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IN THE IOWA SUPREME COURT

Supreme Court No. 23-0605
Linn County District Court No. LACV093892

VALERIE RHEEDER,
Plaintiff-Appellee,

vs.

CITY OF MARION, DOUGLAS SLAGLE, SHELLENE GRAY, AND JOSEPH MCHALE,
Defendants-Appellants.

ON APPEAL FROM THE IOWA DISTRICT COURT IN
LINN COUNTY CASE NO. LACV093892
ORDER DATED APRIL 3, 2023

THE HONORABLE VALERIE L. CLAY,
DISTRICT COURT JUDGE

DEFENDANT-APPELLANT DOUGLAS SLAGLE'S REPLY BRIEF

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High Fructose Corn Syrup Antitrust Litig., 303 F. Supp. 2d 971, 973 (C.D. Ill. 2004)

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Farmland Foods, Inc. v. Dubuque Human Rights Comm'n, 672 N.W.2d 733, 744-45 (Iowa 2003)

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998)

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THAT EVIDENCE OF SLAGLE'S REPUTATION, PRIOR COMPLAINTS, AND ALLEGED HISTORY OF INAPPROPRIATE SEXUAL BEHAVIOR IS ADMISSIBLE.

A. Many of the "facts" included in Rheeder's Brief are mischaracterized, exaggerated, and stated without citation to the record.

The facts that are actually relevant to this case—the events the occurred in January 2019—are largely undisputed. In an effort to distract from the lack of facts supporting her own sexual harassment claim, Rheeder introduces numerous irrelevant "facts" that are (1) mischaracterized, (2) exaggerated, or (3) stated without any citation to the record. The Court should disregard these unsupported, inaccurate "facts" as not relevant to the issues in this case.

While Slagle will not detail every such "fact," a cursory glance of Rheeder's briefing plainly shows that many of the statements included in Rheeder's Statement of the Facts do not include any citation to the record. The Rules of Appellate Procedure require Rheeder to include citations to the record for "[a]ll portions of the statement [of facts.]" Iowa R. App. P. 6.903(2)(f), 6.903(3). To the extent Rheeder's Brief includes facts unsupported by any citation to the record, the Court should disregard those. *See, e.g.*, *Wells v. LF Noll, Inc.*, No. 18-CV-2079-CJW-KEM, 2019 WL

5596409, at *5 (N.D. Iowa Oct. 30, 2019) (finding statements made without citation to the record are insufficient to create a genuine issue of material fact).

Moreover, even where "facts" include record citations, many are exaggerated or mischaracterized. For example, Rheeder states that, in 2016, Adam Cirkl wrote a letter to the City Manager "advising him that Slagle created an atmosphere ripe with sexual harassment." (Rheeder's Brief, 18). The Court can read this letter for itself and see that this allegation appears nowhere in Cirkl's letter. (App. 566). Rather, Cirkl's letter complains of "an atmosphere" created by former police chief Harry Daugherty (notably, not "an atmosphere *ripe with sexual harassment*") and two "offensive interactions" with Slagle. (App. 566). Similarly, Rheeder's Brief attempts to characterize Andrea Wilson's complaint and the City's investigation in 2017 as one of sexual harassment against Slagle. (Rheeder's Brief, 21). In reality, Wilson made no such complaint against Slagle, and to the contrary, reported to the investigator that "Doug hasn't harassed her" and that Slagle was the only person who had asked if she was "okay." (App. 684).

Further, the language used in Rheeder's briefing goes beyond advocacy and exaggerates Slagle's history to a point of arguably misrepresenting the facts. Rheeder would like to portray that "[i]t is well documented that throughout his employment Slagle exhibited a pattern of behavior" of sexual

misconduct, and there is "voluminous evidence of Slagle's history of sexual misconduct and harassment." (Rheeder's Brief 14-15). A review of the record plainly shows that the "well documented" and "voluminous evidence" that Rheeder alleges in reality consists of two incidents over Slagle's 27-year career with the Marion Police Department: (1) an undisputedly consensual sexual encounter in the 1990s and (2) an incident involving discipline for inappropriate use of email in 2007. All other "evidence" consists of generalized reputation and rumors, none of which is "documented." Similarly, Rheeder asserts that "[n]early every witness in this case has testified that they were not surprised to learn of Slagle's sexual harassment of Rheeder because it was consistent with the prior conduct and reputation of Slagle throughout the MPD." (Rheeder's Brief, 17). Far from "nearly every witness"—of the 19 depositions taken in this case, Rheeder cites to the transcripts of *two* witnesses whose testimony supports Rheeder's assertion.[1] (Rheeder's Brief, 17). The

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[1] Rheeder includes numerous record citations supporting this claim, only two of which actually include any such testimony by a witness in this case. Rheeder cites to the affidavit of Andrea Wilson; the deposition transcripts of Adam Cirkl, Judy Ward, Mike Kula, and Renee Fenchel; and a Marion Police Department investigative memo. Of the citations included in Rheeder's Brief, the only two that actually support her assertion are the deposition transcripts of Mike Kula and Renee Fenchel.

