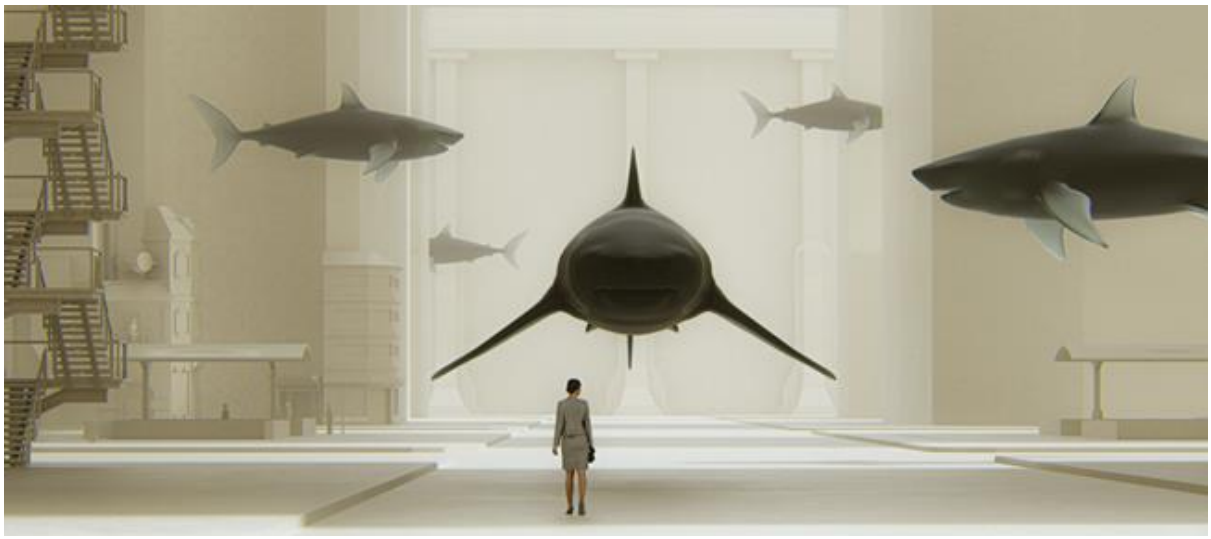
# Paskert and Kenneh: The ‘severe or pervasive’ standard in 2020



## Minnesota moves forward on workplace harassment; the 8th Circuit doubles down

*By Sheila Engelmeier and Heather Tabery*

About two years had passed since the launch of the #MeToo movement when the Minnesota Supreme Court heard oral arguments in *Kenneh v. Homeward Bound* in late 2019. Since then a great many observers have awaited the Court’s pivotal decision in the case, which posed the question of how the “severe or pervasive” standard applies to harassment claims under the Minnesota Human Rights Act (MHRA). Generally, to be actionable under either the MHRA or federal anti-discrimination law (Title VII), harassment must be sufficiently severe or pervasive to alter the conditions of the victim’s employment or create an abusive working environment. The severe or pervasive standard has been a topic of debate in Minnesota and elsewhere for years, never more so than in the wake of #MeToo. Some other states, most notably New York, have statutorily abandoned or adjusted the standard, which allows judges to dismiss harassment cases even when the workplace misconduct is egregious.[1]

Although the phrase “severe or pervasive” does not appear in the MHRA,[2] the requirement that workplace misconduct be severe or pervasive before it creates an actionably hostile environment developed in federal case law and seeped into Minnesota common law. (A detailed history of the “severe or pervasive” standard is set forth in our previous Bench & Bar Online article, “Severe or Pervasive: Just How Bad Does Sexual Harassment Have to Be in Order to Be Actionable?”[3])

By comparing the facts considered on summary judgment or a motion to dismiss to the facts of previously dismissed cases, the courts over time set an extremely high bar for plaintiffs to prove a hostile work environment. The plaintiff’s attorneys in *Kenneh* argued the Minnesota

Supreme Court should lower that bar or eliminate the severe or pervasive standard entirely for harassment claims under the MHRA. The defense argued, among other things, that any change to the standard was not the province of the Court and required legislative action.

