

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

DONNA K. KIRKLAND,

Plaintiff,

v.

THE STATE UNIVERSITY OF IOWA,
a/k/a The University of Iowa,

Defendant.

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No. 3-99-CV-30105

RULING ON
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Plaintiff filed a petition in the Iowa District Court for Johnson County related to her employment with defendant University of Iowa. The petition contained the following six claims: sexual harassment in violation of federal and state law; retaliation in violation of federal and state law; battery in violation of state law; and assault in violation of state law and named both the University and the alleged perpetrator, Dr. Srinivas Bonthu, as defendants. Defendants removed the petition to this court, the parties consented to proceed before a magistrate judge, and the case was transferred to the undersigned. See 28 U.S.C. § 636(c). The University moved for summary judgment on the federal and state-law sexual harassment and retaliation claims against it. Subsequent to hearing on the motion, a stipulated dismissal of the claims against Dr. Bonthu was filed. Fed. R. Civ. P. 41(a).

I. SUMMARY JUDGMENT STANDARD

The University is entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that [defendant is] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

Although we view the facts in a light most favorable to the non-moving party, in order to defeat a motion for summary judgment, the non-moving party cannot simply create a factual dispute; rather, there must be a genuine dispute over those facts that could actually affect the outcome of the lawsuit.

Carter v. St. Louis Univ., 167 F.3d 398, 400 (8th Cir. 1999).

"[M]ere allegations which are not supported with specific facts are not enough to withstand [a motion for summary judgment]." Klein v. McGowan, 198 F.3d 705, 709 (8th Cir. 1999).

Because this case deals with alleged discrimination in the employment context, defendant's motion should be approached with caution because such cases "often depend on inferences rather than on direct evidence." Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994) (citing Johnson v. Minn. Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991)); see also Webb v. St. Louis Post-Dispatch, 51 F.3d 147, 148 (8th Cir. 1995); Hardin v. Hussmann Corp., 45 F.3d 262, 264 (8th Cir. 1995). Still, summary judgment "remains a useful pretrial tool to determine whether or not any case, including one alleging discrimination, merits a trial." Berg

v. Norand Corp., 169 F.3d 1140, 1144 (8th Cir. 1999); see Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1205 (8th Cir. 1997) ("[S]ummary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case.").

II. FACTS

The following facts are either undisputed or disputed but viewed in a light most favorable to plaintiff. Plaintiff Donna K. Kirkland was an electrocardiogram ("EKG") extern with the University hospitals at the time of the alleged harassment. Srinivas Bonthu, M.D., was a fellow¹ at the hospital and committed the alleged sexual harassment. He could not make employment decisions regarding hospital employees but had the authority to page EKG externs, and to order them to perform EKGs and to stay in the lab until all the work was finished. Judith Barrie was plaintiff's immediate supervisor at the time of the alleged harassment. She had day-to-day contact with EKG externs, handled their scheduling, and addressed minor attendance problems. Carol Erenberger was the supervisor above Barrie. She had little interaction with EKG externs but addressed their performance and major attendance problems and had the authority to discipline and terminate their employment. Dr. Frank Abboud was head of the

¹ A fellow is a trainee in a medical subspecialty who is supervised by a faculty attending physician.

department of internal medicine at the University and was one of the physicians who investigated Bonthu's alleged harassment. Dr. Janet Schlechte was the director of postgraduate programs in the department of internal medicine who oversaw the fellowship program in which Bonthu was enrolled. Susan Mask was director of the University's affirmative action office and investigated Bonthu's alleged harassment.

In 1995, plaintiff began her employment with the University as a part-time nursing assistant in the hospital's medical cardiology unit while enrolled in the University's nursing degree program. She had some attendance problems that her supervisor, Cindy Penny, discussed with her.

In January 1997, plaintiff began work as a substitute electrocardiogram ("EKG") extern with the hospital. Erenberger and Barrie were her supervisors. In April 1997, plaintiff became a regular EKG extern and voluntarily resigned her nursing assistant position. Around this same time, plaintiff informed Barrie that Bonthu had kissed her at work. Barrie did not report the incident to anyone or investigate the matter. Plaintiff did not file a complaint or inquire how to do so.

While plaintiff was a regular EKG extern, she was the subject of five attendance incidents that were reported to Erenberger. On July 3, 1997, plaintiff failed to respond to her

pager and told Barrie about it. The pager later was found to be defective. On September 21, 1997, plaintiff was late for the start of a shift, but had requested another extern to cover for her. On November 1, 1997, plaintiff called work and said that she might not report to work because she had hit a deer with her car. She did not report to work, but a replacement covered her shift. After this incident, Barrie told plaintiff to "be careful" around Erenberger. On November 22, 1997, plaintiff failed to show for work and could not be reached by phone. Plaintiff had left a message on a male extern's answering machine to cover for her and asked the extern to call back if he could not. Erenberger spoke with all the male externs but none of them reported receiving a call from plaintiff or agreeing to cover her shift. On January 9, 1998, plaintiff called in near the start of her shift and reported that she could not come to work. On January 21, 1998, Erenberger sent plaintiff a letter about the January 9 absence that informed her that any future unscheduled absences would result in the initiation of her termination.

