Minnesota Journal of Law & Inequality

Volume 40 | Issue 2 Article 7

June 2022

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Recommended Citation
Anne Bolgert, *Breaking Away or Still Broken? A Critique of the Minnesota Supreme Court's Treatment of the Severe or Pervasive Standard for Sexual Harassment Hostile Work Environment Cases in Kenneh v. Homeward Bound*, 40(2) LAW & INEQ. 433 (2022), DOI: https://doi.org/10.24926/25730037.651.

Minnesota Journal of Law & Inequality is published by the University of Minnesota Libraries Publishing.

Breaking Away or Still Broken? A Critique of the Minnesota Supreme Court's Treatment of the Severe or Pervasive Standard for Sexual Harassment Hostile Work Environment Cases in *Kenneh v. Homeward Bound*

Anne Bolgert†

Sexual harassment is both a severe and pervasive problem in American workplaces.[1] This is disproportionately true for women, particularly women in low-wage positions, both because of large power imbalances between workers and employers and because women in low-wage positions are more likely "to accept [the harassment] because they [cannot] afford to lose their jobs."[2]

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1. *See, e.g.*, ALBA CONTE, SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE § 12.01, 7 (5th ed. 2022 & Supp. 1 2019) (citing an Associated Press-NORC Center for Public Affairs Research 2017 poll finding that "[t]hree in 10 women and 1 in 10 men say that they've personally experienced sexual misconduct at work" and "that a majority of Americans think broad sectors of society are not doing enough to prevent sexual misconduct, including institutions such as the entertainment industry, colleges and universities, state and federal governments, the military and the news media. 'The sweeping nature of the national reckoning shows no sign of being resolved soon,' the poll found").

2. *Id.* at 1, 3 (citing Center for American Progress analysis of Equal Employment Opportunity Commission data which found that "the most sexual-harassment charges filed by workers from any one industry between 2005 and 2015 were in one sector accommodation and food services," as well a 2016 Hart Research Associates study); *see also* LISA RABASCA ROEPE, SEXUAL HARASSMENT: HAVE WORKPLACES BECOME LESS TOLERANT OF INAPPROPRIATE BEHAVIOR? (2020), http://library.cqpress.com/cqresearcher/cqr_ht_harassment_2020 [https://perma.cc/X6VU-HE4W] (explaining harassment often occurs by those in positions of power, which makes workers feel deterred from reporting to stay in their superior's good graces); Trina Jones & Emma E. Wade, *Me Too?: Race, Gender, and Ending Workplace Sexual Harassment*, 27 DUKE J. GENDER L. & POL'Y 203, 209 (2020) ("The voices of relatively privileged women . . . tend to shape discussions of sexual harassment and sexual assault, even though such violations disproportionately affect more marginalized women.").

Unfortunately, the United States Supreme Court-developed "severe or pervasive" standard, which federal courts and most states apply in determining whether workplace conduct constitutes sex discrimination through creation of a hostile work environment, has made it extraordinarily difficult for plaintiffs to seek justice and relief after being subjected to workplace sexual harassment.[3]

However, based on the calls for change from women's and workers' advocates and the shift in norms associated with the #MeToo movement, several states have sought to break away from the federal sexual harassment standard and case law.[4] They have done so by replacing the legal standard applied in sexual harassment cases or by placing guardrails on the application of the severe or pervasive standard under their state human rights law in order to ease the burden for plaintiffs.[5]

This Note examines one such state effort. In June 2020, Minnesota became one of the most recent states to attempt a change, with the Minnesota Supreme Court reevaluating the severe or pervasive standard's application to sexual harassment cases brought under the Minnesota Human Rights Act (MHRA) in *Kenneh v. Homeward Bound*.[6] After failed efforts in the state legislature to change the standard statutorily,[7] the *Kenneh* court

3. Marshall H. Tanick, *Perspectives: Is Severe or Pervasive' Too Severe or Perverse?*, MINN. LAW. (Jan. 21, 2020), https://minnlawyer.com/2020/01/20/perspectives-is-severe-or-pervasive-too-severe-or-perverse/ [https://perma.cc/P623-BY4N] ("The 'severe or pervasive' terminology coupled with the rather restrictive way it generally has been interpreted by the courts has raised the hackles of many claimants, nearly all of them women, and their advocates. They view the phrase and the strict treatment frequently accorded it by courts as creating undue hurdles that are often difficult to overcome.").

4. ANDREA JOHNSON, RAMYA SEKARAN & SASHA GOMBAR, NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES 16–17 (2020).

5. California "enacted legislation to clarify the 'severe or pervasive standard'" in 2018. New York "explicitly remove[d] the restrictive 'severe or pervasive' standard for establishing a hostile work environment claim" in 2019. *Id.* Delaware passed a law that establishes the standard for sexual harassment as conduct which "has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment." 81 Del. Laws 399 (2018); *see also* Leslie A. Pappas, *Delaware Expands Sexual Harassment Protections to More Workers*, BLOOMBERG (Aug. 29, 2018), https://news.bloomberglaw.com/daily-labor-report/delaware-expands-sexual-harassment-protections-to-more-workers-1 [https://perma.cc/6CHJ-KQPV] (explaining how the new Delaware law protects more workers by broadening the categories of workers covered under the law and requiring employers to distribute information sheets about sexual harassment to employees).

6. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 226 (Minn. 2020).

7. H.F. 4459, 90th Leg., Reg. Sess. (Minn. 2018); S.F. 2295, 91st Leg., Reg. Sess. (Minn. 2019).

acknowledged the shortcomings of the severe or pervasive standard and addressed its scope and function. Though the court retained the standard, it wrote, "[f]or 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."[8] The court also cautioned lower courts against "usurping the role of a jury when evaluating a claim on summary judgment," noting that "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.'"[9]

The *Kenneh* ruling prompted both praise and critique by workers and victims' advocates,[10] but the question remains as to what, if any, impact the *Kenneh* court's interpretation of the severe or pervasive standard may have on lowering the barriers to justice for plaintiffs bringing hostile work environment sexual harassment claims under the MHRA. This Note will critically analyze the *Kenneh* decision's attempt to answer that question. Part I will provide background on the severe or pervasive standard's development and application, critique of the standard, calls for change fueled by the #MeToo movement, and state responses to those calls for change. Part II will critique the Minnesota Supreme Court's approach in *Kenneh* by analyzing whether it adequately addresses the severe or pervasive standard's shortcomings for plaintiffs and proposing additional needed change.

This Note argues that *Kenneh*'s approach has the potential to serve greater justice for victims of sexual harassment in the workplace by directing lower courts to use summary judgment sparingly in such cases, increasing the likelihood that juries will hear cases and thus apply their post-#MeToo conceptions of sexual harassment to cases. However, *Kenneh*'s impact on plaintiffs' ability to seek justice under the MHRA will ultimately be limited: though

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8. *Kenneh*, 944 N.W.2d at 231.

9. *Id.* at 232 (citing Johnson v. Advoc. Health & Hosps. Corp., 892 F.3d 887, 901 (7th Cir. 2018)).

10. *See* Kevin Featherly, *Sexual Harassment Cases Through a New Lens*, MINN. LAW. (June 10, 2020), https://minnlawyer.com/2020/06/10/sexual-harassment-cases-through-a-new-lens/ [https://perma.cc/6WW9-V9KU] (citing both an attorney who called the ruling "landmark" for plaintiff employees and another attorney who argued that "the ruling does not fundamentally alter the landscape because it neither changes the framework for summary judgment nor dismantles the review standard."); *see also* Susan Fitzke, *Severe or Pervasive Remains the Standard to Evaluate Claims of Sexual Harassment in Minnesota*, JD SUPRA (June 7, 2020), https://www.jdsupra.com/legalnews/severe-or-pervasive-remains-the-12721/ [https://perma.cc/QGU8-6JC2] (calling the ruling a "significant victory" for employers).

providing some guardrails for lower courts' use of the severe or pervasive standard and rejection of federal case law as precedent, the *Kenneh* court's retention of the federal standard's language risks also retaining the confusion that has plagued its application and erroneous reliance on federal case law. In order for Minnesota to make lasting change in its sexual harassment legal protections, it will need to adopt a new standard, either judicially or legislatively, that will distance it from the harmful precedent of federal sexual harassment law, and the previous Minnesota case law that relied on federal precedent.

I. Background

A thoughtful analysis of *Kenneh v. Homeward Bound* requires an understanding of the legal and political background of the severe or pervasive standard. This section briefly describes the development of the severe or pervasive standard, outlines significant criticism of the standard, discusses the interaction of the standard's application with the #MeToo movement, and provides examples of strategies adopted by two other jurisdictions responding to the severe or pervasive standard's shortcomings for plaintiffs.

