UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

S.V.

Plaintiff,

-vs- Case No. 10-cv-919

KENNETH KRATZ

Defendant.

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

INTRODUCTION

After being beaten and strangled by the man she was living with, plaintiff S.V.—in fear for her own safety and their child's as well—overcame years of reluctance to report similar abuse and went to the police. In response to this act of courage and trust, defendant Kratz ignored S.V.'s extraordinary vulnerability and dependence as the victim and complaining witness in a crime of serious domestic abuse, and proceeded instead to pressure her—in a string of 30 leering and overbearing text messages packed into a three-day period—to agree to a sexual relationship with him that he plainly found exciting not just because she would play the "tall, young, hot nymph" to his "older married elected DA," but because their liaison was to be "secret," "the riskier the better" and, as defendant bluntly told her, "wrong." After three days of this, plaintiff found these insistent advances not only so unwelcome, offensive, and harmful but also so threatening that she felt compelled to report defendant himself to a police department entirely outside his jurisdiction, and she then refused, out of sheer revulsion, to participate in any further prosecution in that jurisdiction.

Defendant now seeks to evade his clear liability for this conduct under § 1983 by claiming that it somehow does not constitute sex discrimination for which he is liable under the Equal Protection Clause, as a matter of law, and by insisting that he deserves immunity from such liability in any event, both as a prosecutor carrying out "a function intimately associated with the judicial phase of the criminal process" and as a "reasonable" public official who could not have known from the clearly established law that he was violating plaintiff's equal protection rights. None of these arguments supports dismissal of plaintiff's equal protection claim.[1]

Defendant's motion to dismiss must be denied because the factual allegations in her complaint are more than sufficient to state a wholly "plausible" claim of discriminatory sexual harassment under the Equal Protection Clause, which requires no proof of actual or threatened denial of tangible public benefits, as defendant claims, and looks to the true content and impact of the harassment—not the harasser's self-serving account of it—to determine whether it is an actionable denial of the victim's rights, as defendant's conduct plainly was here. Defendant's "summary judgment" motion for immunity is also both procedurally deficient—failing to meet even the minimal requirements for such motions—and substantively invalid. Defendant cannot prove the kind of "intimate" link between his conduct and legitimate prosecutorial functions or the risk of vexatious litigation and availability of adequate alternative remedies that must be shown to justify *absolute* immunity for all such conduct, regardless of its severity. And defendant also ignores the fact that Seventh Circuit case law—if any such authority is even necessary to confirm so obvious a violation—has in fact clearly established that intentional, sex-linked harassment of exactly the kind he indulged in here does indeed violate the longstanding prohibition of sex discrimination by official actors under the Equal Protection Clause.

[1] Plaintiff has elected not to pursue her additional § 1983 claim for violation of her right to due Process of Law.

Plaintiff therefore respectfully urges the court to deny defendant's motions and allow her equal protection claim to proceed to discovery and trial.

ARGUMENT

I. DEFENDANT HAS FAILED TO ESTABLISH ANY PROPER BASIS FOR GRANTING HIS MOTION TO DISMISS PLAINTIFF'S EQUAL PROTECTION CLAIM

Under the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544, 556, 570 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009), in order to survive a motion to dismiss of the kind defendant brings here, the complaint must "state a claim to relief that is plausible on its face," by "plead[ing] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." This "plausibility" standard does not require any showing that liability was "probable" (*Iqbal*, at 1949) or any determination by the court of "whose version to believe" (*Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010)), but the facts pleaded must at least suggest a right to relief beyond "the speculative level" (*Twombley*, at 555; *Atkins v. City of Chicago*, 631 F.3d 823, 832 (7th Cir. 2011)) or "more than a sheer possibility" of unlawful conduct. *Iqbal*, at 1949; *Atkins*, at 831. The Supreme Court's decisions did not alter the fundamental rules that the complaint "need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (*Swanson*, at 404) and that the reviewing court must assume all well-pleaded allegations in the complaint to be true (*Iqbal*, at 1950; *Atkins*, at 831-32), and "nothing in *Iqbal* or *Twombley* precludes the plaintiff from later suggesting to the court a set of facts, consistent with the well-pleaded complaint, that shows that the complaint should not be dismissed." *Reynolds v. CB Sports Bar, Inc.*, 623 F.3d 1143, 1147 (7th Cir. 2010).

Liability under 42 U.S.C. § 1983 requires proof that the defendant was acting under color of state law and that his conduct violated the plaintiff's rights, privileges, or immunities secured

by the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Lanigan v. Village of East Hazel Crest*, 110 F.3d 467, 471 (7th Cir. 1997). Defendant does not dispute that he acted here "under color of state law" (Def. Brf., 6), and he has failed entirely to establish that plaintiff's complaint does not properly state a claim for violation of her right to equal protection under the Fourteenth Amendment.

A. Under the applicable law, the facts plaintiff has alleged regarding defendant's conduct state a wholly plausible claim of sexual harassment in violation of the Equal Protection Clause

Although defendant has labored hard to avoid acknowledging the fact, by the time plaintiff encountered him in late 2009 it had long since been well established within the Seventh Circuit that intentional sexual harassment by government actors—including unwelcome and oppressive sexual conduct that did not condition tangible benefits on sexual compliance—constituted unlawful sex discrimination that violated the constitutional right to equal protection under the Fourteenth (and, for federal actors, the Fifth) Amendments. In the Seventh Circuit's seminal 1986 decision in *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986), the court held that the prohibition of so-called "environmental" or non-"quid pro quo" sexual harassment—which had developed in the employment context under Title VII and had recently been confirmed by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)—barred "sexual harassment of female employees by a state employer" under the Equal Protection Clause as well, as part of the "federal constitutional right to be free from gender discrimination." 799 F.2d at 1186. Relying heavily on *Meritor*—in which the Supreme Court had stated that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome" (477 U.S. at 68)—the *Bohen* court held that "[c]reating abusive conditions for female employees and not for male employees is discrimination." 799 F.2d at 1185.

Since *Bohen*, Seventh Circuit courts have repeatedly affirmed and applied this basic holding (*e.g.*, *Volk v. Coler*, 845 F.2d 1422, 1430-31 (7th Cir. 1988); *King v. Bd. of Regents of the University of Wisconsin System*, 898 F.2d 533, 537-38 (7th Cir. 1990); *Owens v. Ragland*, 313 F.Supp.2d 939, 944 (W.D. Wis. 2004) (citing cases)), as have the courts in other circuits. *See*, *e.g.*, *Southard v. Texas Bd. Of Criminal Justice*, 114 F.3d 539, 550 (5th Cir. 1997) (citing cases). And the Seventh Circuit decisions have also confirmed that, to prove intentional sexual harassment under the Equal Protection Clause, it is not necessary to show harassment of other female employees by the same defendant (although that fact may be "strong evidence" supporting the plaintiff's claim). *Bohen*, 799 F.2d at 1187. It is sufficient, instead, to prove "harassment of the plaintiff alone because of her sex" (*Bohen*, at 1187; *King*, at 538; *Owens*, at 945-46), and even a single harassing act against her can be enough to establish such discrimination. *Bohen*, at 1186; *King*, at 537.