The alleged harassment by Bonthu occurred in the evening of October 24, 1997, and the early morning of October 25, 1997. Around 11:00 p.m. on October 24, Bonthu reprimanded plaintiff in the emergency room about an unconfirmed EKG.

Later, plaintiff received a page from another department while she was in the laboratory, and when she called the number Bonthu answered the phone. He asked her about her children and other personal matters, and plaintiff asked him if he needed any EKGs. Bonthu told her he was bored, and plaintiff replied that she needed to leave to do an EKG. Bonthu informed her that he needed an EKG, plaintiff told him she would be back in the lab in about fifteen minutes if he needed her, and she left to do the other EKG.

About half an hour later, plaintiff returned to the lab. Bonthu entered the lab about fifteen minutes later, and plaintiff told him she had to leave to do another EKG. As she turned to leave, he grabbed her, wrapped his arms around her, and kissed her. Plaintiff told him she had to do another EKG and attempted to push him away, but he grabbed her again and kissed her, pressing against her mouth so forcefully that it hurt her mouth. As plaintiff left, Bonthu told her to call him because he might want her to do some EKGs.

Approximately fifteen minutes later, plaintiff returned to the lab, called Bonthu and asked if he needed some EKGs. He told her that he would come up to the lab, but plaintiff replied that she would not be in the lab, and she left. She went outside to smoke a cigarette and told a security guard about the incident.

About half an hour later, plaintiff returned to the lab. Bonthu entered a few minutes later and engaged plaintiff in some conversation. He then walked behind her, grabbed her head, pulled it back, and kissed her. She told him to stop, he walked to her side, told her he would never kiss her again, and then proceeded to kiss her again. Bonthu sat down and told her that he did not have to report that she had left an unconfirmed EKG. Plaintiff ignored him, and he then told her he would leave because she was ignoring him, and then he left. After this incident, plaintiff had no further contact with Bonthu.

On October 25, 1997, plaintiff filed a complaint with the University's public safety office about the incident. The University immediately suspended plaintiff with pay until October 30, 1997. Dr. Abboud immediately began an investigation into plaintiff's allegations, and he, Erenberger, and Dr. Schlechte contacted plaintiff and told her they were planning to suspend Bonthu and encouraged her to contact Mask at the University's affirmative action office. Plaintiff did contact Mask about filing a complaint and requested that a lock be placed on the externs' sleeping quarters, which was done immediately.

On October 28, 1997, Abboud and some other doctors confronted Bonthu with the allegations, which he denied. They informed him that he was suspended pending an investigation. On

November 4, 1997, plaintiff filed a formal complaint against Bonthu with the University's affirmative action office. Mask conducted an investigation that led to the conclusion Bonthu had violated the University's sexual harassment policy. On December 5, 1997, before Mask's findings were officially released, Bonthu resigned his position with the University. After plaintiff filed the November 4 complaint, many of her co-workers refused to speak to her, and she was reprimanded orally and in writing for conduct that previously was not even discussed.

In the spring semester of 1998, plaintiff did not enroll in the University's nursing program, but remained employed as a regular EKG extern. In March 1998, plaintiff voluntarily requested she be changed from regular to substitute status because of her son's illness. On April 21, 1998, plaintiff filed a complaint with the Iowa Civil Rights Commission regarding the October incident with Bonthu. In May 1998, plaintiff called Erenberger about returning to regular EKG status, but Erenberger told her that she would not be allowed to return as a regular or substitute EKG extern because she had poor work performance and was unreliable. Plaintiff informed Erenberger that she was planning on returning to classes in the fall, but Erenberger told her that was irrelevant. A termination report, which removes an employee from the payroll system, was not generated for plaintiff until March 1999. The

University sent a notice for a tuberculosis skin test to plaintiff in February 1999, which is only done for current hospital employees. This came to Erenberger's attention whereupon Erenberger took action to formally terminate plaintiff's employment.

In March 1996, Bonthu was temporarily suspended and required to attend classes on the University's sexual harassment policy after he engaged in inappropriate conduct toward two female patients. On another occasion, Erenberger observed Bonthu rubbing the shoulders of a female lab technician. These prior incidents are discussed more fully in the analysis which follows.

Plaintiff and Bonthu had an amicable, nonromantic relationship before the October incident. They studied together and talked on the telephone, and once they and another person went to a movie and had dessert afterwards. One time while they were studying at plaintiff's house, Bonthu tried to kiss plaintiff, but plaintiff refused and told him to leave.

III. ANALYSIS

A. DISCRIMINATION BASED ON SEX

Plaintiff alleges that Bonthu sexually harassed her, and that the University is vicariously liable because he was her supervisor. Alternatively, if Bonthu was not her supervisor, plaintiff argues the University is nonetheless liable for failing to exercise reasonable care to prevent Bonthu's harassment.

