STATE OF MINNESOTA

IN SUPREME COURT

A18-0174

Court of Appeals McKeig, J.

Assata Kenneh,

Appellant,

vs. Filed: June 3, 2020
Office of Appellate Courts

Homeward Bound, Inc.,

Respondent.

Gerald T. Laurie, Laurie Law & ADR, Saint Louis Park, Minnesota; and

Kelly A. Jeanetta, Kelly A. Jeanetta Law Firm, LLC, Minneapolis, Minnesota, for appellant.

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

Leslie L. Lienemann, Celeste E. Culberth, Culberth & Lienemann, LLP, Saint Paul, Minnesota, for amicus curiae Employee Lawyers Association of the Upper Midwest.

Christy L. Hall, Jess Braverman, Ashlynn M. Kendzior, Gender Justice, Saint Paul, Minnesota, for amicus curiae Gender Justice.

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

Lindsay J. Brice, Minnesota Coalition Against Sexual Assault, Saint Paul, Minnesota, for amicus curiae Minnesota Coalition Against Sexual Assault.

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Margaret R. Ryan, Louise A. Behrendt, Meagher & Geer, P.L.L.P., for amicus curiae Minnesota Defense Lawyers Association.

Joseph G. Schmitt, Mark J. Girouard, Nilan Johnson Lewis PA, Minneapolis, Minnesota; and

Sara G. McGrane, Meggen E. Lindsay, Brandon J. Wheeler, Felhaber Larson, Minneapolis, Minnesota, for amicus curiae Minnesota Management Attorneys Association.

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

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

Amy E. Lauricella, Standpoint, Minneapolis, Minnesota, for amicus curiae Standpoint.

S Y L L A B U S

1. Alleged conduct is sufficiently severe or pervasive to state a claim for sexual harassment under the Minnesota Human Rights Act if a reasonable person, considering the totality of the circumstances, would find the alleged behavior objectively abusive or offensive.

2. The text of an employee handbook does not alter the elements of a statutory claim arising under the Minnesota Human Rights Act.

3. Considered in the light most favorable to the employee, the evidence offered by the employee is sufficient to withstand summary judgment on her claim for sexual harassment under the Minnesota Human Rights Act.

Affirmed in part, reversed in part, and remanded.

OPINION

MCKEIG, Justice.

Appellant Assata Kenneh sued her former employer, respondent Homeward Bound, Inc., for sexual harassment in violation of the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01–.44 (2018). The district court granted summary judgment in favor of Homeward Bound after concluding that Kenneh failed to allege conduct sufficiently severe or pervasive to support a claim for sexual harassment. The court of appeals affirmed. Kenneh asks this court to abandon the severe-or-pervasive standard adopted from federal case law interpreting Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e (2018). Because the severe-or-pervasive standard continues to provide a useful framework for analyzing the objective component of a claim for sexual harassment under the Minnesota Human Rights Act, we decline to overturn our precedent. We further conclude that the conduct alleged by Kenneh was sufficiently severe or pervasive for a reasonable person to find the work environment to be hostile or abusive. Therefore, we affirm in part, reverse in part, and remand to the district court for further proceedings consistent with this opinion.

FACTS

This case comes to us on appeal of the district court's grant of summary judgment against appellant Assata Kenneh on her claim for sexual harassment under the Minnesota Human Rights Act. We view the evidence—and summarize it here—in the light most favorable to her. *See McGuire v. Bowlin*, 932 N.W.2d 819, 822 (Minn. 2019).

Kenneh began working for respondent Homeward Bound, Inc., a nonprofit organization that operates residential care facilities for people with disabilities, in 2014. Kenneh transitioned to working as a Program Resource Coordinator at the Brooklyn Park location in February 2016. Shortly after she started in this new position, she met the maintenance coordinator, Anthony Johnson. Because Johnson worked at multiple sites, he was not at the Brooklyn Park location every day.