Relying heavily on *Bohen*, the Seventh Circuit and district courts within that circuit have also applied its coverage of unwelcome and oppressive sexual conduct under the Equal Protection Clause in numerous contexts other than employment. In *Nabozny v. Podlesny*, 92 F.3d 446, 455-56 (7th Cir. 1996), the court held that the well-established general prohibition of "arbitrary, gender-based discrimination" under the Supreme court's Equal Protection precedents prohibited school officials from denying female students protection from harassment equivalent to that accorded to males. And it has been repeatedly held that the Equal Protection Clause bars sexual abuse and harassment of students by teachers and other school personnel, including—as in the employment context—the making of unwelcome and offensive sexual advances that are not linked to any real or explicitly threatened denial of tangible benefits. *E.g.*, *Doe v. Smith*, 470 F.3d 331, 340-41 (7th Cir. 2006) (sexual abuse of student by school dean); *T.E. v. Grindle*, 599 F.3d 583, 587-88 (7th Cir. 2010) (sexual abuse of students by music teacher); *Delgado v. Stegall*,

367 F.3d 668, 672-73 (7th Cir. 2004) (sexual advances and touching of student by voice teacher); *Chivers v. Central Noble Community Schools*, 423 F.Supp.2d 835, 850-53 (N.D. Ind. 2006) (sexual innuendos, advances, and comments in instant messages from teacher/coach to student).

Similarly, the Seventh Circuit in *Markham v. White*, 172 F.3d 486, 488, 491-93 (7th Cir. 1999) relied on *Bohen* and *Nabozny* to hold that the rule "that sexual harassment constitutes sex discrimination in violation of the equal protection clause" is applicable to a *Bivens* action by female Madison police officers alleging that male Drug Enforcement Administration officers had subjected them to a "hostile atmosphere" by making repeated sexually suggestive and sexist remarks during a DEA training seminar in Chicago. And district courts in the Seventh Circuit have, in much the same way, found that the right to be free of intentional sex-based discrimination under the Equal Protection Clause applied to unwelcome and threatening sex-linked behavior by male police officers, including sexual innuendo and comments and sexist remarks, directed at a woman during a traffic stop (*Antia v. Thurman*, 914 F.Supp. 256, 257-58 (N.D. Ill. 1996)) and at a female confidential informant. *Twyman v. Burton*, 757 F.Supp.2d 804, 2010 WL 4978904, *5 (S.D. Ind.).

The facts plaintiff has alleged in her complaint here state a wholly "plausible" claim against defendant Kratz that falls squarely within this extensive body of equal protection precedent. Her complaint alleges that, after enduring years of violent domestic abuse by her boyfriend and child's father, S.K., during which she was reluctant to involve law enforcement, a final incident of beating and strangulation left her so afraid for her life and her child's safety that she reported this assault to the police, and S.K. was charged with Felony Strangulation and Suffocation. (Complaint, ¶¶ 5-8, 21.) In the ensuing prosecution, the complaint alleges, defendant Kratz, as the Calumet County District Attorney, answered only to himself (*id*., ¶¶ 4, 19-20), and plaintiff understood that she would be heavily dependent upon him, as the DA

personally responsible for handling the prosecution of S.K., to assist her in performing her central role as the complaining witness against S.K., to control the conditions of his release on bond and eventual sentencing and otherwise protect her from harm and threats of harm for cooperating with law enforcement against him, and to keep her identity and location confidential and protect her privacy. (*Id*., ¶¶ 8-12.)

Despite his awareness of his ethical and statutory obligations to protect plaintiff in this manner, the complaint alleges, and his awareness that her long history of domestic violence left her particularly vulnerable to unwelcome sexual requests from an official in this position of power, defendant Kratz proceeded to exploit that position, as he had with a previous crime victim in similar circumstances, to pressure plaintiff to engage in a sexual relationship with him—"the riskier the better." He sent her a barrage of 30 text messages over a three-day period, in which he demeaned and described her in explicitly sexual terms, reminded her pointedly of his money and power as District Attorney, and implied a direct link between his prosecution of S.K. and the sexual relationship he was demanding from plaintiff. (*Id*., ¶¶ 13-18, 22-24, 33-35, 38-39.) This misconduct, plaintiff alleges, was both "harmful and threatening" to her, causing her "a high degree of humiliation, anxiety and distress." As a result of defendant's behavior, she became so anguished and fearful of any further contact not just with defendant himself but with Calumet County in any guise that she reported his messages to the City of Kaukauna Police, in Outagamie County, and insisted thereafter that she not be required even to attend any proceeding in Calumet County related to the prosecution of S.K., which was taken over by the Wisconsin Department of Justice. (*Id*. ¶¶ 14, 25, 28, 36-37, 45.)

These well-pleaded factual allegations—which the court, again, must accept as true on defendant's motion to dismiss—leave no "speculation" or mere "possibility" but instead squarely and fully support plaintiff's claim that defendant violated her rights under the Equal Protection

Clause. Acting—as defendant concedes—under color of state law as a public official, defendant abused his authority and position by inflicting on plaintiff exactly the kind of unwelcome, offensive, and coercive sexual conduct that has been held to constitute sexual harassment and discrimination under the Equal Protection Clause. And the severity of the harm and injury this harassing conduct caused to plaintiff, and—particularly—her need to report it to a wholly separate police agency and her absolute refusal to have *any* further contact with defendant or his office, make clear that his abusive behavior had exactly the kind of severe, pervasive, and destructive adverse effect on plaintiff's right and ability to participate normally in the prosecution of S.K. that has been repeatedly found sufficient to establish a sexual harassment violation under the Equal Protection Clause. The *only* "reasonable inference" (*Iqbal*, 129 S.Ct. 1949) to be drawn from plaintiff's allegations, therefore, is that she has, in fact, stated a viable claim for relief on this ground.