Defendant argues that it is not vicariously liable, and that plaintiff fails to establish a prima facie case of sexual harassment. Because Iowa courts look to federal law for guidance in evaluating state-law sexual harassment claims, Vivian v. Madison, 601 N.W.2d 872, 873 (Iowa 1999), plaintiff's state and federal-law claims against the University can be analyzed under the same framework. *Id.*

1. Applicable Law

Sexual harassment can constitute discrimination on the basis of sex. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986). To be actionable, the harassment must be because of sex, unwelcome, and sufficiently severe or pervasive to affect the terms, conditions, or privileges of the harasser's employment and create an abusive working environment. *Id.* at 67-68.

Harassment is "because of sex" when "'members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). Harassing conduct "need not be motivated by sexual desire to support an inference of discrimination on the basis of sex," *id.*, but conduct or comments that are merely tinged with sexual content or connotations are not automatically discrimination because of sex. *Id.* at 80-81.

Harassment is unwelcome if the harassee, "by her conduct[,] indicated that the alleged sexual advances were unwelcome." Meritor, 477 U.S. at 68. Voluntariness, in the sense that the alleged conduct was not forced on the harassee, does not necessarily mean the harassment was welcome, id., but a harassee's sexually provocative speech, dress, or conduct is relevant to the inquiry. Id. at 69.

"Terms, conditions, and privileges of employment" is not limited to economic or tangible discrimination in the narrow contractual sense, but covers "'the entire spectrum of disparate treatment of men and women' in employment," including subjecting people to a hostile or abusive work environments. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (quoting Meritor, 477 U.S. at 64); Oncale, 523 U.S. at 78. For harassment to create a hostile or abusive environment, the harassee must subjectively perceive the environment to be abusive and the environment must be one that a reasonable person would find abusive. Harris, 510 U.S. at 21-22; Oncale, 523 U.S. at 81. Some factors relevant to the objective inquiry are "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." Harris, 510 U.S. at 23. The harassment must be extreme and not merely the "'ordinary

tribulations of the workplace.'" Faragher v. City Boca Raton, 524 U.S. 775, 788 (1998) (quoting B. Lindemann & D. Kadue, Sexual Harassment in Employment Law 175 (1992)). One must view the working environment as would "a reasonable person in plaintiff's position, considering 'all the circumstances,'" including the expectations and relationships of the parties, the social context, and common sense. Oncale, 523 U.S. at 81-82 (quoting Harris, 510 U.S. at 23). This demanding standard prevents the law from becoming a general civility code. Faragher, 524 U.S. at 788; Oncale, 523 U.S. at 80-81.

Once discrimination based on sex is established, the next question is whether the employer is liable for it. An employer may be liable "for both negligent and intentional torts committed by an employee within the scope of his or her employment." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 756 (1998); Faragher, 524 U.S. at 793. However, this theory of employer liability is generally not applicable to cases of sexual harassment because such conduct generally "is not conduct within the scope of employment." Ellerth, 524 U.S. at 757; Faragher, 524 U.S. at 801.

Employers can still be liable for their employees' acts that are outside the scope of their employment. Ellerth, 524 U.S. at 758; Faragher, 524 U.S. at 801-02. Direct liability arises where an employer "acts with tortious intent," such as intending the

conduct or consequences. Ellerth, 524 U.S. at 758. If an employer's high-ranking officer possesses the tortious intent, or if the alleged conduct involves a nondelagable duty, the employer is indirectly liable. *Id.* Employers are also be liable when the conduct "is attributable to [their] own negligence." *Id.* Negligent conduct "with respect to sexual harassment [occurs] if [the employer] knew or should have known about the conduct and failed to stop it." *Id.* at 759.

Even if an employer is not negligent, it can be held liable if the harassing employee was "'aided in accomplishing the tort by the existence of the agency relation'" or if the employee "uses apparent authority" to commit the tort. *Id.* (quoting Restatement (Second) of Agency § 219(d)(2)(1957)); Faragher, 524 U.S. at 802. Apparent-authority analysis is generally relevant "where the agent purports to exercise a power which he or she does not have." Ellerth, 524 U.S. at 759. Such a case is unusual, but in those cases "where there is a false impression that the actor [possessed certain authority], when in fact he [did] not, the victim's mistaken conclusion must be a reasonable one." *Id.* In the usual case, where an employee's harassment "involves the misuse [or threat] of actual power," the imposition of vicarious liability must be pursuant to the aided-in-agency-relation rule, not the apparent-authority rule. *Id.* at 759-60; Faragher, 524 U.S. at 802.