Court can rely on its judicial experience and common sense to read through Rheeder's dramatic language and assess the facts actually in the record.

Finally, Rheeder implies that the relationships Slagle had in 2007 may not have been consensual because "[t]here is no admissible evidence in this case that the women Slagle was contacting consented to the contact." (Rheeder's Brief, 16). There is likewise no admissible evidence that the relationships were *not* consensual. The fact that, at some point in the relationship, one participant decided they no longer wanted it to continue, does not make the relationship nonconsensual. Such logic would make every failed romantic relationship nonconsensual. Rheeder has introduced evidence of decades old relationships, then attempts to shift the burden onto Slagle to prove that they were consensual, arguing that his testimony alone is not enough. Rheeder has offered no authority for her argument that the burden to prove consent in decades old relationships completely unrelated to the claims in this case is on Slagle.

B. Rheeder did not even acknowledge the practical issues Slagle raised regarding reconciling admissibility.

Even taking the numerous unsupported facts Rheeder alleges as true, she has failed to meaningfully respond to Slagle's argument regarding the District Court's abuse of discretion in its evidentiary rulings.

In Slagle's opening brief, he raised practical issues regarding reconciling admissibility rulings by the District Court. More specifically, the District Court ruled that "evidence regarding Slagle's reputation and alleged history of inappropriate sexual behaviors in and around the workplace is admissible (at least in part) with respect to the Defendants other than Slagle[,]" and "evidence of prior complaints against Slagle and his reputation at the [Marion Police Department] are admissible against the City." (App. 829, 839). However, it found "much of this evidence is likely inadmissible for the purpose of proving Rheeder's claim against Slagle." (App. 829). The District Court's suggestions for reconciling admissibility issues were to (1) issue a curative instruction or (2) bifurcate the issues. (App. 829). Slagle's opening brief discusses why neither of these options are viable as both result in unfair prejudice to Slagle and/or the other Defendants in this case.

Rheeder's brief fails to even acknowledge this argument, let alone respond to it. Instead, Rheeder argues only that the evidence is admissible against the City. Rheeder does not argue that any of the evidence is admissible against Slagle, nor does she explain how it can be admitted against the City without unfairly prejudicing Slagle. While Slagle disputes that the evidence is admissible against the City for the reason's discussed in the City's briefing, Rheeder has completely disregarded the substantial issues with respect to her

claim against *Slagle*. Rheeder does not dispute Slagle's argument that neither a curative instruction nor bifurcating trials is practicable. Nor does she offer any alternative.

Further, the cases that Rheeder cites in support of admission of her "me too" evidence do not involve the same issues as this case. Rheeder relies extensively on *Herndon v. City of Manchester*, 284 S.W.3d 682 (Mo. Ct. App. 2009), which she frames as "a nearly identical case." (Rheeder's Brief, 63). Seemingly focusing only on her claims against the City, Rheeder completely disregards the issues with respect to her claim against Slagle, which are materially different than the issues presented in *Herndon*. While the prior misconduct in *Herndon* is not comparable to the alleged prior misconduct here[2], comparison of the conduct is not relevant because the issues before the court were not the same. The sole issue in *Herndon* involved the court's review of an employer's motion for summary judgment. *Id.* At 683. The plaintiff had voluntarily dismissed her claims against the alleged harasser

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[2] The prior misconduct in *Herndon* involved behavior by the harasser at a prior employer where he exposed himself; a complaint was filed with the police department; and he was terminated from employment for his conduct. He was later hired by the defendant employer. He then engaged in behavior that was far more aggressive than Slagle's in sexually propositioning a civilian while working for defendant employer. This fact pattern is not at all comparable to Slagle's history here.

earlier in the case, so no claims against an individual defendant remained. *Id.* Further yet, the employer conceded that the plaintiff's supervisor had sexually harassed her; sexual harassment was not an issue in that case. *Id.* At 684. The only issue before the court was whether the employer took reasonable steps to prevent any sexually harassing behavior. *Id.* At 683.

The issues at stake in *Herndon* are materially different than the issues here. This case involves a sexual harassment claim against an individual defendant who can be held individually liable under the Iowa Civil Rights Act. The issues raised by Slagle regarding the reconciliation of evidence that is not admissible against him was not an issue in *Herndon*. The unfair prejudice resulting from admission of such evidence was not a factor in the court's analysis because the sexual harassment itself was not disputed. The court's holding regarding admission of evidence in *Herndon* thus has no bearing on the Court's analysis here.

It is seemingly undisputed that the "me too" and other evidence at issue is not admissible against Slagle. The District Court offered two solutions to the admissibility issue, neither of which is viable. Rheeder has not disputed that neither option is viable nor offered an alternative. This Court should find that there is no fair manner in which the evidence at issue can be admitted in this case, and the District Court abused its discretion by finding it to be

admissible. *See, e.g.*, *Carr v. Bridgeport Roman Cath. Diocesan Corp.*, No. 321988, 1996 WL 704358, at *1 (Conn. Super. Ct. Nov. 29, 1996) (acknowledging that "a curative instruction would be insufficient" where evidence is inadmissible against one defendant and is "so prejudicial as to preclude his receiving a fair trial"); *In re High Fructose Corn Syrup Antitrust Litig.*, 303 F. Supp. 2d 971, 973 (C.D. Ill. 2004) (noting that where certain evidence is admissible against one defendant but not others, if the case is jointly tried against all defendants, the evidence "will necessarily be excluded, as the probative value of such evidence is substantially outweighed by the danger of unfair prejudice to the [other] Defendants in a joint trial[.]").

II. THE DISTRICT COURT ERRED IN DENYING SLAGLE'S MOTION FOR SUMMARY JUDGMENT.

Rheeder's brief largely ignores the issues Slagle has raised on appeal and rehashes facts and summary judgment arguments that Slagle did not appeal and that are not before this Court. Slagle will not waste the Court's time in responding to those arguments. The issues before this Court with respect to the sexual harassment claim against Slagle are (1) whether the District Court erred in concluding that Slagle's conduct was objectively severe and pervasive enough to create a hostile working environment and (2) whether the District Court erred by concluding Slagle's knowledge of

Rheeder's history of domestic violence is relevant as to whether his conduct was objectively hostile or abusive.

A. The District Court erred by concluding that Slagle's conduct was objectively severe and pervasive enough to create a hostile working environment.

Slagle's opening brief cites and applies extensive Iowa and Eighth Circuit case law, explaining why the District Court erred in concluding that Slagle's conduct was objectively severe and pervasive enough to create a hostile working environment. In response, Rheeder's argument does not substantively discuss Slagle's behavior or how it can be construed as objectively severe and pervasive enough to create a hostile working environment. Instead, Rheeder cites to cases saying it is a question of fact for the jury. These cases miss the mark.

Rheeder points to a U.S. Supreme Court case from three decades ago where Justice Scalia observed that the Court had not announced a clear test as to what constitutes hostile or abusive conduct. (Rheeder's Brief, 41 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993)). What Rheeder fails to acknowledge is that, in the 30 years since then, courts have established the boundaries of what constitutes sexual harassment and what does not through case law. *See, e.g.*, *McMiller v. Metro*, 738 F.3d 185, 188 (8th Cir. 2013) (discussing four Eighth Circuit decisions that "illustrate the boundaries of a

hostile work environment claim under circuit precedent."). This is precisely why, in sexual harassment opinions, courts frequently compare facts of the case at issue to the precedent set by years of case law defining the perimeters of lawful and unlawful conduct. *See, e.g.*, *Easterday v. Whirlpool Corp.*, No. 19-CV-20-LRR, 2020 WL 1536698, at *7 (N.D. Iowa Mar. 31, 2020); *Lopez v. Whirlpool Corp.*, No. 18-CV-22-LRR, 2019 WL 2270600, at *6 (N.D. Iowa May 28, 2019), *aff'd*, 989 F.3d 656 (8th Cir. 2021); *Wright v. Ross Holdings, LLC*, No. 14-1106, 2015 WL 1848534 (Iowa Ct. App. Apr. 22, 2015). Slagle analyzed the relevant precedent at length on pages 33-42 of his opening brief. Neither Rheeder nor the District Court has made any similar analysis or comparison.

No reasonable jury could find Slagle's conduct was severe or pervasive enough to create an objectively hostile or abusive work environment. Well established case law emphasizes "that our precedent 'sets a high bar' for 'sufficiently severe or pervasive' conduct." *Lopez v. Whirlpool Corp.*, 989 F.3d 656, 663 (8th Cir. 2021) (quoting *Paskert v. Kemna-ASA Auto Plaza, Inc.*, 950 F.3d 535, 538 (8th Cir. 2020)). Sexual harassment claims must meet an "exacting standard" to survive summary judgment. *Id.* "'Numerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here.'" *Blomker v. Jewell*, 831

F.3d 1051, 1058 (8th Cir. 2016) (quoting *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 934 (8th Cir. 2002)).