B. Defendant's arguments fail completely to establish any basis for dismissal of plaintiff's equal protection claim

In an effort to evade this wholly "plausible" inference of a viable cause of action under the Equal Protection Clause, defendant for the most part ignores or misstates the actual content—and, frequently, even the existence—of the decisions described above, and relies instead on a miscellaneous group of decisions (cited at Def. Brf. 20-21) that are said to demonstrate two purported flaws in plaintiff's equal protection claim. (Def. Brf., 18-23.) Two of these decisions, however—*Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 62-63 (1992) and *R.S. v. Bd. Of School Directors*, 2006 WL 757816, *7 (E.D. Wis.)—do not involve sexual harassment claims under the Equal Protection Clause *at all*. Of those that do, only *Bohen* itself and *Doe v. Smith*—discussed above—are from the Seventh Circuit, and one—*Lewis v. McDade*, 250 F.3d 1320 (11th Cir. 2001) is barely a "decision" at all but rather a brief concurrence with an "order"

denying a rehearing en banc. There are no grounds to conclude, therefore—and defendant has offered none—that this hodge-podge of decisions somehow constitutes a comprehensive representation of the governing law on sexual harassment under the Equal Protection Clause, either generally or, more to the point, within the Seventh Circuit. Moreover, when properly considered in light of the actual allegations of plaintiff's complaint, both the decisions defendant cites—particularly the Tenth Circuit opinions on which he so heavily relies—and the Seventh Circuit decisions set forth above in fact make clear that neither of defendant's challenges to plaintiff's equal protection claim has any substantive merit.

1. Plaintiff's claim does not fail for any purported lack of "authority over" her by defendant Kratz

Defendant first asserts that the cases it cites somehow stand for a rule that, at least in contexts other than employment, there can be no equal protection violation unless the defendant possessed "authority over" the plaintiff—in the sense of power either to inflict some tangible harm or to deny some tangible public benefit—and also "threatened to use, or did use" that authority to coerce the plaintiff into "engaging in a sexual relationship." Since he did neither of these things, defendant argues, plaintiff's equal protection claim must fail. (Def. Brf. 19-21, 22.) This argument rests on a willful misreading of the both the applicable law and plaintiff's actual allegations, in multiple respects.

Neither the decisions defendant cites nor the applicable Seventh Circuit precedents actually state—or even imply—any such limitations on the kinds of conduct that can constitute unlawful sexual harassment under the Equal Protection Clause, regardless of what the particular facts in defendant's odd lot of cases might themselves have involved in this respect. Instead, defendant attempts to extract his purported rule from Tenth Circuit discussions of public officials' "authority" that do not figure at all in the Seventh Circuit's decisions and that are, in

any event, very plainly based—as defendant's quote from *Johnson v. Martin*, 195 F.3d 1208, 1217 (10th Cir. 1999) (Def. Brf., 19) itself makes clear—on the standard that must be met to satisfy § 1983's separate requirement that the defendant public official have acted "under color of state law." But defendant has already conceded here that he *did* act "under color of state law" (Def. Brf., 6) and he has therefore effectively confirmed—under the standard for that issue applicable in both the Tenth and Seventh Circuits—that in acting as he did toward plaintiff he "exercised power possessed by virtue of state law" and "abused the position given to him by the state" (*Johnson*, at 1216-18; *Whitney v. State of New Mexico*, 113 F.3d 1170, 1174 (10th Cir. 1997); *Walker v. Taylorville Correctional Center*, 129 F.3d 410, 413 (7th Cir. 1997); *Chivers*, 423 F.Supp.2d at 853), and thus that he exercised governmental "authority over" plaintiff in precisely the manner that the Tenth Circuit itself contemplates. *Johnson*, at 1218; *Whitney*, at 1174-75. Moreover, consistent with this concession, plaintiff has also *explicitly* alleged—and defendant must accept as true, for purposes of this motion—the fact that defendant "used the power and position he held as District Attorney to gain access to S.V. and to pressure her to have a sexual relationship with him." (Complaint, ¶ 24.)

Defendant's insistence on proof of actual threats of tangible harm also ignores the true scope and nature of the harassing conduct that can constitute an equal protection violation under the Seventh Circuit's most relevant precedents. Such harassment need not *necessarily* involve (even though it often does) the possession of some custodial power of control—as with students or prison inmates—or the ability to deny some discrete and tangible public benefit—such as a permit or license, a promotion, or a school grade. In *Markham* for example, there was no discussion or concern at all in the Seventh Circuit's opinion about whether the male DEA agents possessed any such "authority over" the female police officers attending their training seminar. 172 F.2d at 488, 491-93.

Even more fundamental, there is nothing in *Meritor* or *Bohen* and the subsequent decisions applying their "environmental harassment" doctrine in non-employment contexts that *requires* proof of any actual threat of denial or actual denial of some tangible benefit in order to coerce compliance with demands for sexual performance. Indeed, it is precisely the infliction of unwelcome, offensive, and detrimental sexual conduct *without* such "quid pro quo" behavior that defines this form of "environmental" sexual harassment (*Meritor*, 477 U.S. at 63-67), and while the harassment victim's perception of an *implicit* threat of potential retaliation by the harasser will often make her reluctant to squarely confront the harasser and thus heighten her sense of vulnerability and distress—as it surely did here—it is clearly the unwelcome sexual advances and other offensive conduct *in themselves* that constitute the unlawful harassment. Thus, in *Markham* (172 F.2d at 488, 491-93), *Delgado* (367 F.3d at 670, 672-73), and *Chivers* (423 F.Supp.2d at 841-48, 851), there were no coercive threats of the kind defendant claims must be present in such non-employment contexts, and these courts nevertheless found that the harasser's sexual advances and other offensive sexual conduct did constitute sexual harassment under the Equal Protection Clause. The same result is plainly warranted here.

2. The adverse impact of the harassment plaintiff has alleged was so severe as to clearly state an equal protection violation

Defendant also asserts that the misconduct plaintiff alleges was inherently too innocuous to have had the kind of "severe or pervasive" adverse effect necessary to establish actionable sexual harassment. (*Id*., 22-23.) This argument, too, has numerous fatal defects.

Defendant's attempts to minimize the extent of his conduct—by spinning it as merely "several" or "some" text messages" (Def. Brf., 1, 12, 22), by claiming that none of the messages was "explicitly sexual in nature" (*id.*, 12), and by likening them to "a single, innocent, romantic solicitation which inadvertently cause[d] offense" (*id*., 23)—violate the basic requirement to

accept the truth of the plaintiff's allegations on a motion to dismiss. Plaintiff alleged here that defendant sent "*thirty (30)* text messages" in the space of three days, *all* of which were "urging [her] to have a sexual relationship with him," the "riskier the better" (Complaint, ¶ 14), and that defendant explicitly referred to her as a "young, hot nymph" (*id*., ¶ 18). The whole of this conduct, therefore, was manifestly sexual in nature, and defendant's suggestion that it was nevertheless brief in duration (Def. Brf. 21) also ignores the fact that the very concentration of these 30 messages within a period of only three days in fact reinforces the intensity and adverse effect of the pressure they exerted, which would plainly have been far less had those messages been sent only intermittently over many weeks, months, or years.