The aided-in-agency-relation rule presupposes that the alleged harasser possesses supervisory authority. See Ellerth, 524 U.S. at 760; Faragher, 524 U.S. at 802. This authority includes the power to effect a significant change in employment status, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, . . . a decision causing a significant change in benefits," Ellerth, 524 U.S. at 761, and "set[ting] work schedules and pay rates." Faragher, 524 U.S. at 803. Generally, the exercise of such power "inflicts direct economic harm" on the harassee. Ellerth, 524 U.S. at 762. Thus, an employer is subject to vicarious liability for sexual harassment by an employee with supervisory authority. Id. at 765; Faragher, 524 U.S. at 807.

In order to provide employers with the incentive to comply with Congress's policy of preventing sexual harassment in the workplace and of encouraging employers to create antiharassment policies and grievance procedures, if the supervisor's harassment does not culminate in a tangible employment action (such as firing or failing to promote), the employer may escape vicarious liability if it can show by a preponderance of the evidence that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or

corrective opportunities provided by the employer or to avoid harm otherwise." Ellerth, 524 U.S. at 764-65; Faragher, 524 U.S. at 806-07. If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable for the harassment and no affirmative defense is available to it. See Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808.

2. Vicarious Liability

Plaintiff argues that the University is vicariously liable for Bonthu's conduct because he was her supervisor under the apparent-authority and aided-in-agency-relation analyses. Defendants challenge plaintiff's arguments.

a. Apparent Authority

Plaintiff's reliance on the apparent-authority analysis is misplaced. The Supreme Court noted that "in the unusual case, [when] it is alleged there is a false impression that the actor was a supervisor, when in fact he was not, the victim's mistaken conclusion must be a reasonable one." Ellerth, 524 U.S. at 759. (emphasis added). Plaintiff concedes that at the time of the alleged harassment, she knew that Bonthu was not her supervisor and had no power to terminate or discipline her. Plaintiff presents evidence, however, that because she performed EKGs for Bonthu and because Bonthu was a doctor, she believed he had the ability to persuasively recommend to her supervisors that she be fired or

disciplined. She also presents evidence that Bonthu subtly threatened to report a mistake she had committed unless she submitted to his sexual advances.

Plaintiff's belief that Bonthu could have her fired or disciplined is beside the point because she knew that he had no supervisory authority to make such decisions. Plaintiff, therefore, was under no mistaken belief that Bonthu could fire or discipline her. Apparent-authority analysis, therefore, is not the proper means of resolving the employer-liability issue. See Todd v. Ortho Biotech, Inc., 175 F.3d 595, 598 (8th Cir. 1999) (seemingly rejecting, as a matter of law, apparent-authority analysis in cases where the harasser is not in the plaintiff's direct chain of command); Bonenberger v. Plymouth Township, 132 F.3d 20, 28 (3d Cir. 1997) (rejecting a quid pro quo claim because the plaintiff knew the harasser "could not fire [her], even assuming he actually threatened to do so."); see also Harrison v. Eddy Potash, Inc., 158 F.3d 1371, 1376 (10th Cir. 1998) (rejecting apparent-authority theory of liability in context of harassment by supervisor with immediate authority over plaintiff). But see Todd, 175 F.3d at 599-600 (Arnold, J. Richard, concurring) (arguing that apparent-authority analysis would not necessarily be inappropriate when the harasser is not in plaintiff's direct chain of command).

b. Aided-in-Agency Relation

Plaintiff's reliance on the aided-in-agency-relation analysis is also without merit. The Supreme Court has stated that vicarious liability extends to an employer for harassment by a supervisor "with immediate (or successively higher) authority over the employee." Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 807. Supervisory authority includes the power to effect a significant change in employment status, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, . . . a decision causing a significant change in benefits." Ellerth, 524 U.S. at 761, and "set[ting] work schedules and pay rates." Faragher, 524 U.S. at 803. Plaintiff argues that Bonthu possessed the necessary supervisory authority because she performed EKGs for him, he was a doctor, he had the ability to persuasively recommend to her supervisors that she be fired or disciplined, and that he subtly threatened to report a mistake she had committed unless she submitted to his sexual advances.

The Eighth Circuit's post-Ellerth case law has not mapped the "contours of the term 'supervisor' as used in the new Ellerth/Faragher standard." Todd, 175 F.3d at 598. Plaintiff relies on Sims v. Health Midwest Physician Services Corp., 196 F.3d 915 (8th Cir. 1999), for support. There, the court agreed that the plaintiff had pleaded sufficient facts to overcome summary judgment

as to whether a doctor was her supervisor for purposes of holding the clinic liable. Id. at 918. In the case, the plaintiff was hired by the clinic as a nurse "for Dr. Richard Harlow," the alleged harasser. Id. at 917. The clinic manager, Kay Hensley, was one of plaintiff's supervisors, id. at 917, 919, but the court did not discuss the authority Dr. Harlow possessed over plaintiff. Plaintiff argued that Harlow "had no authority to hire or fire" plaintiff because Hensley was "her supervisor in the reporting structure." This alleged fact does not exist in the court's opinion. The case, therefore, is of limited use here and is distinguishable anyway because it is clear that plaintiff was not "assigned" to Bonthu or any other physician, but rather performed EKGs for any physician requesting one.

