STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0174

Assata Kenneh,
Appellant,

vs.

Homeward Bound, Inc.,
Respondent.

Filed January 14, 2019
Affirmed
Halbrooks, Judge

Hennepin County District Court
File No. 27-CV-17-391

Gerald T. Laurie, Laurie Law & ADR, St. Louis Park, Minnesota (for appellant)

Marko J. Mrkonich, Emily A. McNee, Littler Mendelson, P.C., Minneapolis, Minnesota (for respondent)

Leslie L. Lienemann, Culberth & Lienemann, LLP, St. Paul, Minnesota (for amicus curiae Employee Lawyers Association of the Upper Midwest)

Frances E. Baillon, Baillon Thome Jozwiak & Wanta LLP, Minneapolis, Minnesota; and

Brian T. Rochel, Teske, Katz, Kitzer & Rochel, PLLP, Minneapolis, Minnesota (for amicus curiae National Employment Lawyers Association Minnesota Chapter)

Justin D. Cummins, Cummins & Cummins, LLP, Minneapolis, Minnesota (for amicus curiae Minnesota Association for Justice)

Considered and decided by Halbrooks, Presiding Judge; Jesson, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant challenges the summary-judgment dismissal of her hostile-work-environment claims under the Minnesota Human Rights Act (MHRA), Minn. Stat. §§ 363A.01-.44 (2018), arguing that the district court erred by applying the incorrect legal standard and failing to make inferences in her favor, and that this court should abandon the "severe or pervasive" standard for hostile-work-environment claims. We affirm.

FACTS

Respondent Homeward Bound, Inc. is a nonprofit organization that operates residential facilities for disabled persons. In October 2014, appellant Assata Kenneh started working for Homeward Bound as an assistant program supervisor at Fernbrook House. She continued to work for Homeward Bound on a part-time basis until February 2016, when she was promoted to the position of program resource coordinator. The following month, Kenneh met Anthony Johnson, a maintenance coordinator for Homeward Bound. Johnson provided maintenance services at Homeward Bound's various locations, and he and Kenneh occasionally interacted when he was performing work at her location. Kenneh was uncomfortable around Johnson because she believed that his behavior was inappropriate.

On April 5, 2016, Kenneh filed a complaint with human resources about Johnson's behavior. The complaint listed three specific incidents. First, Kenneh reported that, when she started working at Fernbrook House, Johnson stopped by her office to introduce himself and fix her desk. Kenneh claimed that Johnson started "talking sexually" and

licking his lips and told her she did not need to move out of the way because he "likes it pretty all day and night." On the second occasion, Johnson stopped by her office with a wad of cash and stated that he "like[s] to" carry large sums of money. The two left her office and went to the vending machine and to get leftover food from a coworker's retirement party. Johnson did not take any food, and when Kenneh asked him what he liked to eat he responded, "Do you really want to know what I eat? I eat women." The third incident occurred at a gas station near Fernbrook House. Kenneh claimed that Johnson pulled into the gas station and began to ask her questions about where she was going and what she was studying in school. He left immediately after she did without getting any gas. Kenneh reported the incidents to human resources because she believed Johnson was "verbally inappropriate" with her.

Homeward Bound placed Johnson on paid suspension and interviewed both Kenneh and Johnson. On April 18, the director of human resources sent Kenneh a letter stating that the results of the investigation were inconclusive. The letter indicated that Johnson had received additional training as a result of Kenneh's complaints and that retraining would continue on an ongoing basis. Finally, the letter said that Kenneh should immediately report any future incidents of harassment. Kenneh did not file any additional complaints with human resources, but asserts that she subsequently complained to her supervisor on two occasions. She was dissatisfied with Homeward Bound's response and on June 29 asked to transfer to a flex-schedule position to avoid seeing Johnson. The parties disagree as to what happened next. Kenneh claims that Homeward Bound denied her request and terminated her employment. Homeward Bound claims that Kenneh threatened to resign if

she was not transferred to a flex schedule and that it subsequently denied her request and accepted her resignation.