Slagle's position as a high-ranking employee does not convert insufficiently severe conduct into actionable harassment. Indeed, substantial case law already discussed in Slagle's briefing involves conduct by supervisors or high-ranking employees that Iowa courts and the Eighth Circuit have rejected as not sufficiently severe or pervasive enough as a matter of law. *See, e.g.*, *Paskert v. Kemna-ASA Auto Plaza, Inc.*, 950 F.3d 535, 538 (8th Cir. 2020) (involving alleged harassment by a supervisor); *Anderson v. Family Dollar Stores of Ark., Inc.*, 579 F.3d 858, 861–62 (8th Cir. 2009) (same); *Al-Zubaidy v. TEK Indus., Inc.*, 406 F.3d 1030, 1038 (8th Cir. 2005) (same); *Remmick v. Magellan Health, Inc*., 908 N.W.2d 882 (Iowa Ct. App. 2017) (same); *Van Horn v. Specialized Support Servs., Inc.*, 241 F. Supp. 2d 994, 1009 (S.D. Iowa 2003) (involving alleged sexual harassment by the executive director).

Rheeder cites *Steck v. Francis* in support of her argument that Slagle's status as Deputy Police Chief is relevant to the Court's inquiry. 365 F. Supp. 2d 951 (N.D. Iowa 2005). Rheeder frames the power differential as "determinative for the Court[.]" (Rheeder's Brief, 42). There is no finding in the decision indicating that this factor was "determinative." To the contrary,

the court expressly stated that it is a "'relevant factor' in the mix of 'all the circumstances.'" *Steck*, 365 F. Supp. 2d at 973 (quoting *Harris*, 510 U.S. at 23). While Slagle does not dispute that his position may be *one* factor relevant to the Court's analysis, that factor does not outweigh the other factors here, including the extremely short timeframe during which the conduct occurred, the lack of any sexual touching, the lack of any sexual proposition or explicitly sexual communication, the lack of any physical intimidation or threats, and the lack of any extreme or egregious comments or conduct.

Finding no other Iowa or Eighth Circuit case law involving comparable conduct, Rheeder instead cites to three cases from over 20 years ago, involving hostile work environment claims in other jurisdictions and analyzed under different standards. (Rheeder's Brief, 42-43). This Court need not look to other jurisdictions to determine the standard for supervisor harassment under Iowa law. Well established Iowa and Eighth Circuit case law defines such boundaries. The conduct here does not meet this high standard, and the District Court erred in finding it does.

B. <u>The District Court erred by concluding that Slagle's knowledge of Plaintiff's history of domestic violence is relevant as to whether Slagle's conduct was objectively hostile or abusive.</u>

Rheeder only very briefly responds to Slagle's argument that the District Court erred by concluding that Slagle's knowledge of Rheeder's

history of domestic violence is relevant as to whether Slagle's conduct was objectively hostile or abusive, citing only *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) in support. *Oncale* does not assess objective severity considering any personal experiences or history of the plaintiff. Rather, the Court discusses the social context and surrounding circumstances, explaining that conduct that may not be abusive in some workplaces may be abusive in other workplaces. *Id.* This is not akin to Rheeder's argument that objective severity accounts for personal experiences of the plaintiff. Neither the District Court nor Rheeder have cited any case law or other authority supporting this position.

Slagle acknowledges that Rheeder's history certainly may have impacted whether she subjectively perceived Slagle's conduct as abusive. However, the Court must separately evaluate whether a reasonable person would find Slagle's conduct abusive. *See Farmland Foods, Inc. v. Dubuque Human Rights Comm'n*, 672 N.W.2d 733, 744 (Iowa 2003). Case law enumerates factors to consider when determining whether sexual harassment is objectively severe or pervasive: "(1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct was physically threatening or humiliating or whether it was merely offensive, and (4) whether the conduct unreasonably interfered with the employee's job performance." *Id*. at 744–45.

None of these factors include a plaintiff's personal experiences or the alleged harasser's awareness of such experiences. The Court should conclude that the District Court erred in finding that Slagle's knowledge of Rheeder's history of domestic violence is relevant to the reasonable person analysis.

CONCLUSION

For the reasons stated above, the District Court erred when it denied Slagle's Motion for Summary Judgment and abused its discretion in finding that some of Slagle's previous character evidence is admissible in this case. Accordingly, the District Court's Summary Judgment Order and Reconsideration Order should be reversed.

JOINDER

Slagle respectfully joins in the Reply Briefs filed contemporaneously herewith by Defendants City of Marion, Shellene Gray, and Joseph McHale.

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The undersigned certifies that the cost for printing and duplicating paper copies of this brief was $0.00.

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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font and contains 3181 words, excluding the parts of the brief exempted from the type-volume requirements by Iowa R. App. P. 6.903(1)(*g*)(1).

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CERTIFICATE OF SERVICE

The undersigned certifies the foregoing document was electronically served on the Clerk of the Supreme Court using the Electronic Document Management System on February 12, 2024, which will serve a notice of electronic filing to all registered counsel of record.

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