The Seventh Circuit has concluded that supervisory authority consists "primarily [of] the power to hire, fire, demote, promote, transfer, or discipline an employee" and that "[a]bsent . . . at least some of this authority, an employee does not qualify as a supervisor." Parkins v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1034 (7th Cir. 1998). The undisputed facts show that Bonthu did not possess some or any of the type of authority discussed in Parkins. The fact Bonthu could recommend that an EKG extern be fired or disciplined "does not elevate him to supervisory status." Id. at 1035 (citing Pfau v. Reed, 125 F.3d 927, 937 (5th

Cir. 1997) (concluding that employee was not a supervisor where he only had the authority to "recommend that employees receive awards or be subject to disciplinary action [and] . . . to issue assignments to [employees] and determine the number of hours allocated to each assignment[, and] . . . had no[] significant input in the decision to fire [plaintiff even though he was] instrumental and mainly responsible for the proper procedural handling of the termination plaintiff"), vacated by 525 U.S. 801 (1998)); see Gutierrez v. Henoach, 998 F. Supp. 329, 331, 334 (S.D.N.Y. 1998) (concluding that licensed physician assistant was not supervisor of plaintiff, who was a medical assistant); see also Eiland v. Trinity Hosp., 150 F.3d 752, 753 n.3 (7th Cir. 1998) (noting that staff physician at hospital where plaintiff worked as a nurse was not plaintiff's supervisor). A fellow EKG extern could use the threat of reporting one of plaintiff's mistakes as blackmail to receive sexual favors. Bonthu, being a doctor, probably possessed more clout than an extern, but like the extern he had no authority to affect plaintiff's employment status other than reporting mistakes he observed. See Ellerth, 524 U.S. at 763 ("[T]here are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be circumstances where the supervisor's status makes little difference.").

Plaintiff's argument would transform agency principles into a tool to expand employer liability, which is contrary to the Supreme Court's admonition that "agency principles *constrain* the imposition of vicarious liability in cases of supervisory harassment." Id. (citing Meritor, 477 U.S. at 72). If Bonthu was plaintiff's supervisor on these facts, all the physicians on whose orders plaintiff might be required to perform an EKG would be her supervisors. In a large medical facility like the University of Iowa Hospitals and Clinics the class of supervisors for whose conduct the University could be vicariously liable would be very broad indeed and far beyond what is typically thought of as a supervisory relationship. Because Bonthu was not plaintiff's supervisor, the University is not vicariously liable for Bonthu's alleged harassment of plaintiff.

3. Co-Worker Liability

Plaintiff argues that the University is liable for Bonthu's harassment even if he was not her supervisor. To prove the non-supervisory liability of her employer, plaintiff must prove "(1) she belongs to a protected group; (2) she was subject to unwelcome harassment; (3) the existence of a causal nexus between the harassment and her protected group status; (4) the harassment affected a term, condition, or privilege of employment; and (5) her employer knew or should have known of the harassment and failed to

take proper action." Palesch v. Mo. Comm'n on Human Rights, 233 F.3d 560, 566 & n.5 (8th Cir. 2000). For purposes of the motion, defendant concedes that plaintiff can prove the first three elements.

a. Severe or Pervasive Conduct

Defendant contends the October 1997 incident did not affect a term, condition, or privilege of plaintiff's employment principally because only a single incident was involved. Harassment affects a term, condition, or privilege of employment when the harassee subjectively perceives the working environment to be abusive and the working environment is "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive." Harris, 510 U.S. at 21. Some factors relevant to the objective inquiry are "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. at 23. Defendant does not dispute that plaintiff subjectively found the environment to be abusive, but challenges whether there was an objectively abusive environment.

The Eighth Circuit has cautioned that "[o]nce there is evidence of improper conduct and subjective offense, the

determination of whether the conduct rose to the level of abuse is largely in the hands of the jury." Howard v. Burns Bros., Inc., 149 F.3d 835, 840 (8th Cir. 1998); see Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir. 1998) ("[S]ince Congress set no clear standard defining a hostile environment, it must be left to 'virtually unguided juries' to decide whether particular conduct is 'egregious enough' to merit an award of damages.") (quoting Harris, 510 U.S. at 24 (Scalia, J., concurring)). However, conduct must still meet a minimum threshold of abusiveness before the issue is left to the jury. See Faragher, 524 U.S. at 788 ("Most recently, we explained that Title VII does not prohibit 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.' A recurring point in these opinions is that 'simple teasing', offhand comments, and isolated incidents (unless *extremely serious*) will not amount to [discrimination]." (emphasis added) (citations omitted) (quoting Oncale, 523 U.S. at 81,82)); Moylan v. Maries County, 792 F.2d 746, 749-50 (8th Cir. 1986) ("The plaintiff must show a practice or pattern of harassment against her or him; a single incident or isolated incidents generally will not be sufficient. The plaintiff must generally show that the harassment is sustained and nontrivial."), cited approvingly by Faragher, 524 U.S. at 788; Cram v. Lamson & Sessions Co., 49 F.3d 466, 474-75 (8th Cir. 1995). As

