

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

BOBBETTE M. BLAKE,
Petitioner,

v .

MJ OPTICAL INC.,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the District Court and the Eighth Circuit erred by imposing on plaintiff the element of “reporting sexual harassment” to management rather than considering the “reporting harassment” as part of the employer’s affirmative defense in *Faragher Ellerth*, which is available only to those employers who have anti-harassment policies and procedures in place.

Whether the District Court and the Eighth Circuit erred by concluding that Ms. Blake was required to report any harassment by the Vice President of Operations who was the highest-ranking management member present at the Company premises on a daily basis.

Whether the District Court and the Eighth Circuit erred by concluding that Ms. Blake’s failure to report sexual harassment by the Vice President of Operations constituted an “invitation” where the Company had neither a Company policy or Handbook providing guidance on reporting such harassment or a Human Resources Department or representative.

PARTIES TO THIS PROCEEDING

The only two parties to this proceeding are identified in the case caption on the cover.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bobbette Blake ("Ms. Blake") respectfully petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion is available at 870 F.3d 820 (8th Cir. 2017). On September 14, 2017, Ms. Blake petitioned the Eighth Circuit for a rehearing *on banc*, which the Court denied in an unreported opinion on October 18, 2017. The opinion of the United States District Court for the District of Nebraska is unreported but is available at 2016 WL 335919 (D. Neb., April 13, 2016). The District Court's opinion on Ms. Blake's motion for rehearing is unreported but available at 2016 WL 3349225 (D. Neb., June 15, 2016).

JURISDICTION

The Eighth Circuit filed its Per Curiam Opinion and Judgment on August 31, 2017. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. §1331

28 U.S.C. §1367

42 U.S.C. § 2000e-2 *et. seq*

42 U.S.C. § 621, *et. seq*

48-1101 *et seq* (2007)

Neb. Rev. Stat. 48-1001 *et seq*

STATEMENT

Bobbette M. Blake (“Ms. Blake”) filed her complaint against MJ Optical, Inc. (“MJ”) in the United States District Court for the District of Nebraska alleging violations of 42 U.S.C. § 2000e-2 *et. seq.* 42 U.S.C. § 621, *et. seq.* The District Court had federal question jurisdiction over Ms. Blake’s age and sex discrimination and harassment claims pursuant to 28 U.S.C. §1331. The District Court had supplemental jurisdiction over Ms. Blake’s claims under the Nebraska Fair Employment Practices Act (“NFEPA”), Neb. Rev. Stat. §§ 48-1001 *et seq.*, 48-1101 *et seq* (2007), pursuant to 28 U.S.C. §1367.

After discovery, MJ Optical filed its motion for summary judgment on all claims. Ms. Blake opposed MJ Optical’s motion. On April 13, 2016, the United States District Court for the District of Nebraska, Hon. Richard G. Kopf, issued an order of final judgment granting MJ Optical’s Motion for Summary Judgment. The Clerk of Court entered judgment the same day. Ms. Blake timely filed a Motion for Reconsideration on May 11, 2016, which the District Court denied on June 15, 2016. Ms. Blake timely appealed from the final decision of the District Court, filing her Notice of Appeal on July 12, 2016.

The Eighth Circuit affirmed the District Court’s decision on all grounds on August 31, 2017. The Eighth Circuit ignored well-established principles of employment discrimination and analysis of sexual harassment claims. In its decision, the Eighth Circuit determined that Ms. Blake, through her conduct, invited her harasser’s actions. (Opinion of Riley, Circuit Judge, Appendix at p. 14)

The conduct by her harasser, MJ Optical’s Vice President of Operations, was well-established and confirmed by the Eighth Circuit: ¹

¹ Opinion of Riley, Circuit Judge, Appendix at p. 14. For a more detailed account, *see* Memorandum and Order of Federal District Court for District of Nebraska Granting Summary Judgment, Appendix at pp.

- (1) *weekly* grab and smack Ms. Blake's butt;
- (2) *visually and verbally* appraised the size of her nipples;
- (3) *regularly* comment that she needed to have sex with a man to improve her disposition; and
- (4) *daily and publicly* tell her that he was only keeping her on the job to watch her die.

The Eighth Circuit found that Ms. Blake invited Marty's harassment by citing the following conduct:

- (1) Ms. Blake knew her harasser and her harasser knew her for 40 years (Opinion of Riley, Circuit Judge, Appendix at p. 16);
- (2) Ms. Blake kept her job at MJ Optical for nearly fifteen years after Marty started harassing her (Opinion of Riley, Circuit Judge, Appendix at p. 17);
- (3) Ms. Blake did not verbally tell Marty that he should stop his actions and she did not complain to his mother, Mary Hagge who was the Company President but not in the office on a daily basis. (Opinion of Riley, Circuit Judge, Appendix at p. 17);
- (4) Ms. Blake interacted with Marty outside of work at two (2) social functions during her fifteen (15) year period of employment (Opinion of Riley, Circuit Judge, Appendix at p. 16);

