

Minnesota Supreme Court Retains Sexual Harassment “Severe-or-Pervasive” Standard, But Instructs Courts to Modernize Assessment of Acceptable Workplace Conduct

by Jillian Kornblatt

Today, the Minnesota Supreme Court upheld the “severe-or-pervasive” framework used to rule on sexual harassment claims, but instructed lower courts to determine what is severe or pervasive in light of *today’s* definition of appropriate workplace conduct, rather than relying on precedent applying dated notions. The Court’s decision in *Kenneh v. Homeward Bound, Inc.*, No. A18-0174, involved sexual harassment claims under the Minnesota Human Rights (MHRA), Minn. Stat. §§363A.01-.44.

Plaintiff Assata Kenneh worked for defendant Homeward Bound, Inc., and alleged that Homeward Bound’s maintenance coordinator made repeated sexually-suggestive comments and gestures to her, and then continued the conduct after he was told to stop and provided sexual harassment training by Homeward Bound. The district court granted summary judgment to Homeward Bound, stressing “the high bar” Minnesota courts have set for what qualifies as sexual harassment, stating that although “some of the conduct was boorish and obnoxious,” and at least one statement was “both objectively and subjectively unacceptable,” under the “severe or pervasive” standard Minnesota courts adopted from federal Title VII cases, the alleged conduct, “however objectionable,” did not give rise to an employer’s liability under the Minnesota Human Rights Act. The court of appeals affirmed.

The Court, in a unanimous opinion authored by Justice McKeig, affirmed in part, reversed in part, and remanded. The Court explicitly rejected plaintiff’s argument that the Minnesota courts’ reliance on federal Title VII cases be abandoned, as well as her argument that Homeward Bound’s workplace policy should be used as the governing standard in the case. Instead, the Court affirmed that the “severe-or-pervasive standard” borrowed from federal Title VII cases “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.”

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But the Court emphasized that this does not mean that Minnesota courts are bound by the conclusions drawn by federal or Minnesota courts in applying the severe-or-pervasive framework. Rather, “the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace.” In particular, the Court stressed that “[t]oday, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside as an ‘unsuccessful pursuit of a relationship,’ or ‘boorish, chauvinistic, and decidedly immature.’” (citations omitted).

The Court instructed that courts and juries “should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode,” but should instead, “consider 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.” (internal quotations omitted).

The Court emphasized that this was generally to be a determination made by the jury, and explicitly “caution[ed] courts against usurping the role of a jury when evaluating a claim on summary judgment.” The Court, however, did not foreclose the possibility of summary judgment on sexual harassment claims, and stated that to grant summary judgment, courts would need to determine that “no reasonable jury could find the conduct at issue severe or pervasive.” The Court applied this standard to the facts of the case without analogizing to any prior federal or state decisions, and reversed the grant of summary judgment.

5 Takeaways For Employers:

- Today’s standards govern what is acceptable workplace conduct;
- Train employees early and often on what the company considers acceptable and unacceptable conduct, and then consistently enforce those standards;
- Make it simple (and comfortable) for employees to raise concerns;
- Consider broadening the investigation, making credibility determinations, and looking for corroborating evidence in circumstances where you need to “break the tie” to determine what occurred (e.g., alleged harasser denies the conduct); and
- Be proactive: Once an investigation is completed, check in with the employee who raised the concerns on a regular basis to determine if the issue remains resolved.