A. Development of the Severe or Pervasive Standard

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against individuals in several protected groups, including on the basis of sex.[11] In 1986, the Supreme Court held in *Meritor Savings Bank v. Vinson* "that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[12] The Court then outlined the standard for the plaintiff to prove their hostile work environment case based on allegations of sexual harassment: "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive work environment.'"[13] Further, under that standard, the plaintiff must prove that the work environment was both objectively and subjectively hostile or abusive.[14]

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11. 42 U.S.C. § 2000e.

12. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

13. *Id.* at 67 (citing Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

14. Carol Schultz Vento, Annotation, *When is Work Environment Intimidating, Hostile or Offensive, so as to Constitute Sexual Harassment Under State Law*, 93 A.L.R.5th 47, at § 2 (2001).

The Court affirmed *Meritor*'s severe or pervasive standard seven years later in *Harris v. Forklift Systems*, and elaborated that determining whether a work environment is hostile or abusive requires "looking at all 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."[15] The Court has minimally refined or commented on the standard since,[16] so the elements established by *Meritor* and *Harris* remain the defining language of the severe or pervasive standard as applied to sex discrimination cases based on creation of a hostile work environment through sexually harassing workplace conduct.[17]

A significant majority of states have enacted antidiscrimination laws that mirror Title VII and are interpreted to prohibit sexual harassment.[18] Though Title VII itself does not contain the words "severe or pervasive," most states, including Minnesota, have treated the standard as "a free-standing tenet" of anti-discrimination law, with lower courts adopting the Supreme Court's standard and utilizing federal case law as precedent in construing state statutes and deciding sexual harassment cases.[19]

B. Critique

Scholars and advocates have critiqued the severe or pervasive standard as disproportionately burdensome for plaintiffs, with this burden growing over time. "As a result of this heightened burden, lower courts routinely dismiss claims alleging sexual misconduct

15. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

16. *See, e.g.*, Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 238 (2018) (noting that Oncale v. Sundowner, 523 U.S. 75 (1998), refined the standard, including by "caution[ing] courts against enforcing Title VII's anti-harassment mandate as a 'civility code'").

17. *See, e.g.*, Fox v. Pittsburg State Univ., 257 F. Supp. 3d 1112, 1130 n.86 (D. Kan. 2017) (citing *Meritor Sav. Bank*, 477 U.S. at 67, and *Harris*, 510 U.S. at 21, in analysis of Title VII sexual harassment claims).

18. Rachel Farkas, Brittany Johnson, Ryann McMurry, Noemi Schor & Alison Smith, *State Regulation of Sexual Harassment*, 20 GEO. J. GENDER & L. 421, 424 ("[F]orty-seven states and Washington, DC have implemented anti-discrimination statutes that either expressly or impliedly prohibit sexual harassment in the private workplace."). *But cf.* CONTE, *supra* note 1, at 1 (noting that "[T]he conditions under which a state action can be maintained will vary under the terms of the statute . . ."); Farkas et al., *supra* note 18, at 435 ("While most state statutes at least partially mirror Title VII, many go further to effectively expand Title VII anti-discrimination protections to cover LGBT workers and workers in settings with fewer than fifteen employees.").

19. Tanick, *supra* note 3; *see* CONTE, *supra* note 1.

that is sometimes flagrant."[20] Critics cite numerous cases in which plaintiffs allege "egregious conduct that, in many cases, would be criminal or at least would outrage any reasonable person."[21] For example, one plaintiff in the Eighth Circuit failed to clear the severe or pervasive hurdle to survive dismissal of their hostile work environment sexual harassment claim even when alleging that "the supervisor grabbed and squeezed the employee's nipple while stating 'this is a form of sexual harassment.'"[22] Another plaintiff's case was dismissed despite alleging, amongst other actions, "that a harasser asked him to watch pornographic movies and to masturbate together" and "suggested that the plaintiff would advance professionally if the plaintiff caused the harasser to orgasm."[23] Scholars offer several explanations for these exasperating results for plaintiffs, as will be discussed below.

1. Who is Reasonable?

First, the flexible nature of the standard has given lower courts significant discretion in determining what behavior is severe or pervasive enough to create a hostile or abusive work environment for a "reasonable" person.[24] The standard does "not differentiate between genders, obfuscating whether it ought to be viewed through the prism of a hypothetical woman, man, or asexual individual."[25] It also does not acknowledge how contextual factors

20. Kenneth R. Davis, *The "Severe and Pervers-ive" Standard of Hostile Work Environment Law: Behold the Motivating Factor Test*, 72 RUTGERS U. L. REV. 401, 416–17 (2020).

21. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 119 (2003); *see also* Tippett, *supra* note 16, at 241.

22. Sheila Engelmeier & Heather Tabery, *Severe or Pervasive: Just How Bad Does Sexual Harassment Have to Be in Order to Be Actionable?*, MSBA, https://www.mnbar.org/archive/msba-news/2020/01/21/severe-or-pervasive-just-how-bad-does-sexual-harassment-have-to-be-in-order-to-be-actionable [https://perma.cc/HPY8-CLYH] (citing Duncan v. Cnty. of Dakota, 687 F.3d 955, 959 (8th. Cir. 2012)) [hereinafter Engelmeier & Tabery, *Severe or Pervasive?*].

23. *Id.* (citing LeGrand v. Area Res. for Cmty. & Hum. Servs., 394 F.3d 1098 (8th Cir. 2005)).

24. *See* Tippett, *supra* note 16, at 237.

25. Tanick, *supra* note 3; *see also* Jones & Wade, *supra* note 2, at 219 ("What remains unclear is whether the allegedly harassing behavior is to be evaluated from the point of view of a reasonable person—or whether the standard should be that of a reasonable woman, or a reasonable victim in the plaintiff's shoes. . . . Importantly, each of [these] standards . . . necessitates a different level of attention to the specific context and power dynamics between the parties. . . . [E]mployment of a reasonable person standard perpetuates existing inequalities by failing to adjust for experiential

such as "race, class, gender identity, and age," create power dynamics that influence how sexual harassment is targeted by harassers and perceived by victims.[26] Therefore, judges, who are arguably "not as sensitive to the realities of what may or may not be acceptable in the workplace,"[27] have underestimated and diminished "the severity of harassment and the impact it would have on a reasonable person" when analyzing a plaintiff's prima facie case.[28] This has, on the whole, disadvantaged plaintiffs and blocked them, based on the potentially limited worldview of the judge, from having their cases heard by peer-comprised juries.[29]

2. Narrowing Over Time, or "The Infinite Regression of Anachronism"

Second, the judicial discretion in interpreting the severe or pervasive standard has built on itself to allow more and more

differences."); Druhan V. Blair, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 356–57 (stating that because of the vagueness of the severe or pervasive standard and "because individuals have different perceptions of what behaviors are severe enough to constitute harassment," three scholarly proposed legal ideas—"the reasonable woman standard, the acknowledgment that individuals view supervisor harassment as more severe, and the importance of workplace integration"—"should . . . be integrated into sexual harassment law").

26. Jones & Wade, *supra* note 2, at 214, 219–20.

27. Tanick, *supra* note 3.

28. Evan D. H. White, *A Hostile Environment: How the "Severe or Pervasive" Requirement and the Employer's Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 875 (2006); *see also* Elizabeth M. Schneider & Nancy Gertner, *"Only Procedural": Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767, 773–78 (2012–2013) (describing how the Supreme Court's holdings in *Twombly* and *Iqbal*, which invite "the exercise of judicial subjectivity, for judges to 'fill in the gaps' of the truncated factual or legal record with what 'they know' or, more significantly, what they *think* they know" in order to determine "plausibility" at the pleading stage, are problematic for plaintiffs in employment discrimination cases, if not through outright dismissal, then at least through an "impact on the subsequent [procedural] rulings that a judge must make—the discovery that a court allows (for example, only discovery on the 'plausible' claims), the class certification decision, and the efficacy of expert testimony" which "make summary judgment for the employer even more likely").