these authorities imply, though a single incident of sexual harassment usually is not sufficient to affect a term, condition or privilege of employment, there are exceptional cases in which a single incident is so remarkable in its nature and severity that it can amount to harassment. Recently the Eighth Circuit reminded lower courts in a case involving conduct not much more egregious than that here: "we are unaware of any rule of law holding that a single incident can never be sufficiently severe to be hostile-work-environment sexual harassment." Moring v. Arkansas Dep't of Corrections, 243 F.3d 452, 456 (8th Cir. 2001).

The "severe or pervasive" standard is in the disjunctive. The alleged harassment in question was a series of events occurring over about two hours, but so connected as to amount to a single incident. The harassment therefore was not pervasive in the sense of being repetitive. The question is whether what occurred was serious enough to create a hostile or abusive work environment. The Court believes there is a genuine jury question here.

Viewed favorably to plaintiff, it appears Bonthu manipulated his ability to call upon plaintiff to perform EKGs in order to place himself in plaintiff's presence on the night in question. On his two visits to the lab, over plaintiff's protests and attempts to resist, he grabbed her and kissed her a number of times, once forcefully enough to hurt plaintiff. When, during the

last episode, Bonthu was unable to gain plaintiff's compliance, he became contrite and said he would not have to report the bad EKG he had earlier complained of, a thinly veiled suggestion that plaintiff submit or face the consequences.

Clearly the jury could conclude Bonthu's conduct would be physically threatening and humiliating to a reasonable person. His kisses were accomplished by physical force and a degree of violence, and thus could be considered severe harassment. A person in plaintiff's position at the time would fear the kisses were a prelude to sexual assault. Bonthu's use of plaintiff's job responsibilities to facilitate his assaults interfered with plaintiff's job performance at the time. In short, Bonthu's conduct in the evening and early morning hours of October 24-25 was of such a kind and degree that reasonable jurors could find it affected a term, condition or privilege of plaintiff's employment even though a single incident was involved.

b. Failure to Prevent Harassment

Defendant contends that the University's response to the October 1997 incident was an adequate remedy reasonably calculated to end the harassment. It is undisputed the University promptly investigated, suspended Bonthu to keep him away, and found Bonthu violated the University's sexual harassment policy whereupon he quit. He and plaintiff did not come in workplace contact again.

Remedial action like this normally insulates the employer from liability. See Carter v. Chrysler Corp., 173 F.3d 693, 700 (8th Cir. 1999) (stating that for co-worker harassment, plaintiff's prima facie case includes the requirement to show that the "employer knew or should have known of the harassment and failed to take prompt and effective remedial action"); cf. Ellerth, 524 U.S. at 764-65 (stating that employer's affirmative defense for supervisor harassment includes a showing that it "exercised reasonable care to *prevent* and correct promptly any sexually harassing behavior") (emphasis added). Plaintiff, however, argues that the University failed in a duty to prevent the harassment from occurring.

Plaintiff contends the University should have acted to prevent Bonthu from harassing her on the night in question based on its knowledge of Bonthu's past conduct, including the previous kissing incident on which she is not suing. The Court agrees with plaintiff that an employer may be liable for hostile work environment harassment if a plaintiff proves that the employer knew or should have known of harassing conduct by a co-worker, on which plaintiff is not suing, and failed to exercise reasonable care to prevent further harassment, on which plaintiff is suing. See Palesch, 233 F.3d at 566 (plaintiff's prima facie case includes a requirement to show that the "employer knew or should have known of

the harassment and failed to take *proper action*"); Drake v. Minn. Mining & Mfg. Co., 134 F.3d 878, 885 n.4 (7th Cir. 1998) ("only those employers who are at least negligent in failing to prevent the hostile environment harassment of co-workers will be held liable."); 29 C.F.R. § 1604.11(f) (2000) ("Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring").

Plaintiff points to four specific incidents of prior conduct by Bonthu. First, in 1996 Bonthu, while employed at the University, acted inappropriately with two patients during examinations. Bonthu made a comment that one of the women was "sexy," asked if he could call her for lunch, and rubbed his hand along a patient's thigh. Bonthu was temporarily suspended and required to attend sexual harassment training. This evidence is of little or no probative value as to whether Bonthu would sexually harass a co-worker. See Williams v. City of Kansas City, 223 F.3d 759, 755 (8th Cir. 2000) ("The dynamic differences between a co-worker and a customer counsels against considering them as equivalents when it comes to workplace romances. A prior relationship with a customer is simply not probative of whether Horn would seek a relationship with a co-worker."). There is also no basis to conclude reasonable care to prevent similar misconduct

directed at co-workers required the University to take different or additional remedial action than the remedial steps employed at the time.