Defendant's arguments that his harassment spanned just three days and involved no overt threats or touching, and that it thus compares favorably with "more egregious" cases involving much longer time periods (Def. Brf. 21-22), also misrepresent the cases he cites and misapply both the "subjective" and "objective" elements (*Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-23 (1993); *King*, 898 F.2d at 537) of the determination whether his conduct had a sufficiently adverse effect on plaintiff's circumstances, as the victim and complaining witness in defendant's prosecution of S.K., to constitute unlawful harassment. None of the decisions cited by defendant—or plaintiff—holds that the particular facts before the court in each of those cases somehow define the general threshold or outer limit for the circumstances that may constitute unlawful sexual harassment. While those specific—and quite distinct—fact patterns may (or may not) have established a violation in the particular circumstances of each specific case, therefore, they do not in any way dictate that defendant's particular conduct *here* failed to do so.

Moreover, if defendant means to argue that the duration and purportedly innocuous content of his behavior make it inherently implausible that plaintiff was herself—subjectively—not adversely enough affected to state a violation, defendant is improperly presenting the kind of

competing "version" of the inferences to be drawn from the facts alleged that courts are prohibited from considering, under *Iqbal*, on a motion to dismiss. *Swanson*, 614 F.3d at 404. The proper inquiry, instead, is whether plaintiff's allegations support a plausible, reasonable inference that the actual impact she suffered *was* sufficiently severe, and she has plainly done so here. As set forth above, she has explicitly alleged her own extraordinary vulnerability to abusive sexual advances (Complaint, ¶¶ 5-7, 22-23) and the inherent threat and harm defendant's misconduct actually caused her (*id*., ¶¶ 14, 36-37, 45). And as the courts have recognized (*e.g.*, *Chivers*, 423 F.Supp.2d at 848-49; *Collins v. Village of Woodridge*, 96 F.Supp.2d 744, 749 (N.D. Ill. 2000)), her allegations that she reported defendant's abuse to a separate police agency and that she felt compelled to remove herself entirely from any further contact with him or his office also constitute strong further proof that she did, *in fact*, find his flood of messages deeply unwelcome, offensive, and threatening and that they made her continued participation in the S.K. prosecution completely untenable.

And if defendant is implying, instead, that this reaction on plaintiff's part was "objectively" unreasonable—that is, that a "reasonable person" (King, 898 F.2d at 537) would not have had this severe a reaction to defendant's conduct, even if plaintiff herself did—defendant again mistakes the proper inquiry. The question is not whether some "reasonable person" in the abstract might have found defendant's conduct, as he implies, merely "rude" or mildly "offensive" or even "romantic"—a point plaintiff in no way concedes. Rather, the proper inquiry is whether a reasonable person *in plaintiff's circumstances* would have reacted as she did. *Chivers*, 423 F.Supp.2d at 848-49. And on that point there is no room for debate.

A victim of years of violent domestic abuse would not only be unusually vulnerable psychologically to conduct like defendant's, as plaintiff has alleged. By bringing about her abuser's arrest and prosecution, she would also have placed herself in an extraordinarily

dangerous situation—as defendant's own *DeShaney* cases illustrate (Def. Brf. 11)—in which she is forced to place enormous trust in the police and prosecutors to put a stop to the abuse and to protect her and her child from retaliation. In *those* inherently tenuous and frightening circumstances, plaintiff submits, a "reasonable woman" would be wholly justified in seeing *any* behavior by the prosecutor in her case suggesting a willingness to exploit his position and her vulnerability for his own sexual advantage as profoundly threatening and harmful conduct by yet another man who had turned out to be more predator than protector, destroying her trust in him and his subordinates and precluding completely her continued participation in the prosecution.

Plaintiff has therefore properly alleged her claim that defendant's misconduct violated her constitutional right to equal protection under the applicable law, and defendant's motion to dismiss that claim must be denied.

II. DEFENDANT HAS FAILED TO ESTABLISH ANY PROPER BASIS FOR EITHER ABSOLUTE OR QUALIFIED IMMUNITY

Defendant also moves for "summary judgment" dismissing plaintiff's complaint on the grounds of absolute prosecutorial immunity or qualified immunity. (Def. Mot., 1-2; Def. Brf. 2, 5-6, 24.) This motion is deficient in both form and substance and must be denied on one or both of these grounds.

A. Defendant's immunity motion is wholly inadequate to carry his initial burden on summary judgment and must be dismissed on that ground alone

While defendant has labeled his "Motion" as one, in part, for summary judgment, he is plainly uncertain himself whether it qualifies as such. His brief states that he is offering the required "proposed material facts" only "[t]o the extent [his] Motion *is treated as* a Motion for Summary Judgment" (Def. Brf., 2 (emph. added))—suggesting that it is up to the court whether to elect such treatment under Federal Rule of Civil Procedure 12(d)—but defendant has failed

entirely to submit the kind of "matters outside the pleadings" that are the necessary predicate for "treating" a motion to dismiss as one for summary judgment under that rule.[2] Defendant's "proposed material facts" are nothing more than paraphrases—with a few bits of self-serving spin—of a partial set of selected allegations from plaintiff's own Complaint, which defendant purports to support not by submitting any actual *evidence* "outside the pleadings" but rather by citing only the Complaint *itself*—an omission that is hardly surprising in light of the fact that there has as yet been *no* discovery of any kind in this case. And defendant's actual arguments for its immunity "Motion" are not based on his partial set of "proposed material facts" at all, but instead refer back to "Plaintiff's allegations"—that is, to *all* of the allegations in plaintiff's Complaint—and to defendant's own earlier arguments, based solely on those allegations, in his motion to dismiss. (Def. Brf., 25-26.)[3]

Defendant's immunity "Motion" is thus both premature and entirely inadequate to carry even his initial burden on summary judgment, and it appears instead to be little more than a thinly disguised (and substantively invalid) motion to dismiss. Defendant's submission does not even *address* the central question, on summary judgment, whether there is an absence of evidence to support the existence of genuine issues of material fact on plaintiff's claims, much

[2] Rule 12(d) provides that "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."

