, known as "Title VII," states it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to

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[12] *Id.* § 363.03(2) (current version at MINN. STAT. § 363A.08, subdiv. 2 (2021)) (Chapter 516—H.F. No. 778). "Sex" was not added to the list of protected categories until 1969. 1969 Minn. Laws 1937, 1938.

[13] MINN. STAT. § 363.01, subdiv. 10 (1957).

[14] *See* Cont'l Can Co. v. State, 297 N.W.2d 241, 249 (Minn. 1980).

[15] *Id.* at 247–48.

[16] MINN. STAT. § 363.01, subdiv. 10a (1982) (1982 c 619 Sec. 2).

> "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 when:
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> (1) submission to that conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment, public accommodations or public services, education, or housing;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public accommodations or public services, education, or housing; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Id. In 2001, the Legislature removed the phrase, "and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action." (Chapter 194 (2001 c 194 Sec. 1.) Act of May 24, 2001, ch. 194, 2001 Minn. Laws 723, 724 (S.F. No. 1215) (codified at MINN. STAT. § 363.01, subdiv. 41(3) (Supp. 2001)). The legislative history indicates this amendment was intended to adopt the federal standard of liability for harassment by a supervisor. Frieler v. Carlson Mktg. Grp., Inc., 751 N.W.2d 558, 566–67 (Minn. 2008). The Minnesota Supreme Court adopted a broader definition. *Id.* at 572–73.

[17] MINN. STAT. § 363.01, subdiv. 10 (1982) ("The term 'discriminate' includes segregate or separate *and, for purposes of discrimination based on sex, it includes sexual harassment.*") (emphasis added).

[18] 42 U.S.C. § 2000e. In some situations, these claims are alleged under Section 1981 of the Civil Rights Act of 1866. *See supra* note 7 and accompanying text.

discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[19] Title VII was enacted to "improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life."[20] While Title VII seeks to make a person whole from their injuries due to employment discrimination, "its primary objective is to avoid harm."[21]

The original text of Title VII specifically prohibited discrimination. But it did not, and still does not, include the term "harassment." Courts, however, recognized race harassment as a claim because harassment creates a discriminatory atmosphere or environment affecting the "terms, conditions or privileges of employment" protected by Title VII.[22]

III. THE HISTORY OF RACE HARASSMENT CLAIMS AND THE ORIGINS OF THE FEDERAL "SEVERE OR PERVASIVE" STANDARD

A. Early Federal Decisions Apply an Expansive View of Title VII and Recognize Race Harassment as a Form of Unlawful Discrimination

Rogers v. Equal Employment Opportunity Commission appears to be the first time a federal court recognized a claim of hostile environment harassment as a form of discrimination.[23] In *Rogers*, plaintiff Josephine Chavez alleged her employer created an offensive working environment by segregating and giving discriminatory service to patients based on their national origin.[24] The district court did not believe that Chavez was "aggrieved" by an unlawful practice under Title VII because the patients were the subject of the discrimination, not Chavez.[25] The Fifth Circuit disagreed, finding "the relationship between an employee and his working environment is of such significance as to be entitled to statutory protection."[26]

While discrimination was viewed more narrowly as something that manifests itself in ultimate employment actions like hiring, firing, or promotion, the *Rogers* court recognized that "employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to

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[19] 42 U.S.C. § 2000e-2(a)(1).
[20] 29 C.F.R. § 1608.1(b).
[21] Faragher v. City of Boca Raton, 524 U.S. 775, 805–06 (1998) (internal citations omitted).
[22] *See infra* Section III.A.
[23] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (stating that *Rogers* "was apparently the first case to recognize a cause of action based upon a discriminatory work environment").
[24] Rogers v. EEOC, 454 F.2d 234, 236 (5th Cir. 1971).
[25] *Id.*
[26] *Id.* at 238.

bread and butter issues."[27] The court found Title VII's very language, "terms, conditions, or privileges of employment," to be "an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."[28] Prohibiting discriminatory practices beyond simply hiring and firing is consistent with Title VII's purpose to "eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination."[29] Rejecting the employer's argument that Chavez's claim was not viable because she alleged discrimination directed toward patients and not toward any employee, the court emphasized that the absence of discriminatory intent by an employer does not redeem an otherwise unlawful employment practice.[30] Title VII's aim is at the "*consequences or effects of an employment practice and not at the employer's motivation.*"[31]

The court also held that what constitutes actionable harassment would evolve over time:

> This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that *constant change is the order of our day* and that the seemingly *reasonable practices of the present can easily become the injustices of the morrow.*[32]

However, possibly concerned its decision might turn Title VII into a "general civility code,"[33] the court warned its decision should not be "interpreted as holding that an employer's *mere utterance* of an ethnic or racial epithet which engenders offensive feelings in an employee falls within the proscription of [Title VII]."[34]

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[27] *Id.*; *see also* Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 514–15 (8th Cir. 1977) (finding that condoning segregated employee "supper clubs" creates discriminatory work environment in violation of Title VII); Harrington v. Vandalia-Butler Board of Educ., 585 F.2d 192, 194 n.3 (6th Cir. 1978) (failing to provide female physical education teachers similar facilities violates Title VII because "terms, conditions, or privileges of employment" reaches the "actual working conditions of employees" and is not confined only to equal opportunity for employment); Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1033 (7th Cir. 1979) (finding employer requirement that only female employees wear a uniform a violation of Title VII because "terms and conditions of employment" means more than tangible compensation).

[28] *Rogers*, 454 F.2d at 238.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 239 (emphasis added).

[32] *Id.* at 238 (emphasis added).

[33] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998).

[34] *Rogers*, 454 F.2d at 238 (emphasis added). As described below, this "mere utterance" concept is often used by courts to diminish the seriousness of epithets and other plainly discriminatory comments. *See infra* note 139 and accompanying text. Indeed, it is hard to imagine *Rogers* surviving a court's scrutiny today.

After *Rogers*, other federal courts followed suit, finding that differential treatment created a hostile working environment for both those who are and are not members of the minority group and that all have the right to work in an environment free of discrimination.[35]

B. Race Harassment Cases Help Pave the Way for Sex Harassment and the Severe or Pervasive Standard

Rogers also opened the door for courts to recognize sexual and sex-based harassment as a claim under Title VII, which in turn produced the "severe or pervasive" standard. In *Henson v. Dundee*, the Eleventh Circuit cited *Rogers* and held that sexual harassment was actionable, reasoning that it is "every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."[36]

Next, in 1986, the U.S. Supreme Court recognized a claim, and set forth a standard, for hostile environment–sexual harassment under Title VII. In *Meritor Savings Bank FSB v. Vinson*, the Court adopted the *Henson* court's view comparing sexual harassment to race harassment: "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."[37] The Court also cited *Rogers* in holding that Title VII is "expansive" and provides a cause of action based on a discriminatory work environment, as well as Equal Employment Opportunity Commission ("EEOC") guidance stating that Title VII provides employees the right to work in an environment free from harassment.[38] And, it also emphasized the holding in *Rogers* that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" may not be described as harassment affecting a term, condition, or privilege of employment.[39]

Ultimately, the Court held that "[f]or sexual harassment to be actionable, *it must be sufficiently severe or pervasive* 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[40] To make this determination, a trier of fact must consider "the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents

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[35] *See, e.g.*, Clayton v. White Hall Sch. Dist., 778 F.2d 457, 459 (8th Cir. 1985) (recognizing that the essence of a hostile work environment claim is that "a plaintiff employee finds racial or other discrimination in the workplace offensive or distasteful because it violates that employee's right to work in an atmosphere free of discrimination and to enjoy the myriad benefits of associating with members of other racial or ethnic groups").

[36] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

[37] The allegations in *Meritor* include the vice president making sexual advances toward the plaintiff, demands for sexual favors at work and afterward, fondling her in front of coworkers, following her into the bathroom, exposing himself, and raping her several times. *Id.* at 59–60.

[38] *Id.* at 65–66.

[39] *Id.* at 67.

[40] *Id.* (emphasis added) (quoting *Henson* v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

occurred.'"[41] Thus, the "severe or pervasive" standard was created. While *Rogers* helped to "launch"[42] a new standard for sex harassment claims, the Court in *Meritor*, and its progeny, do not appear to have taken an "expansive" or "unconstrictive" view of Title VII such that it could evolve to recognize and prevent current and future discriminatory injustices.[43] Rather, as federal courts applied the standard they took a seemingly narrower view of Title VII.

C. Federal Courts Further Define the Severe or Pervasive Standard

After *Meritor*, the Supreme Court further defined the severe or pervasive standard over a series of decisions. For example, in *Harris v. Forklift Systems, Inc.*, the first Title VII harassment case decided after *Meritor*, the Court addressed a circuit split regarding whether actionable conduct creating an "abusive work environment" must "seriously affect an employee's psychological well-being" or lead them to suffer injury.[44] Some circuit courts had dismissed cases because the conduct was insufficiently severe to cause "anxiety and debilitation,"[45] "poison" the working environment,[46] or cause the plaintiff's "psychological well being" to be "seriously affect[ed]."[47]

Some courts disagreed, finding that such a requirement does not appear anywhere in *Meritor*.[48] Not only that, but "[i]t is the harasser's conduct which must be pervasive or severe, not the alteration in the conditions of employment."[49] To constitute actionable conduct, "employees need not endure sexual harassment until their psychological well-being is seriously affected to the extent that they suffer anxiety and debilitation."[50]

In *Harris*, the Court held the conduct must be both objectively and subjectively abusive to violate Title VII, but that "Title VII comes into play

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[41] *Id.* at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).
[42] Chew & Kelley, *infra* note 83, at 109.
[43] *Rogers*, 454 F.2d at 238.
[44] Harris v. Forklift Sys., Inc., 510 U.S. 17, 20 (1993). This line of case law appears to have stemmed from the *Rogers* court's reference to an actionable hostile work environment as "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers." Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (quoted in *Meritor*, 474 U.S. at 66).
[45] Scott v. Sears, Roebuck & Co., 798 F.2d 210, 213 (7th Cir. 1986), *abrogated by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
[46] *Id.*
[47] Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986), *abrogated by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993); *see also* Morgan v. Massachusetts Gen. Hosp., 901 F.2d 186, 193 (1st Cir. 1990), *abrogated by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) (affirming the district court's conclusion that the conduct at issue was insufficient to "interfere with a reasonable person's work performance" or "seriously affect a reasonable person's psychological well-being"); Downes v. F.A.A., 775 F.2d 288, 295 (Fed. Cir. 1985), *abrogated by* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) ("A second element of offensive environment is proof that the misconduct interfered with an employee's work or caused serious psychological damage.")
[48] *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 877–78 (9th Cir. 1991).
[49] *Id.*
[50] *Id.* (citing *EEOC Policy Guidance on Sexual Harassment*, 8 Fair Employment Practice Manual (BNA) 405:6681, n.20 (March 19, 1990)).

before the harassing conduct leads to a nervous breakdown."[51] The Court set forth factors to consider when determining whether the conduct meets the "severe or pervasive" standard. The Court explained:

> [W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances, which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.[52]

No single factor is required, and it is not "a mathematically precise test."[53]

Next, in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court explained the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances."[54] The Court further explained the objective standard is "crucial" to preventing Title VII from becoming a "civility code," as it requires factfinders to consider "the social context in which particular behavior occurs and is experienced by its target."[55] Giving consideration to the context and circumstances of the conduct will necessarily assist in determining what conduct is actionable:

> The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[56]

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[51] Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). The Court clarified that the language from *Rogers*—stating that an actionable environment is "so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers"—was "merely to present some especially egregious examples of harassment." *Id.*

[52] *Id.* at 23.

[53] *Id.* The court remanded the case, and, applying the correct standard, Harris prevailed on her claims and was awarded $150,435, attorneys' fees, and costs. Harris v. Forklift Sys., Inc., Civ. No. 3:89-0557, 1994 WL 792661, at *2 (M.D. Tenn. Nov. 9, 1994).

[54] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (quoting *Harris,* 510 U.S. at 23).

[55] *Id.* To illustrate this point, the Court explained while a professional football player's work environment may not be severely or pervasively abusive when the coach "smacks him on the buttocks," that same conduct would reasonably be abusive and offensive to the coach's secretary. *Id.*

[56] *Id.* at 81–82.

Just a few months later, in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, the Court addressed the standard of liability for sexual harassment specifically committed by a workplace supervisor.[57] In addressing this issue, the Court acknowledged the development and purpose of the severe or pervasive standard and did so in a seemingly more restrictive manner than it had in *Harris* and *Oncale*. In *Harris* and *Oncale*, the Court explained when determining whether the conduct is sufficiently severe or pervasive to be actionable, lower courts should consider "all the circumstances"[58] and distinguish ordinary socializing from discriminatory conditions of employment by analyzing the "social context in which particular behavior occurs and is experienced by the target."[59] "Common sense" and "sensitivity to social context" would provide guidance in making this distinction.[60]

In *Faragher*, however, the Court drew a starker contrast.[61] The Court stated "'simple teasing,' offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[62] It also emphasized the severe or pervasive standard was designed to "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'"[63] Instead, the "conduct must be *extreme* to amount to a change in the terms and conditions of employment."[64] When pointing out that "Courts of Appeal have heeded this view,"[65] the Court cited a string of appellate cases granting summary judgment where the harassment was not sufficiently severe or pervasive—making the connection between summary judgment and the "demanding" standard for hostile environment claims under Title VII.[66]

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[57] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The standard is as follows: "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . compris[ing] two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities . . . or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *accord Ellerth*, 524 U.S. at 764–65.

[58] *Harris,* 510 U.S. at 23 (stating "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances").

[59] *Oncale*, 523 U.S. at 81.

[60] *Id.* at 81–82.

[61] *See Faragher*, 524 U.S. at 788.

[62] *Id.* (quoting *Oncale*, 523 U.S. at 82).

[63] *Id.* (quoting B. LINDEMANN & D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 175 (1992) (footnotes omitted)).

[64] *Id.* (emphasis added).

[65] *Id.*

[66] *Id.* (citing Carrero v. N.Y.C. Housing Auth., 890 F.2d 569, 577–78 (2nd Cir. 1989); then citing Moylan v. Maries County, 792 F.2d 746, 749–50 (8th Cir. 1986); and then citing B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 805–07 n.290 (3d ed. 1996) (collecting cases granting summary judgment for employers because the alleged harassment was not actionably severe or pervasive)); *see also* Duncan v. Cty. of Dakota, Neb.,

Thus, these federal cases created the federal severe or pervasive standard for hostile environment sex harassment claims. And it would not be long until courts applied this standard to all hostile environment harassment claims, including those based on race.

IV. IMPACTS OF THE FEDERAL COURTS' SUMMARY JUDGMENT AND SEX HARASSMENT STANDARDS ON RACE HARASSMENT

The Supreme Court's sex harassment decisions influenced the application of the severe or pervasive standard in federal sex harassment cases, as well as race harassment cases. In *Faragher*, the Court explicitly addressed whether courts should compare the two. The Court noted sex harassment cases have drawn from standards applied in race harassment cases to determine the severity of the offensive conditions necessary to constitute actionable conduct.[67] While the Court recognized the standards are not "entirely interchangeable," it saw "good sense in seeking generally to harmonize the standards of what amounts to actionable harassment."[68] After *Faragher*, the Court applied sex harassment standards to a race harassment claim.[69] With federal courts applying the severe or pervasive standard to race harassment cases, in addition to an increased use of summary judgment, Title VII's protections appeared to be further narrowed.

A. Federal Courts "Drift" Toward Substituting Summary Judgment for Trial

Over time, as federal courts continued to apply the severe or pervasive standard more stringently, a trio of U.S. Supreme Court summary judgment cases[70] appeared to afford courts broader powers to dismiss cases via

687 F.3d 955, 960 (8th Cir. 2012) (noting the U.S. Supreme Court had established "demanding standards" to "clear the high threshold for actionable harm") (quoting Tuggle v. Mangan, 348 F.3d 714, 722 (8th Cir. 2003)); Watson v. CEVA Logistics U.S., Inc., 619 F.3d 936, 942 (8th Cir. 2010) (noting that "[t]he standard is a demanding one").

[67] *Faragher*, 524 U.S. at 786–87.

[68] *Id.* at 787 n.1. *Faragher's* attempts to analogize sex and race harassment may have been directed at Justice Thomas's concerns expressed in his dissent in *Ellerth* that the two decisions create a more favorable standard for sexual harassment than race harassment and should not be adopted. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 767 (1998) (Thomas, J., dissenting) ("As a result, employer liability under Title VII is judged by different standards depending upon whether a sexually or racially hostile work environment is alleged. The standard of employer liability should be the same in both instances: An employer should be liable if, and only if, the plaintiff provinces that the employer was negligent in permitting the supervisor's conduct to occur."). Some, however, have noted potential negative impacts of analogizing and importing sex harassment standards on race harassment claims. *See generally* Camille Hébert, *Analogizing Race and Sex in Workplace Harassment Claims*, 58 Ohio St. L.J. 819 (1997); Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 615 (2006).

[69] *See, e.g.*, Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 116 n.10 (2002) (citing *Faragher* and *Meritor* and volunteering that "hostile work environment claims based on racial harassment are reviewed under the same standard as those based on sexual harassment").

[70] Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

summary judgment.[71] The severe or pervasive standard, coupled with courts' increased exercise of summary judgment resulted in many sex harassment–hostile environment claims being decided by a judge instead of a jury. Since sex and race harassment claims were treated indistinguishably, many race harassment–hostile environment claims suffered the same fate.[72]

Prior to 1986, summary judgment was not only used sparingly, but several courts disfavored or expressed hostility toward it.[73] But in 1986, the U.S. Supreme Court not only decided *Meritor*, adopting the severe or pervasive standard, it also decided a trio of landmark decisions addressing the summary judgment standard—*Celotex Corp. v. Catrett*, *Anderson v. Liberty Lobby, Inc.*, and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*—which have been described as allowing courts greater latitude in screening and adjudicating cases via summary judgment.[74]

Indeed, these decisions are referred to as having "fundamentally altered Rule 56 in two ways."[75]

> First, these cases eased the initial burden placed on the party moving for summary judgment by permitting a summary judgment movant to prevail without having to establish fully the nonexistence of material facts in dispute. Second, the Court allowed greater district court latitude in determining the existence of issues meriting trial, thereby easing the grant of summary judgment.[76]

This shift in the application of Rule 56 has also been interpreted by

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[71] Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 100 (1988) (dubbing *Celotex*, *Matsushita*, *and Liberty Lobby* a "trio"); Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 74 (1990) (describing the "trilogy" of summary judgment cases).

[72] *See generally* Hébert, *supra* note 68; Chew, *supra* note 68 at 616 (noting "[p]arties to racial harassment cases cite to the reasoning and element of sexual harassment cases without hesitation, as if racial harassment and sexual harassment are behaviorally and legally indistinguishable").

[73] Issacharoff & Lowenstein, *supra* note 71, at 73, 78. (citing Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court,* 6 Rev. of Litig. 263, 264 (1987); *see also* Croxen v. United States Chemical Corp., 558 F. Supp. 6, 7 (N.D. Iowa 1982) (describing summary judgment as "an extreme and treacherous remedy"). The doctrinal formulation of these aphorisms is that "summary judgment should be used sparingly in all cases, and it is only with great caution and much soul-searching that such motions will be granted." Bayou Bottling, Inc. v. Dr. Pepper Co., 543 F. Supp. 1255, 1261 (W.D. La. 1982), *aff'd*, 725 F.2d 300 (5th Cir.), *cert. denied,* 469 U.S. 833 (1984)).

[74] *Celotex*, 477 U.S. at 322–24; *Liberty Lobby*, 477 U.S. at 253–55; *Matsushita*, 475 U.S. at 582–83; *see* Issacharoff & Lowenstein, *supra* note 71, at 79. In his dissent in *Liberty Lobby*, Justice Brennan lamented that the majority opinion was "full of language which could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence much as a juror would . . . . I am fearful that this new rule—for this surely would be a brand new procedure—will transform what is meant to provide an expedited 'summary' procedure into a full-blown paper trial on the merits." *Liberty Lobby*, 477 U.S. at 266–67 (Brennan, J., dissenting).

[75] Issacharoff & Lowenstein, *supra* note 71, at 79.

[76] *Id.*

some as allowing a court to keep certain interpretations of fact from the fact-finder and "declare a plaintiff's theory of the case impossible as a matter of law."[77] These cases appear to have "transformed summary judgment from a mechanism for assuring a modicum of genuine dispute in cases set for trial to a full dress-rehearsal for trial with legal burdens and evidentiary standards to match those that would apply at trial."[78]

Commentators and academics predicted that lower courts would begin to grant summary judgment more frequently in the wake of the trio, particularly in discrimination cases and other cases typically proved using circumstantial (rather than direct) evidence.[79] Some commentators observed that the trio indeed had an immediate impact on summary judgment in cases where intent or motive were at issue, including employment discrimination cases.[80]

Members of the judiciary have also recognized the increasing use of summary judgment. In 1997, former Seventh Circuit Chief Judge Posner observed there had been a "drift in many areas of federal litigation toward substituting summary judgment for trial," ascribing this "drift" to growing caseloads.[81] Whatever the reason, between 1975 and 2000, "the rate of cases with [summary judgment] motions granted in whole or in part, and the rate at which cases were terminated by summary judgment, doubled."[82] One study revealed significant challenges for plaintiffs in race harassment cases during approximately the same time period.[83]

The Eighth Circuit has also made clear that summary judgment is still alive and well. In *Torgerson v. City of Rochester*, the court affirmed summary judgment, holding there is no employment discrimination exception to the summary judgment standard and that it is not disfavored in

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[77] Stempel, *supra* note 71, at 108.

[78] Issacharoff & Lowenstein, *supra* note 71, at 87.

[79] Stempel, *supra* note 71, at 175 n.393 ("In the realm of discrimination . . . continued use of the *Matsushita* approach could extinguish jury trial for certain judicially disfavored claims, a result at odds with the seventh amendment.").

[80] *See* Issacharoff & Lowenstein, *supra* note 71, at 89, 89 n.84 (citing Henn v. National Geographic Soc'y, 819 F.2d 824 (7th Cir. 1987); Dale v. Chicago Tribune Co., 797 F.2d 458 (7th Cir. 1986); Wehrly v. American Motors Sales Corp., 678 F. Supp. 1366 (N.D. Ind. 1988)).

[81] Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1396–97 (7th Cir. 1997); *see also* Hon. Mark W. Bennett, *From the "No Spittin', No Cussin' and No Summary Judgment Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed without Comment" Days: One Judges' Four-Decade Perspective*, 57 N.Y.L. Sch. L. Rev. 685, 701 (2013) (including increasing caseloads of federal judiciary as one reason for the "unfriendliness towards resolving employment discrimination cases by jury trial").

[82] Joe S. Cecil, Rebecca N. Eyre, Dean Miletich & David Rindkopf, FED. JUDICIAL CTR., *Trends in Summary Judgment Practice: 1975–2000*, at 20 (2007); *see also* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) (addressing increasing trend granting summary judgment in hostile environment cases and reasons this may be occurring).

[83] Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006) (addressing results of study on race harassment cases and outcomes of proceedings between 1976 and 2002 which present "grim" news for plaintiffs).

employment discrimination claims.[84] The plaintiff argued and relied upon existing Eighth Circuit and U.S. Supreme Court precedent stating that "summary judgment should be used sparingly in the context of employment discrimination and/or retaliation cases where direct evidence of intent is often difficult or impossible to obtain," and that "intent is often the central issue and claims are often based on inference."[85] The court disagreed and held that previous Eighth Circuit decisions stating summary judgment is disfavored or should seldom be granted were "unauthorized" and should no longer be used for purposes of the summary judgment standard of review.[86] One commentator called this the "ultimate step" in increasing the potential for summary judgment in employment discrimination claims.[87]

B. Federal Courts Dismiss Race Harassment Claims via the Federal Severe or Pervasive and Summary Judgment Standards

With federal courts taking a more active role in adjudicating cases via summary judgment, coupled with the severe or pervasive standard, workplace race harassment cases were often being dismissed by courts rather than submitted to a jury.[88] This is on display in the following Eighth Circuit cases dismissed at summary judgment.