29. Tanick, *supra* note 3; *see* Engelmeier & Tabery, *Severe or Pervasive?*, *supra* note 22; *see also* Michael W. Pfautz, *What Would a Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals*, 115 COLUM. L. REV. 1255, 1285 (2015) (citing Jill D. Weinberg & Laura Beth Nielsen, *Examining Empathy: Discrimination, Experience, and Judicial Decisionmaking*, 85 S. CAL. L. REV. 313, 320, 338–39 (2012)) ("[S]tudies have empirically shown how judicial behavior can vary based on a judge's personal background. Weinberg and Nielsen powerfully demonstrate that white judges grant summary judgment in employment discrimination cases more often than minority judges do. . . . And judges may be out of touch with the workplace experiences of most Americans.").

egregious workplace behavior over time.[30] Williams et al., call this trend "the 'infinite regression of anachronism,'" or

> the tendency of courts to rely on cases that reflect what was thought to be reasonable ten or twenty years ago, forgetting that what was reasonable then might be different from what a reasonable person or jury would likely think today. These anachronistic cases entrench outdated norms, foreclosing an assessment of what is reasonable now.[31]

In her study of sexual harassment case law in several circuits fifteen years after *Meritor* was decided, Beiner calls the trend simply, "Bad Precedent Leads to Bad Precedent."[32] For example, in the 1993 case *Saxton v. AT&T Co.*, the Seventh Circuit Court of Appeals affirmed summary judgment for the employer, finding that despite the plaintiff alleging that her supervisor had "rubbed his hand along her upper thigh," and "pulled her into a doorway and kissed her," amongst other harassing behaviors, no "reasonable person would find that her supervisor's conduct created a hostile environment."[33] *Saxton* was cited positively by courts in the Seventh Circuit more than three hundred times by 2001, and in seventy-nine of those cases that positive citation occurred in the context of the citing court's severe or pervasive analysis.[34] In the 2019 case analysis by Williams et al., the authors note that subsequent citing cases like those discussed by Beiner "use the infinite regression of anachronism to ratchet up the standard for what constitutes a hostile environment in their circuit."[35] In other words, courts use outdated decisions as comparators for current cases and find no harassment took place if those comparators had

30. Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #METOO Movement*, 22 RICH. PUB. INT. L. REV. 237, 245–54 (2019); *see also* Tippett, *supra* note 16, at 241–42 (discussing how lower courts have interpreted "severe or pervasive" to be overly stringent, snowballing as judges have been provided an ever growing body of law supporting a "crimped interpretation"); Davis, *supra* note 20, at 425 (noting the original EEOC guidelines made no mention of "severe or pervasive," and it has not supported this restrictive interpretation by the Supreme Court); JOHNSON, SEKARAN & GOMBAR, *supra* note 4, at 16–17 (highlighting that New York and California have enacted legislation to remove or clarify the "severe or pervasive" standard to correct for the overly restrictive interpretation developed by the courts).

31. Joan C. Williams, Jodi L. Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Saron, *What's Reasonable Now? Sexual Harassment Law After the Norm Cascade*, 2019 MICH. ST. L. REV. 139, 145 (2019).

32. Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 817–18 (2002); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986).

33. Beiner, *supra* note 32, at 814–15.

34. *Id.* at 818, n.129.

35. Williams et al., *supra* note 31, at 145.

similar fact patterns to the case at hand. This trend becomes both more problematic and entrenched over time. Thus, the vague content of the severe or pervasive standard, its interpretation by judges, and its narrowing over time, has made it more and more difficult for plaintiffs to prove that the behavior they were subjected to passes the severe or pervasive threshold.[36]

3. The "Norm Cascade"

The discrepancy between the severity or pervasiveness necessary to constitute a hostile work environment at summary judgment and an average person's conception of sexual harassment that creates an intolerable work environment has become more pronounced in the wake of the #MeToo movement.[37] This movement went viral on social media in 2017,[38] after the *New York Times*

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36. Former U.S. District Judge Nancy Gertner has also described the role of "Asymmetric Decisionmaking" in contributing to the disproportionate barriers faced by plaintiffs generally in federal employment discrimination cases:

> When the defendant successfully moves for summary judgment in a discrimination case, the case is over. Under Rule 56 of the Federal Rules of Civil Procedure, the judge must "state on the record the reasons for granting or denying the motion," which means writing a decision. But when the plaintiff wins, the judge typically writes a single word of endorsement—"denied"—and the case moves on to trial. Of course, nothing prevents the judge from writing a formal decision, but given caseload pressures, few federal judges do. . . . The result of this practice—written decisions only when plaintiffs lose—is the evolution of a one-sided body of law. Decision after decision grants summary judgment to the defendant . . . . After the district court has described—cogently and persuasively, perhaps even for publication—why the plaintiff loses, the case may or may not be appealed. If it is not, it stands as yet another compelling account of a flawed discrimination claim. If it is appealed, the odds are good that the circuit court will affirm the district court's pessimistic assessment of the plaintiff's case. . . . Although judges do not publish all the opinions they write, the ones they do publish exacerbate the asymmetry. The body of precedent detailing plaintiffs' losses grows. Advocates seeking authority for their positions will necessarily find many more published opinions in which courts granted summary judgment for the employer than for the employee. . . . But the problem is more than just the creation of one-sided precedent that other judges follow. The way judges view these cases fundamentally changes. If case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most claims are trivial.

Nancy Gertner, *Losers' Rules*, 122 YALE L.J. ONLINE 109, 113–15 (2012).

37. Heydemann & Tejani, *supra* note 30, at 248; *see also* Ann C. McGinley, *#MeToo Backlash or Simply Common Sense?: It's Complicated*, 50 SETON HALL L. REV. 1397, 1416 (2020) (describing the difference between cultural and legal definitions of sexual harassment, where "culture often finds harassment even though the law would say the behavior is not sufficiently severe or pervasive . . .").

38. Though providing a more in-depth history of the #MeToo movement is beyond

published allegations against Harvey Weinstein for predatory sexual behavior.[39] Unlike previous instances in which highly publicized sexual harassment cases have led to a temporary surge in public attention on the issue,[40] change in societal understanding of sexual harassment after #MeToo may be longer lasting.

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the scope of this Note, it is important to highlight how the viral launch and staying power of #MeToo after the *Times* Weinstein article and speaking out of high-profile celebrities, though important and admirable, "illustrates the critical need for an intersectional approach [to discussions of gender and sexual harassment]" through the differential way in which the claims of working class women and women of color are treated in comparison to upper-class white women. Jones & Wade, *supra* note 2, at 208. Jones and Wade explain:

> Me Too did not begin in 2017, nor did it begin on Twitter or Facebook. The phrase Me Too was first coined in 2006 by Tarana Burke, a Black woman activist who had just 500 Twitter followers when the *Times'* article broke. In 2006, Burke was living and working in Alabama where she had just founded Just Be, Inc. The organization's goal was to empower and promote the general wellbeing of young girls of color. In her work with Just Be, Burke encountered a number of girls who, both knowingly and unknowingly, disclosed experiences of sexual violence not unlike her own. Burke set up a 'Me Too' Myspace page to raise awareness of the issue and to establish a supportive community. This Myspace page was Me Too's first virtual home, and soon, Me Too became an organization. Thus, from its inception, Me Too was intended "to help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing."
>
> Despite Burke's best efforts, the hashtag and the term did not go viral for over a decade. It was not until October 2017 when the Weinstein exposé broke and high-profile celebrities began to speak out about their experiences that the movement amassed widespread attention and support. . . . [W]ealthy celebrities and upper-middle-class White women are more likely than lower-income women and women of color to garner attention when they speak. Their concerns are taken more seriously, and they are more likely to be believed.
>
> . . .
>
> Erasure of the activism and experiences of poor women and women of color is . . . part of the social discourse in the United States; it is also reflected in the ways in which U.S. law is taught and created.

Id. at 208–10.

39. CONTE, *supra* note 1, at 1 ("*Bloomberg* analyzed statistics of allegations since the *New York Times* reported allegations of serial predation by Harvey Weinstein a year ago, and found that at least 425 prominent people across industries, including state and local lawmakers, have been publicly accused of sexual misconduct, a broad range of behavior that spans from serial rape to lewd comments and abuse of power. According to the National Women's Law Center, in the past year, state legislators introduced over 100 bills to strengthen protections against workplace harassment, and 11 states and two localities have passed new protections.").

40. L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?* 3 (Ctr. for Interdisc. L. & Pol'y Stud. Pub. L. & Legal Theory Working Paper Series, No. 453, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3236309# ("Prior incidents in which sexual harassment has grabbed the national attention, such as the allegations made by Law Professor Anita Hill in 1991 against now-Associate Justice of the United States Supreme Court Clarence Thomas, have arguably not had staying power.").