Plaintiff next points to an incident in which Erenberger observed Bonthu rubbing a female lab technician's shoulders while the technician was performing a procedure. The technician did not complain at the time or in a written complaint, and Erenberger did not view the incident as sexual harassment. Rather, she felt that the technician needed to devote her full attention to the task and that Bonthu's conduct was distracting, as it would have been if he were merely talking with the technician. Rubbing a person's shoulders is not by its nature sexual or harassing conduct and evidently was not perceived as either at the time. The incident gave no notice of a need for preventative action.

The last incident involved plaintiff. In April 1997 plaintiff reported to her supervisor, Barrie, that Bonthu had leaned over to try to kiss her while she was doing an EKG. Plaintiff turned her head and Bonthu kissed her cheek. Plaintiff did not make a formal complaint, but the incident made her very uncomfortable. Since Barrie was a management-level employee her knowledge is imputed to the University. See Ogden v. Wax Works, Inc., 214 F.3d 999, 1007 & n. 10 (8th Cir. 2000). Barrie did not initiate an investigation or pursue the matter further. That Barrie

did not act on her own in response to this single incident is not in the Court's judgment sufficient to establish that the University failed to exercise reasonable care to prevent the harassment which occurred six months later. The University had harassment policies and procedures in place at the time of which plaintiff was generally aware. Though plaintiff argues that she did not know how to or if she could pursue the matter, the evidence shows she did not attempt to inquire about pursuing the matter. She testified she did not think the incident "crossed the line" to be something that she could pursue. (Kirkland Depo. at 93). If at the time plaintiff did not believe the incident was serious enough to warrant further action, it is difficult to fault Barrie for not taking the matter further on her own initiative. Viewed in the context testified to by plaintiff, Bonthu's kiss was not so objectively offensive that the University, in the person of Barrie, was duty bound to recognize it as sexual harassment and take action to prevent a recurrence.

B. RETALIATION

Plaintiff claims she was retaliated against by the University after complaining to the hospital about the October 1997 harassment and initiating proceedings with the Iowa Civil Rights Commission. Here too Iowa courts look to federal law for guidance

in evaluating state-law retaliation claims, see Kunzman v. Enron Corp., 902 F. Supp. 882, 903 (N.D. Iowa 1995).

1. Applicable Law

Because most retaliation claims involve only indirect evidence of retaliation, the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), applies. Buettner v. Arch Coal Sales Co., Inc., 216 F.3d 707, 713 (8th Cir. 2000). First, a plaintiff must prove a prima facie case, which includes that "(1) she engaged in activity protected by Title VII; (2) an adverse employment action occurred; and (3) a causal connection existed between participation in the protected activity and the adverse employment action." Id. at 713-14. If a plaintiff proves her prima facie case, the burden shifts to the employer to "produce some legitimate, non-discriminatory reason for the adverse action." Id. at 714. If an employer does so, the plaintiff must "prove the proffered reason is a pretext for retaliation, [and] [u]ltimately . . . [that] the employer's adverse action was based on intentional discrimination." Id. A showing that an employer's proffered reason for the adverse action is a pretext can, in itself, suffice to prove that the proffered reason is a pretext for discrimination. Reeves v. Sanderson Plumbing Prods, Inc., 120 S. Ct. 2097, 2109 (2000) ("It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit

a finding of liability, the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination.").

2. Prima Facie Case

Defendant concedes that plaintiff can meet the first element of her prima facie case, but challenges the last two elements.

a. Adverse Employment Action

Plaintiff's evidence of adverse employment action is that her co-workers shunned her, she was reprimanded, and she was terminated from her employment with the University. The termination is cognizable as an adverse employment action but plaintiff's other complaints, while relevant, are not. Only material employment actions qualify, such as a change "in pay, benefits, seniority, or responsibility." Buettner, 216 F.3d at 715. Ostracism by co-workers is not an adverse employment action. Williams, 223 F.3d at 754 ("Horn's silent treatment is at most ostracism, which does not rise to the level of an actionable adverse employment action."). Verbal reprimands, standing alone, also are not adverse employment actions. See LaCroix v. Sears, Roebuck, & Co., 240 F.3d 688, 692

(8th Cir. 2001) (citing Cossette v. Minn. Power & Light, 188 F.3d 964, 972 (8th Cir. 1999)).²

The University does not challenge the fact that plaintiff was terminated from her employment. The disagreement concerns when she was terminated. Plaintiff claims she was terminated in May 1998 during a conversation with Erenberger. Defendants claim she was not fired until March 1999 when a termination report was executed for plaintiff. This dispute is irrelevant to the issue of whether there was an adverse employment action taken by the University. The evidence is clear that she was terminated.

b. Causal Nexus

Plaintiff focuses on the timing of her termination. For the purposes of this motion the Court accepts plaintiff's version of the events surrounding her termination. In March 1998 plaintiff asked to be placed on substitute status. On April 21, 1998 she filed her administrative complaint with the Iowa Civil Rights Commission. In May she called Erenberger about returning to regular status at which time she was told she would not be allowed to

² Reprimands may be an adverse employment action when they are the basis for a termination or other material alteration in the employee's terms and conditions of employment. See Spears v. Mo. Dep't of Corrections & Human Resources, 210 F.3d 850, 854 (8th Cir. 2000) ("An unfavorable evaluation is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment.") (citing Enowbitang v. Seagate Tech., Inc., 148 F.3d 970, 973-74 (8th Cir. 1998)).

return to work because of poor work performance and unreliability, in effect, a termination.