1. Jackson v. Flint Ink North American Corp.

In *Jackson v. Flint Ink North American Corp.*,[89] the district court granted summary judgment on the plaintiff's race-based hostile environment claim. Jackson, a Black employee, alleged "that he heard his supervisor . . . refer to him as 'that damn [N-word].'"[90] Jackson also alleged he heard a manager "use the term 'black' or 'damn black.'"[91] Additionally, Jackson alleged that coworkers uttered racially charged comments such as "'[N-word]-rigging' . . . '[N-word]' . . . '[w]e don't listen to that damn black music around here, [N-word] shit, radio' . . . 'fucking [N-word].'"[92] Lastly, Jackson alleged that KKK signs accompanied with burning crosses were discovered at two different locations in the workplace, and one of the signs

[84] Torgerson v. City of Rochester, 643 F.3d 1031, 1043, 1053 (8th Cir. 2011) (en banc).
[85] *See* Torgerson v. City of Rochester, 605 F.3d 584, 593 (8th Cir. 2010), *aff'd on reh'g en banc*, 643 F.3d 1031 (8th Cir. 2011) (first quoting Wallace v. DTG Operations, Inc., 442 F.3d 1112, 1117 (8th Cir. 2006); and then quoting Peterson v. Scott Cty., 406 F.3d 515, 520 (8th Cir. 2005)).
[86] *Torgerson*, 643 F.3d at 1043, 1058–60 (abrogating numerous cases that state an exception to the summary judgment standard exists for discrimination claims).
[87] Theresa M. Beiner, *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673, 674 (2014).
[88] Issacharoff & Lowenstein, *supra* note 71, at 74–75.
[89] Jackson v. Flint Ink N. Am. Corp., 370 F.3d 791, 792 (8th Cir. 2004), *rev'd*, 382 F.3d 869 (8th Cir. 2004).
[90] *Id.* at 793. With the exception of the "N-word" and "n***a," this Article does not censor slurs or other derogatory terms when they are included in the text of cited opinions.
[91] *Id.*
[92] *Id.* at 793–94.

appeared near Jackson's initials.[93] The district court granted summary judgment, and Jackson appealed.[94]

The Eighth Circuit initially found Jackson did not establish an actionable hostile work environment claim.[95] The court described the racially derogatory language as "six isolated incidents" that were not targeted directly at Jackson or did not explicitly refer to him.[96] As such, these race-based statements were classified as "infrequent" or "offhand" and not actionable. [97]

The court found the racial graffiti incidents made "this a closer case."[98] The court recognized the "burning cross undoubtedly evokes the Ku Klux Klan and its racialist ideology and frequent violent history," but it was "unable to conclude from the evidence in the record that the crosses were 'death threat[s] aimed directly and specifically' at Mr. Jackson as opposed to a generically threatening expressions [sic] of sympathy with the beliefs of the Ku Klux Klan."[99] The court held that Jackson's evidence of the racial graffiti and "sporadic" racial slurs were insufficient to show the harassment he experienced was severe or pervasive enough to alter the terms or conditions of his employment.[100]

On petition for rehearing, the court reversed the district court's grant of summary judgment on the hostile environment claim.[101] The court's decision to reverse turned on evidence that Jackson's name was written on a shower wall in the workplace showing an arrow connecting his name with a burning cross and a KKK sign.[102] The court found that an objective observer would regard these symbols as a threat of violence, if not death.[103] This fact tipped the scale, but the court still cast doubt on the success of the case, finding it to be on the "cusp of submissibility."[104]

2. Bainbridge v. Loffredo Gardens, Inc.

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[93] *Id.* at 794. The majority noted while Jackson's initials were in the vicinity of the burning cross graffiti, the record did not create an inference that the graffiti and Jackson's initials were intended to be connected or read together. *Id.* at 796. The dissent, however, did not think this made a difference because whether Jackson's initials were "connected to KKK and burning cross graffiti is a question of fact." *Id.* at 798–99 (Gibson, J., dissenting).
[94] *Id.* at 792 (majority opinion).
[95] *Id.* at 795.
[96] *Id.* at 795–96.
[97] *Id.* (calling "infrequent" that "Jackson was exposed, at most, to six isolated instances of racially derogatory language from two managers and three co-workers over the course of a year and a half," and calling "offhand" comments of "[N-word] shit, radio" and "[N-word]-rigging" as they "were not referring directly to Mr. Jackson and another ('fucking [N-word]') was made in the heat of the spitting episode, during which it is uncontradicted that Mr. Jackson had threatened to 'kick both of [his co-workers'] asses' and to 'kill' one of them").
[98] *Id.* at 795.
[99] *Id.* at 796 (quoting Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 906, 908–10 (8th Cir. 2003).
[100] *Id.*
[101] Jackson v. Flint Ink N. Am. Corp., 382 F.3d 869, 870 (8th Cir. 2004).
[102] *Id.*
[103] *Id.*
[104] *Id.*

In *Bainbridge v. Loffredo Gardens, Inc.*, an employee asserted a hostile work environment claim under Title VII, section 1981, and the Iowa Civil Rights Act based on racial comments made about Asian people, Black people, and other minorities.[105] Bainbridge, who was married to a Japanese woman, claimed the employer's owners and operators made racially offensive remarks about Asian people, such as "Jap," "nip," and "gook," approximately once a month over a two-year period.[106] Bainbridge testified about specific instances where one employee called another employee a "Jap" and also referred to a customer as such.[107] The employees used other racial slurs, including "spic," "wetback," "monkey," and "[N-word]."[108] Bainbridge complained to his supervisor about the offensive behavior and left for a scheduled vacation.[109] Six days later, before Bainbridge returned, the employer sent him a letter stating his employment was terminated because his interpersonal skills with subordinates were problematic.[110]

Finding the racial slurs did not create a hostile work environment,[111] the court noted the racial remarks were sporadic and not specifically about Bainbridge, his wife, or their marriage.[112] The court also noted the racial remarks were not directed at Bainbridge and Bainbridge only overheard some of them.[113] Thus, the remarks were not "so severe or pervasive that [they] altered the terms or conditions of his employment."[114]

Judge Arnold, dissenting, wrote that "the repeated, seemingly habitual, use of anti-Asian and other slurs" in front of Bainbridge was sufficient to create a hostile work environment, and therefore summary judgment should be reversed.[115] Referring to *Jackson*, Judge Arnold stated: "While I concede that looking to the number of incidents per month reduces what is likely a horrific emotional experience to a numeric fraction, objectively, I think one comment every three months is different than one comment a month."[116]

3. Singletary v. Missouri Department of Corrections

In *Singletary v. Missouri Department of Corrections*, an African American investigator alleged harassment based on racial slurs made by

[105] *See* Bainbridge v. Loffredo Gardens, Inc., 378 F.3d 756, 758–59 (8th Cir. 2004).
[106] *Id.* at 759.
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.* at 758.
[111] *Id.* at 759–60.
[112] *Id.* at 760. The district court in *Bainbridge* relied on both *Johnson v. Bunny Bread Co.* and *Cariddi v. Kansas City Chiefs Football Club, Inc.* in granting summary judgment on Bainbridge's hostile environment claim. *See* Bainbridge v. Loffredo Gardens, Inc., 02-CV-40192, 2003 WL 21911063, at *13 (S.D. Iowa July 31, 2003) (citing Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981); and then citing Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977)).
[113] *Bainbridge*, 378 F.3d at 760.
[114] *Id.* The court did, however, find that Bainbridge had enough circumstantial evidence to put his retaliation claim in front of a jury. *Id.* at 761.
[115] *Id.* at 761 (Arnold, J., dissenting).
[116] *Id.* at 762.

coworkers and his supervisor as well as destruction of his property.[117] A coworker referred to Singletary as a "[N-word]" twice.[118] In one instance the coworker stated to a superior, "[Y]ou mean I can't call him a [N-word?]"[119] Singletary raised concerns, and the coworker was subsequently demoted.[120] Singletary's coworkers allegedly conjured up false allegations that Singletary was engaging in wrongdoing, and his car was vandalized at the workplace.[121] Human resources ("HR") personnel conducted an investigation and learned that one correctional officer overheard another employee say, "[N-word]s around here always want to cause trouble."[122] HR found that Singletary was a "target" of other employees and noted a "racial problem" in the department.[123]

Referring to Singletary, one of the superintendents said, "I see we have a little shiny face with us today," and on another occasion, "I see we have a shiny, little face running around here today."[124] Staff also posted a picture of Aunt Jemima during Black History Month.[125] Singletary requested to be and was transferred.[126] Later, the superintendent was heard saying, "[T]hat nappy headed little [N-word] won't be bothering us anymore. I got rid of him."[127]

The court found these incidents insufficiently severe or pervasive to be actionable because, for example, the "N-word" was not used in front of Singletary, and some of the difficulties Singletary experienced could be attributed to his position as an internal investigator.[128] As many courts before it had done, the court in *Singletary* stated that "[r]acial epithets are morally repulsive. But our cases require that a plaintiff show more than a few occurrences over a course of years."[129]

4. Canady v. Wal-Mart Stores, Inc.

In *Canady v. Wal-Mart Stores, Inc.*, an African American man presented evidence that his supervisor made several racial comments to him.[130] Canady's supervisor called him a "lawn jockey" and used the "N-word" in front of him and other employees.[131] His supervisor greeted him