As we waited for the *Kenneh* decision, the 8th Circuit Court of Appeals decided *Paskert v. Kemna-ASA Auto Plaza, Inc.*[4] on February 13, 2020, doubling down on the notion that the severe or pervasive standard sets a tremendously "high threshold," at least in federal courts applying federal law in this jurisdiction. (Notably, *Paskert* also dismissed an Iowa statutory harassment claim.)

In its June 3 *Kenneh* decision, the Minnesota Supreme Court did not eliminate the severe or pervasive standard, but in stark contrast to *Paskert*, it effectively lowered the standard applied to the MHRA, stating it must evolve to meet societal expectations. The Minnesota Supreme Court also cautioned courts against taking jury trials away from those making harassment claims under the MHRA and noted that the federal jurisprudence does not bind courts interpreting Minnesota law. Two jurisdictions with two very different results means the difficulties with the severe or pervasive standard may live on.

## A brief history of the severe or pervasive standard[5]

Almost 35 years ago, the 8th Circuit Court of Appeals noted that making the *prima facie* case for a hostile environment harassment claim under Title VII requires the employee plaintiffs to prove: (1) they belong to a protected group; (2) they were subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a "term, condition, or privilege" of employment; and (5) the employer knew or should have known of the harassment in question and failed to take proper remedial action.[6] (The fifth element now differs depending on whether the alleged perpetrator is a peer, supervisor, or alter ego of the employer.)

Courts have long acknowledged that anti-discrimination laws exist to protect employees from unlawful discrimination (and unlawful harassment), but the U.S. Supreme Court cautioned that they are not meant as a "general civility code." In 1986 the Court declared that in order to prove the fourth element (that the harassment affected a "term, condition, or privilege" of employment), the harassment must be "sufficiently *severe or pervasive* 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[7] (Emphasis added.) To meet the standard, the plaintiff must prove the harassment was both objectively and subjectively unreasonable, meaning that a reasonable person would find the conduct offensive and that the plaintiff actually did so.[8]

Since *Meritor*, courts have struggled to articulate what the severe or pervasive standard means. In 1993 the U.S. Supreme Court attempted to clarify and admitted the standard "is not, and by its nature cannot be, a mathematically precise test…. [W]hether an environment is 'hostile' or 'abusive' can be determined by looking at all the circumstances.… These 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."[9]

Courts, over the years, have borrowed from the federal jurisprudence interpreting Title VII when analyzing harassment claims under the MHRA. The federal jurisprudence in the 8th Circuit, and the Minnesota cases borrowing from that case law, became more and more

restrictive about what was enough to be severe or pervasive. We have reached the point in federal jurisprudence where conduct meeting the elements of criminal sexual assault may not be enough. Over the last two decades, most hostile environment cases in the 8th Circuit and in Minnesota state courts end when the employer wins a motion for summary judgment. (Remarkably, some cases were dismissed on the pleadings.)

## What do courts say is not enough to be severe or pervasive?

Boorish behavior, horseplay, teasing, bad taste and flirting are not sufficiently severe or pervasive. Squeezing an employee's nipple while stating "this is a form of sexual harassment" is not enough. A manager asking an employee to watch pornographic movies and masturbate is not enough. And so much more.[10]

In *Duncan v. General Motors Corp.*,[11] the jury had awarded plaintiff a seven-figure verdict. The allegations the jury credited involved 10 incidents over a three-year period wherein she was propositioned; made to work on a male employee's computer with a screen saver of a naked woman; unnecessarily touched on the hand; and asked to type a document entitled "He-Men Women Hater's Club," including statements such as "sperm has a right to live" and "all great chiefs of the world are men." A co-worker kept a pacifier shaped like a penis in his office.[12] The 8th Circuit Court of Appeals overturned the jury verdict, concluding that the plaintiff failed to show the alleged harassment was so severe or pervasive as to alter a term, condition, or privilege of her employment.[13]

A plaintiff alleging a greater number of harassing incidents generally is more likely to survive summary judgment than one who alleges a smaller number of specific instances, even if they are severe.[14] In theory, even a single incident of extremely severe conduct should be enough to support a hostile work environment claim.[15] Indeed, multiple courts have stated a single act of sexual assault can be actionable harassment.[16] To state a claim based on a single incident, the conduct generally must involve violence or a serious threat of violence. Even then few cases resolve in favor of the plaintiff.