Williams et al., argue that #MeToo is a "norm cascade" and the impact is here to stay:

> Typically social norms change slowly. In the late 1990s . . . sexual harassment was seen as a "tsking" matter: Only 34% of Americans thought it was a serious problem.
>
> Then came Alyssa Milano's #MeToo tweet on October 15, 2017, which was retweeted over a million times across eighty-five countries. Almost immediately, the percentage of Americans who believe that sexual harassment is a serious problem shot up to 64%. By late 2017, roughly 75% of Americans believed that sexual harassment and assault were "very important" issues for the country. That is a norm cascade.[41]

For Williams et al., this norm cascade magnifies the importance of juries in sexual harassment hostile work environment cases, access to which the severe or pervasive standard has disproportionately functioned to deny.[42] The authors argue that juries, not judges, should be given the opportunity to inform "community standards of appropriate behavior in the workplace" by "grappling with facts and establishing norms about what conduct is considered appropriate in the age of #MeToo."[43]

McGinley suggests that sending all sexual harassment hostile work environment cases to juries is not the only solution to adapting the law to the norm cascade, as judicial norm perceptions may also be subject to the shift.[44] Thus, McGinley argues that in response to the #MeToo movement, "[c]ourts should change their strict interpretation of the sex- and gender-based harassment cases by jettisoning reliance on cases decided before the norm cascade and,

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41. Williams et al., *supra* note 31, at 142; *see also* Cass R. Sunstein, *#MeToo as a Revolutionary Cascade*, 2019 U. CHI. LEGAL F. 261, 262, 271 (2019) (arguing that the #MeToo movement meets the three conditions of a "revolutionary cascade" ("(a) preference falsification, (b) diverse thresholds, and (c) interdependencies") and has revealed a change in "preferences, experiences, beliefs, and values," and has been "about the *transformation* of preferences, beliefs, and values . . .").

42. Williams et al., *supra* note 31, at 224; *see also supra* Section I.B.

43. Williams et al., *supra* note 31, at 224. However, despite the #MeToo movement, juries' evaluations of credibility are still informed by sexist stereotypes which can continue to harm plaintiffs. *See* Nicole Brodeur, *People Are More Likely to Believe Sexual Harassment Claims from Women Who Are 'Conventionally Attractive,' Study Says*, CHI. TRIB. (Feb. 22, 2021), https://www.chicagotribune.com/featured/sns-study-more-likely-believe-sexual-harassment-attractive-women-20210222-dalk43emgndrbeff2og33lsm5m-story.html [https://perma.cc/K69H-WAJQ] (describing study published in January 2021 which found that "people are more apt to believe sexual harassment claims by women who are young, 'conventionally attractive' and appear and act feminine. Women who don't fit that prototype not only are less likely to be believed, but also are presumed to be unharmed by harassing behavior . . . ." Thus "[t]he findings have implications for workplaces and courtrooms, where credibility and perceived harm are important to making a case . . .").

44. McGinley, *supra* note 37, at 1424.

in doing so, analyze cases with reference to how reasonable jurors would react today, given the norm cascade."[45]

C. Calls for Change: State Law Approaches to Change

In addition to scholarly critique and recommendations for legal adaptations, the #MeToo Movement has brought about increased calls for change and political attention to those calls. In response, state legislatures have introduced bills addressing employer practices, such as by limiting nondisclosure agreements where employers prevent employees from discussing their experience of discrimination or harassment, and requiring anti-harassment training.[46] Several states have also specifically attempted to reform the severe or pervasive standard in recognition of its role in blocking victims' access to justice.[47] These reforms have taken the approach of adopting an entirely new standard to replace severe or pervasive, or retaining the standard but "adding guardrails to the 'severe or pervasive' language to indicate expressly how the standard should and should not be interpreted."[48]

1. Adoption of a New Standard: New York City and State

New York is not the only state that has adopted a new standard for analysis of hostile work environment sexual harassment cases,[49] but it serves as a case study here. Even before

45. *Id. But see* Pfautz, *supra* note 29 (documenting disproportionate rate of summary judgment errors in civil rights cases).

46. JOHNSON, SEKARAN & GOMBAR, *supra* note 4, at 2 ("Three years after #MeToo went viral, the unleashed power of survivor voices has led to more than 230 bills being introduced in state legislatures . . . ."); Heydemann & Tejani, *supra* note 30, at 255; *see also* Tamra J. Wallace, *Nine Justices and #MeToo: How the Supreme Court Shaped the Future of Mandatory Arbitration and Sexual Harassment Claims*, 72 ME. L. REV. 417, 418 (2020) (describing how "the Supreme Court's continued stance to liberally applying the [Federal Arbitration Act] to uphold arbitration agreements contained within employment agreements over the past decades" necessitates legislation to protect vulnerable workers who have been victims of workplace sexual harassment); Christopher Cole, *End 'Forced Arbitration,' Ex-Fox Host Carlson Urges House*, LAW360 (Feb. 11, 2021), https://www.law360.com/employment/articles/1354189/end-forced-arbitration-ex-fox-host-carlson-urges-house [https://perma.cc/M9TL-6PJC] (providing an example of current federal congressional debate on the issue of arbitration and sexual harassment).

47. JOHNSON, SEKARAN & GOMBAR, *supra* note 4, at 16–17.

48. Heydemann & Tejani, *supra* note 30, at 255.

49. *See* Kathryn Barcroft, *Hostile Work Environment: Is NYC's Standard the Path Forward in the Era of #MeToo?*, N.Y.L.J. (Apr. 11, 2019), https://www.law.com/newyorklawjournal/2019/04/11/hostile-work-environment-is-nycs-standard-the-path-forward-in-the-era-of-metoo/ [https://perma.cc/8YV7-8BQW] ("Delaware is another state that has taken affirmative action to modify the standard for sexual

the #MeToo movement, New York City recognized that their local Human Rights law had "'been construed too narrowly to ensure protection of the civil rights of all persons covered by the law'" and "passed the Local Civil Rights Restoration Act of 2005" to "assert that the provisions of the New York City Human Rights Law (NYCHRL) were to be 'construed independently from similar or identical provisions of New York state or federal statutes.'"[50] This began an iterative process between the legislature and courts that ultimately led to adoption of a new standard by both the city and state legislatures for analysis of sex discrimination claims asserting creation of a hostile work environment through sexual harassment.[51]

That iterative process continued in 2009, when the New York State Appellate Division had the first opportunity to interpret the city's Restoration Act as applied to a sexual harassment hostile work environment case.[52] The court held that the City's instruction to courts in the Restoration Act to construe the Human Rights Law "*more broadly than federal civil rights laws and the State* [Human Rights Law]" required a rejection of the severe or pervasive standard, which "has routinely barred the courthouse door to women who have, in fact, been treated less well than men because of gender."[53] The court thus adopted a new standard: "For [Human Rights Law] liability, therefore, the primary issue for a trier of fact in harassment cases, as in other terms and conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender."[54] The court explained that this new standard would both maximize deterrence and align more closely with other discrimination liability standards.[55] This new standard was explicitly adopted by the City in 2016 in a second Restoration Act.[56]

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harassment claims. Delaware HB 360, which went into effect January 1st, broadens the definition of a hostile work environment in Delaware's Discrimination in Employment Act, in recognition of the high bar to sexual harassment claims. The new Delaware law provides that sexual harassment is unlawful if the conduct 'creates an intimidating, hostile, or offensive work environment.'").

50. Heydemann & Tejani, *supra* note 30, at 255–56 (citing N.Y.C. LOC. L. NO. 85 (2005); N.Y.C. Human Rights Law, N.Y. ADMIN. CODE §§ 8-101–107 (2005)).

51. Heydemann & Tejani, *supra* note 30, at 255–57.

52. Williams v. N.Y.C. Hous. Auth., 61 A.D.3d 62 (N.Y. App. Div. 2009); *see also* Heydemann & Tejani, *supra* note 30, at 255–57 (describing New York City's adoption of a new standard).

53. *Williams*, 61 A.D.3d at 73–74 (emphasis in original).

54. *Id.* at 78.

55. *Id.*

56. Heydemann & Tejani, *supra* note 30, at 257; Barcroft, *supra* note 49, at 2.

New York State, with momentum from the #MeToo movement and using New York City's lowered burden of proof as guidance, passed legislation amending its anti-discrimination law to eliminate the severe or pervasive standard.[57] Instead, an employer is liable for harassment "when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories," including sex, "regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims."[58] New York's local and state courts and legislatures thus each played roles in the replacement of the severe or pervasive standard in its anti-discrimination, anti-harassment law.