[117] Singletary v. Missouri Dep't of Corr., 423 F.3d 886, 888–90 (8th Cir. 2005).
[118] *Id.* at 888–89.
[119] *Id.* at 889.
[120] *Id.* at 888–89.
[121] *Id.* at 889.
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.* at 889–90.
[127] *Id.* at 890.
[128] *Id.* at 893. Further, the court discounted the vandalism issue noting that there was not enough proof to conclude that it was because of his race. *Id.*
[129] *Id.*; *see* Woodland v. Joseph T. Ryerson & Son, Inc., 302 F.3d 839, 844 (8th Cir. 2002) (holding that while "certainly offensive" and "inexcusable," racial epithets, racist poetry, and racist graffiti were not actionable); Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981) (stating that racial slurs, "while certainly not to be condoned," do not always violate Title VII).
[130] Canady v. Wal-Mart Stores, Inc., 440 F.3d 1031, 1033 (8th Cir. 2006).
[131] *Id.* at 1033; *id.* at 1036 (Lay, J., dissenting).

with "What's up my [n***a]?", a statement the supervisor claimed was a reference to a movie in an attempt to make a joke.[132] The supervisor also described his management style as that of a "slave driver."[133] The supervisor "told Canady and another African-American employee that a black man's skin color rubs off on a towel when he sweats."[134] Finally, he commented to another African American employee that "all African Americans look alike."[135]

The court held that while the supervisor's comments were offensive, they did not meet the threshold of actionable harm.[136] Citing the "mere utterance" language that arose from *Rogers*[137] and was cited in *Meritor*,[138] the court dismissed the conduct because it did not "'sufficiently affect the conditions of employment' to give rise to a triable hostile work environment claim."[139]

Judge Lay dissented, finding "lawn jockey" especially offensive, along with the supervisor's use of this term multiple times along with the use of the "N-word."[140] While the majority had noted that Smith apologized for the slave driver comment and the "What's up my [n***a]?" movie reference, the dissent found the apology of minimal significance.[141]

5. Smith v. Fairview Ridges Hospital

In *Smith v. Fairview Ridges Hospital*, an African American woman presented evidence of numerous racially charged comments and actions by her coworkers:[142]

> (1) A nurse took a "patient chart from Smith's hands and said, '[T]hese black aides don't know what they are doing'";[143]
> (2) A coworker referred to Smith's lunch as smelling worse than garbage;[144]
> (3) Smith saw coworkers viewing an article on The Onion's website that "discussed Hurricane Katrina and contained an image of a helicopter hovering over houses that were flooded by the hurricane. On the front porch of one of the houses, three people, appearing to be African-American, were pictured," and

[132] *Id.* at 1036.
[133] *Id.*
[134] *Id.* at 1036.
[135] *Id.* at 1033 (majority opinion).
[136] *Id.* at 1035.
[137] Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971).
[138] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).
[139] *Canady*, 440 F.3d at 1035. (quoting Elmahdi v. Marriott Hotel Servs., Inc., 339 F.3d 645, 653 (8th Cir. 2003)).
[140] *Id.* at 1036 (Lay, J., dissenting).
[141] *Id.* (stating an apology is "by no means a panacea for harassment that has already occurred").
[142] Smith v. Fairview Ridges Hosp., 625 F.3d 1076, 1081–82 (8th Cir. 2010), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).
[143] *Id.* at 1081.
[144] *Id.*

> the caption read, "FEMA representatives call out to survivors, 'Show us your tits for emergency rations!'";[145]
> (4) A coworker asked Smith "if she was Puerto Rican because she spoke Spanish";[146]
> (5) Smith brought fried chicken to a work potluck, and a coworker asked who brought fried chicken, and another coworker responded, "Who else?";[147]
> (6) A picture of the character "Buckwheat" from *Little Rascals* was placed on a door next to photographs of other employees' childhood pictures, along with the caption: "Guess who this is?";[148]
> (7) Coworkers were looking at t-shirts on the website, www.getoffended.com, which stated "Guns don't kill people, only angry minorities kill people," and "How do you stop five [N-word]s from raping a white girl? You throw them a basketball";[149]
> (8) Smith overheard a coworker state, "Just like a dog, you beat them and abuse them, they still come back. Just like any good runaway slave would";[150]
> (9) In a conversation about acne, a coworker told Smith, "People can't see yours because you're black";[151]
> (10) A colleague called Smith "gal," which Smith explained "reflected racial animosity";[152]
> (11) A coworker told a volunteer, who was Somalian, that discussing ethnic foods was "inappropriate";[153]
> (12) A coworker overheard two white colleagues state, "She needs to go back to the ghetto where she came from," in reference to Smith.[154]

Smith reported most of the incidents to her immediate supervisor or a human resources representative, but the only action the defendant took was to tell Smith's coworkers that "personal internet use at work was inappropriate," in reference to the racist t-shirts they viewed on www.getoffended.com.[155]

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[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 1081–82.
[150] *Id.* at 1082.
[151] *Id.*
[152] *Id.*
[153] *Id.*
[154] *Id.* This Article capitalizes terms referring to race and ethnicity, with the exception of "white." At the time of this writing, the propriety of capitalizing "white" is a subject of debate. *Compare* Mike Laws, *Why We Capitalize 'Black' (and Not 'White')*, Colum. Journalism Rev. (June 16, 2020), https://www.cjr.org/analysis/capital-b-black-styleguide.php [https://perma.cc/4V9Q-UG5L], *with* Neil Irvin Painter, *Why 'White' Should be Capitalized, Too*, Wash. Post (July 22, 2020), https://www.washingtonpost.com/opinions/2020/07/22/why-white-should-be-capitalized/ [https://perma.cc/MR77-VAGK].
[155] *Id.*

The Eighth Circuit held Smith did not establish a hostile work environment claim, noting the "stringent hostile work environment standard is designed to 'filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language . . . and occasional teasing.'"[156]

The court separated the above conduct into three categories: no overt racial animus, some inference of racial animus, and overtly racial animus.[157] It first explained that some of Smith's allegations, including "the comments regarding Smith's lunch, acne, and ability to speak Spanish; the coworker's comment about Smith's conversation with the Somali volunteer; and the image on *The Onion*—have no obvious or overt racial animus."[158] With respect to the other two categories:

> [T]he picture of Buckwheat, the comment about fried chicken, and the reference to the ghetto, although not all shown or recited directly to Smith, carry some inferences that they were racially motivated. . . . Furthermore, the evidence clearly indicates that Smith experienced unwelcome racial harassment when exposed to several comments that were explicitly racial in nature. Specifically, the material on the website getoffended.com, the comment regarding 'black aides,' and the references about runaway slaves unambiguously permit an inference of racial animus.[159]

However, these incidents were insufficiently frequent because they occurred over the course of twelve months and insufficiently severe because they did not involve Smith's direct supervisors and lacked physical threats or intimidation.[160] Finally, the court concluded that "although many of the coworkers' 'racially tinged' comments and actions were 'ill-chosen,' and 'however ill-advised [their] attempts at racial humor, [the] conduct did not give rise to an actionable claim of racial hostility.'"[161]

Judge Bye, dissenting, found the majority committed legal error in its analysis by separating the allegations into three different categories instead of looking at the totality of the circumstances.[162] The dissent also noted the majority replaced its judgment for a jury's by deciding and disregarding the instances of harassment it found "tenuously related" to race because "a rational trier of fact could conclude they were related to Smith's membership in the protected group."[163] The dissent emphasized it is not the

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[156] *Id.* at 1083.
[157] *Id.* at 1085.
[158] *Id.*
[159] *Id.* (citations omitted).
[160] *Id.* at 1086.
[161] *Id.* at 1086–87 (quoting Canady v. Wal-Mart Stores, Inc., 440 F.3d 1031, 1035 (8th Cir. 2006)).
[162] *Id.* at 1089 (Bye, J., dissenting).
[163] *Id.* at 1091.

court's role at summary judgment to "draw its own conclusions on how offensive or racially insensitive these instances are to a reasonable person."[164]

With increasing frequency the severe or pervasive and summary judgment standards appeared to filter out cases involving evidence of "morally repulsive"[165] racial conduct or epithets that a reasonable juror could find creates a hostile work environment.[166]

V. THE HISTORY OF MHRA HARASSMENT CLAIMS AND THE IMPACT OF THE FEDERAL CASE-CREATED SEVERE OR PERVASIVE STANDARD

Before Minnesota courts recognized the severe or pervasive standard, harassing conduct was addressed as discriminatory. But, after *Meritor* and the adoption of the severe or pervasive standard, Minnesota courts began relying on federal harassment decisions in their analysis of sex and race harassment claims.