In *Paugh v. P.J. Snappers*, a female went to a restaurant/bar to apply for a job and consumed alcohol given to her by a male manager.[17] The facts presumed as true in *Paugh* are these. The male manager made advances on her and rubbed her shoulders as she drank. The applicant went to the restroom and returned to the bar to continue drinking. Her next memory was waking up the following morning in the male manager's bedroom. A rape kit revealed more than one man's semen inside her. The court considered the applicant an employee for purposes of summary judgment, but held the plaintiff failed to establish the male manager's conduct in making advances and rubbing her shoulders at the restaurant qualified as sufficiently severe or pervasive to affect the terms, conditions, or privileges of her employment. It also determined that, since the rape took place off-premises, it was outside the scope of his employment.

In *Anderson v. Family Dollar Stores of Ark., Inc.*,[18] the plaintiff alleged the following. Over the course of a five-week training period, her supervisor rubbed her shoulders, back, or hands; cupped her chin in his hand; tried to flirt with her; and on one occasion told her, "I can make or break you." After the training period was over, he continued to harass her. She called him to discuss a workplace issue and he told her she ought to be with him where he was, in a Florida motel room, "in bed with me with a Mai Tai and kicking up." During another work call he told

her, “I’ll deal with it, baby doll,” and on another occasion referred to her as “honey.” Finally, when she complained to him about a workplace injury, the supervisor “grabbed her arm, pulled her back to the storeroom, pushed her, and in a mean tone asked, ‘Are you going to work with me? Are you going to be nice? Are you going to fit into my group? ... [N]ow you’re telling me your back is hurt?... [Y]ou’re just nothing but trouble... You’re just not going to be one of my girls, are you?’” and then fired her. The 8th Circuit Court of Appeals held the supervisor’s conduct, while “ungentlemanly,” was not severe or pervasive.

In the current social climate, it is fair to say that any of the aforementioned examples would be considered sexual harassment in casual conversation among most people. If someone tweeted the facts of any of these cases, the bad actor would likely be fired or at least intensely shamed on social media.

## *Paskert v. Kemna-Asa Autoplaza, Inc.*

Paskert was a female used car sales associate in Iowa. The following facts were presumed true. Paskert was hired to sell cars, complete collections work, and prepare cars for sale. She could not complete her training because when she tried to shadow superiors, Burns and Bjorkland, while selling cars on the lot, Burns would send her back inside to answer the phone. Burns frequently lost his temper, ridiculed and screamed at employees, referred to female customers using derogatory names, and threw objects in the office. Burns’s treatment of women was demeaning, sexually suggestive, and improper. Burns said he “never should have hired a woman” and wondered aloud if he could make Paskert cry. Burns openly bragged at work about his purported sexual conquests. On one occasion, Burns attempted to rub Paskert’s shoulders and said he was going to hug her.

On another occasion, Paskert criticized the way Burns treated women and wondered how his wife tolerated such behavior. Burns replied, “Oh, if you weren’t married and I wasn’t married, I could have you… You’d be mine… I’m a closer.” Both Paskert and Bjorkland reported Burns’s behavior to management, and, thereafter, Burns assigned Paskert a different job title and pay structure, which Paskert understood to be a demotion. Paskert accepted the changes, and three days later she was fired for insubordination and “refus[ing] to discuss what was bothering her on Friday, November 6th.” Burns further justified the termination by criticizing Paskert’s sales record and use of profanity at work.

Paskert filed a complaint with the Iowa Civil Rights Commission (ICRC) alleging a hostile work environment and later sued in federal district court alleging a hostile work environment and retaliation. The district court granted summary judgment for the defendant, finding in part that Paskert failed to show defendant’s conduct was sufficiently severe or pervasive to constitute a hostile work environment under Title VII or the Iowa Civil Rights Act. Paskert appealed.