Kenneh filed a complaint, alleging claims under the MHRA based on sexual harassment and reprisal. In addition to the incidents mentioned in the human-resources complaint, Kenneh alleged that Johnson offered to cut and style her hair and would frequently call her "beautiful" and "sexy." She also claimed that Homeward Bound terminated her position in retaliation for her complaint to human resources. Homeward Bound moved for summary judgment, arguing that the alleged conduct did not meet the standard for sexual harassment and that Homeward Bound took appropriate remedial actions. Homeward Bound also argued that it was entitled to summary judgment on Kenneh's reprisal claim because she failed to establish a causal connection between her complaint to human resources and any adverse employment action.

The district court granted Homeward Bound's motion for summary judgment on both claims. The district court determined that Johnson's actions did not meet the standard for sexual harassment. The district court further determined that Kenneh failed to establish a causal connection between her complaint and any adverse employment action. This appeal follows.

D E C I S I O N

We review summary-judgment decisions de novo. *Riverview Muir Doran, LLC v. JADT Dev. Grp., LLC*, 790 N.W.2d 167, 170 (Minn. 2010). We "determine whether the district court properly applied the law and whether there are genuine issues of material fact that preclude summary judgment." *Id.* The evidence is viewed in the light most favorable

to the party against whom summary judgment was granted. *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002). A genuine issue of material fact exists if a rational fact-finder, when considering the record as a whole, could find for the non-moving party. *Coursolle v. EMC Ins. Grp., Inc.*, 794 N.W.2d 652, 657 (Minn. App. 2011), *review denied* (Minn. Apr. 19, 2011).

I.

To prevail on her claim of sexual harassment based on a hostile work environment, Kenneh must show that

> (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on membership in a protected group; (4) the harassment affected a term, condition or privilege of her employment; and (5) the employer knew of or should have known of the harassment and failed to take appropriate remedial action.

Goins v. W. Grp., 635 N.W.2d 717, 725 (Minn. 2001). To establish that the harassment affected a term, condition, or privilege of employment, Kenneh must show that the harassment was "so severe or pervasive" as to alter the conditions of employment and create a hostile working environment. *Id.* The Minnesota Supreme Court has determined that

> [t]he objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim did in fact perceive to be so. In ascertaining whether an environment is sufficiently hostile or abusive to support a claim, courts look at 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.

Id. (quotations and citations omitted). There is a "high threshold" to establish actionable harm based on sexual harassment. *Cummings v. Koehnen*, 568 N.W.2d 418, 424 (Minn. 1997).

Kenneh argues that the district court erred in granting summary judgment on her hostile-work-environment claim. She contends that the district court failed to consider all of the relevant circumstances and that, when the circumstances are properly viewed, they establish that she experienced severe or pervasive sexual harassment. She argues that, instead of considering the totality of the circumstances, the district court impermissibly relied on comparing the alleged conduct to prior cases. But the cases cited by the district court are instructive in distinguishing between conduct that meets the standard for sexual harassment and conduct that is offensive but not actionable.

In *Geist-Miller v. Mitchell*, this court addressed what conduct constitutes actionable harm. 783 N.W.2d 197, 203 (Minn. App. 2010). We observed that the appellant's harassment allegations primarily involved "inappropriate sexual banter and [the] unsuccessful pursuit of a relationship," which were the "types of conduct that lack the severity and level of interference" required to establish severe or pervasive harassment. *Id.* We distinguished between conduct that is "boorish, chauvinistic, and decidedly immature" and that which is "physically threatening or intimidating." *Id.* at 204 (quotation omitted). We noted that the employer's attempt to kiss the appellant and instances in which he touched her hair and leg were more severe than the inappropriate remarks, but still did not amount to actionable harm. *Id.* at 203. Finally, this court determined that the appellant's

assertions that the conduct made her uncomfortable, embarrassed, and upset were insufficient to establish that the harassment was severe or pervasive. *Id.* at 204.

Here, Kenneh's allegations relate primarily to Johnson making inappropriate remarks and gestures toward her. Kenneh claims that Johnson would lick his lips whenever he saw her and would call her "beautiful" and "sexy." While these actions may be boorish and immature, they do not rise to the level of actionable harm. *See id.* at 203-04 (noting that "inappropriate sexual banter" does not constitute actionable harm). And, as noted above, the fact that Kenneh was "uncomfortable, embarrassed, and upset" about Johnson's behavior does not render the conduct actionable sexual harassment.

