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Disrespectful, Offensive, Boorish & Decidedly Immature Behavior Is Not Sufficient to Meet the Requirements of Title VII

Duncan v. General Motors Corp.¹

I. INTRODUCTION

A recent law school graduate has just passed the bar exam and is ready to begin her first job as a licensed attorney at a prestigious law firm. Within the first few weeks of employment, one of the managing partners asks her to lunch. While at lunch he mentions an affair he is having with another associate. The partner also divulges to the young associate his marital problems and then he propositions her for a sexual relationship. The young associate refuses and leaves. After the initial request, the partner never propositions the young associate again; however, after the incident, the partner becomes increasingly critical of her work product and insults her by saying an inexperienced paralegal would do a better job. Over the next two years the partner subjects the associate to other offensive behavior including hanging a poster at work describing the “Man Haters Club of America,” naming the associate as the President and CEO and listing a requirement that all members “must be in control of sex.” In addition, the partner’s screen saver is a picture of a naked woman, and he tells the associate she is to type certain items on his computer because it is the only one with the necessary software. Located on his desk is a penis-shaped pacifier as well as a planter in the shape of a man with a cactus protruding from his unzipped pants. Furthermore, on several occasions, the partner inappropriately brushes the associate’s hand when she is handing him documents. This behavior not only makes the associate uncomfortable, but also intimidates her and humiliates her in front of her peers.

It does not seem unreasonable that a judge or jury could find this behavior sufficiently severe or pervasive to warrant a hostile environment sexual harassment claim. This is just a hypothetical situation, but in Duncan v. General Motors Corp.,² the United States Court of Appeals for the Eighth Circuit held that a jury could not reasonably find similar circumstances so severe or pervasive to alter the terms or conditions of employment in the context of an automobile factory.

The United States Supreme Court has stated that when considering whether conduct reaches the threshold of actionable sexual harassment it is necessary to

¹. 300 F.3d 928 (8th Cir. 2002), cert. denied, 123 S. Ct. 1789 (2003).
². Id.
look at the totality of the circumstances. The Equal Employment Opportunity Commission ("EEC") also advances this approach. However, a circuit split exists in applying the totality of the circumstances approach. One approach includes considering the work environment as part of the totality of the circumstances, while the other approach specifically rejects considering whether the environment is blue-collar or professional. This Note explains that while the Eighth Circuit has not specifically adopted one approach, it seems apparent from Duncan that the court takes into consideration the specific work atmosphere. This Note also examines whether the standard is discriminatory in and of itself.

II. FACTS AND HOLDING

Diana Duncan filed suit under Title VII of the Civil Rights Act of 1964 against her employer, General Motors Corporation ("GMC"). Duncan claimed she was sexually harassed by her supervisor, James Booth, from two weeks after she was hired in August 1994 until the time she quit in May 1997.

More specifically, Duncan alleged that Booth requested a meeting with her at a local restaurant two weeks after she was hired, where he disclosed to her his then-current affair and marital problems. Booth then propositioned Duncan, requesting that she engage in a sexual relationship with him. Duncan denied this request and left the restaurant. This was the only attempt by Booth to

5. See infra Part III.B.
7. It is debated whether GMC was actually Duncan's employer because Duncan was placed at GMC through a program at the Junior College District of St. Louis. Duncan, 300 F.3d at 930. Duncan had two supervisors, Reese through the College, and Booth at GMC. Id. For the purposes of this case the court decided not to rule on the issue and assumed that GMC was the actual employer of Duncan. Id. at 933.
8. Id. at 930-31. Although the court does not address who hired Duncan, it is interesting to note that Duncan attained her position at GMC through her acquaintance with Booth. Id. at 931. Duncan was working as a bartender and waitress at Booth's country club and Booth asked her if she knew anyone who would be interested in the position. Id. She stated that she was and he brought her the necessary paperwork. Id. In addition, Booth submitted Duncan’s application and participated in the interviewing process. Id.
9. Id.
10. Id.
11. Id.
proposition Duncan for a sexual relationship.\textsuperscript{12} Duncan confronted Booth about his behavior the following day at work, at which time he apologized.\textsuperscript{13} Duncan alleged that after the incident at the restaurant Booth became hostile toward her and more critical of her work; however she admitted that Booth was critical of other employees as well, including her male counterparts.\textsuperscript{14}

Another instance of alleged inappropriate behavior entailed Booth requiring Duncan to use his computer on which there was a screen saver of a naked woman because, he claimed, his computer was the only computer with the necessary software.\textsuperscript{15} In addition, Duncan alleged that Booth unnecessarily touched her hand when she passed him the phone on four or five occasions.\textsuperscript{16} Duncan also claimed that Booth kept a pacifier that was shaped like a penis in his office.\textsuperscript{17} Booth showed this penis-shaped pacifier to his coworkers on occasion, and on two occasions showed the pacifier to Duncan specifically.\textsuperscript{18}