2. Interpretation Guardrails: California

California took a different approach to updating its sexual harassment law in the wake of #MeToo. The California legislature passed a bill, which took effect on January 1, 2019, that added a section to California's Fair Employment and Housing Act "declar[ing] its intent with regard to application of the laws about harassment contained in this part."[59] The bill does not strike the severe or pervasive standard language but adopts Justice Ruth Bader Ginsburg's articulation of the plaintiff's burden of proof under the standard, set forth in her concurrence in *Harris v. Forklift Systems*:

> [I]n a workplace harassment suit the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.[60]

The law goes on to affirm, or reject, specific holdings of several Ninth Circuit and California state court sexual harassment cases in order to place further guidelines on the standard's application.[61] In doing so, the law establishes that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence

57. Engelmeier & Tabery, *Severe or Pervasive?*, *supra* note 22, at 25 (citing N.Y. Sess. A8421 (N.Y. 2019)).

58. N.Y. Sess. A8421, 2 (N.Y. 2019).

59. CAL. GOV'T CODE § 12923 (West 2019).

60. *Id.* (citing Harris v. Forklift Sys., 510 U.S. 17, 25–26 (1993)) (internal quotations omitted).

61. Barcroft, *supra* note 49; Heydemann & Tejani, *supra* note 30, at 258–59; *see* JOHNSON, SEKARAN, & GOMBAR, *supra* note 4, at 17.

of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment"; that "a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a non-decision maker, may be relevant, circumstantial evidence of discrimination" in order to establish a hostile work environment; and that "[t]he legal standard for sexual harassment should not vary by type of workplace."[62] Finally, the law states that, "[h]arassment cases are rarely appropriate for disposition on summary judgment."[63]

With this background in place, this Note will now analyze the unique approach to potential legal evolution of the severe or pervasive standard taken by the Minnesota Supreme Court in *Kenneh v. Homeward Bound*.

II. *Kenneh v. Homeward Bound*: Critiquing Minnesota's Approach

Like many other states, the Minnesota legislature reconsidered the state's sexual harassment law following the 2017 #MeToo movement, attempting both New York's approach of rejecting the severe or pervasive standard and California's approach of placing guardrails on the standard's application.[64] The Minnesota House introduced a bill in 2018 to amend the MHRA definition of sexual harassment.[65] The bill rejected the application of the federal severe or pervasive standard to MHRA sexual harassment claims, explicitly stating, "[a]n intimidating, hostile, or offensive environment . . . does not require the harassing conduct or communication to be severe or pervasive."[66]

The Minnesota Senate took a different approach in the bill it introduced in 2019.[67] Like California's legislation,[68] this bill retained the severe or pervasive standard but sought to modify its application.[69] The bill stated that "courts should not be bound by prior federal case law holding that conduct does not rise to the level

62. CAL. GOV'T CODE § 1293 (West 2019) (rejecting Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000); affirming Reid v. Google, Inc., 235 P.3d 988 (Cal. 2010); disapproving Kelley v. Conco Cos., 196 Cal. App. 4th Supp. 191 (Cal. Ct. App. 2011)).

63. *Id.* (affirming Nazir v. United Airlines, Inc., 178 Cal. App. 4th. Supp. 243 (Cal. Ct. App. 2009)).

64. *See supra* Part I.C.

65. H.F. 4459, 90th Leg., Reg. Sess. (Minn. 2018).

66. *Id.*

67. S.B. 2295, 91st Leg., Reg. Sess. (Minn. 2019).

68. *See supra* Part I.C.2.

69. S.B. 2295, 2019 Reg. Sess. (Minn. 2019).

of actionable sexual harassment if the conduct described therein would be considered severe or pervasive in the state" and specifically rejected the holdings of several Eight Circuit cases "as inconsistent with the severe or pervasive standard for sexual harassment under state law."[70] Further, though the bill noted that "state law is not a general civility code" nor a "strict liability statute" for employers, it provided that "a single significant instance of harassing conduct or communication" may constitute severe or pervasive harassment.[71]

The Minnesota Supreme Court took up the issue shortly after neither of the bills passed, granting review in *Kenneh v. Homeward Bound*.[72]

A. Case Summary and Holdings

Assata Kenneh brought a sexual harassment claim against her employer, Homeward Bound, under the MHRA, alleging that the actions of a co-worker, Anthony Johnson, created a hostile work environment.[73] These actions, occurring between the months of February and June 2016, included offering to cut Kenneh's hair in his home the first day they met, telling Kenneh that he "'likes it pretty all day and night'" and "'beautiful women and beautiful legs,'" "talking to [Kenneh] in a seductive tone and lick[ing] his lips in a suggestive manner," telling Kenneh "'I will eat you–I eat women,'" following Kenneh to a gas station, and repeatedly calling Kenneh "'sexy,'" "'pretty,'" and "'beautiful,'" and "simulat[ing] oral sex with his tongue."[74]

Kenneh made a written complaint to Homeward Bound, which resulted in an investigation and an assurance from Homeward Bound "that Johnson would receive additional sexual harassment training and would be instructed not to be alone with Kenneh."[75] When Johnson's behavior continued despite the investigation and training, Kenneh made two additional complaints to her supervisor,

70. *Id.* (rejecting holdings in McMiller v. Metro, 738 F.3d 185 (8th Cir. 2013); Anderson v. Fam. Dollar Stores of Ark., Inc., 579 F.3d 858, 860 (8th Cir. 2009); LeGrand v. Area Resources for Cmty. & Hum. Servs., 394 F.3d 1098 (8th Cir. 2005); and Duncan v. General Motors Co., 300 F.3d 928 (8th Cir. 2002)).

71. *Id.*

72. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231 (Minn. 2020); Fitzke, *supra* note 10 ("Shortly after the House bill failed, the Minnesota Supreme Court granted review in *Kenneh*.").

73. *Kenneh*, 944 N.W.2d at 228.

74. *Id.* at 226–27.

75. *Id.* at 227.

which again resulted in no change.[76] In June 2016, Kenneh "arrived late to work and was unprepared for a meeting" because "she did not want to come to work because of Johnson."[77] Homeward Bound then denied Kenneh's request to "return to a flex-schedule position that would allow her to avoid interactions with Johnson," and terminated Kenneh's employment.[78]

The district court found that Johnson's conduct failed to satisfy the severe or pervasive standard for sexual harassment, hostile work environment claims, calling the standard a "high bar" for actionable sexual harassment.[79] The court thus granted summary judgment to Homeward Bound, finding that though "'some of the conduct was 'boorish and obnoxious' and that the statement, 'I will eat you. I eat women,' was both 'objectively and subjectively unacceptable,'" the conduct "does not constitute pervasive, hostile conduct that changes the terms of employment and exposes an employer to liability under the Minnesota Human Rights Act."[80]

After the court of appeals affirmed, Kenneh sought review in the Minnesota Supreme Court.[81] Kenneh, with the support of six amici, asked the court to abandon the severe or pervasive standard and associated federal precedent in analysis of hostile work environment sexual harassment claims.[82] Kenneh and supporting amici argued "that the severe-or-pervasive standard is notorious for its inconsistent application and lack of clarity" and that "federal courts tend to interpret the meaning of 'severe or pervasive' archaically, which places federal interpretations directly at odds with Minnesota's statutory directive to construe the Human Rights Act liberally."[83] Homeward Bound argued in response that rejecting the severe or pervasive standard would interfere with the need for legal consistency and predictability, including across state lines, and that the court "must exercise judicial restraint" because the state legislature "has recently shown an interest in redefining sexual harassment . . . ."[84]

The court rejected Kenneh's request, holding that "Kenneh has not presented us with a compelling reason to abandon our

76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.* at 228.
80. *Id.* (quoting directly from the trial court's order granting summary judgment in Hennepin County District Court File No. 27-CV-17-391).
81. *Id.*
82. *Id.* at 229; Fitzke, *supra* note 10.
83. *Kenneh*, 944 N.W.2d at 230 (citing Minn. Stat. § 363A.04).
84. *Id.*

precedent," and that 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."[85] However, the court continued, "tak[ing] this opportunity to clarify how the severe-or-pervasive standard applies to claims under the Human Rights Act."[86] The court's first point of clarification was that Minnesota courts utilizing the standard are not bound by federal decisions utilizing the same framework.[87] Second, "[f]or 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."[88] Third, the court emphasized the fact-intensive nature of an inquiry into whether sexual harassment rises to the level of severe or pervasive: "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."[89] At the same time, "[p]ervasive incidents, any of which may not be actionable when considered in isolation, may produce an objectively hostile environment when considered as a whole."[90] In order to maintain the fact-intensiveness of the inquiry, the court "caution[ed] courts against usurping the role of a jury when evaluating a claim on summary judgment," emphasizing that "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.'"[91]

Applying this clarified standard to Kenneh's case, and "[c]onsidering the totality of the circumstances," the court "conclude[d] 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."[92] Therefore, "[t]he district court . . . erred in granting summary judgment to Homeward Bound."[93]

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85. *Id.* at 230, 226.
86. *Id.* at 231.
87. *Id.*
88. *Id.*
89. *Id.* at 231–32 (citations omitted).
90. *Id.* at 232 (citations omitted).
91. *Id.* (citations omitted).
92. *Id.* at 233.
93. *Id.* at 234.

B. Early Commentator Response

That the *Kenneh* court took time to clarify how the severe or pervasive standard should be applied indicates that it will have some impact on future cases. Yet, the mixed response of commentators closely involved with the *Kenneh* decision demonstrates that this impact was not immediately clear following the case. One attorney who filed an amicus brief in support of Kenneh praised the decision, calling "the ruling 'a landmark,' even though it preserves the standard that his brief argued against," because it "lowers the bar for purposes of establishing illegal harassment," "explicitly rejects the previously favored approach of deferring to federal precedent when deciding these cases," and states that "these cases should be decided at trial, not on summary judgment."[94]

Yet, another brief-filing attorney disagreed, "argu[ing] the ruling does not fundamentally alter the landscape because it neither changes the framework for summary judgment nor dismantles the review standard."[95] Another observer called the decision "a significant victory for employers," elaborating that the court's retention of the severe-or-pervasive standard "allows employers greater predictability under the MHRA. *Kenneh* made clear that any attempt to change the MHRA's sexual harassment definition will have to go through the legislature."[96]

Others have suggested that the *Kenneh* decision lies somewhere between a landmark for plaintiff employees and a victory for defendant employers, concluding that the court's retention of the standard combined with its emphasis on the evolution of workplace norms and focus on the facts of each case amounts to a "nuanced" though "significant shift for hostile work environment claims under the MHRA."[97]

C. Impact and Insufficiency

It is still too early to know the aggregate effect of *Kenneh*'s clarification of sexual harassment standards on the outcomes in lower Minnesota courts. This Note argues that while recent decisions indicate that *Kenneh*'s caution regarding summary judgment has slightly influenced lower courts' considerations,

94. Featherly, *supra* note 10.

95. *Id.*

96. Fitzke, *supra* note 10.

97. Sheila Engelmeier & Heather Tabery, Paskert *and* Kenneh*: The 'Severe or Pervasive' Standard in 2020*, 77 BENCH & BAR MINN. 24, 29 (2020) [hereinafter Engelmeier & Tabery, Paskert *and* Kenneh].

ultimately, there is reason to be skeptical that the Minnesota Supreme Court's holdings will be sufficient to give plaintiffs meaningful relief. A critique of *Kenneh*'s potential impact on summary judgment as well as the retention of the severe or pervasive standard follows.

1. Summary Judgment

Since *Kenneh* was decided in June 2020, there has only been one lower court summary judgment decision applying *Kenneh* to a sexual harassment claim brought under the MHRA.[98] In the case, *Schroeder v. Axel H. Ohman, Inc.*, Schroeder alleged that her co-worker made graphic sexual comments on at least four occasions over the course of approximately one year.[99] Eventually, and after a series of potentially retaliatory actions by the employer following Schroeder's report of the harassment, she left the job and was hired at a different company.[100] On the defendant's motion for summary judgment, the District Court analyzed Schroeder's federal Title VII sexual harassment claims and state MHRA claims jointly.[101] The court cited *Kenneh* as "rejecting employee's attempt to renounce federal severe-or-pervasive standard but clarifying that a MHRA sexual harassment claim must be considered on its facts, not on a purportedly analogous federal decision."[102] Applying "the standard under both Title VII and the MHRA [of] whether a reasonable person could find the alleged behavior objectively abusive or offensive, and that Plaintiff actually perceived the conduct as abusive," the court denied the defendant's motion for summary judgment, finding that "[h]ere, Plaintiff has presented sufficient evidence upon which a reasonable jury could find the alleged behavior was objectively abusive or offens[ive]."[103]

On the one hand, *Schroeder*'s citation to *Kenneh*'s emphasis on making fact-intensive considerations of MHRA sexual harassment claims might be perceived as a step toward interrupting the

98. As of electronic searches conducted via Westlaw and LexisNexis on February 6, 2021.

99. Schroeder v. Axel H. Ohman, Inc., No. 19-1836 (MJD/TNL), 2021 WL 396779, at *1–2 (D. Minn. Feb. 4, 2021) (describing the statements that plaintiff alleged her co-worker made to her, including that he could "'see her tits'"; stating "'you like it bent over,' 'I bet you can't handle eight inches,' 'I would show you, but I don't want to hurt you,' . . . . 'You know I got a big dick,' 'That's not a sock I got in there. That's my real bulge,' and 'Do you want to look at it?'").

100. *Id.* at *4.

101. *Id.* at *4–6.

102. *Id.* at *5.

103. *Id.* at *6.

injustice that plaintiffs have endured in both state and federal sexual harassment cases when judges have quickly disposed of their claims based on precedent allowing egregious conduct on the part of defendants.[104] Yet, this optimism is undercut, even in light of summary judgment being denied to the employer here, by the court's joint state and federal analysis, which demonstrates that courts may not actually interpret sexual harassment claims under the MHRA differently after *Kenneh*, an argument which will be explored further in the following section.

Courts have also applied *Kenneh*'s summary judgment cautions to non-sexual harassment claims. In the weeks immediately after the *Kenneh* decision, a district court denied summary judgment to the defendant in a personal injury case, emphasizing that, "[i]ndeed, the Minnesota Supreme Court recently 'cautioned' trial courts 'against usurping the role of the jury when evaluating a claim on summary judgment.'"[105] Another district court trial order cited *Kenneh*'s warning in an employment injury case, writing in a denial of summary judgment to the defendant:

> [T]he current state of the law in Minnesota state courts is clear: in granting summary judgment, trial courts should be cautious when there are contested facts about what really happened. As recently as last week, the Minnesota Supreme Court reversed an order granting summary judgement. . . . The decision in this order is to apply the law as decided by the Minnesota Supreme Court. . . . [The plaintiff] is entitled to have a jury decide the merits of his case.[106]

Similarly, in August of 2020 the Court of Appeals of Minnesota cited *Kenneh* in its reversal of a district court grant of summary judgment to the defendant medical clinic in a medical malpractice suit.[107]

Though these cases did not involve sexual harassment claims, they indicate that the *Kenneh* decision is influencing courts to be

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104. *See supra* Part I.B.

105. Krause v. Martinez, No. 27-CV-19-2618, 2020 WL 4915385, at *4 (D. Minn. June 30, 2020) (citing Kenneh v. Homeward Bound, Inc., No. A18-0174, 2020 WL 2893352, at *6 (Minn. June 3, 2020), as "reiterating that '[S]ummary judgment is a blunt instrument' that is 'inappropriate when reasonable persons might draw different conclusions from the evidence presented'").

106. Reed v. Soo Line R.R. Co., No. 27-CV-18-10179, 2020 WL 4218226, at *3 (D. Minn. June 9, 2020) (citing Kenneh v. Homeward Bound, Inc., No. A18-0174, 2020 WL 2893352 (Minn. June 3, 2020)).

107. Ingersoll v. Innovis Health, LLC, No. 60-CV-17-1135, 2020 WL 4434605, at *2 (Minn. Ct. App. Aug. 3, 2020) (citing Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 228 (Minn. 2020)) ("Appellant argues that the district court erred when it granted summary judgment . . . because the actions of appellant and her husband were not, as matters of law, intervening, superseding causes of her husband's death. We agree.").

more hesitant generally in granting summary judgment. That hesitancy in future sexual harassment cases may lead to a greater number of those cases being heard by juries, whose conceptions of workplace behavior are more likely to correspond with post-#MeToo norms, thus increasing opportunities for relief for plaintiffs.[108]

Conversely, lower courts have also cited *Kenneh* in non-sexual harassment cases granting summary judgment, demonstrating that judges have not taken *Kenneh* to mean that summary judgment should be denied blindly, and countering the argument that jury trials will soon excessively burden the judicial system and clog up the courts.[109] However, even if *Kenneh* does result in a greater cost to the system due to more cases reaching juries,[110] this expense is justified by the need to remedy the disproportionate burden that has been borne by sexual harassment plaintiffs and the importance of jury access in achieving justice in these cases.[111]

2. Retention of "Severe or Pervasive"

The *Kenneh* decision's statements regarding summary judgment may lead to more cases being heard by juries, thus making initial strides in addressing the inequality for plaintiffs in sexual harassment law in Minnesota. However, if the MHRA, and the decisions interpreting it, are to truly reflect evolving workplace norms and provide a means of protection against harmful workplace behavior, the Minnesota Supreme Court or the legislature will need to explicitly reject Minnesota's utilization of the severe or pervasive standard, as the standard's bounds and specifics of application remain elusive and, this Note argues, will continue to disproportionately disfavor plaintiffs by allowing continued reliance on outdated precedent.