The timing of an adverse employment action alone is generally insufficient to meet the causal prong. Buettner, 216 F.3d at 716 ("Generally, however, more than a temporal connection between protected activity and an adverse employment action is required to show a genuine factual issue on retaliation exists."). Plaintiff, however, also points to the verbal and written reprimands she received after she filed the complaint with the hospital. Cf. id. (citing cases in which retaliation claim failed because plaintiff relied solely on temporal proximity of adverse employment action and protected activity). Plaintiff claims that these reprimands addressed issues that were not even discussed before she complained about Bonthu's conduct. She also disputes the facts which constitute the basis for some of the reprimands and argues that the severity of the conduct has been exaggerated. See Carter, 167 F.3d at 402 (rejecting claim of pretext and distinguishing case from those where the plaintiff "produced evidence indicating that the employer's proffered reasons were false, carelessly inaccurate or willfully exaggerated") (citing Young v. Warner-Jenkinson Co., Inc., 152 F.3d 1018, 1023-24 (8th Cir. 1998)). A pattern of reprimands for conduct that was not an issue before engaging in the protected activity is evidence that,

when combined with the circumstances, including temporal, surrounding the discharge, could support an inference of retaliation. See Bassett v. City of Minneapolis, 211 F.3d 1097, 1106 (8th Cir. 2000) (noting that plaintiff had received a positive job evaluation prior to the protected activity but poor evaluation after the activity); cf. Kneibert v. Thomson Newspapers, Michigan Inc., 129 F.3d 444, 455 (8th Cir. 1997) (noting that plaintiff had received numerous reprimands prior to the protected activity). Viewing the summary judgment record favorably to plaintiff, she has put forward a prima facie case of retaliation.

b. Legitimate, Nondiscriminatory Reason

The University's nondiscriminatory reason for discharging plaintiff is tied to its version of when she was terminated. According to the University, despite her attendance and reliability problems, plaintiff was kept on the employment rolls until March 1999 when it came to Erenberger's attention (when it was noted plaintiff had not shown up for her annual tuberculosis test) that plaintiff had not worked a shift in over a year. Her long time away from work coupled with her previous attendance problems caused Erenberger to take action to terminate plaintiff's employment. The University does not articulate a nondiscriminatory reason for discharging plaintiff in May 1998 when plaintiff contends she was terminated.

c. Pretext

Assuming for the moment that plaintiff's attendance and reliability are the asserted reasons for her eventual termination, plaintiff argues and produces evidence the incidents for which she was reprimanded after she complained about Bonthu's conduct concerned issues that were never before discussed or addressed by her supervisors. She disputes that her post-complaint work conduct was significantly different than that which preceded the complaint. She claims that defendant was scrutinizing her so it could lay a paper trail of "misconduct" in order to fire her later. Defendant produces evidence which documents plaintiff's work problems, but the Court must view the record favorably to plaintiff.

Moreover, if plaintiff's attendance and reliability were really reasons for her discharge, the jury might question why the University waited until plaintiff had not worked a year before discharging her. In the normal course discharge would occur when the problems arose or persisted not, as appears the case, as an afterthought when it was noted plaintiff had not performed any work for a very long time. In fact, on January 21, 1998 Erenberger wrote plaintiff that if she had another unscheduled absence, she would be subject to termination. (Def. Ex. D). Plaintiff had no unscheduled absences after that date as she did not work any further shifts until she was taken off the employment rolls in March 1999. (Def.

Ex. B). It follows the jury could conclude plaintiff was not terminated for the reason given by the University.

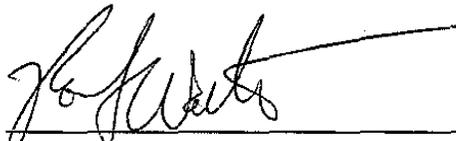
Plaintiff's prima facie case coupled with evidence which, if believed, permits a finding that the employer's justification was false, usually is enough to avoid summary judgment. See Reeves, 530 U.S. at ___, 120 S. Ct. at 2109.

IV. RULINGS AND ORDER

Defendant's motion for summary judgment on plaintiff's state and federal-law sexual harassment claims against the University is **GRANTED**, and it is **ORDERED** that those claims be dismissed with prejudice.

Defendant's motion for summary judgment on plaintiff's state and federal-law retaliation claims against the University is **DENIED**.

Dated this 1st day of May, 2001.



ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE