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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JENNIFER PIRIE, Plaintiff, vs. THE CONLEY GROUP, INC., TOM CONLEY, MATT ROESLER, MICHAEL YALE, and KAREN CONLEY, Defendants.	**No. 4:02-cv-40578** **ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This matter is before the Court on Defendants' Motion for Summary Judgment. The Court heard oral argument on the motion in a hearing held on December 22, 2003. Attorneys for the Plaintiff are Paige E. Fiedler and Beth A. Townsend, with Ms. Fiedler presenting argument opposing the motion; attorneys for the Defendants are Elizabeth Gregg Kennedy and Nathan J. Overberg, with Mr. Overberg presenting argument in support of the motion. For the following reasons, the Court grants in full the Defendants' Motion for Summary Judgment.

PROCEDURAL HISTORY

The Plaintiff, Jennifer Pirie ("Pirie"), commenced this action against the Defendants, The Conley Group, Inc., Tom Conley, Matt Roesler, Michael Yale, and Karen Conley (collectively, "the Conley Group" or "the Company"), on November 4, 2002. Jurisdiction is proper pursuant to 28 U.S.C. § 1331, as this case arises under Title VII of the Civil Rights Act of 1964 ("ERISA"), 29 U.S.C. §§ 1001 et seq. The Court also has jurisdiction over the Plaintiff's claims brought pursuant to the Iowa Civil Rights

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Act ("ICRA") under the Court's pendant claim jurisdiction pursuant to 28 U.S.C. § 1367(a).

This lawsuit arises out of one incident of alleged sexual harassment and the subsequent actions of the Defendants, including the eventual termination of Plaintiff's employment. The filing of the lawsuit followed Pirie's exhaustion of remedies with the Iowa Civil Rights Commission ("ICRC") and the Equal Employment Opportunity Commission ("EEOC").[1] On September 30, 2003, the Conley Group filed a Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56. Pirie opposes this Motion.

BACKGROUND FACTS[2]

Pirie was employed by the Conley Group during the incident of harassment and the other events giving rise to this lawsuit. The Conley Group is an Iowa corporation doing business in Polk County, Iowa. Tom Conley is President and C.E.O. of the

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[1] Pirie filed charges of sex discrimination, sexual harassment, and retaliation with the ICRC and EEOC on May 9, 2002. This was within 180 days of the acts of which she complains as required by statute. The ICRC issued an Administrative Release with respect to her charges on October 4, 2002, and the EEOC issued a Notice of Right-to-Sue with respect to Plaintiff's charges. Plaintiff then filed suit within 90 days of receipt as required by statute. Defendants have not alleged that Plaintiff did not exhaust her administrative remedies prior to bringing this lawsuit, and the Court finds Pirie has fully complied with the statutory requirements prior to filing this action.

[2] Rather than discuss the facts in chronological order, this section will first detail the alleged sexual harassment and the events related to it, including the response of the Conley Group. This will be followed by a discussion of Pirie's employment with the Conley Group. The connection, if any, between the incident of sexual harassment and Pirie's termination will be discussed in the Court's analysis. For purposes of the current motion, the Court views the record in the light most favorable to Pirie.

Conley Group. His wife, Karen Conley, is Vice President of the Conley Group. Matt Roesler[3] and Michael Yale are both employed by the Conley Group.

A. The Alleged Sexual Harassment and the Company's Response

The sexual harassment at issue here consists of one incident.[4] Pirie had been employed by the Conley Group as a security officer since August 2001. On March 30, 2002, Pirie and Officer Don McRae were providing security at what is known as location 1 at the Des Moines International Airport. McRae and Pirie were the only officers assigned to location 1 during the shift that ran from midnight to 8:00 a.m. Pirie was the lead officer overseeing four other officers, including McRae, located at the various security locations at the airport.

During their shift together, McRae and Pirie engaged in conversation. During the course of their conversation, McRae began to engage in inappropriate sexual banter. This included a discussion of his sex life with his wife and other women. He also wanted to know about Pirie's intimate relations. McRae pursued this type of talk for approximately one hour. The focal point of his discussion was the size of his penis, which McRae repeatedly offered to display for Pirie. She declined the offer.

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[3] Defendant Roesler is currently serving in the Armed Forces and is stationed in the Middle East. He is scheduled to return sometime in late January, following which he is scheduled to depart for training in Virginia. The Conley Group has requested a continuance of the trial date based on his absence. By granting in full the Defendants' Motion for Summary Judgment, a continuance becomes unnecessary. The Court addresses this in a separate order.

[4] Pirie does not contend that she was treated inappropriately because of her sex by anyone at the Conley Group prior to this incident.

Despite being rebuffed on multiple occasions, McRae proceeded to turn out the lights in the security office[5] and to unzip his pants. He then displayed his penis to the Plaintiff. This display lasted for approximately three minutes, during which time McRae urged Pirie to look, both at the size of his penis and at a birthmark located on his testicles. After Pirie expressed her displeasure, McRae ended his exhibition.

Pirie finished her shift at 8:00 a.m. the morning of March 30, 2002. She did not report McRae's conduct to anyone at this time.[6] She reported for her next shift at 7:00 p.m. on this same day. Plaintiff admits that she was still unsure at this time whether or not she was going to report the incident that occurred the night before. Shortly after midnight, McRae contacted Pirie at her post. During this visit, McRae accused Pirie of reporting him and attempted to convince her to not report the incident to their supervisors if she had not already done so. At least two other officers witnessed the heated

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[5] According to uncontroverted testimony, even though it was the middle of the night, there was sufficient light coming from outside lights that Plaintiff was able to clearly observe McRae's penis when he exposed himself to her. In fact, in deposition testimony, she was able to candidly provide details on the size, shape, and coloring of McRae's penis, as she was able to observe it for approximately one minute of the three minutes of exposure.

[6] Defendants urge the Court to weigh this fact against Pirie, pointing out on numerous occasions that Pirie, as lead officer, was in a position to complete a written report with respect to any malfeasance of the four officers under her lead. She did not actually make a report of the incident until nearly halfway into her next shift. While the "Reporting" paragraph of the anti-harassment policy states "[i]t is essential . . . to notify your supervisor immediately even if you are not sure the offending behavior is considered harassment," Pirie's failure to report the incident at the end of her shift does not make her report any less credible.

exchange between Pirie and McRae. It was during this exchange that Pirie determined to report McRae's misconduct.

A few minutes after McRae left, Pirie called Corporal Roesler and reported the sexual harassment from her previous shift. Corporal Roesler told Pirie to write a detailed report of the incident. He further informed her that he would call the appropriate supervising officer to ensure that McRae would not visit her at the airport during the remainder of her shift. Roesler made the call and ordered McRae to stay away from Pirie's location. Pirie did not see McRae the rest of her shift.

While McRae was scheduled to be the watch commander during Pirie's April 18 and 19 shifts, Pirie never again worked with or around McRae. In fact, Corporal Yale had directed Pirie and McRae that they were not to have any contact with each other even if McRae was assigned as watch commander on shifts Pirie was assigned to work.

Pirie provided a written report of the incident to Roesler, who asked her to rewrite the complaint. This new statement was returned to the Conley Group four or five days after she first reported the incident. McRae was also asked to write, and then rewrite, his description of the incident.

After receiving the written complaint, the Conley Group initiated an investigation into Pirie's allegations. Pirie was made aware that an investigation was being undertaken. On April 12, 2002, both Pirie and McRae signed confidentiality agreements with respect to the investigation. At first, the Company was going to look into the allegations of sexual harassment itself. Later, the Conley Group decided an

independent investigator was needed, and it hired Presti & Presti Investigations, Inc. ("Presti"), which began an investigation into Pirie's complaint on or about April 22, 2003.

Presti's investigation consisted of reviewing the materials the Conley Group had on the incident and interviewing several employees of the Conley Group on April 25, 2002. Neither McRae nor Pirie were ever interviewed by Presti during the course of his investigation. Pirie was contacted by letter but declined to be interviewed. McRae originally agreed to be interviewed but later declined.

On or about May 1, 2002, Pirie was fired by the Conley Group. The events leading to her termination are outlined in greater detail below. On May 3, 2002, the Conley Group terminated McRae's employment with the Company. His firing was based on the results of the independent investigation undertaken by Presti. While Presti originally stated he would be making no findings but was merely investigating the complaint, he did call Karen Conley on or about May 3, 2002, and conveyed to her his belief that the penis display probably occurred. It was based on this communication that the Company fired McRae.

B. Pre-Termination Work Environment and Discipline of Pirie

As noted, Pirie was hired by the Conley Group in August 2001 as a security officer and remained in that position throughout her employment. After being offered the security officer position, Pirie reviewed the Conley Group's employee handbook

with Karen Conley.[7] At this same time, Pirie participated in orientation training with Corporal Michael Yale.

The Company's uniform policy provides that "[n]o earring, bracelets, or necklaces may be worn while in uniform. The only acceptable jewelry is a wedding ring or class ring. No large jewelry." This policy has been interpreted to prohibit an officer from wearing a tongue stud while in uniform. While Pirie understood a tongue stud was prohibited by Company policy, she claims this policy was not enforced as she wore a tongue stud to her preemployment interviews and continued to wear the stud virtually every day of her employment without consequence and with the knowledge of management.

Pirie was wearing a tongue stud when observed by Tom Conley on February 7, 2002. Conley told Pirie she was not authorized to wear the tongue stud and gave her an ultimatum that if she ever wore the tongue stud again she would be fired. On February 11, 2002, Pirie was again observed wearing the tongue stud, this time by Karen Conley. Pirie was again told this was against Company policy and once again was warned that any further violations would result in her termination.[8] She was also

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[7] Relevant to this action, the employee manual contains the Company's uniform policies and sexual harassment policy. The manual also contains a list of unacceptable activities that may give rise to disciplinary action up to and including termination.

Pirie executed a "Receipt and Acknowledgment of the Conley Group Employee Manual" on August 16, 2001, thereby acknowledging she had received and read a copy of the employee manual. Pirie also received an overview of the employee manual during her orientation training.

[8] Apparently, Karen Conley was unaware of the ultimatum given by Tom Conley just four days earlier. Pirie emphasizes that Tom Conley failed to carry out his

counseled again by Corporal Yale with respect to the tongue stud. In addition, at some point Pirie had discussions with Karen Conley wherein it was agreed that Pirie would be allowed to wear a tongue flat to work.[9]

On April 19, 2002, Pirie received performance evaluations covering the months of January and February.[10] Both of these evaluations noted that she was out of uniform because of unauthorized jewelry. As a result, she was rated unsatisfactory in the area of uniform appearance.

Pirie arranged for another officer to cover her shifts on April 18 and 19, 2002. She did not notify and get authorization from any supervisor or manager to have another officer cover her shifts on those days. Failure to get authorization from a

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February 7 ultimatum. The Conley Group explains this inaction was a result of a lack of communication between Company officials. After discussing the issue, the Conley Group decided it was too late to rescind Karen Conley's warning and to give Pirie one more chance. Pirie argues this indicated the Company's lax enforcement of the Company policy prohibiting tongue studs until *after* she filed a complaint for sexual harassment.

[9] A tongue flat is worn like a tongue stud but is flat to the tongue and colored to blend in and not be noticed. They are worn to keep the hole in the tongue from closing and are relatively inconspicuous.

[10] Pirie again notes the date she received the evaluations for January and February came *after* she filed her sexual harassment complaint. She seems to argue that the Company was making a paper trail for her eventual dismissal. However, she does note that she received the evaluations only after she requested a copy of her personnel file on April 18, 2002. Corporal Yale testified by affidavit he completed the evaluations prior to the filing of the sexual harassment complaint. Moreover, Pirie herself admits to being out of uniform by wearing a tongue stud during those months and that, according to Company policy, her uniform appearance would be considered unsatisfactory.

supervisor prior to such a shift change is a violation of Company policy. Pirie notes that McRae was scheduled to be the watch commander on both of these days.[11]

On April 19, 2002, Pirie received a written reprimand with respect to her violation of Company policy by not getting pre-authorization to make a shift change. The reprimand further provided "Officer Pirie is hereby directed one last time that she is required to follow all Company policies and procedures. Any further violations of Company policies and procedures will be subject to disciplinary action up to and including her immediate termination from employment." Pirie signed this written reprimand.

On May 1, 2002, Corporal Yale observed Pirie wearing her tongue stud at work. While Pirie contends she had worn the tongue stud continuously and that it was readily observed by other employees, this was the first time Corporal Yale had witnessed her wearing the tongue stud during work hours. Later that day, Pirie went to the office of the Conley Group and showed Mr. Roesler she had taken out the tongue stud.[12] She

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[11] There is nothing to indicate that this was the reason Pirie did not work these days. She had indicated some days prior that she needed to visit her mother to help her go to a doctor's appointment and to see an attorney regarding her grandmother's estate. Pirie states McRae was scheduled as watch commander but never affirmatively states this was the reason she found someone to cover her shifts on those dates.

[12] The precise sequence was that Pirie stuck out her tongue while conversing with Roesler and said, "Look, full uniform, no tongue stud." When asked if she had just taken the stud out on the way to the office, Pirie responded, "Yes. Shhh, isn't that all that matters?"

admittedly removed the tongue stud on her way to the office because she knew she was not supposed to be wearing the tongue stud on the job.

Pirie was notified on May 2, 2002, that she was terminated from her position with the Conley Group for wearing a tongue stud contrary to written policy and the direct orders of her supervisors. After filing a complaint with the ICRC and the EEOC and receiving the respective right-to-sue letters from these agencies, Pirie brought this action alleging hostile environment sexual harassment, and retaliation. The sexual harassment claim arises out of the incident occurring March 30, 2002, and the retaliation claim arises out of her treatment by the Conley Group following her complaint of sexual harassment that culminated in her being fired from the Company.

ANALYSIS

The Defendants seek summary judgment on all of the claims asserted by the Plaintiff in her Complaint. The Conley Group asserts it is entitled to summary judgment because the Plaintiff has failed to establish a prima facie case of sex discrimination, sexual harassment, and retaliation, and as a result, her claims fail as a matter of law. Conversely, Pirie argues she has established a prima facie case on her claims.

A. Standard for Summary Judgment

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment should be rendered

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

> issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). To avoid summary judgment, the non-moving party must make a sufficient showing on every essential element of its case for which it has the burden of proof at trial. See Celotex v. Catrett, 477 U.S. 317, 322-23 (1986). The non-moving party must go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. While the quantum of proof that must be produced to avoid summary judgment is not precisely measurable, it must be enough evidence for a reasonable jury to return a verdict in its favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

In considering a motion for summary judgment, the Court must view all the facts in the light most favorable to the non-moving party and give that party the benefit of all reasonable inferences that can be drawn from the facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (citations omitted); Rifkin v. McDonnell Douglas Corp., 78 F.3d 1277, 1280 (8th Cir. 1996); Marts v. Xerox, Inc., 77 F.3d 1109, 1112 (8th Cir. 1996). On the present motion, the Plaintiff is the non-moving party. With these principles in hand, the Court analyzes the arguments of the parties.

Pirie argues that the Defendants must meet an exceptionally high standard on their summary judgment motion as this is an employment law case. The Eighth Circuit

has cautioned that summary judgment should rarely be granted in employment discrimination cases. See Keathley v. Ameritech Corp., 187 F.3d 915, 919 (8th Cir. 1999); Lynn v. Deaconess Med. Ctr.-West Campus, 160 F.3d 484, 486 (8th Cir. 1998); Hindman v. Transkrit Corp., 145 F.3d 986, 990 (8th Cir. 1998). "Because employment discrimination cases frequently turn on inferences rather than direct evidence, the court must be particularly deferential to the party opposing summary judgment." Bell v. Conopco, Inc., 186 F.3d 1099, 1101 (8th Cir. 1999).

The Conley Group contends that Pirie's assertions regarding the "exceptionally high" summary judgment standard in employment discrimination cases is entitled to little, if any, weight in the present case. Defendants accept that the Eighth Circuit has cautioned that summary judgment should be used sparingly in employment discrimination cases. They argue, however, that the Eighth Circuit has qualified that statement by explaining that notwithstanding this consideration, summary judgment "is appropriate where one party has failed to present evidence sufficient to create a jury question as to an essential element of its claim." Whitley v. Peer Review Sys., Inc., 221 F.3d 1053, 1055 (8th Cir. 2000); see Duffy v. Wolle, 123 F.3d 1026, 1033 (8th Cir. 1997) ("While 'summary judgment should seldom be granted in employment discrimination cases, summary judgment is proper when a plaintiff fails to establish a factual dispute on an essential element of her case.'") (quoting Helfter v. United Parcel Serv., Inc., 115 F.3d 613, 615-16 (8th Cir. 1997)).

Indeed, the Eighth Circuit has recited that summary judgment should be cautiously granted in employment discrimination cases while simultaneously affirming the district court's grant of summary judgment in the same case. See, e.g., Whitley, 221 F.3d at 1055, 1056; Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1205, 1209 (8th Cir. 1997); Duffy, 123 F.3d at 1033, 1041. The Defendants also point out as noteworthy that in recent cases wherein the Eighth Circuit reviews summary judgment, the "warning" with respect to employment cases is conspicuously absent. See, e.g., McCown v. St. John's Health Sys., 349 F.3d 540 (8th Cir. 2003) (affirming summary judgment without making caution concerning summary judgment in employment cases); Tenkku v. Normandy Bank, 348 F.3d 737 (8th Cir. 2003) (same); Harris v. Interstate Brands Corp., 348 F.3d 761 (8th Cir. 2003) (same); Landers v. Nat'l RR Passenger Corp., 345 F.3d 669 (8th Cir. 2003) (same); Allen v. Rumsfeld, 72 Fed. Appx. 497 (8th Cir. 2003) (same).

B. Sexual Discrimination Claims

The Defendants have moved for summary judgment on any sexual discrimination claims brought by the Plaintiff. The Plaintiff, however, states she has not alleged a separate sex discrimination claim. Therefore, the Court need not address this issue.

C. Sexual Harassment Claims

The Defendants have also moved for summary judgment on all sexual harassment claims brought by the Plaintiff. Pirie has brought claims for sexual harassment under Title VII and the ICRA. The claims are based on a theory of hostile work

environment sexual harassment. The analysis on the state law claim is guided by federal law and federal cases. Hulme v. Barrett, 449 N.W.2d 629, 631 (Iowa 1989).

1. Hostile Work Environment

Title VII provides "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The Supreme Court has held that sexual harassment that is so severe and pervasive as to alter the conditions of employment, thereby creating a hostile or abusive work environment, violates Title VII. Faragher v. Boca Raton, 524 U.S. 775, 786 (1998); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986). This has come to be known as hostile environment sexual harassment.[13]

To establish an actionable hostile environment sexual harassment claim against a non-supervisory co-worker, Pirie must satisfy the following five elements:

> (a) she belongs to a protected group; (b) that she was subject to unwelcome sexual harassment; (c) that the harassment was based on sex; (d) that the harassment affected a term, condition, or privilege of employment; and (e) that the employer knew or should have known of the harassment and failed to take proper remedial action.

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[13] The Eighth Circuit has accepted hostile environment sexual harassment as violative of Title VII. See Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986) (finding a sexually hostile work environment violates Title VII). The Supreme Court subsequently adopted this view. See Meritor, 477 U.S. 57 (1986).

Scusa v. Nestlé U.S.A. Co., 181 F.3d 958, 965 (8th Cir. 1999) (citations omitted); see also Alagna v. Smithville R-II Sch. Dist., 324 F.3d 975, 979 (8th Cir. 2003) (quoting Scusa, 181 F.3d at 965). The Defendants argue that Pirie cannot meet the final two elements, and, as a result, summary judgment is mandated.

2. Severity or Pervasiveness That Alters Terms or Conditions of Employment

In order to meet the fourth element and be actionable under Title VII as a hostile work environment, the Plaintiff must establish the workplace was "permeated with 'discriminatory intimidation, ridicule, and insult' . . . that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993) (quoting Meritor, 477 U.S. at 65, 67); see also Bowen v. Mo. Dep't of Soc. Servs., 311 F.3d 878, 883 (8th Cir. 2002) (finding plaintiff must demonstrate unwelcome harassment was sufficiently severe or pervasive so as to affect a term, condition, or privilege of employment, thereby creating an objectively hostile or abusive work environment). This standard requires that the environment must be both objectively and subjectively offensive. Faragher, 524 U.S. at 787; Harris, 510 U.S. at 21-22. In other words, a reasonable person would find the work environment hostile or abusive and the victim in fact actually perceived it to be so. Faragher, 524 U.S. at 787; Harris, 510 U.S. at 21-22 (1993).

While there is no bright-line test to determine whether an environment is sufficiently hostile or abusive, Hathaway v. Runyon, 132 F.3d 1214, 1221 (8th Cir.

1997), courts are to look at the totality of the circumstances. Duncan v. GMC, 300 F.3d 928, 934 (8th Cir. 2002). Some of the factors the court should consider include the "frequency of the discriminatory conduct; its severity; whether it is physically threatening; and whether it unreasonably interferes with an employee's work performance."[14] Harris, 510 U.S. at 23; see also Faragher, 524 U.S. at 787-88. None of these factors is in itself dispositive, and there is no mathematically precise formula to use when considering these factors. See Harris, 510 U.S. at 22-23; Quick v. Donaldson Co., 90 F.3d 1372, 1378 (8th Cir. 1996).

The standards for judging hostility of the work environment are demanding. Faragher, 524 U.S. at 788. This is to ensure that Title VII does not become a "general civility code," Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); see also Faragher, 524 U.S. at 788, as "[n]ot all unpleasant conduct creates a hostile work environment." Williams v. Kansas City, 223 F.3d 749, 753 (8th Cir. 2000) (citing Hathaway, 132 F.3d at 1221). As the courts have explained, 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," Oncale, 523 U.S. at 81, nor is it designed "'to purge the workplace of vulgarity.'" Duncan, 300 F.3d at 934 (quoting Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)). Under

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[14] This is a nonexhaustive list. See Harris, 510 U.S. at 24-25 (Scalia, J. concurring). In fact, Harris also discusses the plaintiff's psychological injury, if any, as a factor, but found that a court is not required to find conduct is psychologically injurious for a hostile environment sexual harassment claim to be actionable under Tile VII. Id. at 22, 23.

this standard, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" Faragher, 524 U.S. at 788 (internal citations omitted).

Thus, the Supreme Court has "made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment." Faragher, 524 U.S. at 788. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview." Harris, 510 U.S. at 21.

The Eighth Circuit has also recently made it clear that this element is not easily satisfied. See, e.g., Tuggle v. Mangan, 348 F.3d 714, 722 (8th Cir. 2003) (finding hostile work environment claims must "satisfy the demanding standards . . . to clear the high threshold for actionable harm"); Alagna, 324 F.3d at 980 ("These standards are demanding"); Duncan, 300 F.3d at 934 (stating it is a "high threshold" that plaintiff must meet). Thus, Pirie must show that the conduct she complains of was so severe or pervasive so as to alter a term or condition of her employment with the Conley Group to support a claim of hostile environment sexual harassment. Failure to do so will result in her claim failing as a matter of law. Prior decisions by other federal courts, especially those within the Eighth Circuit, are particularly instructive as to the types of conduct sufficient to survive a motion for summary judgment.

In Duncan v. GMC, the Eighth Circuit found that the plaintiff had failed to show that the occurrences complained of, when considered in the aggregate, were "so severe

and extreme that a reasonable person would find that the terms and conditions of Duncan's employment had been altered, a failure that dooms [the plaintiff's] hostile work environment claim." Duncan, 300 F.3d at 934. The court found five incidents perpetrated by Booth, Duncan's immediate supervisor, that were based on sex: the proposition for a relationship, improper touching of Duncan's hand on multiple occasions, a request that Duncan sketch a planter that was sexually objectionable,[15] the posting of a Man Hater's Club poster, and a request that she type the He-Men Woman Hater's beliefs. Id. at 933-34. Booth also had a screen saver with a picture of a naked woman and a child's pacifier in the shape of a penis in his office. Id. at 931. While these incidents made Duncan uncomfortable and were "boorish, chauvinistic, and decidedly immature," the court found they did not meet the standard necessary for the harassment to be actionable. Id. at 934, 935. Thus, in overturning a jury verdict and finding the district court improperly denied the defendant's post-trial motion for judgment as a matter of law, the Eighth Circuit panel concluded that Duncan did not show a sufficiently hostile work environment. Id. at 935. In other words, the harassment complained of was not so severe or pervasive so as to affect the terms and conditions of the plaintiff's employment, and so her action failed as a matter of law. Id.

Following Duncan, numerous cases have found summary judgment proper, or that the defendant was otherwise entitled to judgment as a matter of law, due to the

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[15] The planter was shaped like a slouched man with a sombrero and had a hole in the crotch area to allow a cactus to protrude.

plaintiff's failure to meet the fourth element of a hostile environment sexual harassment claim. See, e.g., Tuggle, 348 F.3d at 714 (finding that while plaintiff "was clearly subjected to harassing conduct," it was "not the kind of actionable conduct" where a co-worker made a number of comments based on plaintiff's gender and posted a picture that showed her clothed rear end); Ottman v. Independence, Mo., 341 F.3d 751 (8th Cir. 2003) (finding the district court erred in finding a triable issue for the jury on a hostile environment sexual harassment claim where conduct consisted of belittling and sexist remarks on an almost daily basis); Meriwether v. Caraustar Packaging Co., 326 F.3d 990 (8th Cir. 2003) (finding hostile environment sexual harassment claim failed where there was one incident where a co-worker grabbed the plaintiff's buttock and then confronted her the next day about it at work); Alagna, 324 F.3d at 975 (finding that while the co-worker's conduct was inappropriate, it was not sufficiently severe or pervasive where it included repeated calls to the plaintiff's home, frequent visits to her office, discussions about relationships (not including sexual details) with his wife and other women, touching the plaintiff's arm and saying he "loved" her and she was "very special," placing romance novels in her faculty mailbox, and invading her personal space); Pedroza v. Cintas Corp., 2003 WL 828237 (W.D. Mo.) (finding conduct below the baseline of actionable conduct where the alleged harassment included that a co-worker kissed the plaintiff three times, grabbed her, rubbed her buttocks on a frequent basis, blew kisses at her, followed her into her work area, and used sexual and profane comments directed at the plaintiff); Melina v. Brooklyn Park

Budget Cars, Inc., 2002 WL 31898164 (D. Minn.) (concluding conduct did not surpass the high threshold for a hostile work environment claim where the conduct consisted of a co-owner making multiple phone calls to the plaintiff, allegedly while inebriated, and even professing his love to her); Schmerr v. USDA, 2002 U.S. Dist. LEXIS 25946 (S.D. Iowa) (finding severity of alleged conduct paled in comparison to that found insufficient in Duncan).

Similarly, prior to Duncan, many cases found the plaintiff's hostile environment sexual harassment claims failed as a matter of law. See, e.g., Stuart v. GMC, 217 F.3d 621 (8th Cir. 2000) (finding alleged incidents of sexual harassment did not affect term, condition, or privilege of employment where the plaintiff was subjected to harassing conduct such as regular comments regarding "PMS" and lack of sexual relations, "saluting" by male employees where they would grab their genitals and make "hoo-ha" noises, the placement of sexually oriented photographs in her locker on one occasion, the presence of a pornographic computer program in her work area, and the placement of offensive signs on her work locker); Scusa, 181 F.3d at 958 (finding the alleged harassment insufficiently severe or pervasive where it included approximately nine incidents consisting of teasing and thumping the plaintiff on the head, yelling at her, using profanity, telling her to use the wrong chemicals, and telling her there were no extra large t-shirts remaining).

On the other hand, Duncan seems to have been somewhat tempered by a more recent Eighth Circuit decision. See Eich v. Bd. of Regents for Central Missouri State

Univ., Dep't of Pub. Safety, 350 F.3d 752 (8th Cir. 2003). In Eich, the court found that the facts were sufficient to conclude the plaintiff was subjected to sexual harassment that was sufficiently severe or pervasive to establish a hostile work environment. Id. at 759. On several occasions, Eich's co-worker brushed up against her breasts, ran his fingers through her hair, rubbed her shoulders, and ran a finger up her spine. Id. at 761. On more than one occasion, he stood behind her and simulated a sex act while she was bent over and handcuffed (during police training exercise). Id. On other occasions, the same co-worker simulated sexual acts with a nightstick while in the presence of Eich. Id. In addition, he directed constant sexual innuendos to her and other female employees. Id. Adding to this harassment, during the same time period, another co-worker rubbed his hand up and down her leg, brushed up against her, and pressed his groin into her shoulder while standing behind her. Id.

The court emphasized sexual touching and sexual innuendos that were made in the plaintiff's presence for a continuous period of time (over seven years). Id. at 759. The court compared these incidents of harassment with those found insufficient in Duncan. Id. at 760-61. In so doing, the court found Eich experienced much more serious harassment than did the plaintiff in Duncan. Id. at 761.

Other cases have found genuine issues of material fact exist as to a hostile environment sexual harassment claim.[16] See, e.g., Eich, 350 F.3d at 759 n.1 (citing the

[16] With the exception of Eich and Van Horn, all of these cases were decided prior to the Duncan decision.

following cases with the parenthetical descriptions: Henderson v. Simmons Foods, Inc., 217 F.3d 612, 616-17 (8th Cir. 2000) (holding sufficient evidence supported jury's verdict for plaintiff where she was subjected to a verbal barrage of crude sexual vulgarities, physical touching in a sexually offensive manner, and obscene hand gestures); Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1159 (8th Cir. 1999) (reversing summary judgment for employer where supervisor "fondled his genitals in front of" a female employee and "used lewd and sexually inappropriate language"); Rorie v. United Parcel Serv., Inc., 151 F.3d 757, 762 (8th Cir. 1998) (concluding work environment where a supervisor pats female employee on the back, brushes up against her, and tells her she smells good could create a hostile work environment); Howard v. Burns Bros., Inc., 149 F.3d 835, 838-41 (8th Cir. 1998) (finding sufficient evidence to support jury's verdict where female employees were subjected to sexual innuendos, sexual touching, and other unwelcome sexual remarks); Smith v. St. Louis Univ., 109 F.3d 1261, 1264-65 (8th Cir. 1997) (holding district court incorrectly granted summary judgment on hostile work environment sexual harassment claim given evidence of frequent and regular derogatory comments toward plaintiff and other female employees); Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 266-69 (8th Cir. 1993) (finding evidence of abusive conduct, including shouting and swearing at female employees and using vulgar names, sufficient to preclude summary judgment for employer); Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8th Cir. 1993) (finding Title VII clearly violated where owner of company repeatedly asked plaintiff for a sexual

relationship and where other employees called plaintiff crude names and harassed her over her nude depiction in a national magazine); Hall v. Gus Const. Co., 842 F.2d 1010, 1012-14 (8th Cir. 1988) (finding conduct involving crude names and other verbal abuse, requests to engage in sexual acts, offensive and unwelcome physical touching of thighs and breasts to be sufficiently severe or pervasive to support hostile work environment claim)); see also, e.g., Beard v. Flying J, Inc., 266 F.3d 792 (8th Cir. 2001) (finding numerous incidents over three-week period where plaintiff's breasts had been touched by supervisor, including rubbing cooking tongs across her breasts and flicking a pen across plaintiff's nipples, were sufficient to create submissible case for hostile environment sexual harassment); Moring v. Ark. Dep't of Corr., 243 F.3d 452 (8th Cir. 2001) (finding district court did not err in denying judgment as a matter of law where the harassment occurred while on a business trip and consisted of plaintiff's supervisor engaging in conversation about extramarital affairs, coming to plaintiff's room dressed only in his boxers, later barging in (this time fully dressed) with a drink in his hand, ostensibly to make a phone call, and then remained in the room telling plaintiff she "owed him," later placing his hand on her thigh and leaning in to kiss her, and where the court further found such behavior frightened the plaintiff and was hostile and abusive); Williams v. Kansas City, 223 F.3d 749 (8th Cir. 2000) (finding hostile work environment claim stands where conduct consisted of a supervisor making frequent calls to the plaintiff, inviting her to train him on the weekend, stared at her body, and made sexually charged comments about penis size); Bales v.

Wal-Mart Stores, Inc., 143 F.3d 1103 (8th Cir. 1998) (finding supervisor's behavior was severe and pervasive where the behavior consisted of intimate and sexually oriented conversations, calls to the plaintiff's home, calling her by intimate nicknames such as "honey" and "dear," pulling her hair and other unwelcome physical contact, referring to a pen as a "big red penis," telling plaintiff he dreamed of her, referring to oral sex and giving words a sexual connotation where none existed, giving plaintiff a sexually suggestive birthday card, and posing as plaintiff's boyfriend in order to purchase "sexier" poses in photos plaintiff had taken at a portrait studio); Hathaway, 132 F.3d at 1214 (finding circumstances sufficiently severe to submit the factual evidence to a jury where the evidence showed the plaintiff was physically touched in a sexually suggestive and intimate manner by a co-worker on at least two occasions, and was otherwise frightened and intimidated by the alleged harasser and a friend who snickered, laughed, and made suggestive noises after she rebuffed the original advances); Quick, 90 F.3d at 1372 (concluding summary judgment on hostile environment claim not warranted where the alleged harassment of the plaintiff included "bagging" (which involves being hit in the testicles or upper thigh) on at least 100 occasions, other physical assault, and verbal harassment, including being taunting about being homosexual); Van Horn v. Specialized Support Servs., Inc., 269 F. Supp. 2d 1064 (S.D. Iowa 2003) (amending the court's prior judgment in Van Horn v. Specialized Support Servs., Inc., 241 F. Supp. 2d 994 (S.D. Iowa 2003), and finding the client's behavior was sufficiently severe and pervasive to constitute actionable

harm where the plaintiff was touched in an inappropriate sexual manner on three occasions, including one instance where the client tried to lay on top of her and another that constituted a direct assault where the client squeezed her breast, along with inappropriate comments and utterances); Hanna v. Boys & Girls Home & Family Servs., 212 F. Supp. 2d 1049 (N.D. Iowa 2002) (finding fact issue existed as to whether conduct was so severe or pervasive as to alter term or condition of employment where main allegations occurred over two-week period and consisted of direct sexual advances from a co-worker, sexual gestures toward her by the same co-worker such as grabbing his butt cheeks and thrusting his groin toward her with accompanying dialogue, and comments about her appearance, clothes, and the way she walked); Begley v. Davis County Hosp., 2002 WL 824777 (S.D. Iowa) (finding hostile work environment claim was valid where plaintiff subjected to constant derision and degrading comments based on her gender); Kirkland v. Univ. of Iowa, 2001 WL 737548 (S.D. Iowa) (finding jury question existed as to severity[17] where co-worker grabbed plaintiff, wrapped his arms around her, and kissed her, and then returned later, grabbed her head, pulled it back, and kissed her, and after she told him to stop and he promised he would not kiss her again, he proceeded to again kiss her).

The conduct now before this Court falls somewhere between the conduct at issue in Duncan and the conduct complained of in Eich. While the incident of

[17] The court ultimately concluded no jury question existed as to the remedial measures undertaken by the employer and granted summary judgment on the hostile environment sexual harassment claim. Kirkland, 2001 WL 737548 at *10, 13.

harassment was not a continuous occurrence and lacked any physical touching, it certainly went beyond sexual banter and innuendos. The record is not entirely clear with regard to the level of intimidation experienced by Pirie, but McRae's wrongful conduct is easily regarded as inherently intimidating and did occur in an isolated area late at night. However, because the harassment was limited to one occasion, further discussion is necessary on whether this single incident of harassment by a co-employee is actionable against the employer under Title VII.

Usually, "[m]ore than a few isolated incidents are required." Kimzey v. Wal-Mart Stores, Inc., 107 F.3d 568, 573 (8th Cir. 1997). This does not mean that there is a rule of law holding a single incident can *never* be sufficient to support claim of sexual harassment. Moring, 243 F.3d at 456. To the contrary, a single incident has been found to be enough to constitute sexual harassment. See, e.g., id. at 456-57 (see parenthetical description of incident above); Barrett v. Omaha Nat'l Bank, 584 F. Supp. 22, 30 (D. Neb. 1983) ("While the usual rule is that trivial or isolated events do not give rise to liability, this Court feels that the instant case warrants a different result."). The Eighth Circuit has recognized that "such extremely serious incidents may occur," Meriwether, 326 F.3d at 993, and that such acts can amount to actionable hostile environment sexual harassment. Id.; Todd v. Ortho Biotech, Inc., 175 F.3d 595, 599 (8th Cir. 1999) (Arnold, R. concurring).

As the Supreme Court stated, single or isolated incidents are insufficient to effect a change in the terms and conditions of employment "unless *extremely* serious."

Faragher, 524 U.S. at 788 (emphasis added). The Ninth Circuit has stated that "an isolated incident of harassment by a co-worker will rarely (if ever) give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship." Brooks v. San Mateo, 229 F.3d 917, 924 (9th Cir. 2000). Other circuits have echoed this sentiment. See, e.g., Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002) ("Isolated acts, unless very serious, do not meet the threshold of severity or pervasiveness."). As this court has stated, "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." Kirkland, 2001 WL 737548 at *8 (emphasis added).

Generally, for an isolated act to be considered severe or extreme, it must include either violence or the serious threat thereof. See Herberg v. Cal. Inst. of the Arts, 124 Cal. Rptr. 2d 1, 7 (Cal. App. 2002) (reviewing cases where court found single incident was so severe or pervasive to affect a term, condition, or privilege of employment); Jones v. U.S. Gypsum, 2000 WL 196616 *3 (N.D. Iowa) (discussing cases finding single episode is sufficiently severe where sexual assault is perpetrated). Meanwhile, even unwelcome sexual touching has been found to be insufficient where the incidents are isolated and there is no threat of violence. See Herberg, 124 Cal. Rptr. 2d at 8-9 (reviewing cases where court found single incident of unwelcome touching was not so severe or pervasive to affect a term, condition, or privilege of employment); see, e.g.,

Brooks, 229 F.3d at 924-27 (finding single incident where co-worker placed his hand on the plaintiff's stomach and commented on its softness and sexiness, followed a short time later where he boxed her in and forced his hand under her sweater and bra and fondled her bare breast, was not so severe or pervasive as to alter a term or condition of her employment); Del Valle Fontanez v. Aponte, 660 F. Supp. 145, 147-49 (D.P.R. 1987) (finding single incident where defendant called plaintiff into his office, locked the door, pressed her against the door with his body, placing his erect sexual organ against her body, and then forced himself up against her a short time after being initially pushed away, would not be so severe or pervasive as to create a hostile or abusive working environment); cf., e.g., Jones, 2000 WL 196616 at *1, 3 (finding single incident in which plaintiff struck in groin by co-worker sufficiently severe so as to create an actionable hostile work environment claim).

In Meriwether v. Caraustar Packaging Co., the court found a lone act of sexual physical aggression, where the co-worker squeezed the plaintiff's buttock, was insufficient to bring a claim for hostile environment sexual harassment, even when coupled with a subsequent attempt to intimidate. Meriwether, 326 F.3d at 993; see also Clayton v. White Hall Sch. Dist., 875 F.2d 676, 680-81 (finding court should have granted summary judgment in hostile working environment claim because plaintiff's single allegation of discrimination was insufficient as a matter of law). The conduct did not rise to the level of severe or pervasive conduct that alters the conditions of the victim's employment or create an abusive work environment. Meriwether, 326 F.3d at 993.

Conversely, in Kirkland v. University of Iowa, the court found the facts surrounding a single incident occurring over about two hours was enough to give rise to a jury question over whether the harassment was sufficiently serious so as to alter a term or condition of employment. Kirkland, 2001 WL 737548 at *9. The court found the incident involved several forcible kisses that were accomplished by physical force and a degree of violence that could be considered severe. Id. The court in Barrett v. Omaha National Bank also found a single incident constituted sexual harassment. Barrett, 584 F. Supp. at 30.[18] In Barrett, the harassment was of a serious nature involving inappropriate touching that took place inside a vehicle from which there was no escape. Id.

Defendants point to two cases involving exposure of the male genitalia that were found insufficient to support a hostile environment sexual harassment claim. Defendants argue these cases indicate "[a] single incident of indecent exposure that does not constitute a sexual assault is generally insufficiently severe to constitute sexual harassment." Durkin v. Chicago, 199 F. Supp. 2d 836, 841 (N.D. Ill. 2002); see also Jones v. Clinton, 990 F. Supp. 657, 675-76 (E.D. Ark. 1998).

In Durkin v. Chicago, the plaintiff was subjected to coarse and degrading language based on her gender while attending the police academy. Durkin, 199 F.

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[18] The courts in both Kirkland and Barrett ultimately decided the plaintiff did not have an actionable sexual harassment claim because the employer acted appropriately in remedying the situation. Kirkland, 2001 WL 737548 at *9-10; Barrett, 584 F. Supp at 30-31. This issue is discussed further in section C.2 below.

Supp. 2d at 851. In addition, on one occasion one of her classmates exposed his penis to her while urinating and said, "suck this." Id. at 841-42. The court found Durkin could not prevail at trial based on this isolated incident. Id. at 850. The court noted that "[a]lthough single incidents of harassment may be sufficient to create a hostile environment, they generally involve threatening physical contact." Id. (citations omitted). The court found this incident was not physically threatening because the plaintiff was separated from her classmate by a car door. Id. at 851.

Meanwhile, in Jones v. Clinton, the alleged incident took place in a hotel room where the plaintiff was alone with then-Governor Clinton. Jones, 990 F. Supp. at 662-63. According to the facts accepted for purposes of the court's analysis, while in the room, the Governor took Jones by the hand and pulled her towards him but was rebuffed. Id. at 664. He persisted and later put his hand on her leg, sliding it toward her pelvic region while telling her he loved her curves and the way her hair flowed. Id. Plaintiff again warded off the Governor's advances. Id. Undeterred, he approached where she was sitting on a sofa, exposed his penis to her and told her to "kiss it." Id. Plaintiff reacted in a horrified manner. Id. The Governor, while fondling his penis, told her he didn't want to make her do anything she didn't want to do before finally pulling up his pants. Id.

The court found that while boorish and offensive, the alleged conduct did not constitute sexual assault and was not so severe and pervasive so as to create an abusive working environment. Id. at 675. The court further found that this was "not one of those exceptional cases in which a single incident of sexual harassment, such as an

assault, was deemed sufficient to state a claim of hostile work environment sexual harassment." Id. The penis exposure was not frequent, severe, or physically threatening, and thus was not so severe or pervasive so alter a term or condition of the plaintiff's employment. Id. at 675-76.

Plaintiff also points out that McRae's conduct constituted a criminal violation, namely indecent exposure.[19] However, just because conduct of a co-employee constitutes a crime does not make it actionable against the employer under Title VII. Much of the conduct complained about in the cases discussed above would be considered criminal assault or battery, yet in many of these cases the court found Title VII did not cover the conduct and in none did the court ponder the criminality of the alleged harassment as having any relation to whether the conduct was actionable under Title VII.

In Brooks v. San Mateo, for example, the co-worker that perpetrated the harassment actually pleaded no contest to a misdemeanor sexual assault charge and served 120 days in jail. Brooks, 229 F.3d at 922. Despite the criminal resolution, the court found the incident was not severe or pervasive so as to affect the plaintiff's employment and so she could not sustain a hostile environment sexual harassment claim against her employer. Id. at 926-27.

To summarize, "conduct must be extreme and not merely rude or unpleasant to affect the terms and conditions of employment." Alagna, 324 F.3d at 980. The plaintiff must show the conduct "was so intimidating, offensive, or hostile that it 'poisoned

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[19] See Iowa Code § 709.9 (2003).

the work environment.'" Scusa, 181 F.3d at 967 (quoting Scott v. Sears, Roebuck & Co., 798 F.2d 210, 214 (7th Cir. 1986)). In other words, the alleged harassment must have "transformed the work environment, as a whole, into one so extreme as to change the terms and conditions of [the plaintiff's] employment, such that [the plaintiff] was prevented from succeeding in the workplace." Tuggle, 348 F.3d at 722.