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108. *See supra* Part I.B.3.

109. *See, e.g.*, Novak v. Gjerde & Pederson, No. 19HA-CV-20-314, 2020 WL 7296627 (D. Minn. Oct. 21, 2020); Casanova v. Tri-Cnty. Cmty. Corr., No. 60-CV-18-2160, 2020 WL 4280999 (Minn. Ct. App. July 27, 2020); Enerwise Power Sol. Corp. v. Renewable Energy Fund, LLC, No. 27-CV-19-7420, 2020 WL 6882791 (D. Minn. Sep. 25, 2020).

110. *See* Scott Brister, *The Decline of Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 209 (2005) ("While estimates vary, some estimate that the marginal cost of each jury trial is ten times that of each bench trial.").

111. *See supra* Part I.B.; *see also* Williams et al., *supra* note 31, at 145–47 (arguing that in order to interrupt the "infinite regression of anachronism" which has unjustly limited access to juries by sexual harassment plaintiffs, and in light of the updated conceptions of workplace norms following the #MeToo movement, "[e]ven judges who felt confident that they knew what was reasonable in the past should not assume they know what Americans believe is reasonable today. Those judges should be more inclined to let juries decide what's reasonable now").

The *Kenneh* court stated that "[o]ur use of the 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."[112] Yet, retaining the standard means that courts will continue to cite the federal law which established it and the state cases which adopted it, as the Minnesota Supreme Court itself did in *Kenneh*.[113] Additionally, though the *Kenneh* court specifically overruled the application of the severe or pervasive standard in one Minnesota Court of Appeals case,[114] and wrote disapprovingly of statements made in several others,[115] its attempt to clarify the standard's application, in discussing Title VII as well as MHRA claims, fails to provide explicit guidance to lower courts as to which previous interpretations to disregard and which to embrace.

California's recent sexual harassment cases support the hypothesis that the Minnesota Supreme Court's retention of the severe or pervasive standard will result in similar application as before the *Kenneh* clarification, and lower courts will continue to cite to the outdated case law that *Kenneh* discouraged. The California legislature's approach to updating its sexual harassment law, by amending the law to clarify the intended application of the severe or pervasive standard and cautioning courts against disposing of sexual harassment cases on summary judgment, is similar to *Kenneh*'s approach, but is more specific.[116] Whereas *Kenneh* only explicitly overrules a portion of a previous case,[117] the California legislation attempted to set firm boundaries on the standard for courts by endorsing the reasoning of three different decisions, and rejecting two others.[118]

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112. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 230–31 (Minn. 2020).

113. *See id.* at 229, 231 (discussing the development of the severe or pervasive standard in federal Title VII law and the adoption of the standard in Minnesota).

114. *Id.* at 231 n.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.").

115. *Id.* at 231 ("Today, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside as an 'unsuccessful pursuit of a relationship,' or 'boorish, chauvinistic and decidedly immature . . . .'") (citing Geist-Miller v. Mitchell, 783 N.W.2d 197, 203 (Minn. Ct. App. 2010); Duncan v. Gen. Motors Corp., 300 F.3d 928, 935 (8th Cir. 2002); McMiller v. Metro, 738 F.3d 185, 188–89 (8th Cir. 2013)).

116. CAL. GOV'T CODE § 12923 ("The Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision Kelley v. Conco Companies (2011) 196 Cal.App.4th 191.").

117. *Kenneh*, 944 N.W.2d at 231.

118. The law states, in part:

Yet, despite those specific boundaries, it is not clear that lower courts have updated their application of the severe or pervasive standard to hostile work environment sexual harassment claims or interrupted the "infinite regression of anachronism" that has developed out of the federal law.[119] For example, in the 2019 case *Jernigan v. Southern California Permanente Medical Group*, a California trial court evaluated a state law hostile work environment claim after the updated legislation's enactment.[120] In its hostile work environment analysis which culminated in granting summary judgment to the employer, the court cited *Lewis v. City of Benicia*, which cites to *Kelley v. The Conco Companies*, one of the cases explicitly disapproved of in the sexual harassment legislation.[121] The case also cites to *Fuentes v. AutoZone, Inc.* in supporting its decision, a case which cites to the United States Supreme Court's majority opinion in *Harris v. Forklift Systems*, contrary to the California legislature's endorsement of Justice Ruth Bader Ginsburg's concurrence.[122] In doing so, the trial court avoided

> [T]he Legislature affirms its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in *Harris v. Forklift Systems* (1993) 510 U.S. 17 that in a workplace harassment suit "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job." (Id. at 26) . . . . A single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment. In that regard, the Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in *Brooks v. City of San Mateo* (2000) 229 F.3d 917 and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act . . . .[T]he Legislature affirms the decision in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 in its rejection of the 'stray remarks doctrine.' . . . In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties. The Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision *Kelley v. Conco Companies* (2011) 196 Cal.App.4th 191. Harassment cases are rarely appropriate for disposition on summary judgment. In that regard, the Legislature affirms the decision in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 and its observation that hostile working environment cases involve issues 'not determinable on paper.'"

CAL. GOV'T CODE § 12923.

119. *See supra* Part I.B.2.

120. Jernigan v. S. Cal. Permanente Med. Grp., Inc., No. BC703698, 2019 Cal. Super. LEXIS 12827 (Cal. Sup. Dec. 6, 2019).

121. *Id.* at *8; Lewis v. City of Benicia, 224 Cal. App. 4th Supp. 1519, 1525 (Cal. Ct. App. 2014); CAL. GOV'T CODE § 12923.

122. *Jernigan*, 2019 Cal. Super. LEXIS 12827, at *8; CAL. GOV'T CODE § 12923; Fuentes v. AutoZone, Inc., 200 Cal. App. 4th Supp. 1221, 1227 (Cal. Ct. App. 2011).

citing directly to the particular cases forbidden by the updated legislation, but because it was applying the severe or pervasive standard, it continued to cite to the line of cases which have established the narrowed standard over time.[123]

Jackson v. Pepperdine University, a 2020 case, also demonstrates the manner in which California courts continue to treat the federal severe or pervasive standard and the "updated" state standard in substantially the same way.[124] In the case, the court explicitly discussed whether its analysis would differ based on the recent California legislation because whether that legislation would be retroactive was in dispute.[125] The court did not address the retroactivity issue, determining that "both before and after its enactment, the totality of the circumstances Jackson alleged do not reflect conduct sufficiently severe to constitute actionable sexual harassment."[126] The court acknowledged its inability under the legislation to rely on certain precedent, but concluded that the formulation of a court's inquiry into what constitutes a hostile work environment under the new legislation is "extremely similar" to that established by earlier case law.[127]

These post-legislation California cases demonstrate that, because the severe or pervasive standard originated in Title VII law and has permeated sexual harassment cases in both federal and state contexts, it is unlikely that it can shake its origins and history and be applied in a new and unique manner to state Human Rights Act hostile work environment claims. The early embodiment of this minimally altered application of the severe or pervasive standard in Minnesota is seen in the *Schroeder* case discussed above.[128] In *Schroeder*, the district court wrote that the elements of a Title VII and an MHRA hostile work environment sexual harassment claim are the same, and confirmed that under both types of claims, the court analyzes the harassing conduct under the severe or pervasive standard.[129] *Schroeder*'s side-by-side application of the standard to federal and state claims thus demonstrates the risk that courts will brush aside the *Kenneh* court's direction that, "[i]n Minnesota, the standard must evolve to reflect changes in societal attitudes

123. *See supra* Part I.B.2.

124. Jackson v. Pepperdine Univ., No. B296411, 2020 WL 5200946, at *1–10 (Cal. Ct. App. Sept. 1, 2020).

125. *Id.* at *1.

126. *Id.* at *2.

127. *Id.* at *9.