[3] To the extent that defendant's "summary judgment" motion for immunity was actually intended to be a covert motion to *dismiss*, of course, it is still wholly inadequate to establish any basis for immunizing defendant's misconduct—as will be noted below—particularly with regard to his assertion of qualified immunity. "[A] complaint is generally not dismissed under Rule 12(b)(6) on qualified immunity grounds." *Alvarado v. Litscher*, 267 F.3d 648, 651 (7th Cir. 2001); *Gray v. Taylor*, 714 F.Supp.2d 903, 910 (N.D. Ill. 2010). Because, as here, "an immunity defense usually depends on the facts of the case, dismissal at the pleading stage is inappropriate: The plaintiff is not required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity." *Alvarado*, at 651; *Tamayo v. Blagojevich*, 526 F.3d 1074, 1090 (7th Cir. 2008).

less bear his initial burden of actually *demonstrating* that any such absence of evidence and disputed issues exists. *See McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 795 (7th Cir. 1997), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *Rex v. City of Milwaukee*, 321 F.Supp.2d 1008, 1011 (E.D. Wis. 2004); *Davidson v. Wisconsin Natural Gas Co.*, 986 F.Supp. 539, 543 (E.D. Wis. 1997). And even if defendant *had* at least addressed this central question, his mere "conclusory assertion" of an absence of evidence showing disputes of fact on plaintiff's claims would not have sufficed to carry his initial burden (*Mombourquette ex rel. Mombourquette v. Amundson*, 469 F.Supp.2d 624, 654 (W.D. Wis. 2007)), and his "proposed material facts" fail completely to discharge his obligation of "identifying those portions of [the record] which [he] believes demonstrate the absence of a genuine issue of fact." *McClendon*, 108 F.3d at 795. The proposed facts required from a summary judgment movant by section 56(b)(1)(C)(i) of this Court's Local Rules—and similar provisions in other courts—may not be supported solely by citation to the complaint itself (*Markham*, 172 F.3d at 489-90; *Najieb v. William Chrysler-Plymouth*, 2002 WL 31906466, *1 (N.D. Ill.)), and where a movant has merely cherry-picked a few facts from the non-movant's complaint and supported them only with citations back to that complaint itself—as defendant has done here—that failure to comply with the local rules and to properly demonstrate an *evidentiary* basis for summary judgment is, in itself, reason enough to deny a motion for summary judgment. *Markham*, 172 F.3d at 489-90.

The Court therefore can and should deny defendant's "summary judgment" motion without further consideration. Should the court for any reason be disinclined to do so, however, plaintiff is also submitting with this Brief her own Declaration and Statement of Additional Material Facts (cited here as "PPFF") which will demonstrate, as set forth below, that issues of disputed material fact remain that preclude any finding of absolute or qualified immunity for defendant's violation of her constitutional rights.

B. Defendant has failed to carry his burden of proving his entitlement to absolute prosecutorial immunity

Because absolute immunity of the kind defendant Kratz claims here is a complete defense to liability for monetary damages, it "is of a rare and exceptional character" (*Auriemma v. Montgomery*, 860 F.2d 273, 275 (7th Cir. 1988); *Graffree v. Shelton*, 2011 WL 839530, *4 (E.D. Wis.)), and the federal courts have been "quite sparing" in recognizing it. *Buckley v. Fitzsimmons*, 509 U.S. 259, 269 (1993); *Walrath v. U.S.*, 35 F.3d 277, 281 (7th Cir. 1994). There is a presumption against granting absolute rather than qualified immunity (*Burns v. Reed*, 500 U.S. 478, 486-87 (1991); *Houston v. Partee*, 978 F.2d 362, 365 (7th Cir. 1992); *Graffree*, 2011 WL 839530 at *4), and the burden of proving entitlement to absolute immunity is borne by the defendant official who claims such immunity. *Buckley*, 509 U.S. at 269; *Burns*, 500 U.S. at 487; *Davis v. Zirkelbach*, 149 F.3d 614, 617 (7th Cir. 1998); *Auriemma*, 860 F.2d at 275.

In his perfunctory attempt to meet this demanding burden of proof, defendant contends that he is entitled to absolute immunity simply because his flood of offensive and threatening text messages was sent to plaintiff in the course of his carrying out the "inherently prosecutorial function" of "contacting" her as the complaining witness regarding his prosecution of the felony charges against S.K. (Def. Brf. 24-25.) The actual standard for prosecutorial immunity, however, is not nearly so simplistic or categorical as this. The courts have made abundantly clear that merely because the conduct challenged by a plaintiff in subsequent civil litigation falls within the scope of a prosecutor's official duties does *not* automatically mean that such conduct is entitled to absolute immunity. *See, e.g.*, *Auriemma*, 860 F.3d at 277-78 (no "blanket grant" of absolute immunity for government attorneys); *Odd v. Malone*, 538 F.3d 202, 213 (3d. Cir. 2008) ("[t]he prosecutorial nature of an act does not spread backwards like an inkblot, immunizing everything it touches"). Instead, the court must look to the particular circumstances of each case

and "narrowly define" the conduct at issue (*Odd*, 538 F.3d at 213), and must apply far more stringent standards for entitlement to absolute immunity, in a least two critical respects.

First, the courts have consistently held that, even where the challenged conduct occurred while "initiating a prosecution"—a time when the prosecutor's official functions might otherwise warrant absolute immunity—that conduct will nevertheless be entitled to such immunity *only* if it is shown to have been "intimately associated" with the "judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Burns*, 500 U.S. at 487; *Smith v. Power*, 346 F.3d 740, 742 (7th Cir. 2003); *Houston*, 978 F.2d at 365; *Auriemma*, 860 F.2d at 278.[4] Under this exacting standard, the courts have had no difficulty in denying absolute immunity to various forms of conduct that, despite having occurred in the course of the initiation or conduct of a prosecution or other comparable litigation, were found not to have been so closely related to those "advocacy" functions as to satisfy the "intimately associated" test. *E.g.*, *Auriemma*, 860 F.3d at 277-78 (obtaining credit reports on opposing parties in violation of the Fair Credit Reporting Act); *Odd*, 538 F.3d at 211-14 (leaving a material witness incarcerated during a lengthy continuance in the criminal trial at which he was to testify); *Gagan v. Norton*, 35 F.3d 1473, 1475-76 (10th Cir. 1994) (countermanding the court-ordered preparation of transcripts from previous criminal proceedings for a pro se petitioner applying for habeas corpus). *See also Chrissy by Medley v. Mississippi Dept. of Public Welfare*, 925 F.2d 844, 850-

[4] As *Smith* and *Auriemma* illustrate, this same standard for absolute immunity applies where prosecutors or other government attorneys claim that their conduct was "intimately associated" with civil enforcement proceedings that are comparable to criminal prosecutions or with the defense of civil lawsuits against the government. *Smith*, 346 F.3d at 742; *Auriemma*, 860 F.2d at 276-77.