In addition, failure to indicate how the alleged harassment affected a term, condition, or privilege of employment will cause a hostile environment sexual harassment claim to fail. See Stuart, 217 F.3d at 632-33 (finding plaintiff failed to do this where it appeared she "was able to perform all of her duties and work all shifts unimpeded by the alleged harassment").

Viewing the Plaintiff's hostile environment sexual harassment claim in light of the demanding standard set by Duncan and its progeny, the Court finds the claim fails as a matter of law. It is not sufficiently severe or pervasive so as to affect a term, condition, or privilege of employment. Furthermore, the conduct complained of was limited to one incident that was neither physically violent nor overtly threatening. Moreover, at least two other federal courts have found similar conduct, essentially consisting of indecent exposure, was neither severe enough nor sufficiently pervasive to sustain a harassment claim.

The whole incident lasted approximately one hour and consisted of inappropriate sexual banter and, ultimately, in the three-minute penis display. The harasser did not demand that Pirie perform any sexual act as was the case in Durkin and Jones respectively. In fact, Pirie does not claim that McRae demanded any sexual favors.

The Court notes that the incident did take place in an isolated area, in the middle of the night, and that McRae turned off the lights prior to his exhibitionist act. A reasonable person may have felt some inherent threat existed under these circumstances, but there is no indication that this particular situation was threatening. Pirie never complained of being frightened or intimidated as a result of McRae's conduct. There was no actual or threatened violence or even any physical touching involved. Pirie was not restrained by McRae from leaving the location. In fact, Pirie finished out the rest of her shift in the same small booth with McRae. Thus, the single episode at issue here is not sufficiently severe to constitute severe and pervasive harassment.

Finally, Pirie has failed to establish any genuine issue as to how her work environment was abusive or hostile, or how the harassment affected a term, condition, or privilege of her employment. The only short-term fallout from the incident was that McRae was forbidden from coming near Pirie while she was working. She did not have to give up any of her shifts, she was not demoted, transferred, or denied benefits or pay raises. Moreover, the Court cannot find her work environment was hostile or abusive following the incident of harassment.[20] As detailed above, the harassment was

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[20] Plaintiff urges the Court to look at the whole picture to find sexual harassment affecting a term or condition of employment, including the exposure incident, the lack of investigation, the eventual investigation into her sex life, and the personal hostility exhibited to her in the form of heightened discipline for minor infractions. The Court did consider this but finds the record does not generate fact issues as the Plaintiff asserts. To the contrary, Defendants did undertake an investigation. As discussed below, the outside investigator did not unduly delve into Pirie's sex life, and she had been previously disciplined for some of the same infractions regarding her appearance and had been repeatedly warned that her continued failure to follow Company policy could result in termination.

limited to a single incident, and no further harassment based on Plaintiff's sex was perpetrated.

For the foregoing reasons, the Court finds Pirie fails to meet the fourth element of a hostile environment sexual harassment claim. Looking at the totality of the circumstances in this case and applying the Harris factors, i.e., "frequency of the discriminatory conduct; its severity; whether it is physically threatening; and whether it unreasonably interferes with an employee's work performance," the Court finds that Pirie has not shown that the conduct was so severe or pervasive to affect a term or condition of her employment. Based on this failure, Pirie's claim for hostile environment sexual harassment fails as a matter of law, and summary judgment is warranted.

3. Liability of Defendants

The fifth and final element in a hostile environment sexual harassment claim where the alleged harassment is perpetrated by a co-worker is whether the employer failed to properly remedy harassment that it knew or should have known about. Scusa, 181 F.3d at 965; Quick, 90 F.3d at 1378.[21] This means that an employer is only liable to an employee on a hostile environment action if the employer "knew or should have known of the harassment and failed to take proper remedial action." Bailey v. Runyon,

[21] This standard differs from cases involving supervisor harassment. In those cases, an employer has an affirmative defense if it can show "it exercised reasonable care to prevent sexual harassment and promptly corrected any harassment that did occur." Beard, 266 F.3d at 799; see also Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher, 524 U.S. at 807. Here, the remedial response of the employer is an element of the prima facie case, rather than a defense, and indicates whether the employer is liable for the harassment.

167 F.3d 466, 468 (8th Cir. 1999) (citations omitted); Chauffeurs Loc. Union No. 238 v. Civil Rights Comm'n, 394 N.W.2d 375, 378 (Iowa 1986) (applying same standard to co-worker harassment claim brought pursuant to the ICRA). Because McRae was not Pirie's supervisor when the incident occurred on March 30, 2002, Plaintiff must meet this element to make a prima facie showing of hostile environment sexual harassment.

In assessing the reasonableness of an employer's response to a complaint of sexual harassment, courts consider (1) the temporal proximity between the notice and any remedial action; (2) the disciplinary or preventive measures taken; and (3) whether the measures end the harassment. Meriwether, 326 F.3d at 994 (citing Stuart, 217 F.3d at 633); see also Robinson v. Valmont Indus., 238 F.3d 1045, 1047 (8th Cir. 2001) ("When assessing the reasonableness of an employer's remedial actions, the court may consider the time that elapsed between the notice of the harassment and the remedial measures taken, including any disciplinary action against the harasser or other options available to the employer such as employee training sessions.").

The law does not require that an employer fire or take any other particular type of action against an alleged harasser. Bailey, 167 F.3d at 468 (citing Davis v. Tri-State Mack Distribs., Inc., 981 F.2d 340, 343 (8th Cir. 1992)). Rather, the law only requires that the employer take such action as is reasonably calculated to end the harassment. Id. at 468-69 (citations omitted); see also Scusa, 181 F.3d at 967-68 (citing Carter v. Chrysler Corp., 173 F.3d 693, 702 (8th Cir. 1999), Zirpel v. Toshiba America Info.

Sys., Inc., 111 F.3d 80, 81 (8th Cir. 1997), and Callanan v. Runyon, 75 F.3d 1293, 1296 (8th Cir. 1996)).

As long as the employer's response is prompt and adequate, the plaintiff will fail to meet this element. See Meriwether, 326 F.3d at 993-94 (affirming summary judgment where district court determined as a matter of law that the employer promptly and adequately responded to each of the plaintiff's complaints of harassment); Robinson, 238 F.3d at 1048 (same); Stuart, 217 F.3d at 633-34 (same); Scusa, 181 F.3d at 967-68 (same).

Thus, an employer has a duty to take prompt corrective action that is reasonably calculated to put an end to the harassment. See Bailey, 167 F.3d at 468-69 (citations omitted); Swenson v. Potter, 271 F.3d 1184, 1192 (9th Cir. 2001). This obligation consists of two parts: first, the short-term, temporary steps taken to deal with the situation while the employer takes steps to determine whether the complaint is valid, and second, the permanent remedial steps taken following the completion of the investigation into the complaint. Swenson, 271 F.3d at 1192. If the employer fulfills both parts of this obligation in a prompt and adequate manner, then it is entitled to judgment as a matter of law. See Meriwether, 326 F.3d at 993-94.

In Kirkland, the court found the plaintiff failed to meet this final element. Kirkland, 2001 WL 737548 at *9-10. The conduct constituting the harassment essentially consisted of a single incident. Id. at *8. Immediately after the incident was reported, the defendant promptly investigated, suspended the alleged harasser to keep

him away from the complainant, and began termination proceedings upon determining he violated the University's sexual harassment policy. Id. at *9. While the proceedings were pending, the alleged harasser quit. Id. The plaintiff did not come into contact with him again. Id. The court granted the defendant's motion for summary judgment based on the plaintiff's failure to meet the final element for employer liability in spite of earlier finding that issues of fact remained as to whether the single incident of harassment was so severe or pervasive as to affect a term or condition of employment. Id. at *13; see also Barrett, 584 F. Supp. at 30-31.

In addition to asserting the Defendants' actions were neither prompt nor adequate, Pirie makes the argument that the investigation and ultimate remedial action undertaken by the Conley Group was flawed and inadequate. She makes this argument based on the time it took the Company to hire the outside investigator, Presti's deficiencies as an investigator of sexual harassment claims, and the imperfect investigation that resulted.

Liability cannot, however, be premised on perceived inadequacies in the investigation as long as the employer takes prompt steps to end the harassment. See Swenson, 271 F.3d at 1198. The Third Circuit explained:

> Even if a company's investigation into complaints of sexual harassment is lacking, the employer cannot be held liable for the hostile work environment created by an employee under a negligence theory of liability unless the remedial action taken subsequent to the investigation is also lacking. In other words, the law does not require that investigations into sexual harassment be perfect. Rather, to determine whether the remedial action

> was adequate, we must consider whether the action was "reasonably calculated to prevent further harassment."