Furthermore, Duncan claimed that Booth placed a planter in his office that was in plain view of everyone who entered the office. The planter, shaped like a slouched man wearing a sombrero, had a hole in the front of the man’s pants where a cactus protruded.\textsuperscript{19} Duncan accused Booth of directing her to draw the planter to prove her artistic skills when she requested a pay increase and promotion to an illustrator’s position.\textsuperscript{20} Duncan refused to draw the planter because previous applicants for the illustrator’s position were only required to draw automotive parts.\textsuperscript{21}

Booth also created a “recruitment” poster for the “Man Hater’s Club of America” that he displayed on the bulletin board in Duncan and Booth’s work area.\textsuperscript{22} Booth named Duncan as President and CEO of the Club, and listed among other membership qualifications that members “must always be in control of . . . [s]ex.”\textsuperscript{23}

\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id. The criticism included telling Duncan that she was “incompetent and that [Booth] should hire a [temporary employee] to replace her” when she made typographical errors. Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 931-32.
\textsuperscript{21} Id. at 932. Duncan later learned that she was unqualified for the position because she did not have a college degree. Id.
\textsuperscript{22} Id.
\textsuperscript{23} Id. The poster listed the club’s membership requirements as: “Must always be in control of: (1) Checking, Savings, all loose change, etc.; (2) (Ugh) Sex; (3) Raising children our way!; (4) Men must always do household chores; (5) Consider T.V. Dinners
Duncan also alleged that Booth and another employee arranged for Duncan to be “arrested” while at work as part of a charity event. A fellow employee explained the event to Duncan and she left with the “police officer,” only to be released upon a financial donation by Booth to the charity. After having Duncan released, Booth allegedly took Duncan to a bar instead of to work despite her protests.

Booth’s alleged inappropriate behavior did not stop there. Duncan claimed that on May 5, 1997, Booth directed Duncan to type a draft of the “He-Men Women Hater’s Club,” which she refused to type. Duncan resigned from GMC two days later.

GMC conceded all of these facts, but claimed that Booth’s behavior, which resulted in an offensive and disagreeable atmosphere, was directed at both female and male employees. Thus, GMC asserted that the sexual discrimination claim failed because the harassment was not directed toward Duncan, or women in general, because of gender. GMC further argued that the “alleged harassment was not so severe or pervasive as to alter a term, condition, or privilege of Duncan’s employment.”

The district court jury found in favor of Duncan and awarded her over one million dollars in damages and back pay. GMC unsuccessfully sought judgment as a matter of law. GMC then appealed to the United States Court of Appeals for the Eighth Circuit which reversed the lower court’s finding and

*a gourmet meal.*” Id.

24. Id.
25. Id.
26. Id.
27. The beliefs included:
   * Constitutional Amendment, the 19th, giving women [the] right to vote should be repealed. Real He-Men indulge in a lifestyle of cursing, using tools, handling guns, driving trucks, hunting and of course, drinking beer.
   * Women really do have coodies [sic] and they can spread.
   * Women [are] the cause of 99.9 per cent of stress in men.
   * Sperm has a right to live.
   * All great chiefs of the world are men.
   * Prostitution should be legalized.

Id.

28. Id.
29. Id.
30. Id. at 933-34.
31. Id. at 934.
32. Id. at 930-31. More specifically, Duncan was awarded “$4600 in back pay, $700,000 in emotional distress damages on her sexual harassment claim, and $300,000 in emotional distress damages on her constructive discharge claim.” Id.
33. Id. at 931.
granted GMC’s motion for judgment as a matter of law. The Eighth Circuit held that although Booth acted in a “boorish, chauvinistic, and decidedly immature” manner, the behavior did not create “an objectively hostile work environment permeated with sexual harassment.” Even though Booth’s behavior made Duncan uncomfortable and embarrassed, it was not enough to constitute actionable sexual harassment. Because Duncan failed to prove the behavior in the aggregate was so severe and extreme that a reasonable person would find the terms or conditions of her employment had been altered, she was ultimately unsuccessful.