51 (5th Cir. 1991) (failing to report child abuse by a criminal defendant); *McDonald v. Doe*, 650 F.Supp. 858, 860 (S.D.N.Y. 1986) (orchestrating police beating of a criminal defendant).[5]

Second, to carry the burden of establishing justification for absolute immunity, its proponent "must show that overriding considerations of public policy require that [he] be exempt from personal liability" for the challenged conduct (*Auriemma*, 860 F.2d at 275; *Finnegan v. Myers*, 2011 WL 781582, *11 (N. D. Ind.)), and to apply this requirement, three considerations have been found particularly important: 1) whether there is any historical or common law basis for absolute immunity in such circumstances; 2) whether denying immunity for the challenged conduct poses a substantial risk of "vexatious litigation" that would impair the prosecutor's independence and ability to function; and 3) whether other safeguards against the challenged conduct would exist, particularly through the original judicial process, if actions for damages were precluded. *Burns*, 500 U.S. at 489-96; *Houston*, 978 F.2d at 366-67; *Lucien v. Preiner*, 967 F.2d 1166, 1167 (7th Cir. 1992); *Auriemma*, 860 F.2d at 275; *Odd*, 538 F.3d at 216. Under this standard, too, courts have denied absolute immunity for challenged conduct where the risk of impeding true prosecutorial functions was not substantial and other safeguards against such conduct were too ineffectual. *E.g.*, *Burns*, 500 U.S. at 492-96; *Houston*, 978 F.2d at 367-68; *Auriemma*, 860 F.2d at 278-80; *Odd*, 538 F.3d at 216-17.

Viewed properly under these standards, the facts alleged in plaintiff's complaint and set forth in her Declaration do not remotely suffice to carry defendant's burden of proving

[5] In a similar approach that focuses in much the same way on the linkage between the challenged conduct and the "judicial process," courts have also held that absolute immunity will only be given where "the injury depends on the judicial decision"—that is, only where the "prosecuting" attorney's challenged conduct causes injury because of its adverse effect on the outcome in the original criminal prosecution or other "judicial decision." Where the alleged injury occurs by other means unrelated to that judicial outcome, therefore, only qualified immunity is appropriate. *E.g.*, *Houston*, 978 F.2d at 368 n.4; *Millspaugh v. Dept. of Public Welfare of Wabash County*, 937 F.2d 1172, 1175 (7th Cir. 1991); *Cooney v. Cassady*, 652 F.Supp.2d 948, 956 n.5 (N.D. Ill. 2009).

entitlement to absolute immunity in this case. He has offered no legal authority of any kind or any argument—nor could he possibly do so—establishing that pressing plaintiff for a sexual relationship in the manner and under the circumstances she has proven (PPFF ¶¶ 2-46) was somehow a form of conduct so "*intimately* associated" with his legitimate prosecutorial functions—so closely related and vital to the effective performance of those functions—as to require the blanket excuse of *absolute* immunity. Indeed, given the nature of domestic abuse crimes and the well-documented relationship such crimes have to issues of sexual domination and power within the context of co-dependent relationships, defendant's conduct here could be viewed by a reasonable jury as a repetition or extension of the underlying crime itself—no less harmful to plaintiff than if he had himself delivered physical blows—that was motivated by her sex and position of vulnerability. That is hardly the stuff contemplated by the immunity in which a prosecutor can legitimately be clothed. While defendant himself may have believed that his conduct was somehow at least in part helpful to a genuine prosecutorial function, therefore, that wholly subjective belief in some such marginal link falls far short of establishing by any sound, objective measure that conduct of the kind defendant engaged in here is somehow so tightly linked and essential to the "judicial phase of the criminal process" as to be "intimately associated" with it in the sense that absolute immunity requires.

The lack of any such close link between defendant's conduct and legitimate prosecutorial functions is also strongly reinforced by the fact that his conduct injured plaintiff directly (PPFF ¶¶ 34-46) rather than through any "judicial decision" that resulted from the actual prosecution of S.K. Plaintiff is not a former criminal defendant claiming wrongful conviction through prosecutorial misconduct in a previous trial—as does the typical plaintiff in prosecutorial immunity cases—nor is plaintiff here claiming, as a crime victim and complaining witness, that she was in some way denied justice or other rights by some error in the actual

prosecution of S.K. The harm plaintiff suffered from defendant Kratz's conduct thus occurred not through but rather collateral to the actual prosecution in this case, and for that reason, too, no absolute immunity is warranted.

That conclusion is still further reinforced by the complete absence of any policy justification for conferring such immunity here. First, defendant has failed to identify any historical or common law support for extending absolute immunity to the kind of coercive and threatening sexual advances that defendant engaged in here (PPFF ¶¶ 23-39)—indeed, the very notion of any such immunity is preposterous on its face.

Second, defendant has also failed to demonstrate that permitting damages actions for misconduct of this kind will pose any risk of "vexatious litigation" that would chill prosecutors' willingness to make independent decisions about the actual prosecution of their cases or otherwise impair their exercise of *legitimate* prosecutorial functions "closely related to the judicial process" (*Burns*, 500 U.S. at 494), including prosecutors' interaction with crime victims and witnesses. Nor would prosecutors be left exposed to genuinely groundless sexual harassment claims by the denial of absolute immunity. As the courts have repeatedly recognized, qualified immunity itself provides prosecutors with "ample protection" (*id*. at 495) from such claims and with a "broad range of discretion" (*Auriemma*, 860 F.2d at 279) for conduct so distant from their core functions, and where—as here—"an official could be expected to know that his conduct would violate statutory or constitution rights, he *should* be made to hesitate" by the knowledge that he will not have *absolute*, carte blanche immunity for such conduct. *Burns*, 500 U.S. at 495 (orig. emphasis, internal quotations omitted).

Finally, if officials having no direct superior—as was true of defendant here (PPFF ¶¶ 10-11)—were absolutely immune from damages liability for conduct of the kind involved in this case, there would plainly be too few effective safeguards against such abuse. The primary

safeguard that the criminal trial and appeal process itself provides to criminal *defendants* claiming prosecutorial misconduct offers no similar means through which crime victims or witnesses can redress prosecutorial violations of their own civil rights. And since the statutory scheme setting forth those persons' "rights" in the criminal process itself offers only very limited redress (*see* Wis. Stat. §§ 950.09, 950.10-11)—as defendant himself concedes (Def. Brf. 16-18)—absolute immunity from civil damages liability would leave plaintiff and others like her without *any* effective remedy or deterrent for the kind of abuse and resulting harm that defendant felt free to inflict upon her here. Both law and sound policy, therefore—not to mention simple justice—argue strongly against any award of absolute immunity for such misconduct.

C. Defendant has failed to show any basis for qualified immunity on plaintiff's equal protection claim

Defendant has also proven no proper ground for "summary judgment" granting him qualified immunity from liability for sex discrimination and harassment under the Equal Protection Clause.

1. Plaintiff has properly established the defendant's conduct deprived her of her constitutional right to equal protection

With regard to the "threshold inquiry" on a claim of qualified immunity—"whether plaintiff's allegations, if true, establish a constitutional violation" (*Hope v. Pelzer*, 536 U.S. 730, 736 (2002))—plaintiff has demonstrated above that the factual allegations in her complaint itself are more than adequate to establish a "plausible" claim for relief under the Equal Protection Clause, thus precluding any dismissal for failure to state a claim. And plaintiff's Declaration confirms those allegations and provides ample basis for any "reasonable jury" to find such a violation (*Boyd v. Wexler*, 275 F.3d 642, 647 (7th Cir. 2001)) and thus bars any grant of summary judgment on this claim as well.