Knabe v. Boury Corp., 114 F.3d 407, 412 (3d. Cir. 1997) (internal citations omitted); see also Saxton v. A.T.&T., 10 F.3d 526, 528, 535 (7th Cir. 1993) (finding that even though the employer's remedial actions did not meet the plaintiff's expectations, "they were both timely and reasonably likely to prevent the conduct underlying her complaint from recurring."). An investigation is actually a key step in the response of the employer and can be a powerful tool in remedying the current offending conduct and deterring future harassment. Swenson, 271 F.3d at 1193 (citations omitted). However, if the investigation is "rigged to reach a pre-determined conclusion or otherwise conducted in bad faith," the employer's remedial obligation will not be met. Id.

The record reveals the Conley Group did take prompt remedial action in an effort to end the alleged harassment. As soon as Pirie reported the incident, McRae was contacted and told to have no further contact with Pirie for the remainder of the shift. Supervisors were also advised of the situation and told not to allow McRae to have contact with Pirie while the matter was being investigated. In addition, it is uncontroverted that McRae and Pirie had no further contact while employed by the Conley Group.

After reporting the incident, Pirie was asked by Corporal Roesler to write a detailed report of the incident. Both Pirie and McRae provided Roesler with written reports of their version of the incident. Both were asked to rewrite their statements to

exclude the impertinent information. The Company received the reports approximately four to five days after the harassment was reported. The Conley Group initially began an internal investigation and both Pirie and McRae were advised that such was occurring. They were asked to sign confidentiality agreements on April 12, 2002.

Upon determining an internal investigation would not be sufficient, the Company decided to hire an outside investigator to look into the incident of harassment. On April 22, 2002, the Conley Group hired Presti & Presti Investigations, Inc., to look into the allegations. Presti, the investigator, was provided with the documentation the Company had already gathered. After reviewing the materials provided, he conducted a series of interviews on April 25, 2002. Presti attempted to interview both Pirie and McRae but was unsuccessful.[22] On May 3, 2002, Presti contacted Karen Conley via telephone and indicated the incident most likely did occur. Based on the results of the investigation as conveyed to Karen Conley, McRae's employment was terminated later that day.

Based on the foregoing facts, the Court finds that Pirie failed to meet the fifth element of a hostile environment sexual harassment claim where the harassment was perpetrated by a co-worker. The Company immediately ordered McRae and Pirie be separated and were successful in accomplishing this. The Conley Group undertook its

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[22] Pirie was contacted but refused to participate because she felt the investigation was undertaken just to protect the Conley Group from liability. She did, however, state she would consent to be interviewed if the focus was on her harassment claim. McRae originally agreed to be interviewed but later declined.

own investigation and eventually turned to an outside investigator. Based on this investigation, McRae was fired for his actions on March 30, 2002. This all took place within five weeks from the date the harassment occurred. As a matter of law, the Defendants adequately fulfilled their obligation by taking temporary steps to deal with the situation while it was investigating and ultimately firing McRae when the investigation was completed within the five-week time frame.

Most importantly, the Plaintiff encountered no further incidents of sexual harassment following her reporting of this incident. The record reveals no prior notice of such or similar conduct by McRae, so Defendants were not on notice of a need to prevent the incident on March 30, 2002. Furthermore, the Company did take prompt remedial action upon hearing of the harassment that, while perhaps flawed and imperfect, served to end the harassment after just one incident. In short, the Conley Group's conduct was "reasonably calculated to end the harassment." Scusa, 181 F.3d 967; Bailey, 167 F.3d at 468-69 (citations omitted). As a result, Pirie's claim for hostile environment sexual harassment fails as a matter of law, and summary judgment is warranted.

D. Retaliation Claims

The Defendants also seek to have the Plaintiff's retaliation claims dismissed on summary judgment. The Conley Group asserts that Pirie has failed to meet all of the elements required to sustain a retaliation claim. Even if Pirie does meet these elements, the Conley Group maintains her claim must still fail as a matter of law as she

cannot show the proffered reason for her termination was pretextual. In the absence of direct evidence of retaliation, courts apply the McDonnell Douglas burden-shifting analysis. See Womack v. Munson, 619 F.2d 1292, 1296 (8th Cir. 1980) (applying the burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), to Title VII retaliation claims).

To establish a prima facie case of retaliation, Pirie must prove the following elements: (1) she engaged in a protected activity such as filing a charge of harassment; (2) her employer subsequently took some sort of adverse employment action against her; and (3) the adverse action is causally linked to the protected activity. Scusa, 181 F.3d at 968; see also EEOC v. Kohler Co., 335 F.3d 766, 772-73 (8th Cir. 2003); Cross v. Cleaver, 142 F.3d 1059, 1071 (8th Cir. 1998); Coffman v. Tracker Marine, L.P., 141 F.3d 1241, 1245 (8th Cir. 1998); Hulme, 449 N.W.2d at 633. If Plaintiff establishes a prima facie case of retaliation, a presumption of unlawful discrimination exists. Stuart, 217 F.3d at 634. The employer must then offer a legitimate and non-discriminatory reason for the adverse employment action to overcome this legal presumption. Id. If the employer is able to so offer, the burden shifts back to the employee to offer evidence that the proffered reason is pretextual. Id.

1. Causal Connection

The Conley Group argues that Pirie has failed to make a prima facie case of retaliation because she is unable to show the requisite causal connection. Defendants assert that the only evidence Pirie has of a causal connection is that she was terminated

approximately four weeks after she reported the incident of harassment. They further assert this is not enough.

It is well established that Plaintiff must show a causal connection between the protected activity engaged in and an adverse employment action to establish a retaliation claim. Scusa, 181 F.3d at 970; Harris v. Sec'y of U.S. Dep't of the Army, 119 F.3d 1313, 1318 (8th Cir. 1997). Evidence that an adverse employment action is taken after protected activity is insufficient on its own to create a submissible case of retaliation. Kiel v. Select Artificials, Inc., 169 F.3d 1131, 1136 (8th Cir. 1999); Nelson v. J.C. Penney Co., 75 F.3d 343, 346-47 (8th Cir. 1996); see also Hulme v. Barrett, 480 N.W.2d 40, 43 (Iowa 1992) ("The mere fact that an adverse employment decision occurs after a charge of discrimination is not, standing alone, sufficient to support a finding that the adverse employment decision was in retaliation to the claim."). Temporal proximity on its own is insufficient to show a causal connection. Bradley v. Widnall, 232 F.3d 626, 633 (8th Cir. 2000); see, e.g., Gagnon v. Sprint Corp., 284 F.3d 839, 851-52 (8th Cir. 2002) (finding that plaintiff fired one month after filing charge of discrimination failed to establish causal link without more evidence than temporal proximity); Feltmann v. Sieben, 108 F.3d 970, 977 (8th Cir. 1997) (finding six months insufficient); Nelson, 75 F.3d at 346-47 (finding one month insufficient); Sweeney v. City of Ladue, 25 F.3d 702, 703-04 (8th Cir. 1994) (finding two months insufficient).

Also, the significance of temporal proximity is undercut when the employer was concerned about a problem even before the employee engaged in the protected activity.

Smith v. Memorial Hosp. Corp., 302 F.3d 827, 834 (8th Cir. 2002) ("Evidence that the employer had been concerned about a problem before the employee engaged in the protected activity undercuts the significance of the temporal proximity.") (citing Smith v. Ashland, Inc., 250 F.3d 1167, 1174 (8th Cir. 2001)); see also Nelson, 75 F.3d at 346-47 (holding that plaintiff fired one month after filing a discrimination charge failed to establish the necessary causal link, especially in light of the fact that he was reprimanded several times and was given a final warning about the status of his job before the employer was aware of the discrimination charge); cf. Bassett v. Minneapolis, 211 F.3d 1097, 1105-06 (8th Cir. 2000) (finding temporal proximity less than two months between the protected activity and the adverse employment action combined with a pattern of increasing levels of discipline immediately following claims of discrimination was sufficient to create a causal connection). Participating in intervening unprotected conduct, such as violating company policies, erodes any causal connection suggested by the temporal proximity of the protected conduct and the adverse employment action. See Kiel, 169 F.3d at 1136 (dismissing retaliation claim as a matter of law where employee was terminated for engaging in unacceptable conduct while protesting perceived discrimination).

Plaintiff was terminated approximately four weeks after she reported the sexual harassment incident. During that time, Pirie was cited for failing to get proper authorization to make a shift change. She was given a final warning and told that any future Company policy violations would result in termination. She had previously been cited

for violating the Company's uniform policy by wearing a tongue stud while at work. Despite repeated warnings and several "final" opportunities, Pirie violated Company policy on May 1, 2002, by wearing her tongue stud to work. She was fired the following day for violating Company policy.

Pirie contends that the Defendants improperly focus solely on her termination and ignore other adverse employment action. She argues that the retaliatory conduct of the Conley Group following her report of the harassment sufficiently establishes the required causal connection. She relies on basically three occurrences: (1) that she was disciplined on April 19, 2002, for failing to get a supervisor's approval for a shift change; (2) that she received written evaluations for January and February on April 19, 2002, and these commented on her failure to comply with the Company's uniform policy; and (3) that she was not disciplined for failing to comply with the uniform policy prior to her harassment complaint.