The 8th Circuit Court of Appeals, citing *Meritor* and *Harris*, noted, “Although the Supreme Court’s precedent is clear that ‘Title VII comes into play before the harassing conduct *leads to a nervous breakdown*,’… our Eighth Circuit precedent sets a high bar for conduct to be sufficiently severe or pervasive in order to trigger a Title VII violation.” (Emphasis added.) The court relied on its precedent, noting that some conduct well beyond the bounds of respectful and appropriate behavior is nonetheless insufficient to violate Title VII because it is not severe

or pervasive enough, including graphic sexual propositions and even incidental unwelcome sexual contact.

Specifically, "In light of these precedents, Burns's alleged behavior, while certainly reprehensible and improper, was not so severe or pervasive as to alter the terms and conditions of Paskert's employment." The court noted Paskert "only" alleged one instance of unwelcome physical conduct and one or two statements by Burns that he could "have Paskert." The court said "all of this behavior is inappropriate and should never be tolerated in the workplace, but is not nearly as severe or pervasive as the behavior found insufficient in *Duncan*… [Employer] and Burns should both be embarrassed and ashamed for how they treated her. Nevertheless, we may only ask whether their behavior meets the severe or pervasive standard applied by this circuit, and it does not." The 8th Circuit Court of Appeals affirmed summary judgment.

*Paskert* suggests the 8th Circuit Court of Appeals is unfazed by social norms and that #TimesUp has not yet found its way into the federal jurisprudence.

## *Kenneh v. Homeward Bound*

Assata Kenneh worked as a program resource coordinator at Homeward Bound, a nonprofit organization that operates residential care facilities for people with disabilities. In her case, the following facts were presumed true. Shortly after she started working she met the maintenance coordinator, Anthony Johnson, who worked at multiple sites and was not at her location every day. Between February and June 2016, Kenneh experienced multiple incidents of sexualized or intrusive behavior. The first time they met, Johnson complimented Kenneh on her haircut, asked her who cut her hair and where she lived, and offered to cut her hair at her home or his, which alarmed Kenneh. Not long afterward, Johnson walked up to Kenneh as she struggled to open her desk drawer and offered to help. As she started to move out of his way, he told her she did not need to move because he "likes it pretty all day and all night" and he liked "beautiful women and beautiful legs." Kenneh got out of her chair anyway, and while he was working on her desk, Johnson began talking to her in a seductive tone and licked his lips in a suggestive manner.

About a month later, Johnson blocked Kenneh's office door with his body. She made the excuse that she was going to get a drink from the gas station in order to leave her office to avoid him. In a sexually suggestive voice, Johnson insisted on taking her to the onsite vending machine instead. She complied and on their way back she suggested he take home some cake from a party that day. Johnson said, "I don't eat any of this." Kenneh asked what he meant; he said, "I will eat you—I eat women." Kenneh quickly walked back to her office alone. A week later, Johnson drove up alongside Kenneh's car while she was buying gas, asked her where she was going, and left immediately after her without putting gas in his car.

The next day, Kenneh told her supervisor about Johnson's actions and conduct. Her supervisor asked her to make a written complaint and she complied. Human Resources conducted an investigation, but Johnson denied each incident, so Homeward Bound informed Kenneh the investigation was inconclusive, but assured her that he would receive additional sexual harassment training and be instructed not to be alone with Kenneh. Thereafter, Johnson began to stop by Kenneh's office more frequently. He would block her door, make gestures with his tongue simulating oral sex, and call her "sexy," "pretty," or

"beautiful" every time he saw her despite her requests that he stop. He would stand in her doorway watching her, and although Kenneh tried to ignore him, he simulated oral sex with his tongue when she made eye contact. Kenneh complained on two more occasions, but nothing was done. One day, she arrived late to work and was unprepared for a meeting. She told her supervisor that she did not want to go to work because of Johnson and asked to be transferred so she could avoid interactions with him. Homeward Bound denied her request and terminated her employment.

Kenneh sued Homeward Bound for sexual harassment in violation of the MHRA. The district court granted summary judgment to Homeward Bound, concluding Kenneh failed to allege conduct sufficiently severe or pervasive to support a claim for sexual harassment. The Minnesota Court of Appeals affirmed.