In her Declaration, plaintiff attests to her history of domestic abuse, her overcoming of her reluctance to report the abuser to the police, her fear of retaliation and further injury, and the great trust she was necessarily placing in the law enforcement authorities by having him prosecuted. (PPFF ¶¶ 2-9.) Plaintiff also confirms that she knew clearly that she was heavily dependent on defendant, as Calumet County's District Attorney and the prosecutor of her abuser, to guide her participation in the prosecution and to conduct that prosecution in a manner that would protect her and her child, and that thwarting defendant would risk impairment of that help and protection (PPFF ¶¶ 10-12, 18-22, 38-39, 43)—thus confirming, as well, her allegations and defendant's own concession that he did in fact possess, by virtue of his official position and these circumstances, very real and powerful "authority over" plaintiff.

Plaintiff's Declaration—and defendant's messages themselves—prove that he exploited that position of power and plaintiff's resulting vulnerability and her difficult personal circumstances to exert concentrated pressure on her over a three-day period to agree to a secret, avowedly improper, and unquestionably sexual relationship with him. (PPFF ¶¶ 23-33.) And plaintiff also clearly confirms that she saw these self-evidently sexual advances not just as unwelcome and deeply offensive—and as directed at her *because* she was a vulnerable woman—but also that she was injured, upset, and humiliated by them and that, because of her dependent and potentially dangerous position and her fear of retaliation if she resisted defendant too directly, she was also frightened, intimidated and threatened by his behavior. (PPFF ¶¶ 34-39, 43.) As a result, plaintiff states, her trust and ability to participate in a prosecution run by defendant was destroyed, and she reported him to an outside law enforcement agency and was so revolted by his conduct that she refused to participate in any further prosecution in Calumet County. (PPFF ¶¶ 40-46.)

Even more clearly than her complaint, therefore, this credible evidence affirms the sex-linked abuse of power inherent in defendant's conduct and its severe and pervasive adverse effect on plaintiff's well-being and ability to continue functioning in defendant's prosecution, and thus establishes that defendant did indeed violate plaintiff's right to be free of such discrimination under the Equal Protection Clause.

2. Defendant's sexually harassing conduct violated "clearly established" constitutional rights

Defendant may be held immune from liability for this violation only if his conduct did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope*, 536 U.S. at 739 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *Narducci v. Moore*, 572 F.3d 313, 318 (7th Cir. 2009) (same). For a constitutional right to be "clearly established," its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [I]n the light of pre-existing law the unlawfulness must be apparent." *Hope*, 536 U.S. at 739 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *Narducci*, 572 F.3d at 318 (same). This does not, however, require that there be previous cases that are "fundamentally" or "materially similar" to the circumstances here, and it is "clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741; *Narducci*, 572 F.3d at 318 (citing *Hope*). Indeed, where the constitutional violation is "patently obvious," a plaintiff "may not be required to present the court with *any* analogous cases, as widespread compliance with a clearly apparent law may have prevented the issue from previously being litigated." *Nanda v. Moss*, 412 F.3d 836, 844 (7th Cir. 2005) (emph. added); *Jacobs v. City of Chicago*, 215 F.3d 758, 767 (7th Cir. 2000) (same). *See also Anderson v. Romero*, 72 F.3d 518, 526-27 (7th Cir. 1995) ("a

constitutional violation that is so patent that no violator has even attempted to obtain an appellate ruling on it can be regarded as clearly established even in the absence of precedent").

Under these rules, defendant plainly has no right to qualified immunity. To begin with, the very absence of any reported case in which a district attorney has even attempted to defend a constitutional claim of sexual harassment by the victim in one of his own prosecutions strongly suggests, in itself, that the validity of such claims was already well beyond question by the time defendant acted here. That conclusion is also powerfully reinforced by the sheer notoriety this same form of sexual harassment by public figures has achieved over the past several decades, by the specific prohibition of sex-based harassment in Wisconsin's rules of professional conduct for attorneys (Wis. SCR ch. 20 § 8.4(i)), and by the Wisconsin District Attorneys Association's forceful statement to defendant that he was well aware that crime victims have "both statutory and constitutional protections" against prosecutorial abuse and that the abuse he inflicted here—particularly in light of his long advocacy of "victims rights"—was "neither unintentional nor innocent." (PPFF 49-50.) In light of all this, the unlawfulness of the misconduct plaintiff alleges here was so "patently obvious" that no reasonable prosecutor in defendant's circumstances could conceivably have doubted that he was violating her fundamental constitutional right to be free of intentional sex discrimination even in the absence of *any* relevant precedent.

Moreover, there was, in fact, more than enough plainly applicable precedent to have "clearly established" that right here. As plaintiff has shown above, well before defendant inflicted his coercive sexual advances on plaintiff in late 2009—indeed, in the most important respects, for more than a *decade* before that time—there was in fact an extensive body of case law within the Seventh Circuit that would have made clear to any reasonable official in defendant's circumstances that his misconduct violated the Equal Protection Clause. Although the specific holding of *Bohen* in 1986 was that the constitution was violated by non-quid pro quo

"sexual harassment" creating a "hostile or abusive *working* environment," *Bohen* was repeatedly characterized by the courts over the next 20 years as having established the far more general principle that "sexual harassment constitutes sex discrimination in violation of the equal protection clause," without any stated or implicit limitation of this principle to the employment context. (*E.g.*, *King*, 898 F.2d at 537; *Markham*, 172 F.3d at 491; *Owens*, 313 F.Supp.2d at 944; *Nanda*, 412 F.3d at 844; *Chivers*, 423 F.Supp.2d at 851.) And as plaintiff has also demonstrated above, these and other courts have clearly held—before defendant acted here—that the kind of non-quid pro quo "environmental" harassment addressed in *Bohen* is unconstitutional sex discrimination not just in employment but in non-employment settings as well.[6] Thus, in its 1999 decision in *Markham v. White*, for example, the Seventh Circuit relied heavily on *Bohen* (and *Nabozny*) to hold that hostile and unwelcome sexual commentary by male DEA agents conducting a training session for non-employee female police officers violated those officers' right to equal protection, and the court summarily rejected the agents' claim for qualified immunity as well, stating:

> [T]he fact that neither this court nor any other has ever dealt with a situation involving a short training seminar conducted by narcotics officers is of no moment. Under the doctrine of qualified immunity, "liability is not predicated upon the existence of a prior case that is directly on point."