III. LEGAL BACKGROUND

A. The Foundation: Title VII of the Civil Rights Act of 1964

The Civil Rights Act of 1964 was enacted to protect individuals from hostile work environments and unlawful employment practices. The original purpose of Title VII was “to eliminate . . . discrimination in employment based on race, color, religion, or national origin.” Sexual discrimination was not included in the original draft of Title VII, but was added at the last minute on the floor of the House of Representatives. Even though Title VII prohibits discrimination based on sex, it does not prohibit all sex-related activity in the

34. Id. at 936.
35. Id. at 935.
36. Id.
   It shall be an unlawful employment practice for an employer—
   (1) to fail or refuse to hire or to discharge any individual, or otherwise to 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; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.
39. Judith A. Baer, Women in American Law: The Struggle Toward Equality from the New Deal to the Present 77 (3d ed. 2002). The original Title VII did not address sex discrimination. The amendment adding “sex” was proposed by an opponent of civil rights who urged his colleagues “to protect our spinster friends in their ‘right’ to a husband and family.” Id. The last minute joke failed when a group of female legislators saved the amendment. Id.
work environment; sexual conduct in the work setting that does not alter the terms of employment does not reach the level necessary for a Title VII claim.40

B. The United States Supreme Court Interprets Title VII

1. Hostile Environment Sexual Harassment Constitutes Discrimination

In 1986 the Supreme Court had the opportunity to address sexual harassment standards in the work place in Meritor Savings Bank, FSB v. Vinson.41 In Meritor the plaintiff, Vinson, alleged that her supervisor, Taylor, invited her out to dinner and requested they go to a hotel to engage in sexual relations.42 At first, Vinson refused to participate, but out of "fear of losing her job she eventually agreed."43 Vinson also testified that following the initial incident Taylor made repeated demands for sexual favors, both during work and after business hours.44 Furthermore, Vinson testified that over the next several years she had intercourse with Taylor forty to fifty times, he fondled her in front of coworkers, followed her into the women's restroom when she went there alone, exposed himself to her while at work, and forcibly raped her.45 For the first time, the Supreme Court stated that a hostile environment sexual harassment claim is a form of discrimination under Title VII and held that Taylor's behavior constituted such discrimination.46 The Court went on to say that the purview of Title VII is not confined to "economic" or "tangible discrimination" and the EEOC guidelines support the conclusion that economic injury is not necessary to violate Title VII.47 The Court did not define a standard describing what sexual harassment constituted a violation of Title VII. It stated: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of employment and create an abusive working environment.'"48


41. Meritor, 477 U.S. at 59.

42. Id. at 60.

43. Id.

44. Id.

45. Id.

46. Id. at 57-58.

47. Id.

48. Id. at 67 (emphasis added) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
2. Severe and Pervasive, but Not Affecting Psychological Well-Being

In *Harris v. Forklift Systems, Inc.*, the Supreme Court again addressed the issue of the hostile work environment standard. In *Harris*, the plaintiff filed a Title VII action against her former employer alleging that on several occasions and in front of other employees, the President of Forklift Systems said to her, “You’re a woman, what do you know,” “We need a man as the rental manager,” and told her on at least one occasion that she was “a dumb ass woman.” In addition, the plaintiff, Harris, alleged that Hardy, Forklift Systems’ owner, suggested in front of other employees that she “go to the Holiday Inn [with Hardy] to negotiate [her] raise.” According to Harris, Hardy had requested that she, as well as other female employees, retrieve coins from the front pockets of his pants. Furthermore, Harris alleged that Hardy tossed things on the ground in front of her and other female employees and ask them to bend over and pick them up. Harris eventually spoke to Hardy about his offensive behavior, and Hardy apologized, stating that he was just joking, and it would not happen again. Because of Hardy’s promise, Harris agreed to stay on the job. According to Harris, Hardy’s behavior changed for approximately one month. However, Harris claimed that while she was negotiating a deal with one of Forklift Systems’ customers, Hardy said to her in front of other employees, “What did you do, promise the guy... some [sex] Saturday night?” This was the last straw for Harris. She collected her final paycheck and quit.

The United States District Court for the Middle District of Tennessee dismissed the action. The United States Court of Appeals for the Sixth Circuit upheld the dismissal on the grounds that the conduct was not so severe or pervasive to affect Harris’ psychological well-being or cause her injury. Thus, according to the Sixth Circuit, Hardy’s conduct did not create an actionable

51. *Harris*, 510 U.S. at 19.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 19-20.
61. *Id.*
hostile work environment claim under Title VII.\textsuperscript{62} The Supreme Court granted certiorari\textsuperscript{63} and reversed and remanded the case, stating that the standard takes "a middle path between making actionable any conduct that is merely offensive and requiring conduct to cause a tangible psychological injury."\textsuperscript{64} The Court went on to say that "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."\textsuperscript{65} Thus, even though conduct that could seriously affect a reasonable person's psychological well-being is actionable under Title VII, reaching that level of behavior is not the threshold requirement.\textsuperscript{66}