The Minnesota Supreme Court found the evidence offered by Kenneh sufficient to withstand summary judgment on her claim for harassment under the MHRA, and concluded that the conduct alleged by Kenneh was sufficiently severe or pervasive for a reasonable juror to find the work environment to be hostile or abusive. The Court, however, declined to discard the severe or pervasive precedent "because the [standard] continues to provide a useful framework for analyzing the objective component of a claim for sexual harassment under the [MHRA]."

The Court's decision lowered the severe or pervasive standard as applied to the MHRA. It further specifically acknowledged that the MHRA provides greater protection than the federal law. Thus, *Kenneh* means that what is "severe or pervasive" under the MHRA is a less stringent standard than set forth in the federal jurisprudence.

## The nuance

Unlike Title VII, the MHRA defines sexual harassment as "unwelcome sexual advances… or communication of a sexual nature when… that conduct or communication has the purpose or effect of substantially interfering with an individual's employment… or creating an intimidating, hostile, or offensive employment… environment."[19] In declining to abandon the severe or pervasive standard entirely, the Court cited its earlier decision in *Goins v. W. Grp.,*[20] which quoted *Meritor*: "We have held that discriminatory conduct 'is not actionable unless it is "so severe or pervasive" as to "alter the conditions of the [plaintiff's] employment and create an abusive working environment.'" Yet, the Court acknowledged that the severe or pervasive standard originated in federal case law involving harassment claims under Title VII.

The *Kenneh* Court also pointed out that its reliance on federal law in interpreting the MHRA has not been absolute, recognizing "significant differences" between the MHRA and Title VII—among them that the MHRA defines sexual harassment. Kenneh and amici argued that the severe or pervasive standard is notorious for being inconsistently applied and lacking clarity, arguing the federal courts tend to interpret "severe or pervasive" archaically, which is directly at odds with Minnesota's statutory directive to construe the MHRA liberally.[21] The Court cited *stare decisis* and the Legislature's ability to alter what the courts have done as reasons why it chose not to overturn precedent, but noted *stare decisis* is a guiding policy, not an inflexible rule or a shield for errors of law.

The Court said the severe or pervasive standard reflects a "common-sense understanding that, to alter the conditions of employment and create an abusive working environment,

sexual harassment must be more than minor: the work environment must be both objectively and subjectively offensive in that a reasonable person would find the environment hostile or abusive and the victim in fact perceived it to be so." But the Court used *Kenneh* as an opportunity to "clarify how the severe-or-pervasive standard applies to claims arising under the [MHRA]."

The Court made clear that its continued use of a more flexible, fact-sensitive severe or pervasive standard does not mean that courts are bound to the conclusions of federal courts when deciding cases under the MHRA. Instead, "For the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace. As we recognized 30 years ago, the 'essence' of the [MHRA] is 'societal change';
'[r]edress of individual injuries caused by discrimination is a means of achieving that goal.'"

In addition to criticizing federal case law such as *Duncan*, the Minnesota Supreme Court was critical of the Minnesota Court of Appeals' decision in *Geist-Miller v. Mitchell*,[22] noting that the court "brushed aside" unacceptable behavior as "an unsuccessful pursuit of a relationship." This suggests that, under the severe or pervasive standard now applicable to the MHRA, such conduct would be actionable. This is a significant departure from the federal jurisprudence, where courts have not adjusted the severe or pervasive standard to reflect social attitudes toward what is acceptable behavior in the workplace. In fact, they have done the opposite: Over the course of 30 years, as more and more behaviors became socially unacceptable in the workplace, the federal courts defined more and more *narrowly* the conduct that can reach severe or pervasive's "high threshold."

The *Kenneh* Court directed courts interpreting the MHRA thus:

- "Each case in Minnesota state court must be considered on its facts, not on a purportedly analogous federal decision."
- "[W]e caution courts against usurping the role of a jury when evaluating a claim on summary judgment.... If a reasonable person *could* find the alleged behavior objectively abusive or offensive, a claim is sufficiently severe or pervasive to survive summary judgment (emphasis added)."[23]

In short, *Kenneh* reminds factfinders that they must consider the context in which the behavior occurred, the totality of the circumstances, and the case's particular facts; it cautions against courts making credibility determinations. Further, the *Kenneh* decision reminds judges interpreting the MHRA that summary judgment is inappropriate when reasonable minds might differ.