A. With No Recognized Harassment Claim or Standards, Minnesota Courts Address Harassing Conduct Based on Race as Discrimination

In early cases, when "harassment" was not yet recognized or was just newly recognized, courts addressed what now would be considered harassment as discriminatory or unequal treatment that draws "an adverse distinction" between persons of different races.[167] For example, in *City of Minneapolis v. Richardson,* the Minnesota Supreme Court addressed a claim of race discrimination in the public accommodation setting, expressing little tolerance for the use of racial slurs.[168] In *Richardson*, plaintiff Samples, a twelve-year-old Black youth, was grabbed by police and dragged by his feet face-down for twenty-four to thirty-two feet, placed in a squad car, called the "N-word" several times, had a police dog lunge at and pounce on him, and was placed in a detention center.[169] Samples was later released from custody, and no charges were filed. The court upheld the Human Rights Commission's finding of discrimination and assessment of punitive damages.[170] In upholding the Commission's findings, the court analyzed and

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[164] *Id.* at 1092.
[165] Singletary v. Missouri Dep't of Corr., 423 F.3d 886, 893 (8th Cir. 2005).
[166] *See, e.g.*, Colliers v. Dallas Cty. Hospital Dist., 827 Fed. App'x 373, 377–78 (5th Cir. 2020) (holding that the plaintiff being called "boy," finding N-word scratched on elevator wall and left for months after complaining, two swastikas drawn on walls of a room the plaintiff worked in and remained for eighteen months after he complained insufficient); Fortson v. Carlson, 618 F. App'x 601, 607 (11th Cir. 2015) (holding that the plaintiff being called "black ass" and black ass fool" on nine occasions by five different coworkers insufficient); Carpenter v. Con-Way Cent. Express, Inc., 481 F.3d 611, 618 (8th Cir. 2007) (finding a coworker's extensive use of the N-word, references to slavery, and other racist comments about the plaintiff's wife being African American were insufficient to create a hostile environment for a white employee because the plaintiff heard most comments second-hand).
[167] City of Minneapolis v. Richardson, 307 Minn. 80, 89, 239 N.W.2d 197, 203 (Minn. 1976).
[168] *See id.* at 80, 239 N.W.2d at 197.
[169] *Id.* at 82–83, 239 N.W.2d at 200.
[170] *Id.* at 88–93, 239 N.W.2d at 203–05.

applied the term "discriminate," including how it was defined in the Act, and emphasized the negative impact and distinction created by race-based words:

> When a racial epithet is used to refer to a person of that race, an adverse distinction is implied between that person and other persons not of his race. The use of the term '[N-word]' has no place in the civil treatment of a citizen by a public official. We hold that use of this term by police officers coupled with all of the other uncontradicted acts described herein constituted discrimination because of race.[171]

The court's decision was not only grounded in the plain language of the Act, but also the legislature's intent that it be liberally construed.[172]

Later, the Minnesota Supreme Court took a similarly firm stance against racial slurs and treatment in the employment context. In *Lamb v. Village of Bagley,* the court held racial slurs by a supervisor may establish a prima facie case of discrimination and rejected the employer's attempts to contextualize overtly racist behavior.[173]

Lamb, an Indigenous man, worked for the Police Department of the Village of Bagley just shy of one year.[174] The police chief, Francis "Fritz" LaRoque, was hostile and abusive toward Lamb calling him "damn Indian," "big fat Indian," "dumb Indian," and "fat dumb [N-word]."[175] LaRoque also subjected Lamb to differential treatment compared to white officers, including requiring him to move into town as a condition of employment, forcing him and another Native officer to lose weight, and disciplining him more severely.[176] When Lamb left, the Department replaced him with a white officer.[177]

The Minnesota Supreme Court found "the racial epithets, admittedly made, coupled with the admittedly disparate treatment, establish[ed] impermissible discrimination as a matter of law."[178] The court also held the "racially derogatory remarks directed at Lamb establish[ed] a prima facie case of unequal treatment."[179] Relying on *Richardson*, the court made clear "there is no room for the police chief to abuse a minority employee of his

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[171] *Id.* at 89, 239 N.W.2d at 203.
[172] Relying on the plain language of the MHRA and the intent it be liberally construed, the Minnesota Supreme Court rejected the argument that discrimination in the arrest and detention is not discrimination with regard to full access to a public service. *Id.* at 203. The court also rejected the argument, based on Federal Civil Rights Act cases, that municipalities are not subject to liability unless there is a pattern or practice of discrimination. Citing the language of the Act, the Court held liability attaches when there is a finding of discriminatory practice, including a single act of discrimination. *Id.*
[173] Lamb v. Vill. of Bagley, 310 N.W.2d 508 (Minn. 1981).
[174] *Id.* at 509.
[175] *Id.* at 509–10.
[176] *Id.* at 510.
[177] *Id.* at 509.
[178] *Id.* at 511.
[179] *Id.*

department with racially derogatory terms."[180] The fact the chief of police abused others did not excuse his abuse of Lamb, nor did the fact that the chief also identified as "half Indian."[181]

Thus, the Minnesota Supreme Court applied the language and policy of the MHRA to rid the workplace of race discrimination with little reliance on federal law.

B. Minnesota Courts Recognize Harassment as a Form of Discrimination in Violation of the MHRA

Before the U.S. Supreme Court recognized sex harassment as a form of discrimination under Title VII in *Meritor*,[182] the Minnesota Supreme Court recognized sex harassment as a form of discrimination in violation of the MHRA—based in part on race harassment cases. In *Continental Can Co. v. State*,[183] plaintiff Hawkins, a Black woman, testified that her coworkers subjected her to repeated sexually explicit derogatory remarks, verbal sexual advances, and physical conduct of a sexual nature for over five months.[184] Hawkins reported this conduct to management, and nothing was done.[185] A Department of Human Rights hearing examiner found Hawkins was discriminated against and awarded damages.[186] The district court reversed the Department's decision, and the Department appealed.[187]

On appeal, the court was faced with an issue of first impression: whether sexual harassment by a coworker could be considered sex discrimination under the MHRA.[188] At the time, the MHRA only prohibited sex discrimination and did not mention harassment.[189] The court looked to federal sexual and racial harassment cases but found racial harassment cases "factually more similar to the case at bar than most existing sexual harassment cases."[190] Ultimately, based on the MHRA's mandate that it be construed liberally and on similar reasoning applied in federal race harassment cases, the court recognized harassment as a form of discrimination: "When sexual harassment is directed at female employees because of their womanhood, female employees are faced with a working environment different from [men]."[191] Therefore, "sex discrimination in

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[180] *Id.*
[181] *Id.*
[182] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); *see supra* Section III.B.
[183] Cont'l Can Co. v. State, 297 N.W.2d 241 (Minn. 1980).
[184] *Id.* at 245. Some of the comments included coworkers telling Hawkins how they could make her feel sexually, and that based on their sexual prowess she would want to leave her husband. *Id.* A coworker told her "he wished slavery days would return so that he could sexually train her and she would be his bitch." *Id.* at 246. A coworker also patted her on the buttocks and grabbed her between the legs. *Id.*
[185] *Id.* On one occasion when Hawkins reported this conduct, she was told she had to expect this kind of behavior when working with men. *Id.*
[186] *Id.* at 245.
[187] *Id.*
[188] *Id.*
[189] *See* MINN. STAT. § 363.03, subdiv. 1(2)(c) (1978).
[190] Cont'l Can Co. v. State, 297 N.W.2d 241, 246–47 (Minn. 1980).
[191] *Id.* at 248–49.

Minn. Stat. § 363.03, subd. 1(2) (c) (1978) includes sexual harassment which impacts on the conditions of employment when the employer knew or should have known of the employees' conduct alleged to constitute sexual harassment and fails to take timely and appropriate action."[192]

To determine that actionable harassment has occurred, the court held that "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."[193] The court also held the circumstances regarding notice to the employer should be considered.[194] The court also made clear the MHRA does not require an employer to "maintain a pristine working environment."[195] Therefore, prior to *Meritor*, Minnesota had its own standard to apply in determining actionable harassment.