3. Social Context and the Totality of the Circumstances

In \textit{Oncale} the Supreme Court discussed the social context of sexual harassment in a hostile work environment case.\textsuperscript{67} \textit{Oncale} was unique because the Court was asked to address the issue of whether same-sex harassment was actionable under Title VII.\textsuperscript{68} The Court held that same-sex harassment was prohibited by Title VII.\textsuperscript{69} Furthermore, Title VII's prohibition of discrimination protects men as well as women.\textsuperscript{70} The \textit{Oncale} decision was also significant because the Court stressed the need to look at the social context of the alleged harassment.\textsuperscript{71} The Court stated that the standards set forth in \textit{Harris v. Forklift Systems, Inc.}\textsuperscript{72} were still applicable and emphasized a point previously made in \textit{Meritor Savings Bank, FSB v. Vinson}:\textsuperscript{73} "The trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.'"\textsuperscript{74} The Court stated that judging the behavior within its cultural context would prevent Title VII from becoming a

\textsuperscript{62} Id.
\textsuperscript{63} Id. at 20.
\textsuperscript{64} Id. at 21.
\textsuperscript{65} Id. at 22.
\textsuperscript{66} Id.
\textsuperscript{68} Id. at 75.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 78.
\textsuperscript{71} Id. at 81-82.
\textsuperscript{72} 510 U.S. 17 (1993).
\textsuperscript{73} 477 U.S. 57 (1986).
\textsuperscript{74} Id. at 69 (quoting 29 C.F.R. \S 1604.11(b) (1985)); see also Frank, \textit{supra} note 50, at 449-50.
code of general civility in the workplace and would guard against imposing liability for behavior that does not reach the necessary level of severeness and pervasiveness. More specifically, the Court stated:

We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering “all the circumstances.” In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. 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.

Although the Supreme Court emphasized the importance of analyzing the alleged sexual harassment in light of social context, it did not specifically explain what “social context” meant. The term “social context” can and has been interpreted by courts to mean many different things.

75. Oncale, 523 U.S. at 80-81.
76. Id. at 81-82 (citations omitted).
77. See generally id.
78. Frank, supra note 50, at 451-65.
C. The Circuit Split Regarding the "Social Context" Standard

1. The Tenth Circuit Approach

In Gross v. Burgraff Construction Co.\textsuperscript{79} the United States Court of Appeals for the Tenth Circuit applied the standard set forth by the United States Supreme Court in Meritor, which required courts to look at the totality of the circumstances. The court started its analysis by recognizing that sexual harassment must be sufficiently severe or pervasive, altering the terms or conditions of the victim's employment to be actionable.\textsuperscript{80} The Tenth Circuit also noted that when deciding whether sexual harassment occurred the court should look at the record as a whole and must look at the totality of the circumstances.\textsuperscript{81} This would include the nature of the sexual advances and the context in which the alleged incidents occurred.\textsuperscript{82} In light of this precedent the Tenth Circuit acknowledged that "[i]n the real world of construction work, profanity and vulgarity are not perceived as hostile or abusive," and "[i]ndelicate forms of expression are accepted or endured as normal human behavior."\textsuperscript{83} The court concluded that when appraising the plaintiff's gender discrimination claim it must do so in the context of a blue collar work environment where crude language is used often.\textsuperscript{84} The court also reasoned:

"[T]he standard for determining sex[ual] harassment would be different depending upon the work environment. Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite

\textsuperscript{79} 53 F.3d 1531 (10th Cir. 1995). The alleged incidents of harassment by the plaintiff's supervisor included referring her as a "cunt"; stating over the CB radio "sometimes, don't you just want to smash a woman in the face"; yelling at her, "What the hell are you doing? Get your ass back in the truck and don't you get out of it until I tell you"; referring to her as "dumb"; using profanity in reference to her; generally disliking women unless they were between the ages of nineteen and twenty-five and weighed less than 115 pounds; and threatening retaliation against plaintiff because he was under the impression that she was going to file an EEOC claim against him. Id. at 1536.

\textsuperscript{80} Id. at 1537.

\textsuperscript{81} Id. (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986)).

\textsuperscript{82} Id.

\textsuperscript{83} Id.

\textsuperscript{84} Id. at 1538.
different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers."

2. The Sixth Circuit Approach

In *Williams v. General Motors Corp.*, the United States Court of Appeals for the Sixth Circuit specifically rejected the Tenth Circuit’s approach. The Sixth Circuit, however, adopted the application of “totality of the circumstances” test that requires the court to look at the accumulated effect of the harassing behavior, instead of determining if isolated incidents meet the severe or pervasive standard. In rejecting the Tenth Circuit’s approach, the Sixth Circuit reasoned that a woman does not give up the right to be free from sexual harassment because she decides to work in a male-dominated trade. The court concluded that the Tenth Circuit’s reasoning was “illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment.” The Sixth Circuit also reasoned that this logic allows courts to impose an “assumption of the risk” liability upon women entering male-dominated fields.