Disciplinary actions short of termination have been held to constitute adverse employment actions for the purposes of a retaliation claim. Casey v. Riedel, 195 F. Supp. 2d 1122, 1131-32 (S.D. Iowa 2002). These include a reduction in duties, disciplinary action, negative personnel reports, false accusations, see id., threats, reprimands, harassment, or other adverse treatment. See E.E.O.C. Compliance Manual § 8-II(D)(1). "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." Kirkland, 2001 WL 737548 at *12.

The reprimand on April 19, 2002, was for conduct unrelated to the tongue ring. Pirie was reprimanded for failure to receive authorization prior to making a shift change. Pirie was aware that her failure to do so was against Company policy. The Company again gave her another opportunity but warned her that *any* future violations could result in her termination. Despite this warning, Pirie was caught with a tongue ring on May 1, 2002, an act she knew to be a violation of Company policy.

Pirie's file also contained written evaluations for January and February that indicate her uniform policy violation due to her wearing the tongue stud. While she was not provided with these evaluations until April 19, 2002,[23] Plaintiff can only speculate these were prepared later and then backdated.

In addition, the evidence indicates Pirie's tongue stud *was* an issue prior to her sexual harassment complaint. On February 7, 2002, she was verbally reprimanded by Tom Conley for wearing the tongue ring and was warned any future violation would result in termination. Just four days later, Pirie was again caught wearing her tongue ring, this time by Karen Conley. She was again warned, both by Karen Conley and by Michael Yale. The record reveals that Karen Conley was unaware of the prior "final" warning given by Tom Conley. After discussing the two incidents, the Company decided to give Pirie one more opportunity. Her file contains internal memos regarding her violations and the Company's warnings. Moreover, Pirie took certain

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[23] Pirie did not request the contents of her personnel file until April 18, 2002.

measures to avoid being caught with her tongue stud, including removing it before going to the main office even though she continued to wear it at work.

Because there were warnings and reprimands for wearing the tongue ring that predated the harassment charge, no reasonable jury could find subsequent discipline for these actions was caused by her protected activity. Pirie does not provide evidence that other employees were treated any differently for like or similar violations of Company policy. She is unable to demonstrate a factual basis for making a causal connection between her protected activity and the adverse employment action she encountered. Absent such evidence, Plaintiff's retaliation claim must be dismissed.

2. Legitimate and Non-discriminatory Reason or Pretext

Even assuming Pirie can establish the prima facie elements of a retaliation claim, specifically the causal connection element, her retaliation claim must still be dismissed. If the Plaintiff can show a prima facie case of retaliation, the McDonnell Douglas burden-shifting approach applies. Kohler Co., 335 F.3d at 772-73. This means that any presumption of retaliation is erased if the employer can show she was terminated for a legitimate, non-retaliatory reason. Id. The burden then shifts back to the Plaintiff to show that the proffered reason is pretextual. Id.; see also Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination").

Merely disputing the employer's proffered reason is not enough. Stuart, 217 F.3d at 634. Rather, the employee must show both of the following: that the reason given was false, and that discrimination is the real reason behind the adverse employment action. Id.; see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515-16 (1993). However, the plaintiff "need not disprove all possible reasons for his discharge. [She] need only offer sufficient evidence to support a reasonable inference that [she] was terminated [for an illegal reason]." E.E.O.C. v. HBE Corp., 135 F.3d 543, 555 (8th Cir. 1998).

A plaintiff has the opportunity to critically examine the proffered business reasons to determine whether the employer is telling the truth. Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1101 n.1 (8th Cir. 1998), abrogated on other grounds, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). Plaintiffs may in part meet their ultimate burden of proof in an employment discrimination case by proving the defendant's proffered reason is unworthy of belief. Reeves v. Sanderson Plumbing Prods., Inc, 530 U.S. 133, 146-47 (2000). In addition, the plaintiff's testimony alone is enough under some circumstances to create a genuine issue of material fact to preclude summary judgment. Kenney v. Swift Transp., Inc., 347 F.3d 1041, 1045-46 (8th Cir. 2003).

The Conley Group maintains Pirie was fired for knowingly and intentionally violating Company policy with respect to wearing a tongue stud while on duty. Pirie's argument that this reason is nothing more than a pretext and that she was actually fired in retaliation is based on her contention that she wore her tongue stud every day and

was only fired for doing so after she engaged in protected activity. She also points to the factual assertions discussed above as proof that Defendants' conduct after she reported the harassment was part of a plan to get rid of her for filing the harassment claim.

However, the record makes clear that Pirie had been reprimanded in the past for this same conduct. She had been given repeated warnings that she was violating Company policy and had even been given two "final" warnings with respect to wearing the tongue stud. Thus, she cannot argue that she had tacit approval to wear the tongue stud due to management's failure to react to her doing so. In fact, she took measures to avoid being caught wearing the tongue stud by management. Furthermore, Pirie knew such conduct violated Company policy and had been warned just two weeks prior that *any* future violations could result in termination, yet she persisted in wearing her tongue stud.

The anti-retaliation provisions of Title VII and the ICRA do not insulate an employee from discipline for insubordination or ongoing violations of the employer's policies just because they occur after the plaintiff engages in protected activity. See, e.g., Smith, 250 F.3d at 1174 (noting that employee may not avoid discipline for poor work performance simply because she engages in protected activity, especially where the performance problems were noted by the employer prior to the protected activity); Jackson v. St. Joseph State Hosp., 840 F.2d 1387, 1391 (8th Cir. 1988) ("Title VII protection from retaliation for filing a complaint does not clothe the complainant with

immunity for past and present inadequacies, unsatisfactory performance, and uncivil conduct"); Hulme, 480 N.W.2d at 43 (noting that "the protection afforded by anti-retaliation legislation does not immunize the complainant from discharge for past or present inadequacies, unsatisfactory performance, or insubordination"). In other words, an employer is not prevented from enforcing its policies with an employee merely because that employee has engaged in some protected activity. Furthermore, it is not within the province of the court to determine the wisdom of a Company's decision as courts are not in the business of making personnel decisions and are not equipped to act as human resource experts. Stuart, 217 F.3d at 637 ("The wisdom of a company's decision to terminate its employee for what this Court may regard as a frivolous reason is not an issue in a Title VII case.").

"The core question in a retaliation case does not, ultimately, concern the veracity of the facts underlying an employer's legitimate non-discriminatory reason for discharging its employee, but rather concerns whether 'the employment decision was based upon intentional discrimination.'" Stuart, 217 F.3d at 637 (quoting Ryther v. KARE 11, 108 F.3d 832, 837-38 (8th Cir. 1997)). Pirie cannot establish the Conley Group's legitimate, non-discriminatory reason for her termination was pretext and that she was really fired in retaliation for reporting the incident of sexual harassment. There are neither discrepancies "sufficient to raise a 'suspicion of mendacity,'" nor evidence that the Defendants' "proffered reasons were mere pretext" such that the Court can reasonably infer that the Conley Group unlawfully retaliated against Pirie.

Morgan v. FBL Fin. Servs. Inc., 178 F. Supp. 2d 1022, 1030-31 (S.D. Iowa 2001) (quoting Reeves, 530 U.S. at 147). As such, Plaintiff's retaliation claim must fail as a matter of law.

CONCLUSION

The harassment at issue in this case was an isolated incident consisting of indecent exposure. There was no physical contact or violence, there was not the threat of violence, the Plaintiff was not restrained, and the harasser did not attempt any act beyond his inappropriate sexual banter and exposing himself to an unwilling spectator. This does not meet the requirement that the harassment be so severe or pervasive as to affect a term, condition, or privilege of employment. Furthermore, the Company promptly and adequately responded to the complaint of harassment in a manner reasonably calculated to prevent any further harassment. Based on the foregoing discussion, the Court finds that the Plaintiff has failed to meet two of the five elements of a prima facie case of hostile environment sexual harassment, and thus Pirie's claim necessarily fails as a matter of law.

In addition, the Plaintiff also fails to establish the elements of a prima facie case of retaliation by failing to adequately establish the causal connection between her reporting the harassment and her subsequent termination. Even assuming Plaintiff is able to show a prima facie case of retaliation, she is unable to counter the Defendants' legitimate and non-discriminatory reason for her termination by showing it is a pretext and that retaliation was the real reason for the adverse employment actions taken by

the Company. Pirie blatantly violated Company policy and received several warnings prior to engaging in the protected activity, and, despite being given one last opportunity when she violated another Company policy, she once again demonstrated a disregard for the Company's rules when she committed the infraction for which she was ultimately terminated.

Therefore, considering the facts in the light most favorable to the Plaintiff and granting her all reasonable inferences, the Court finds the Defendants' Motion for Summary Judgment (Clerk's No. 17) must be **granted.**

IT IS SO ORDERED.

Dated this 7th day of January, 2004.

JAMES E. GRITZNER, JUDGE
UNITED STATES DISTRICT COURT