The Minnesota Supreme Court later applied this standard in what appears to be the only employment based race harassment case the court has addressed.[196] In *Minneapolis Police Department v. Minneapolis Commissioner on Civil Rights,* plaintiff Sterling alleged a claim of "racially antagonistic attitudes of coworkers."[197] Sterling, a white woman, was called the following by a coworker: "that f—ing broad, that gray bitch. It makes me sick. [N-word] lover. Gray lady."[198] These statements were made as Sterling returned to the station with a Black officer.[199] She could hear the coworker say something but could not hear clearly.[200] A coworker told Sterling what had been said, and coworkers explained "gray lady" is a slang term meaning a white woman who has Black friends.[201]

Although alleged under the Minneapolis ordinances, the court applied *Continental Can* and noted it previously held that "in order to establish a claim of co-employee harassment it is necessary to show not only discriminatory treatment but also the employer's failure to take prompt action when it knew or should have known of the co-employee's conduct."[202] The court determined Sterling's claim failed because the employer did not

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[192] *Id.* at 249.
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] The court had another opportunity to address a race harassment claim in *Hasnudeen v. Onan* but declined to do so on grounds that the issue was not properly before the court, reasoning that the trial court had not addressed it and in the court's view, the plaintiff had not pled it. 552 N.W.2d 555, 557–58 (Minn. 1996). The dissent disagreed and stated that the trial court's choice not to address the harassment claim "foster[ed] the perception in communities of color across this state . . . that the system is flawed and stacked against them." *Id.* at 561 (Page, J., dissenting).
[197] *Minneapolis Police Dep't v. Minneapolis Comm'r on Civil Rights*, 425 N.W.2d 235, 238 (Minn. 1988) (citing MINNEAPOLIS CODE OF ORDINANCES 139, §§ 139.40(b)(3) and 139.40(k)(3)).
[198] *Id.* at 237.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.* at 239 (citing Cont'l Can Co. v. State, 297 N.W.2d 241, 249 (Minn. 1980)).

have knowledge of the conduct she alleged.[203]

Because Sterling's claim failed on this basis, the court did not address whether the harassment reached an actionable level.[204] The court of appeals, however, did address whether the harassment was actionable, and in doing so relied in part on federal precedent.[205] It would not be long before Minnesota courts increasingly relied on federal precedent and adopted the severe or pervasive standard.

C. Minnesota Courts Apply the Federal Severe or Pervasive Standard and Increasingly Rely on Federal Precedent to Decide MHRA Harassment Claims

Just months after the U.S. Supreme Court adopted the severe or pervasive standard in *Meritor*, the Minnesota court of appeals applied it to a claim of sex harassment in *Klink v. Ramsey County by Zacharias*.[206] Rather than just months later, it appears Minnesota courts did not specifically apply the severe or pervasive standard to a race harassment claim until almost nine years after *Meritor* and *Klink*, when the court of appeals decided *Fletcher v. St. Paul Pioneer Press*.[207] It is worth noting that in decisions before *Fletcher*, when the court of appeals addressed whether racially harassing conduct was actionable, it relied on federal case law in granting or affirming summary judgment for employers, a practice that became more common.

For example, in *Minneapolis*, the court of appeals reversed a finding of race discrimination relying in part on *Johnson v. Bunny Bread Co.* for the contention that "not all racial slurs rise to the level of discrimination," including when they are "merely part of casual conversation."[208] In *Young v. Todd Chevrolet*, the court also affirmed summary judgment relying in part on *Cariddi v. Kansas City Chiefs Football Club, Inc.* in holding that "occasional or sporadic uses of racial slurs or epithets will not in and of themselves support a claim of racial discrimination."[209]

However, *Fletcher v. St. Paul Pioneer Press* not only appears to be the first case where the court of appeals explicitly applied the severe or pervasive standard to a race claim, but the court reversed summary judgment based

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[203] *Id.* at 240.
[204] *See id.*
[205] Minneapolis Police Dep't v. Minneapolis Comm'n on Civil Rights, 402 N.W.2d 125, 131 (Minn. Ct. App. 1987), *aff'd*, 425 N.W.2d 235 (Minn. 1988).
[206] Klink v. Ramsey Cty. by Zacharias, 397 N.W.2d 894, 901 (Minn. Ct. App. 1986), *abrogated on other grounds by* Cummings v. Koehnen, 568 N.W.2d 418, 423 (Minn. 1997) (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60 (1986) for the severe or pervasive standard without expressly adopting it).
[207] Fletcher v. St. Paul Pioneer Press, No. C7-95-2, 1995 WL 379140, at *5 (Minn. Ct. App. June 27, 1995).
[208] *Minneapolis*, 402 N.W.2d at 131 (citing Johnson v. Bunny Bread Co., 646 F.2d 1250, 1257 (8th Cir. 1981)).
[209] *Id.* ("Sporadic racial slurs do not become actionable discrimination because they were uttered by a supervisory employee.") (citing Cariddi v. Kansas City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977)).

on the lower court's failure to properly apply the standard.[210] While the court referenced federal case law, it applied the standard to the facts of the case before it and the decision was not governed by "analogous" federal cases.[211]

The plaintiff in *Fletcher*, an African American man, was employed in a pressroom.[212] He had a verbal altercation with his supervisor culminating in the supervisor stating, "I'll fire your ass you dumb [N-word]."[213] Two others witnessed this incident, and Fletcher reported it to the defendant.[214] The defendant demoted the supervisor and, based on the collective bargaining agreement, demoted him to a pressman position.[215] Fletcher objected to the supervisor being given the pressman position as Fletcher had been waiting for the position to open and was not given the opportunity to apply for it.[216] He alleged race harassment, retaliation, and common law negligence claims.[217] The district court granted summary judgment on all claims, and Fletcher appealed.[218]

The court of appeals specifically recognized that "[r]acial harassment is an actionable form of race discrimination under the MHRA."[219] The court also applied the severe or pervasive standard with reference to federal Title VII cases.[220] It focused on the totality of circumstances, not simply on the number of incidents, because "there is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."[221] Applying these principles, the court of appeals held the district court erred when it determined the use of a racial slur could not constitute a hostile work environment.[222]

The court found the slur was not part of "casual conversation,"[223] because it was directed at and about Fletcher, made by a supervisor, used in conjunction with language that could be construed as a threat to terminate him, made in the presence of other employees, and involved the use of an epithet with particularly negative connotations.[224] Therefore, because reasonable minds could reach different conclusions on whether the conduct

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[210] *Fletcher*, 1995 WL 379140, at *5. On remand, the trial court found for the employer on the harassment claim. Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999). Fletcher appealed the court's finding on his reprisal claim, but not his harassment claim. *Id.*
[211] Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231–32. (Minn. 2020).
[212] *Fletcher*, 1995 WL 379140, at *1.
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.* at *2 (citing Minneapolis Police Dep't v. Minneapolis Comm'n on Civil Rights, 402 N.W.2d 125, 131 (Minn. Ct. App. 1987), *aff'd*, 425 N.W.2d 235 (Minn. 1988)).
[220] *Id.*
[221] *Id.* (quoting Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 674 (7th Cir. 1993).
[222] *Id.*
[223] *Id.* (citing *Minneapolis*, 402 N.W.2d at 131, in support of the "casual conversation" statement).
[224] *Id.* at *2 (citing various federal appellate and district court cases).

was sufficiently severe or pervasive, summary judgment was inappropriate.[225]

Thus, the federal severe or pervasive standard made its way into Minnesota decisions addressing race harassment via the court of appeals' decision in *Fletcher*. The court of appeals also applied and expanded the application of the standard to other protected classes.[226] The Minnesota Supreme Court, however, has addressed the standard almost exclusively in the context of sex harassment. As a result, the standard created for sex harassment claims became a monolith for all forms of harassment.[227]

The Minnesota Supreme Court has addressed the severe or pervasive standard in a series of MHRA sex-based harassment cases, relying on federal cases in doing so. In *Goins v. West Group*, plaintiff Goins, a transgender woman, alleged she was subject to "scrutiny, gossip, stares, glares and restrictions" relating to her use of the women's restroom.[228] The court considered the claim as one for sexual orientation harassment and applied the severe or pervasive standard, even though a harassment claim had not been specifically pleaded.[229] In a footnote, the court recognized that the MHRA does not explicitly provide for a hostile environment harassment claim based on sexual orientation but that federal law recognized a claim for discriminatory harassment "so severe or pervasive as to alter the conditions of employment."[230] And, it also noted "[t]he MHRA is to be construed liberally, . . . with reference to federal law."[231] Assuming such a claim existed under the MHRA, the court relied on federal law to set forth the elements of a hostile environment claim, including the severe or pervasive standard.[232] The court affirmed summary judgment, holding that "leering," "following," "offensive comments," and the like do not meet the severe or pervasive standard.[233]

Next, in *LaMont v. Independent School District No. 728*, the court cited *Goins* for the severe or pervasive standard without further

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[225] *Id.* at *2–3.

[226] Wenigar v. Johnson, 712 N.W.2d 190, 205–06 (Minn. Ct. App. 2006) (recognizing a claim for hostile environment based on disability consistent with liberal construction of MHRA and federal case law recognizing same claims under federal disability statute); Minnell v. City of Minnetonka, No. A08-2183, 2009 WL 2928317, at *4 n.1 (Minn. Ct. App. Sept. 15, 2009) (recognizing a claim for hostile environment harassment based on age, noting that the MHRA's prohibitions on harassment have been interpreted to apply in contexts other than sex harassment); Goins v. W. Grp., 635 N.W.2d 717, 726 (Minn. 2001) (assuming claim for hostile environment harassment based on sexual orientation).

[227] Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 615, 618 (2006) (noting courts have not recognized a distinct "jurisprudential model for racial harassment" but rather "view the jurisprudential model for work-place harassment as monolithic, and that the monolithic model should be the one designed for sexual harassment").

[228] Goins v. W. Grp., 635 N.W.2d 717, 726 (Minn. 2001).

[229] *Id.* at 725. Though gender identity and sexual orientation are independent traits, as of this writing, the MHRA includes gender identity in its definition of sexual orientation. Minn. Stat. § 363A.03 (2021).

[230] *Goins*, 635 N.W.2d at 725 n.6 (citing Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999)).

[231] *Id.*

[232] *Id.*

[233] *Id.* at 726.

explanation.[234] The court also relied on federal decisions to support its conclusion that plaintiff LaMont failed to meet the "high threshold" of the severe or pervasive standard.[235] LaMont alleged that over the course of several months, a supervisor separated work areas by gender, instructed female employees not to talk, and made comments about not wanting women on his crew and keeping women "in their place," which he said was in the "kitchen and the bedroom."[236] The court noted its determination that the conduct was not sufficiently severe or pervasive was supported by federal courts interpreting and applying the standard and listed several federal cases that had been decided in favor of the employer.[237] The dissent challenged the majority's reliance on federal decisions because those decisions set a higher standard than the MHRA requires and instead concluded the conduct was sufficiently severe or pervasive, considering the plain meaning of the words "severe" or "pervasive" and because the comments and conduct occurred over a period of months and were directed at LaMont because she was a woman.[238]

Next, in *Rasmussen v. Two Harbors Fish Co.*, the court specifically addressed and explicitly recognized the severe or pervasive standard:

> [I]n determining whether the conduct had the purpose or effect of substantially interfering with a plaintiff's employment or created an intimidating, hostile, or offensive employment environment under the MHRA, *we consider whether the conduct was sufficiently severe or pervasive* to objectively do so and whether the plaintiff subjectively perceived her employment environment to be so altered or affected.[239]

The court's reasoning for its adoption of the standard was that it had "relied on federal case law interpreting Title VII in the interpretation of the MHRA" and would "continue to do so here."[240] Due to underlying errors by the district court, the supreme court did not address whether the district court had erred in dismissing the plaintiffs' harassment claim.[241]

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[234] LaMont v. Indep. Sch. Dist. No. 728, 814 N.W.2d 14, 21 (Minn. 2012).
[235] *Id.* at 23.
[236] *Id.* at 16–17.
[237] *Id.* at 23. The court referred to the standard in the conjunctive rather than the disjunctive, as the standard is "severe *or* pervasive." *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).
[238] *LaMont*, 814 N.W.2d at 24–25 (Page, J., dissenting) (emphasis added) ("But this case does not require us to interpret Title VII or some other jurisdiction's anti-discrimination law. Here, we are asked to interpret Minnesota law. The standard for bringing a claim in those other jurisdictions is inconsistent with Minnesota's stated public policy. Applying the standard the court adopts will not 'secure for persons in [Minnesota] freedom from discrimination' in employment because of one's sex.") (citing Minn. Stat. § 363A.02, subd. 1(a)).
[239] Rasmussen v. Two Harbors Fish Co., 832 N.W.2d 790, 796–97 (Minn. 2013) (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); and then citing Goins v. W. Grp, 635 N.W.2d 717, 725 (Minn. 2001)).
[240] *Id.* at 796.
[241] *Id.* at 799.

Most recently, in *Kenneh v. Homeward Bound*, a sexual harassment case, while the court applied the severe or pervasive standard it made important clarifications regarding its application under the MHRA.[242] Plaintiff Kenneh, a woman, alleged that over the course of about five months, a male employee propositioned oral sex, made pervasive tongue gestures simulating oral sex, followed her, blocked her office door, called her "sexy," and spoke to her in a seductive tone.[243]

Kenneh asked the court to reject the application of the federal severe or pervasive standard to sexual harassment claims under the MHRA and abandon its reliance on federal Title VII decisions.[244] While the court declined, it made a point to clarify: "We often have relied on federal law interpreting Title VII when interpreting the Minnesota Human Rights Act. But our reliance has not been absolute."[245] The court noted the "significant differences" between the two laws[246] and made clear that federal Title VII decisions applying the severe or pervasive standard are not binding on Minnesota courts: "Our use of the severe or pervasive framework from federal Title VII decisions does not mean that the conclusions drawn by those courts in any particular circumstances bind Minnesota courts in the application of our state statute."[247] The court also restricted the district court's process when applying the severe or pervasive standard and adopted a jury-centric process.[248] The court placed at the center of the summary judgment inquiry the goal of eliminating discrimination in the workplace and rejected a fact-based standard that weighed evidence against dated standards deemed "not severe enough" from past federal cases.[249] The court held that under its less stringent standard, the evidence was sufficient to merit a trial.[250] The *Kenneh* decision is expected to have an impact on MHRA workplace harassment cases.[251]

VI. CONCLUSION

[242] *See* Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222 (Minn. 2020).
[243] *Id.* at 227.
[244] *Id.* at 229–30.
[245] *Id.* at 229 (citations omitted).
[246] *Id.* at 229 n.2 (noting how the court recognized sexual harassment as a form of discrimination and protection against same sex discrimination before the United States Supreme Court, and that the MHRA provides other broader protections and remedies than Title VII.)
[247] *Id.* at 231.
[248] *Id.* at 231–32.
[249] *Id.*
[250] *Id.*
[251] Sheila Engelmeier & Heather Tabery, Paskert *and* Kenneh*: the 'Severe or Pervasive' Standard in 2020*, 77 Bench & B. Minn. 24, 29 (2020) ("*Kenneh* . . . amounts to a significant shift for hostile environment claims under the MHRA."); V. John Ella, *Minnesota Sexual Harassment Law Reviewed by State's Supreme Court*, TREPANIER MACGILLIS BATTINA P.A. (June 10, 2020), https://trepanierlaw.com/minnesota-sexual-harassment-law-reviewed-by-states-supreme-court/ [https://perma.cc/VMG5-L6KN] ("The likely result of [*Kenneh*] is that it will be more difficult for employers to have sexual harassment cases in Minnesota dismissed before trial.").

Workplace harassment claims and the severe or pervasive standard have a complex history. This is due in part to the fact that both concepts initially arose from case law rather than the statutes, the fact that most of the development of the standards occurred through sex harassment, and a shift toward dismissal at summary judgment. The differences between Title VII and the MHRA complicated matters even more. Indeed, until *Kenneh*, Minnesota state courts applied federal precedent, including adopting the practice of analyzing and deciding MHRA claims based on "analogous" federal Title VII decisions even though the MHRA provides "more expansive protections to Minnesotans than federal law."[252]

Though the severe or pervasive standard was once a seemingly insurmountable hurdle, the *Kenneh* decision clarified how the standard applies to MHRA claims and in so doing appears to have brought harassment cases back in line with the MHRA's policy to rid the workplace of discrimination. However, because *Kenneh* was based on sexual harassment, how the case will affect race harassment jurisprudence remains to be seen. The companion to this article discusses the *Kenneh* decision in more detail, examining the potential impact of the decision on race harassment claims. It also suggests that the unique attributes of race and sex harassment be considered when analyzing each claim rather than automatically analogizing them as indistinguishable.[253]

[252] *Id.* at 229.
[253] Frances Baillon & Michelle Gibbons, *The Minnesota Supreme Court's Not-So-Severe "Severe or Pervasive" Standard: Potential Impacts of* Kenneh v. Homeward Bound, Inc. *on Race Harassment Claims Under the Minnesota Human Rights Act*, 49 MITCHELL HAMLINE L. REV. (forthcoming 2023).