Kenneh alleges that Johnson engaged in multiple incidents of sexual harassment from approximately February until June 2016. On their first encounter, Johnson complimented Kenneh on her haircut. He asked her who had cut her hair and where she lived. Although Kenneh said that her cousin cut her hair, Johnson said that he would cut her hair, at her home or at his. Kenneh was alarmed by the idea that a person she had just met would invite her into his home. Not long after their first encounter, Johnson walked by Kenneh's office and saw her struggling to open her desk drawer. He offered to help. As Kenneh started to move out of his way, he told her that she did not need to move because he "likes it pretty all day and all night." He also told her he liked "beautiful women and beautiful legs." Kenneh got out of her chair to avoid contact with him. While he was working on her desk, Johnson began talking to her in a seductive tone and licked his lips in a suggestive manner.

On March 24, Johnson stopped by Kenneh's office, blocking her door with his body. Kenneh made up an excuse to leave her office to avoid Johnson. She told him that she was going to buy something to drink from a nearby gas station. In what Kenneh viewed to be a sexually suggestive tone of voice, Johnson insisted on taking Kenneh to the onsite

vending machine. Kenneh complied. On their way back from the vending machine, Kenneh suggested that Johnson could take some of the cake left over from a party held earlier that day. Johnson turned to look at Kenneh, licked his lips, and said in a seductive tone, “I don’t eat any of this.” When Kenneh asked Johnson what he meant, he said, “I will eat you—I eat women.” Kenneh quickly walked past him and went back to her office alone.

On March 31, Kenneh was buying gas when Johnson drove up alongside her car. He rolled down the window and asked Kenneh where she was going. Kenneh answered Johnson’s questions. When Kenneh pulled out of the gas station, she noticed Johnson left immediately after her, without putting gas in his car.

Kenneh told her supervisor about Johnson’s comments and conduct the following day. Her supervisor was alarmed and asked Kenneh to make a written complaint. Kenneh’s written complaint stated Johnson had been very verbally inappropriate with her and identified three specific incidents of harassment, including the desk-repair incident, Johnson’s statement that he eats women, and that Johnson followed her to the gas station. Homeward Bound placed Johnson on paid leave pending an investigation. Human Resources personnel interviewed Kenneh and Johnson, at which time Kenneh also reported their first conversation about her hair. Johnson denied that each incident happened as alleged by Kenneh.

On April 11, the Director of Human Resources met with Kenneh and informed her that the investigation was inconclusive. She assured Kenneh that Johnson would receive

additional sexual harassment training and would be instructed not to be alone with Kenneh. The Director sent Kenneh a letter the following week repeating what they had discussed.

Neither Kenneh's complaint nor Homeward Bound's investigation stopped Johnson's behavior. Instead, Johnson stopped by Kenneh's office more frequently, blocking her door with his body. Whenever Johnson would see Kenneh, he would gesture with his tongue, simulating oral sex. He continued to call her "sexy," "pretty," or "beautiful" every time that he saw her, despite Kenneh's requests for him to stop. Kenneh tried to ignore Johnson but he would stand in her doorway, watching her. When she turned toward the door and made eye contact with him, he simulated oral sex with his tongue.

Kenneh complained to her supervisor about Johnson's ongoing behavior on two more occasions to no avail. On June 1, Kenneh arrived late to work and was unprepared for a meeting. When her supervisor spoke with her about her attendance, Kenneh replied that she did not want to come to work because of Johnson. On June 29, Kenneh asked her supervisor if she could return to a flex-schedule position that would allow her to avoid interactions with Johnson. Homeward Bound denied her request for a transfer and terminated her employment.

Kenneh brought an action against Homeward Bound, claiming violations of the Minnesota Human Rights Act, including a claim for sexual harassment.[1] Kenneh alleged

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[1] Kenneh also alleged that Homeward Bound had terminated her position in retaliation for her complaint to Human Resources. The district court granted summary judgment to Homeward Bound on the retaliation claim, concluding that Kenneh failed to establish a causal connection between her complaint and any adverse employment action. The court of appeals affirmed. *Kenneh v. Homeward Bound, Inc.*, No. A18-0174,

that Johnson's conduct created a hostile work environment. The district court granted summary judgment to Homeward Bound. Stressing "the high bar" that courts have set for sexual harassment claims based on a hostile work environment, the district court reluctantly determined that the conduct alleged did not meet the severe-or-pervasive standard for actionable sexual harassment. The district court found that "[s]ome of the conduct was boorish and obnoxious" and that the statement, "I will eat you. I eat women," was "both objectively and subjectively unacceptable." Nonetheless, the district court determined that the conduct, "however objectionable, does not constitute pervasive, hostile conduct that changes the terms of employment and exposes an employer to liability under the Minnesota Human Rights Act."

The court of appeals affirmed. *Kenneh v. Homeward Bound, Inc.*, No. A18-0174, 2019 WL 178153 (Minn. App. Jan. 14, 2019). In addition to determining that Kenneh did not experience "severe or pervasive" sexual harassment, the court of appeals concluded that Kenneh did not make a sufficient showing that Homeward Bound was aware of ongoing harassment and failed to take appropriate remedial action. *Id.* at *3. We granted Kenneh's petition for review on issues related to her sexual harassment claim.

ANALYSIS

This case comes to us on appeal from summary judgment and our review is de novo. *Visser v. State Farm Mut. Auto. Ins. Co.*, 938 N.W.2d 830, 832 (Minn. 2020). On appeal from summary judgment, we examine whether there any genuine issues of material fact

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2019 WL 178153, at *4 (Minn. App. Jan. 14, 2019). We denied Kenneh's petition for review on that claim. As a result, the sexual harassment claim is the only claim before us.

and whether the district court erred in its application of the law. *Jennissen v. City of Bloomington*, 938 N.W.2d 808, 813 (Minn. 2020). The construction of the Human Rights Act's provisions is a question of law that we review de novo. *LaPoint v. Family Orthodontics, P.A.*, 892 N.W.2d 506, 513 (Minn. 2017). We view the evidence in the light most favorable to the nonmoving party—here Kenneh—and we do not weigh facts or make credibility determinations. *Stringer v. Minn. Vikings Football Club, LLC*, 705 N.W.2d 746, 753–54 (Minn. 2005). When reasonable persons might draw different legal conclusions from the evidence presented, summary judgment must be denied. *See Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017).

At issue here is the interpretation and application of the Minnesota Human Rights Act—specifically, the statutory standards that govern claims for sexual harassment. The Human Rights Act provides that "[t]he opportunity to obtain employment . . . without . . . discrimination . . . [is] a civil right." Minn. Stat. § 363A.02, subd. 2. Under the Minnesota Human Rights Act, it is an "unfair employment practice" for an employer to "discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment" because of sex. Minn. Stat. § 363A.08, subd. 2. The Human Rights Act is a remedial act that courts are to " 'construe[] liberally' . . . in order to accomplish its purpose of 'secur[ing] for persons in this state, freedom from discrimination.' " *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 795 (Minn. 2013) (quoting Minn. Stat. §§ 363A.02, subd. 1(a), 363A.04).

Discrimination based on sex "includes sexual harassment." Minn. Stat. § 363A.03, subd. 13 (defining the term "discriminate"). Unlike federal law, Minnesota specifically

defines "sexual harassment" by statute. *Compare* 42 U.S.C. § 2000e (2018), *with* Minn. Stat. § 363A.03, subd. 43. The definition includes "unwelcome sexual advances . . . or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment." Minn. Stat. § 363A.03, subd. 43(3).

I.

As a threshold matter, Kenneh asks this court to abandon our reliance on federal case law under Title VII in evaluating sexual harassment claims based on a hostile work environment. We have held that discriminatory conduct "is not actionable unless it is 'so severe or pervasive' as to 'alter the conditions of the [plaintiff's] employment and create an abusive working environment.' " *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2001) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)); *accord LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 21–22 (Minn. 2012). The severe-or-pervasive standard originated in federal case law involving sexual harassment claims under Title VII. *See Meritor Sav. Bank, FSB*, 477 U.S. at 66–67. As explained by the United States Supreme Court, "[c]onduct 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 v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

We often have relied on federal law interpreting Title VII when interpreting the Minnesota Human Rights Act. *See, e.g.*, *Rasmussen*, 832 N.W.2d at 796–97. But our

reliance has not been absolute. *See Ray v. Miller Meester Advert., Inc.*, 684 N.W.2d 404, 408 (Minn. 2004) (recognizing "significant differences" between the Human Rights Act and Title VII); *Cummings v. Koehnen*, 568 N.W.2d 418, 422 n.5 (Minn. 1997) (observing that "Title VII's statutory prohibition turns on discrimination, while Minnesota's statutory language includes the specific definition of sexual harassment"). Historically, the Human Rights Act has provided more expansive protections to Minnesotans than federal law.[2]

Kenneh asks us to renounce the federal severe-or-pervasive standard for sexual harassment claims under the Human Rights Act. Kenneh argues that the severe-or-pervasive standard is notorious for its inconsistent application and lack of clarity. Amici, on behalf of Kenneh, contend that federal courts tend to interpret the meaning of

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[2] We recognized sexual harassment as a form of sex discrimination 6 years before the United States Supreme Court did so under Title VII. *Compare Cont'l Can Co. v. State*, 297 N.W.2d 241 (Minn. 1980), *with Meritor Sav. Bank, FSB*, 477 U.S. 57. We also held that the Human Rights Act provides protection from same-sex discrimination before the Supreme Court recognized similar protections under Title VII. *Compare Cummings*, 568 N.W.2d at 421, *with Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). Further, we have held that Minnesota law protects employees from "equal opportunity harasser[s]," *Cummings*, 568 N.W.2d at 423, while federal law does not, *Oncale*, 523 U.S. at 80–81 ("The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex *are not exposed*." (emphasis added) (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring))). Minnesota law also provides more extensive remedies, *see Ray*, 684 N.W.2d at 409 (declining to adopt Title VII damages principles for the Human Rights Act). Unlike Title VII, the Human Rights Act applies to employers of all sizes and does not similarly cap the sum of compensatory and punitive damages. *Compare* 42 U.S.C. § 2000e(b) (limiting Title VII to employers with fifteen or more employees for each working day in each of twenty or more weeks per calendar year), *with* Minn. Stat. § 363A.03, subd. 16 (" 'Employer' means a person who has one or more employees."); *compare* 42 U.S.C. § 1981a(b)(3) (limiting the sum of awarded compensatory and punitive damages by employer size), *with* Minn. Stat. § 363A.29, subd. 4 (allowing as much as treble compensatory damages in addition to $25,000 in punitive damages).

"severe or pervasive" archaically, which places federal interpretations directly at odds with the Minnesota's statutory directive to construe the Human Rights Act liberally. *See* Minn. Stat. § 363A.04.

Homeward Bound counters that the law needs predictability and consistency. Homeward Bound notes that courts in Minnesota have relied on federal interpretations of Title VII for more than 30 years.[3] Homeward Bound further asserts that courts nationwide have adopted the severe-or-pervasive standard, and employers and employees alike rely on congruent standards across state lines. In addition, Homeward Bound argues that, because the Legislature has recently shown an interest in redefining sexual harassment, we must exercise judicial restraint.

We do not overturn past precedent lightly. *Daniel v. City of Minneapolis*, 923 N.W.2d 637, 645 (Minn. 2019). We are "extremely reluctant to overrule our precedent under principles of stare decisis and require a compelling reason" before we will do so. *Id.* at 645 (citation omitted). Further, this case involves statutory interpretation and "judicial construction of a statute becomes part of the statute as though written therein." *Caldas v. Affordable Granite & Stone, Inc.*, 820 N.W.2d 826, 836 (Minn. 2012). For that reason, "[t]he doctrine of stare decisis has special force in the area of statutory interpretation because the Legislature is free to alter what we have done." *Schuette v. City of Hutchinson*, 843 N.W.2d 233, 238 (Minn. 2014). But stare decisis is "a 'guiding policy,'

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[3] The court of appeals first applied the severe-or-pervasive framework in 1986. *Klink v. Ramsey Cty.*, 397 N.W.2d 894, 901 (Minn. App. 1986), *rev. denied* (Minn. Feb. 13, 1987), *abrogated on other grounds by Cummings v. Koehnen*, 568 N.W.2d 418, 420 n.2 (Minn. 1997).

not an 'inflexible rule' or a 'shield' for an error of law." *Daniel*, 923 N.W.2d at 645–46 (quoting *Johnson v. Chi., Burlington & Quincy R.R. Co.*, 66 N.W.2d 763, 771 (Minn. 1954)).

Without addressing the merits of Homeward Bound's arguments, we conclude that Kenneh has not presented us with a compelling reason to abandon our precedent. The severe-or-pervasive standard reflects a common-sense understanding that, to alter the conditions of employment and create an abusive working environment, sexual harassment must be more than minor: "the work environment must be both objectively and subjectively offensive in that a reasonable person would find the environment hostile or abusive and the victim in fact perceived it to be so." *LaMont*, 814 N.W.2d at 22. But we do take this opportunity to clarify how the severe-or-pervasive standard applies to claims arising under the Human Rights Act.

Our use of the severe-or-pervasive framework from federal Title VII decisions does not mean that the conclusions drawn by those courts in any particular circumstances bind Minnesota courts in the application of our state statute. *See Carlson v. Indep. Sch. Dist. No. 623*, 392 N.W.2d 216, 220 (Minn. 1986). For the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace. As we recognized 30 years ago, the "essence" of the Human Rights Act is "societal change"; "[r]edress of individual injuries caused by discrimination is a means of achieving that goal." *Wirig v. Kinney Shoe Corp.*, 461 N.W.2d 374, 378 (Minn. 1990).

Today, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside as an "unsuccessful pursuit of a relationship," *Geist-Miller v. Mitchell*, 783 N.W.2d 197, 203 (Minn. App. 2010), or "boorish, chauvinistic, and decidedly immature," *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002). *See generally McMiller v. Metro*, 738 F.3d 185, 188–89 (8th Cir. 2013) (collecting cases of "inappropriate" but not actionable behavior). "[O]ne of the 'avowed public policies' of the [Human Rights Act] has been 'to foster the employment of all individuals in this state in accordance with their fullest capacities.' " *Daniel*, 923 N.W.2d at 650–51 (quoting *Wirig*, 461 N.W.2d at 378).[4] In a hostile work environment, no employee can thrive.

"To determine whether actionable sex discrimination exists in a given case, all the circumstances surrounding the conduct alleged to constitute sexual harassment, such as the nature of the incidents and the context in which they occurred, should be examined." *Cont'l Can Co. v. State*, 297 N.W.2d 241, 249 (Minn. 1980); *see also Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) ("The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage."); *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 945 (8th Cir. 2016). This is not "a mathematically precise test." *Harris*, 510 U.S. at 22. In other words, courts "should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode." *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 564 (8th Cir. 1992). Instead,

[4] To the extent that the court of appeals' analysis in *Geist-Miller*, 783 N.W.2d 197, is inconsistent with this opinion, it is overruled.

courts and juries—the fact-finders—must consider the totality of the circumstances, "including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.' " *Goins*, 635 N.W.2d at 725 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)).

"Each case must stand on its own circumstances." *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 760 (8th Cir. 2003). Put another way, each case in Minnesota state court must be considered on its facts, not on a purportedly analogous federal decision. A single, severe incident may support a claim for relief. *See, e.g.*, *Moring v. Ark. Dep't of Corr.*, 243 F.3d 452, 456–57 (8th Cir. 2001); *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000); *Grozdanich v. Leisure Hills Health Ctr., Inc.*, 25 F. Supp. 2d 953, 969–70 (D. Minn. 1998) (collecting cases). Pervasive incidents, any of which may not be actionable when considered in isolation, may produce an objectively hostile environment when considered as a whole. *See Harris*, 510 U.S. at 23; *see also Oncale*, 523 U.S. at 82 ("Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find . . . hostile or abusive.").

Our decision today does not transform the Human Rights Act into a general civility code. But we caution courts against usurping the role of a jury when evaluating a claim on summary judgment. " '[S]ummary judgment is a blunt instrument' that is 'inappropriate when reasonable persons might draw different conclusions from the evidence presented.' "

Montemayor, 898 N.W.2d at 628 (quoting *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008)). Moreover, whether the alleged harassment was sufficiently severe or pervasive as to create a hostile work environment is "generally a question of fact for the jury." *Johnson v. Advocate Health & Hosps. Corp.*, 892 F.3d 887, 901 (7th Cir. 2018); *see Howard v. Burns Bros., Inc.*, 149 F.3d 835, 840–41 (8th Cir. 1998). "In order to remove such a question of fact from the jury on summary judgment, the court would have to determine that no reasonable jury could find the conduct at issue severe or pervasive." *Johnson*, 892 F.3d at 901. If a reasonable person could find the alleged behavior objectively abusive or offensive, a claim is sufficiently severe or pervasive to survive summary judgment. *See Montemayor*, 898 N.W.2d at 630 (holding that summary judgment is inappropriate when reasonable minds might differ). With this standard in mind, we turn to the conduct alleged in this case.

II.

Kenneh argues that her sexual harassment claim should be evaluated based on a statement in Homeward Bound's "employee guide," which provides: "HARASSMENT OF ANY KIND IS NOT TOLERATED." Neither the district court nor the court of appeals specifically considered this statement in resolving Kenneh's sexual harassment claim under the Human Rights Act. Kenneh acknowledges that the statements in the employee guide are "not contractual" and describes the statement about harassment as a promise. Based on this "promise," Kenneh argues that Homeward Bound "waived its right to argue for a 'severe or pervasive' standard and should be bound by a zero-tolerance standard." We disagree. The only claims that Kenneh asserted in her complaint are statutory claims. The

text of the Human Rights Act defines the conduct that is an "unfair employment practice" under state law. Minn. Stat. § 363A.08, subd. 2; *see also* Minn. Stat. § 363A.03, subd. 43 (defining "sexual harassment"). The terms of a non-contractual employment policy do not alter statutory definitions or the showing needed to establish a statutory claim under the Human Rights Act. Therefore, Kenneh's reliance on the employee guide fails.

III.

Kenneh argues that summary judgment was inappropriate here for two reasons: first, the conduct alleged is sufficiently severe and pervasive to support an actionable claim under the Human Rights Act, and second, the court of appeals made inappropriate credibility determinations. We discuss each argument in turn.

A.

As noted, the Human Rights Act broadly defines sexual harassment to include "unwelcome sexual advances . . . or communication of a sexual nature when . . . that conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment." Minn. Stat. § 363A.03, subd. 43. As discussed above, to determine whether the alleged conduct had the purpose or effect of substantially interfering with employment or creating an intimidating, hostile, or offensive employment environment, we consider "whether the conduct was sufficiently severe or pervasive to objectively do so and whether the plaintiff subjectively perceived her employment environment to be so altered or affected." *Rasmussen*, 832 N.W.2d at 796–97. Here, the

only issue before us is whether Kenneh has presented sufficient evidence of severe or pervasive conduct to survive summary judgment under the objective test.

We start with the frequency of the alleged conduct. Viewing the evidence in the light most favorable to Kenneh, the record suggests there were at least five separate incidents in less than 4 months, with ongoing interactions between these events. The interactions began shortly after Kenneh started to work at the Brooklyn Park location and continued until Homeward Bound terminated Kenneh's employment. Although Kenneh struggled during her deposition to quantify her interactions with Johnson, she testified: "I didn't see him ten or [twenty] times a day, but I did [see] him, you know, a couple times a day when [he was] at work and at that location." She testified that Johnson would show up to her office "every chance he [got]" and that "it was so persistent [that she] couldn't keep track of it because that's him." According to Kenneh, Johnson would say something to the effect of "you look pretty" or "hey sexy" whenever he saw her. Kenneh explained that "this is somebody who[] talk[s] to me sexually each and every chance he gets, every time he sees me. And he's talking to me, he's putting his tongue out, up and down, up and down."

Further, on review of summary judgment, we must accept the incidents as Kenneh described them. Whether Johnson actually said, "I will eat you. I eat women," presents a credibility question for a jury. *See State v. Reese*, 692 N.W.2d 736, 741 (Minn. 2005). Assuming that Kenneh's testimony is accurate and truthful, Kenneh has presented evidence that she was directly propositioned by Johnson. Kenneh argues that the severity of Johnson's proposition for oral sex is heightened by his pervasive tongue gestures.

According to Kenneh, the gesture became a substitute for provocative words. Kenneh also argues that, when considering the severity of Johnson's behavior, we should consider Johnson's relative body size to hers and his pattern of blocking her office door with his body when he would stop by to talk, uninvited. Kenneh argues that in the context of their interactions, a reasonable person in her position would be objectively frightened each time that Johnson blocked her doorway.

Considering the totality of the circumstances, we conclude that Kenneh presented sufficient evidence for a reasonable jury to decide, on an objective basis, that Johnson's alleged behavior was sufficiently severe or pervasive to substantially interfere with her employment or to create an intimidating, hostile, or offensive employment environment. If so, the jury would then determine whether Kenneh subjectively perceived her employment environment to be so altered and affected. The district court therefore erred in granting summary judgment to Homeward Bound.

B.

Kenneh also argues that the court of appeals made inappropriate credibility determinations by concluding that she did not make "a sufficient showing that Homeward Bound was aware of ongoing harassment and failed to take appropriate remedial action." *Kenneh*, 2019 WL 178153, at *3. According to the court of appeals, "even if Kenneh's allegations rose to the level of severe or pervasive sexual harassment, summary judgment was properly granted because Homeward Bound took remedial action when it learned of the harassment allegations." *Id.* Although the court of appeals acknowledged that "Kenneh claims that she complained to her supervisor on two other occasions" after her initial

complaint to Human Resources, the court of appeals stressed that she "did not file any additional complaints" and "she was unable to identify when she complained to her supervisor." *Id.* at *3.

Kenneh's testimony regarding the ongoing harassment she experienced after her initial complaint shows that Johnson's behavior did not stop after Homeward Bound committed to providing additional training to him. Kenneh alleges that he continued to greet Kenneh by saying, "hey sexy," and spoke to her "in a very seductive way" after he was expressly instructed to stay away from her. She testified that she reported Johnson's behavior to her supervisor at least twice after her formal complaint and that she reported that Johnson's behavior was affecting her work performance before Homeward Bound terminated her employment.[5] The court of appeals' comment regarding Kenneh's inability to recall the specific dates of her complaints to her supervisor suggests that the court of appeals may have discounted these subsequent complaints in its review of the district court's decision, based on credibility determinations. "Weighing the evidence and assessing credibility on summary judgment is error." *Hoyt Props., Inc. v. Prod. Res. Grp., LLC*, 736 N.W.2d 313, 320 (Minn. 2007). Viewed in the light most favorable to Kenneh, these assertions create a genuine issue of material fact concerning whether Homeward Bound knew or should have known about Johnson's behavior and failed to take appropriate

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[5] Homeward Bound's policies allow employees to report sexual harassment to a supervisor verbally or in writing; supervisors must notify Human Resources if they have any knowledge of sexual harassment, including when they receive an employee's complaint.

remedial action. The court of appeals' determination to the contrary was based on impermissible credibility determinations.

CONCLUSION

For the foregoing reasons, we affirm in part, reverse in part, and remand to the district court for proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.