172 F.2d at 491-92 (quoting *Nabozny*, 92 F.3d at 456).

This Court must take the same approach here. Just as with the male DEA agents in *Markham*, defendant cannot plausibly claim that, because no equal protection decision had yet

[6] Plaintiff also cited *Twyman v. Burton* and *T.E. v. Grindle* above, both of which are 2010 decisions. While neither decision predated defendant's misconduct here, therefore, both explicitly rely on *pre-2009* law—including several of the principal decisions cited above—to hold that unwelcome sexual harassment and abuse constitutes an equal protection violation in both law enforcement and educational contexts. *Twyman*, 2010 WL 4978904, at *5 (sexual harassment of female confidential informant); *T.E.*, 599 F.3d at 587-88 (sexual abuse of students).

addressed the situation in which a prosecutor sexually harasses a crime victim whose assailant he is prosecuting, no reasonable official in defendant's position could be expected to have known, by late 2009, that sexual harassment inflicted on a victim like plaintiff in that setting would be held to have violated her equal protection rights. The application of the broad principal *Bohen* had first articulated in the employment context to those prosecutorial circumstances was plainly no more "novel," in 2009, than its application to the DEA training seminar in *Markham* had been years earlier—indeed, far less so in view of the numerous similar decisions applying the *Meritor/Bohen* paradigm outside the employment setting that were issued in the fifteen years since the *Markham* defendants' had acted, in 1994 (172 F.3d at 490).[7] And the very Tenth Circuit decisions defendant himself relies on would have made this broad applicability outside of employment, if anything, even more obvious to that reasonable official. In *Johnson*, issued in 1999, the Tenth Circuit categorically rejected a qualified immunity argument by the defendant—a building inspection official accused of sexually harassing female building owners—that all prior equal protection decisions had been confined to the employment setting, stating:

> There is no indication in those decisions that a public official's abuse of governmental authority in furtherance of sexual harassment in the employment setting is fundamentally different than when the abuse of authority occurs outside the workplace. . . . We therefore conclude that . . . a public official's reasonable application of the prevailing law would lead him to conclude that to abuse *any one of a number of kinds of authority* for the purpose of one's own sexual gratification . . . would violate the Equal Protection Clause.

Johnson, 195 F.3d at 1217-18 (emph. added).

Nor is there any merit in defendant's insistence that pre-2009 case law established that "sexual conduct must be significantly more egregious" than his—involving such things as

[7] While *Markham* had likened the "short training seminar" in that case to the "educational setting" to which non-Seventh Circuit courts had already transposed *Meritor*'s "environmental harassment" paradigm (172 F.3d at 491-92), nothing in *Markham* limited such transpositions only to "education," and *Markham* itself was never cited in the later Seventh Circuit decisions holding that paradigm applicable in the context of actual schools.

physical touching, overt threats to coerce sexual compliance, or "weeks or months" of "severe, pervasive and abusive contact"—to constitute unlawful sexual harassment, and that he would therefore "have had no way of knowing" that his purportedly "flirtatious" or merely "boorish" text messages violated plaintiff's equal protection rights. (Def. Brf., 26-27.) As with defendant's motion to dismiss, this argument—and the highly sanitized "proposed material facts" defendant has extracted from plaintiff's own allegations in her complaint—grossly understate the scope, content, and intensity of his coercive sexual advances and their undeniably severe adverse impact on her well-being and ability to function as the complaining witness in his prosecution of S.K. As set forth above, plaintiff's Declaration—which must be credited on summary judgment and viewed in the light most favorable to her (*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986))—only reinforces and amplifies the plausible inferences to be drawn from the allegations in the complaint that defendant has carefully omitted from his proposed facts—that in plaintiff's vulnerable, and dependent state, defendant's rash of overbearing and leering sexual advances so harmed her well-being and threatened her trust in defendant's willingness to help and protect her as to utterly destroy her capacity to participate further in any prosecution he or his office might conduct. (PPFF ¶¶ 34-45.) This severe and pervasive adverse impact is "egregious" by any standard, and more than sufficient to meet any extant threshold for "environmental" sexual harassment.

Defendant's argument also simply ignores—again—the pre-2009 Seventh Circuit case law clearly establishing that "environmental" sexual harassment *can* violate the equal protection clause where there has been no offensive sexual touching (*Markham*, 172 F.2d at 488, 491-93; *Chivers*, 423 F.Supp.2d at 841-48, 851), where there have been no threats of tangible harm to force compliance (*id.*; *Delgado*, 367 F.3d at 670, 672-73), and where the harassment at issue has not continued for "weeks or months." *Markham*, 172 F.2d at 488, 491-

93; *Antia*, 914 F.Supp. at 257-58. Indeed, *Markham* alone would have sufficed to make clear to any reasonable official in defendant's circumstances that the absence of these features from his conduct did *not* insulate him from equal protection liability. The pattern of sexual and sexist comments engaged in by the federal agent defendants in *Markham* involved no *quid pro quo* threats or touching of any kind and occurred only in a "short training seminar" (172 F.3d at 488, 492), but the Seventh Circuit nevertheless flatly rejected the defendants' qualified immunity claim that this conduct was not "severe or pervasive" enough, as a matter of law, to violate the Equal Protection Clause. *Id.*, at 492-93. And the court's explicitly stated willingness to make this ruling without any need for "a prior case that is directly on point" (*id*., at 493) would also have made clear to that reasonable official in defendant's circumstances that he was not immune simply because no court had yet addressed a pattern of unwelcome, coercive, and harmful sexual advances directly comparable to his own.

In light of *Markham*, therefore, and the other clearly established law set forth above, there is no question that the "contours" of the sexual harassment prohibition under the Equal Protection Clause were sufficiently clear that the "unlawfulness" of defendant's conduct would have been "apparent" (*Hope*, 536 U.S. at 739) to any reasonable prosecutor—and to defendant himself, had he bothered to consider the question. His motion for qualified immunity must therefore be denied.

CONCLUSION

Defendant's assertions that his conduct was too innocuous to be actionable and abused no power or "authority" over plaintiff, and that it must in any event be excused in order to protect the prosecutorial process, should be given no more credence by this court than they were given by his peers. His conduct was "repugnant," they told him, not merely because it violated "constitutional protections" of which he was plainly aware but also because it had destroyed the

ability of plaintiff and other crime victims to trust in him and to participate in his prosecutions. (PPFF 50 and Fox Aff., Exh. A.) It is thus the *grant* of immunity to such conduct, not its denial, that would undermine the integrity of the prosecutorial process and of those constitutional protections as well, and defendant's requests to be excused and immunized from liability for his egregious mistreatment of plaintiff must therefore be denied.

Dated this 1st day of June, 2011.

Respectfully submitted,

FOX & FOX, S.C.

s/ Michael R. Fox

Michael R. Fox
State Bar No. 01015173
124 West Broadway
Monona, WI 53716
(608) 258-9588
Attorney for Plaintiff