85. *Id.* (alterations in original) (quoting Rabidue v. Osceola Refining Co., 584 F. Supp. 419, 430 (E.D. Mich. 1984), aff’d, 805 F.2d 611 (6th Cir. 1986)).
86. 187 F.3d 553 (6th Cir. 1999).
87. *Id.* at 564.
88. *Id.* at 562-63. More specifically the court stated:

“The [severe or pervasive] analysis cannot carve the work environment into a series of discrete incidents and measure the harm adhering in each episode. Rather, a holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes.”

*Id.* at 563 (quoting Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991)).
89. *Id.* at 564.
90. *Id.*
IV. INSTANT DECISION

A. The Majority

In *Duncan v. General Motors Corp.* 92 the United States Court of Appeals for the Eighth Circuit was faced with deciding whether disturbing, boorish and embarrassing behavior that occurred over several years was enough to meet the high threshold of the *Harris* 93 standard, which requires behavior to be so severe or pervasive that a reasonable person would find the environment abusive and hostile. 94 The Eighth Circuit held Booth’s harassment was not so severe or pervasive as to affect a term, condition, or privilege of Duncan’s employment, and, therefore, Duncan failed to prove a prima facie case. 95 Thus, the court overturned the jury award, totaling over one million dollars, and it granted the defendant’s motion for judgment as a matter of law. 96

The Eighth Circuit’s analysis addressed each element necessary to succeed on a claim of hostile work environment sexual harassment. 97 The plaintiff must show that “she was a member of a protected group, that she was subjected to unwelcome sexual harassment, that the harassment was based on sex, and that the harassment affected a term, condition, or privilege of employment.” 98 The court noted that it was undisputed that Duncan satisfied the first two requirements necessary to succeed on the hostile work environment sexual harassment claim. 99 The court also concluded that the harassment of Duncan by Booth was based on gender, even though Booth’s behavior was at times directed at both males and females. 100

The court stated that unlawful discrimination does not occur when the atmosphere is offensive, unless one gender is treated differently than the other. 101

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94. *Duncan*, 300 F.3d at 933-34.
95. *Id.* at 934-35.
96. *Id.* at 933. “Judgment as a matter of law is proper ‘when all the evidence points in one direction and is susceptible to no reasonable interpretation supporting the jury verdict.’” *Id.* (quoting Blackmon v. Pinkerton Sec. & Investigative Servs., 182 F.3d 629, 635 (8th Cir. 1999)).
97. *Id.*
98. *Id.* (quoting Beard v. Flying J, Inc., 266 F.3d 792, 797-98 (8th Cir. 2001)).
99. *Id.*
100. *Id.* at 933-34.
101. *Id.* at 933 (citing *Oncale v. Sundowner Offshore Servs.*, Inc., 523 U.S. 75, 80 (1998)); cf. *Schnoffstall v. Henderson*, 223 F.3d 818, 826-27 (8th Cir. 2000) (affirming grant of summary judgment for employer when plaintiff alleged that her supervisor lost his temper, swore at her, intimidated her, pounded on desks, and on one occasion lunged across his desk at her; stating that “[a]lthough this conduct [was] abusive and harassing,
The court noted that "[t]he fundamental issue is whether members of one sex are subjected to unfavorable conditions of employment that the members of the opposite sex are not." 102 Evidence suggested that some of Booth's offensive behavior was directed at both female and male employees. 103 GMC contended that only five of the incidents Duncan complained of could arguably be based on sex. 104 The court, however, found this argument lacking, stating "A plaintiff in this kind of case need not show . . . that only women were subjected to harassment, so long as she shows that women were the primary target of such harassment." 105 Thus, the court concluded that "a jury could reasonably find that Duncan and her gender were the overriding themes of [the] incidents." 106

GMC next argued that even if the alleged harassment was based on sex, it was not "so severe or pervasive as to alter a term, condition, or privilege of Duncan's employment." 107 The court agreed with GMC; thus Duncan had to show that her workplace was permeated with insult, ridicule and discriminatory intimidation to fall within the purview of Title VII. 108 The court went on to say that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." 109 The court stated that in order to determine whether behavior is sufficiently severe and pervasive to constitute hostile environment sexual harassment it "look[s] to the totality of the circumstances, including 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." 110 The court also stated that it was not the purpose of Title VII "to purge the workplace of vulgarity." 111 It then mentioned that these standards were in place to "filter out complaints attacking

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102. Duncan, 300 F.3d at 933 (citing Oncale, 523 U.S. at 80).
103. Id.
104. Id. GMC conceded that "(1) Booth’s proposition for a 'relationship'; (2) Booth’s touching of Duncan’s hand; (3) Booth’s request that Duncan sketch his planter; (4) the Man Hater's Club poster; and (5) Booth’s request that Duncan type the He-Men Women Haters beliefs" might arguably be based on Duncan’s sex. Id. at 933-34.
105. Id. at 934 (quoting Beard v. Flying J, Inc., 266 F.3d 792, 798 (8th Cir. 2001)).
106. Id.
107. Id. (citing Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 967 (8th Cir. 1999)).
108. Id.
110. Id. (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).
111. Id. (quoting Baskerville v. Culligan Int’l Co., 50 F.3d 428, 430 (7th Cir. 1995)).
the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.”

The court acknowledged the evidence presented could prove Duncan was upset and embarrassed by the “derogatory” poster and that she was disturbed by Booth’s sexual advances toward her and his “boorish” behavior; but reasoned that as a matter of law, Duncan failed to show that Booth’s conduct in the aggregate was so severe or pervasive that a reasonable person would find the terms or conditions of Duncan’s employment had been affected. To support its decision that Booth’s behavior did not reach the level necessary to meet the high threshold required for hostile environment sexual harassment, the court cited several federal cases in which it believed the facts equally, if not more, egregious than the circumstances of Duncan’s situation. While Booth’s

112. Id. (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quotation marks omitted)).

113. Id. The court cited Scusa v. Nestle U.S.A. Co., 181 F.3d 958, 967 (8th Cir. 1999), which stands for the proposition that experiencing “unpleasant conduct and rude comments” does not equal severe or pervasive harassment that alters the terms or conditions of employment.

114. Id. at 934-35. The court cited several cases to support its holding that the circumstances in Duncan’s case were not severe or pervasive enough to warrant a finding of hostile work environment sexual harassment. Id. (citing Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871, 872-74 (5th Cir. 1999) (holding that several incidents including statements that the plaintiff’s elbows were the same color as her nipples and that she had big thighs, repeated touching of her arm, and attempts to look down her dress, were insufficient to support hostile work environment claim when they occurred over a two year period); Adusumilli v. City of Chicago, 164 F.3d 353, 357, 361-62 (7th Cir. 1998) (holding that when employee made sexual jokes aimed at the plaintiff, told her not to wave at police officers “because people would think she was a prostitute,” commented about low-necked tops, leered at her breasts, and touched her arm, fingers, or buttocks on four occasions the behavior in the aggregate was not sufficient to support the hostile environment claim); Black v. Zaring Homes, Inc., 104 F.3d 822, 823-24, 826 (6th Cir. 1997) (when employee reached across plaintiff, stating “[n]othing I like more in the morning than sticky buns” while staring at her suggestively; suggested to her that land be named “Hootersville,” “Titsville,” or “Twin Peaks”; and asked “weren’t you there Saturday night dancing on the tables?” while discussing property near a biker bar, the court held the behavior to be offensive, but not sufficient to support a hostile environment claim); Weiss v. Coca-Cola Bottling Co., 990 F.2d 333, 337 (7th Cir. 1993) (holding no sexual harassment when plaintiff’s supervisor asked her for dates, asked about her personal life, called her a “dumb blond,” put his hand on her shoulder several times, placed “I love you” notes on her work station, and attempted to kiss her three times); see also Clearwater v. Indep. Sch. Dist. No. 166, 231 F.3d 1122, 1128 (8th Cir. 2000) (holding that a solitary dinner invitation from plaintiff’s supervisor did not amount to hostile work environment claim even though it made the plaintiff uncomfortable); Hocevar v. Purdue Frederick Co., 223 F.3d 721 (8th Cir. 2000) (affirming motion for summary judgment in employer’s favor when plaintiff claimed that over a three-year
actions "were boorish, chauvinistic, and decidedly immature," they were not severe enough to create "an objectively hostile work environment permeated with sexual harassment."\textsuperscript{115}

The court focused on the fact that Duncan presented only four categories of harassing conduct which were based on her sex: one request for a relationship, four or five incidents where Booth briefly touched her hand, a request to draw a planter for an illustrator's position, and teasing, including a poster and beliefs for an imaginary club.\textsuperscript{116} The court concluded that although Booth's behavior made Duncan uncomfortable, his conduct did not meet the standard for hostile work environment sexual harassment.\textsuperscript{117} The court held that as a matter of law Duncan did not show harassment sufficiently severe or pervasive so as to alter the conditions of her employment, necessary requirements for a sexual harassment hostile environment claim.\textsuperscript{118}

**B. The Dissent**

Judge Richard S. Arnold dissented from the majority opinion concluding the harassment suffered by Duncan was sufficiently severe and pervasive for a reasonable jury to conclude that Booth's conduct had altered a term, condition or privilege of Duncan's employment.\textsuperscript{119} Judge Arnold concluded that Booth subjected Duncan to a series of incidents of harassment, "going far beyond 'gender-related jokes and occasional teasing.'"\textsuperscript{120} He believed the conclusion by the jury, that Booth's offensive behavior created an objectively hostile work environment, was supported by ample evidence.\textsuperscript{121}

In supporting this conclusion, Judge Arnold noted that Duncan was propositioned by her supervisor within days of starting her employment with GMC, the sexual advancement occurred during work hours, and the advancement was a direct request for a sexual relationship.\textsuperscript{122} Judge Arnold referred to the statement by the majority that the incident was a "single request"

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\textsuperscript{115} Duncan, 300 F.3d at 935.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id. (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).
\textsuperscript{119} Id. at 936 (Arnold, J., dissenting).
\textsuperscript{120} Id. (Arnold, J., dissenting) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).
\textsuperscript{121} Id. at 937 (Arnold, J., dissenting).
\textsuperscript{122} Id. (Arnold, J., dissenting).
by Booth.\textsuperscript{123} He believed "[t]his description minimizes the effect of the sexual advance on Ms. Duncan's working conditions."\textsuperscript{124} To further this point, he relied on facts which indicated Booth became hostile to Duncan, increased his criticism of her work, and degraded her professional capabilities in front of coworkers in the months following her refusal to engage in a sexual relationship with him.\textsuperscript{125} Judge Arnold noted, "Significantly, there is no suggestion that this hostile behavior occurred before Ms. Duncan refused his request for sex."\textsuperscript{126} He went on to say that this was only the beginning of the harassment Duncan suffered at the hands of Booth based on her sex, noting the physical touching, social humiliation and emotional intimidation suffered by Duncan.\textsuperscript{127} Judge Arnold then proceeded to discuss the Eighth Circuit's own jurisprudence, which could suggest that Duncan experienced enough sexual harassment to reach the threshold necessary for a hostile environment sexual harassment claim.\textsuperscript{128} Judge Arnold stated that the Eighth Circuit has "acknowledged that '[t]here is no bright line between sexual harassment and merely unpleasant conduct, so a jury's decision must generally stand unless there is trial error.'"\textsuperscript{129} He then went on to say that the Eighth Circuit has "ruled that '[o]nce there is evidence of improper conduct and subjective offense, the determination of whether the conduct rose to the level of abuse is largely in the hands of the jury.'"\textsuperscript{130} Thus, Judge Arnold believed that the court erred when it decided as a matter of law that

\begin{itemize}
  \item \textsuperscript{123} \textit{Id.} (Arnold, J., dissenting).
  \item \textsuperscript{124} \textit{Id.} (Arnold, J., dissenting).
  \item \textsuperscript{125} \textit{Id.} (Arnold, J., dissenting).
  \item \textsuperscript{126} \textit{Id.} (Arnold, J., dissenting).
  \item \textsuperscript{127} \textit{Id.} (Arnold, J., dissenting). More specifically, Judge Arnold relied on evidence claiming Booth touched Duncan's hand on several occasions, singled her out as a "Man Hater" who must always be in control of sex, and required her to draw a "vulgar planter" in order to be considered for a promotion. He described this as "an unfair choice that would likely intimidate a reasonable person from seeking further career advancement." \textit{Id.} (Arnold, J., dissenting).
  \item \textsuperscript{128} \textit{Id.} at 938 (Arnold, J., dissenting). Judge Arnold also distinguished the precedent relied upon by the majority noting that in \textit{Weiss v. Coca-Cola Bottling Co.}, 990 F.2d 333 (7th Cir. 1993), the plaintiff did not allege her duties or evaluations were different because of sex; noting that in \textit{Shepherd v. Comptroller of Public Accounts}, 168 F.3d 871 (5th Cir. 1999), the court relied on the absence of a claim that the plaintiff was professionally incompetent because of her sex in affirming the motion for summary judgment; and distinguishing \textit{Black v. Zaring Homes}, 104 F.3d 822 (6th Cir. 1997), by acknowledging that in \textit{Black} the comments were not directed specifically at the plaintiff. \textit{Id.} at 937 (Arnold, J., dissenting).
  \item \textsuperscript{129} \textit{Duncan}, 300 F.3d at 938 (Arnold, J., dissenting) (quoting Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1998)).
  \item \textsuperscript{130} \textit{Id.} (Arnold, J., dissenting) (quoting Howard v. Burns Bros., Inc., 149 F.3d 835, 840 (8th Cir. 1998)).
\end{itemize}
the jury acted unreasonably in finding that Duncan faced severe or pervasive harassment creating a hostile work environment.\textsuperscript{131}

V. COMMENT

It is difficult, if not impossible, to establish a bright line rule to determine if and when hostile environment sexual harassment has occurred. The United States Court of Appeals for the Eighth Circuit applies the somewhat ambiguous precedent of the United States Supreme Court by requiring that the harassment be so severe or pervasive as to alter a term, condition, or privilege of employment. The Eighth Circuit also applies the Supreme Court's "totality of the circumstances" test, which includes consideration of "social context."\textsuperscript{132}

Thus, the issue is whether the "totality of the circumstances" test set forth by the Supreme Court was intended to include consideration of the work atmosphere; more specifically, a professional atmosphere versus a blue-collar work environment, such as a construction sight or an automobile factory. While the Eighth Circuit does not explicitly adopt the approach taken by the Tenth Circuit, it seems apparent that through its analysis of recent cases the court does take into consideration the entire work environment in which the alleged harassment occurs, and not just the social context of the actual conduct.\textsuperscript{133}

The Tenth Circuit approach was established prior to the Supreme Court's decision in \textit{Oncale}. \textit{Oncale} does not, however, clear up the confusion among the lower courts because \textit{Oncale} neither adopts nor rejects the Tenth Circuit's approach. The confusion exists because there are at least two interpretations of "social context" and "totality of the circumstances." On one hand the language of \textit{Oncale} can be interpreted to mean the social context of actions taken in the workplace (the Sixth Circuit approach). On the other hand the language in \textit{Oncale} can be interpreted to mean the social context of the entire workplace (the Tenth Circuit approach).\textsuperscript{134} This second approach seems to be fueled by the notion that Title VII is not a general civility code.

While this is true, it is important to consider the overall purpose of Title VII, which was to open the doors of workplaces formerly closed to certain groups and to provide a work atmosphere that is "free of discriminatory animus."\textsuperscript{135} The Sixth Circuit notes that the objective and subjective tests set forth "in \textit{Harris} sufficiently prevent Title VII from expanding into a general civility code" as feared by the Tenth Circuit.\textsuperscript{136} Significantly, the Sixth Circuit also stated,

\begin{itemize}
\item \textsuperscript{131} \textit{Id.} (Arnold, J., dissenting).
\item \textsuperscript{133} \textit{See supra} Parts II, III.C.
\item \textsuperscript{134} \textit{See generally} Frank, \textit{supra} note 50.
\item \textsuperscript{135} \textit{See} Williams v. Gen. Motors Corp., 187 F.3d 553, 553-64 (6th Cir. 1999).
\item \textsuperscript{136} \textit{Id.} at 564 (quoting \textit{Oncale}, 523 U.S. at 79).
\end{itemize}
“While ‘[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing . . . and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive,’” it is improper for the court to make judgments as to a woman’s assumption of risk upon entering a hostile environment. 137

In his dissent, Judge Arnold seems to adopt this approach to interpreting the standards set forth by the Supreme Court. When the alleged behavior of Booth is considered as a whole, with one incident building on the next, Judge Arnold found that a reasonable jury could find sufficient severity or pervasiveness. Each individual incident, viewed separately, is unarguably insufficient; however, according to the Sixth Circuit approach, it is only necessary for the incidents in the aggregate to be so severe or pervasive that the conduct alters a term, condition or privilege of employment. This seems to be the more logical approach when taking into consideration the purpose of Title VII.

Requiring a higher standard in a work environment because it has a history of discrimination seems to defeat the purpose of Title VII altogether. Women who want to work as construction workers should not be forced to run a gauntlet of lewd comments and remarks because construction sites have a history of such behavior. Most people would not expect an accountant, doctor or lawyer to tolerate the level of disrespect many women face in the blue-collar work environment.

The present standards negatively affect employees as well as employers. 138 Employers who are unsure of what the current standards require may over-regulate the behavior of employees in fear of being sued. 139 Or, employers may under-regulate because they are unaware of what is required, or because they assume an employee will not prevail in a harassment claim. 140 Neither situation is ideal. Furthermore, it is unclear to employees and their attorneys what conduct could possibly constitute sexual harassment. The result of this uncertainty is that employees who have suffered egregious treatment may not file suit because of the belief that it is impossible to prevail when they are employed in a blue-collar work environment. 141 This problem is exacerbated when attorneys must put their own money on the line to litigate such cases. Because there is no real standard set forth by the courts to judge conduct in the workplace, it is difficult to fault the plaintiff or his attorney for bringing claims that do not ultimately succeed. 142 While it is inefficient to have courts overloaded with baseless claims, it is

137. Id. (quoting Oncale, 523 U.S. at 82) (citation omitted).
138. Frank, supra note 50, at 508-09.
139. Id.
140. Id.
141. Id.
142. Id. at 511.
necessary to have the court doors open to those who have been harmed by what should be actionable sexual harassment.

VI. CONCLUSION

As the law stands, it is unclear to courts, attorneys, employers and employees what constitutes an actionable hostile environment sexual harassment claim. Even though the Supreme Court had the opportunity to clarify what was meant by "totality of the circumstances" in *Oncale*, it only reaffirmed its previous ambiguous "social context" standard. As it stands now, if you are a female working for a construction crew or a factory, be prepared, because in choosing such an environment you are in danger of being harassed without the protection of the law in the Eighth Circuit.

MELISSA R. NULL