But even if Kenneh's allegations rose to the level of severe or pervasive sexual harassment, summary judgment was properly granted because Homeward Bound took remedial action when it learned of the harassment allegations. In order to establish a claim based on a hostile work environment, a plaintiff must show that the employer was aware of the harassment and failed to take remedial action. *Goins*, 635 N.W.2d at 725. Here, Kenneh's complaint to human resources reported three incidents of alleged sexual harassment. Kenneh reported that on one occasion Johnson started "talking sexually" and licked his lips, on another he told her he liked to "eat women," and on a third occasion he spoke with her at a gas station near Fernbrook House and asked her what she was studying in school. Her report did not include that he would make an inappropriate licking gesture whenever he saw her or that he referred to her as "beautiful" and "sexy."

Homeward Bound investigated the complaint and subsequently retrained Johnson on the sexual-harassment policy. It also indicated that it would provide additional training

on an ongoing basis and urged Kenneh to report any future incidents. Kenneh claims that she complained to her supervisor on two other occasions, but did not file any additional complaints. And she was unable to identify when she complained to her supervisor. Kenneh argues that Homeward Bound failed to interview other employees who would have supported her allegations. But Kenneh reported to human resources that there were no witnesses to the incidents and that, while she had told one other employee about the situation, she had not discussed it with her in detail. On this record, Kenneh has not made a sufficient showing that Homeward Bound was aware of ongoing harassment and failed to take appropriate remedial action.

Finally, Kenneh and the amici curiae argue that we should abandon the severe-or-pervasive standard for sexual harassment. They argue that the Minnesota Supreme Court impermissibly read the "severe or pervasive" language into the statutory definition of sexual harassment, which does not include the language. *See* Minn. Stat. § 363A.03, subd. 43 (defining "sexual harassment"). They are correct that the definition of "sexual harassment" does not include the "severe or pervasive" standard. *Id.* But this court is bound by supreme court precedent and does not have the authority to abandon a standard established by the supreme court. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987). Accordingly we decline to abandon the severe-or-pervasive standard.

II.

Kenneh argues that the district court erred by granting summary judgment on her reprisal claim. The MHRA prohibits reprisal against an employee who files a complaint about an unfair discriminatory practice. Minn. Stat. § 363A.15. A prima facie case of reprisal requires a showing that the complainant engaged in statutorily protected conduct, that the employer took adverse action against the complainant, and that a causal connection exists between the two. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 548 (Minn. 2001).

Kenneh argues that the district court erred in determining that she failed to establish a prima facie case of a causal connection between her complaint and termination of employment. The district court determined that the claimed causal connection was based solely on the temporal connection—a three-month period—between her complaint to human resources and her termination. A temporal connection alone is generally insufficient to establish a prima facie case of a causal connection. *See Smith v. Allen Health Sys., Inc.*, 302 F.3d 827, 832 (8th Cir. 2002) (stating that generally more than a temporal connection is required to create a genuine factual issue on reprisal); *see also Kipp v. Mo. Highway & Transp. Comm'n*, 280 F.3d 893, 897 (8th Cir. 2002) (observing that an "interval of two months . . . dilutes any inference of causation"); *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 796 (Minn. 2013) (stating that the court has "relied on federal law" in interpreting the MHRA and will "continue to do so"). Kenneh claims that she complained to her supervisor "about two times about it" but was unable to identify

when the conversations occurred and acknowledged that she did not file another formal complaint.

Kenneh asserts that the only reason for the interval between her complaint and termination is that Homeward Bound "knew it would face a retaliation lawsuit if it could not find some pretext for letting her go" and "waited to terminate her until it found the right opportunity." She contends that Homeward Bound used her request to change schedules as a pretext to terminate her employment and claim that she resigned and that it had been waiting to do so since her initial complaint. But Kenneh does not cite to anything in the record to support this argument; it is based merely on her own conjecture. To defeat a summary-judgment motion, a party cannot rely on "general assertions" but rather "must demonstrate that specific facts exist which create a genuine issue for trial." *Johnson v. Van Blaricom*, 480 N.W.2d 138, 140 (Minn. App. 1992). Kenneh fails to point to any specific facts in the record to support her claim. Accordingly, the district court did not err in granting summary judgment in favor of Homeward Bound on the reprisal claim.

Affirmed.