128. Schroeder v. Axel H. Ohman, Inc., No. 19-1836 (MJD/TNL), 2021 WL 396779 (D. Minn. Feb. 4, 2021).

129. *Id.* at *5.

towards what is acceptable behavior in the workplace,"[130] and instead continue to apply the standard in the same pre-*Kenneh* way, citing the precedent that the *Kenneh* court hoped to evolve beyond.[131]

This risk of federal courts engaging in joint Title VII and MHRA sexual harassment hostile work environment analyses that fail to acknowledge any unique qualities of the severe or pervasive standard under Minnesota law is especially true as the Eighth Circuit, just a few months prior to *Kenneh*, retained the severe or pervasive standard in *Paskert v. Kemna-ASA Auto Plaza, Inc.*, "doubling down on the notion that the severe or pervasive standard sets a tremendously 'high threshold,' at least in federal courts applying federal law in this jurisdiction."[132] With the United States Supreme Court subsequently denying Paskert's petition for certiorari, the severe or pervasive standard remains ensconced in federal law and the federal cases pose a danger of continuing to inform state precedent through side-by-side Title VII and MHRA hostile work environment analyses.[133]

D. Recommendations for Further Change

Because of the continuing lack of clarity and risk of confusing influence of federal precedent, as well as state precedent that relied on federal law, the Minnesota Supreme Court or Minnesota state legislature should reject the severe or pervasive standard and adopt a new standard in order to increase the ability of plaintiffs to have a meaningful opportunity for justice when bringing sexual

130. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231 (Minn. 2020).

131. The difficulty of applying an "evolved" or "expanded" standard by trial courts has been demonstrated in disability law. In 2008, Congress passed the Americans with Disabilities Act Amendments Act [ADAAA], which "explicitly disavow[ed] the reasoning of the four Supreme Court decisions that narrowed the scope of the [Americans with Disabilities Act]'s disability definition." Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2042–43 (2013). However, while the "ADAAA emphasizes that the definition of disability should be broadly construed and clarifies and expands the definition's meaning in several ways," there is some evidence that courts have continued to interpret the definition of disability in a less-than-expansive way, thus mitigating the increase in plaintiff-friendly outcomes intended by the ADAAA. *Id.* at 2042–43, 2066–68.

132. Engelmeier & Tabery, Paskert *and* Kenneh, *supra* note 97, at 25 (citing Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535 (8th Cir. 2020)).

133. Michael Angell, *High Court Won't Weigh in on Bar for Sex Harassment Claims*, LAW360 (Dec. 7, 2020), https://www.law360.com/articles/1335107/print?section=appellate [https://perma.cc/86JH-5UVV]; *see also* Engelmeier & Tabery, *Severe or Pervasive?*, *supra* note 22 ("Minnesota state law cases are invaded by the 8th Circuit's standard.").

harassment claims under the MHRA. One option for this rejection and adoption of a new standard would be to build on California's approach. California's legislation "affirm[ed] its approval" for Justice Ruth Bader Ginsburg's standard proposed in her concurrence in *Harris v. Forklift Systems*, that a plaintiff in a hostile work environment sexual harassment case must prove "that a reasonable person subjected to the discriminatory conduct would find . . . that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'"[134] However, instead of solely "affirming" that standard, either the Minnesota Supreme Court or legislature should explicitly denounce the severe or pervasive standard and replace it with Ginsburg's.

Based on the *Kenneh* court's reluctance to overturn precedent, particularly in the realm of statutory interpretation, this replacement of the severe or pervasive standard would ideally be enacted by the state legislature.[135] Because the MHRA does not actually contain the words "severe or pervasive,"[136] this legislation would likely take the form of amending the MHRA to denounce the severe or pervasive standard and related precedent and to insert the new standard, as proposed in a previous bill.[137]

However, if the legislature fails to act, the replacement of the standard by the Minnesota Supreme Court is possible and justified. As noted, the severe or pervasive standard is not codified in the MHRA, and was not expressly adopted by the Minnesota Supreme Court as the standard for interpreting hostile work environment sexual harassment cases until 2013.[138] Thus the court would not be overturning any statutory language but instead would overturn the case which adopted that standard for interpreting the statute.[139] Though the *Kenneh* court expressed a desire to maintain stability

134. CAL. GOV'T CODE § 12923 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

135. *Kenneh*, 944 N.W.2d at 230 ("[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.") (citing Schuette v. City of Hutchinson, 843 N.W.2d 233, 238 (Minn. 2014)).

136. Minnesota Human Rights Act, MINN. STAT. § 363A.03 (2020).

137. H.F. 4459, 90th Leg., Reg. Sess. (Minn. 2018) ("An intimidating, hostile, or offensive environment under paragraph (a), clause (3), does not require the harassing conduct or communication to be severe or pervasive.").

138. Brief for Emp. Law. Ass'n Upper Midwest, et al. as Amici Curiae Supporting Appellant, Kenneh v. Homeward Bound, Inc., (No. A18-0174), 2018 WL 5111128, at *3 (Minn. Ct. App. May 17, 2018) (citing Rasmussen v. Two Harbors Fish Co., 832 N.W.2d 790, 796–97 (Minn. 2013)).

139. *Id.*

in the law under stare decisis,[140] it failed to mitigate the inconsistency and instability of the law it was choosing to retain, instead making the contradictory suggestion that the standard must evolve.[141] As this Note has argued, maintaining the standard with its inconsistent and frequently offensive precedent for the sake of stability, while also modernizing with society, poses the risk both of continued inconsistency and lack of evolution as applied in the lower courts.[142] As the Minnesota Supreme Court has previously stated, "[s]tare decisis promotes stability in the law, but it 'does not bind [the court] to unsound principles.'"[143] The severe or pervasive standard has proven to be "unsound," and rejecting it can better serve the public policy of the MHRA of protecting employees against harm and promoting workplace safety and equality.[144] Further, like in New York, where the state legislature subsequently enacted a law following that new court-adopted standard,[145] the Minnesota Supreme Court's replacement of the severe or pervasive standard in the next hostile work environment sexual harassment case may

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140. The Court of Appeals of Minnesota recently defined the doctrine of stare decisis as:

> [A] foundation stone of the rule of law that instructs appellate courts to stand by yesterday's decisions. Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. "The doctrine of stare decisis directs us to adhere to our former decisions in order to promote the stability of the law and the integrity of the judicial process." Adherence to the principle of stare decisis promotes the important values of "stability, order, and predictability."

State v. Ahmed, No. 19-1222, 2020 Minn. App. LEXIS 266, at *4–5 (Minn. Ct. App. Apr. 6, 2020).

141. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231 (Minn. 2020).

142. *See supra* Part II.C.

143. Cargill, Inc. v. Ace Am. Ins. Co., 784 N.W.2d 341, 352 (Minn. 2010) (citing Oanes v. Allstate Ins. Co., 617 N.W.2d 401, 406 (Minn. 2000)).

144. *See* Brief for Emp. Law. Assoc. Upper Midwest, et al. as Amici Curiae Supporting Appellant, Kenneh v. Homeward Bound, Inc., No. A18-0174, 2018 WL 5111128, at *9 (Minn. Ct. App. May 17, 2018) ("The public policy underlying the MHRA sexual harassment prohibition has been highlighted on a national scale in recent months. Sexual harassment remains prevalent in the American workplace and remains a substantial hurdle for working women. Minnesota Department of Human Rights Commissioner Kevin Lindsey recently . . . cited a 2016 Equal Employment Opportunity Commission report stating that 85% of women report having suffered sexual harassment on the job. Sexual harassment is not isolated or rare but has rather been a hidden epidemic. The public policy underlying the MHRA's prohibition of sexual harassment has not been served by the Court's insertion of the 'severe or pervasive' standard into its definition." (internal citations omitted)). *Contra Kenneh*, 944 N.W.2d at 230 ("Homeward Bound argues that, because the Legislature has recently shown an interest in redefining sexual harassment, we must exercise judicial restraint.").

145. *See supra* Part I.C.1; N.Y. Sess. A8421 (N.Y. 2019).

provide the needed support for the state legislature to pass associated legislation amending the MHRA to incorporate the new standard.

Conclusion

The Minnesota Supreme Court took an initial step to increase the opportunity for justice for victims of workplace sexual harassment in *Kenneh v. Homeward Bound Inc.*, specifically in its warning to lower courts about granting summary judgment to defendant employers and depriving plaintiffs of a jury trial. However, this step is ultimately insufficient for Minnesotans seeking protection under the MHRA. In order to truly break free from the current sexual harassment precedent, which has disproportionately burdened plaintiffs, the Minnesota legislature or Minnesota Supreme Court should adopt a new standard for hostile work environment sexual harassment claims. Combined with *Kenneh*'s summary judgment holdings, this new standard can set Minnesota apart from the federal law that has harmed victims, and better fulfill the MHRA's policy goals of protecting the civil right of discrimination-free employment for all Minnesotans.[146]

146. Minnesota Human Rights Act, MINN. STAT. § 363A.02 (2020).