## Conclusion

Although the Kenneh decision is nuanced in its lowering of the severe or pervasive standard, it amounts to a significant shift for hostile environment claims under the MHRA. How long it will take for a similar sentiment to reach the 8th Circuit or other federal circuits—or whether it ever will—remains unknown. The Minnesota Legislature and Congress still have the ability to provide additional clarity or guidance on the severe or pervasive standard. For now, the bar remains high in federal court interpreting Title VII. But in cases under the MHRA, there is a new paradigm, designed to evolve in step with societal changes and less stringent than the federal

courts' historical view of severe or pervasive.

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*Over her 30+ years practicing law, SHEILA ENGELMEIER has handled the full panoply of employment litigation and counseling matters, from shareholder disputes and non-competes to discrimination or employee theft. She has developed and facilitated many training programs on a variety of workplace issues such as diversity and inclusion, and avoiding harassment and discrimination, including development of the premier training tool, RESPECT EFFECT™ (www.respect-effect.com). Sheila also regularly mediates employment matters and investigates allegations of misconduct in the workplace.*

*HEATHER TABERY's employment law practice at Engelmeier & Umanah includes representing employers and employees in cases involving sex discrimination, sexual harassment, and hostile work environment. The scope of her practice consists of advising clients pre-litigation, during settlement negotiations, mediations, and through litigation, including the appellate level.*

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***Notes***

[1] *See, e.g.*, A08421 *https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A08421&term=0&Summary=Y&Memo=Y*. Similarly, Minnesota judges have advocated for a reduced standard when interpreting MHRA harassment claims for years (*see, e.g.*, Justice Page's dissent in *LaMont v. Ind. Sch. Dist. #728*, 814 N.W.2d 14, 24 (Minn. 2012) and Justice Wright's dissent in *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 804 (Minn. 2013)).

[2] The word "harassment" appears nowhere in Title VII, unlike the MHRA. The concept arose in the case law interpreting Title VII's prohibition of gender discrimination.

[3] Bench & Bar Online, March 2020. *https://www.mnbar.org/archive/msba-news/2020/01/21/severe-or-pervasive-just-how-bad-does-sexual-harassment-have-to-be-in-order-to-be-actionable*.

[4] 950 F.3d 535 (8th Circuit, 2020).

[5] For a detailed history of state and federal law on this issue, see 4/26/2018 testimony before the Minnesota House Civil Law and Data Practices Committee regarding HF4459. *https://www.youtube.com/watch?v=GDQtCudBZl8*

(Co-author Sheila Engelmeier's main testimony, starting at the 6:00 minute mark and ending at 34:00, describes the relevant law; later, other employment law experts also testified).

[6] *Moylan v. Maries Cnty*., 792 F.2d 746, 749 (8th Cir. 1986).

[7] *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

[8] *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21-22 (1993).

[9] *Harris* at 22-23.

[10] Supra note 3.

[11] 300 F.3d 928 (8th Cir. 2002).

[12] *Id*. at 931-932.

[13] *Id.* at 933-934.

[14] Supra note 3, pp. 25-33.

[15] *Id.*, pp. 12, 20-23.

[16] *See, e.g*., *Moring v. Ark. Dep't of Corr*., 243 F.3d 452, 456–57 (8th Cir. 2001); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 969–70 (D. Minn. 1998) (collecting cases).

[17] No. 2004-T-0029, 2005 WL 407592 (Ohio App. 2/18/2005).

[18] 579 F.3d 858, 860 (8th Cir. 2009).

[19] Minn. Stat. §363A.03, subd. 43(3).

[20] 635 N.W.2d 717 (Minn. 2001).

[21] *See* Minn. Stat. §363A.04.

[22] 782 N.W.2d 197 (Minn. App. 2010).

[23] 944 N.W.2d 222 (Minn. 2020).