- (5) When Marty said, “I love you” to Ms. Blake, she would jokingly respond by saying, “Yeah, yeah, I love you, too Marty.” (Opinion of Riley, Circuit Judge, Appendix at p. 17)
- (6) Ms. Blake that on one occasion she placed her hand on Marty’s back, between his shoulders (Opinion of Riley, Circuit Judge, Appendix at p. 17); and
- (7) Marty claimed he did not know it was wrong to sexually assault and harass Ms. Blake and thought that his harassment of Ms. Blake was funny and nice (Opinion of Riley, Circuit Judge, Appendix at p. 17).²

Ms. Blake’s conduct was and is not comparable to the type and level of conduct described in the cases relied on by Eighth Circuit for its conclusion that Ms. Blake “invited” her harasser’s sexual and age-based harassment. There is no evidence even suggesting Ms. Blake ever carried on any consensual sexual relationship whatsoever with Marty. *See* Opinion of Riley, Circuit Judge, Appendix at p. 16, *citing Souther v. Posen Constr., Inc.*, 523 F. App’x 352, 355 (6th Cir. 2013) (unpublished). In *Souther*, the parties had a long term consensual, sexual relationship. *Id.*

Second, Ms. Blake never engaged in reciprocal harassing behavior like her harasser. *See* Opinion of Riley, Circuit Judge, Appendix at p. 15, *citing Scuza v. Nestle U.S.A. Co.*, 181 F.3d 958, 962, 966 (8th Cir. 1999) (deciding there was insufficient proof of unwelcome harassment where the plaintiff “engaged in behavior similar to that which she claimed was unwelcome and offensive.”).

Third, there is no evidence Ms. Blake ever touched Marty in any intimate area of his body or made any comment about his body. *See Carr v. Allison Gas Turbine Div.*,

² Marty’s subjective understanding or belief regarding his conduct has no bearing on any issue relating to Ms. Blake’s purported invitation. She was under no obligation whatsoever to “educate” her harasser.

General Motors Corp., 32 F.3d 1007, 1011 (7th Cir. 1994) (plaintiff's use of profanity, casual attitude toward pornography and touching harasser's thigh could not be used to justify harasser's conduct).

Ms. Blake requested a rehearing *en banc*, which the Eighth Circuit denied on October 18, 2017.

REASONS FOR GRANTING THE WRIT

Bobbette Blake seeks review on certiorari based on considerations stated in Rule 10(a) to the SUP. CT. R. 10(A). The Eighth Circuit has departed from, or sanctioned the departure by the District Court of Nebraska's departure from the "accepted and usual course of judicial proceedings and calls for an exercise of this Court's supervisory power[.]" (*Id.*)

- 1. The Eighth Circuit Imposed A New Element for Plaintiffs Alleging A Hostile Work Environment By Requiring The Victimized Employee Report Harassing Conduct to Management— Rather Than Considering The "Reporting Harassment" Element As Part Of The Employer's Affirmative Defense In Faragher Ellerth, Which Is Available Only To Those Employers Who Have Anti-Harassment Policies And Procedures In Place.**

Ms. Blake's case presents a garbled analysis of her hostile work environment case because contrary to case law in this Court and other circuits, the Eighth Circuit considered "reporting to management" an element of a victimized employee's case. In so doing, the Eighth Circuit departed from well-established case law on two issues: (1) Courts consider reported and unreported incidents of harassment; and (2) the reporting of alleged harassment is properly considered part of the employer's affirmative defense pursuant to the doctrine established by this Court in *Faragher-Ellerth*. *Faragher v. City of Boca Raton*, 118 S.Ct. 2275 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

In this instance, the Eighth Circuit refused to consider in Ms. Blake's harassment case those unreported instances of harassment *Compare Anda v. Wickes Furniture Co., Inc.* 517 F.3d 526, 534 (8th Cir. 2008) (stating that with respect to "the unreported incidents of sexual harassment, Anda did

not provide sufficient probative evidence to raise a material question of fact as to whether Wickes knew or should have known about the incidents and failed to take prompt and effective remedial action”) with *Distaso v. Perkin Elmer Corp.* 157 F.3d 55, 62 (2d Cir. 1998). In *Distasio*, the Second Circuit held:

While the fact that a complaint was unreported may be relevant in considering whether an employer had knowledge of the alleged conduct, an employer is not necessarily insulated from Title VII liability simply because a plaintiff does not invoke her employer's internal grievance procedure if the failure to report is attributable to the conduct of the employer or its agent. *See, e.g., Meritor [Sav. Bank, FSB v. Vinson, 477 U.S. 57,] 72, Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1180-81 (2d Cir.1996).*

Distasio, 157 F.3d at 62. *See also Madray v. Publix Supermarkets Inc.*, 208 F.3d 1290, 1299-1300 (11th Cir. 2000) (stating that an employer has “established that when one of the delineated ‘appropriate Company representatives’ was contacted regarding harassment, it then had been given notice sufficient to obligate it to make a prompt corrective response.”) *citing Coates v. Sundor Brands*, 164 F.3d 1361, 1364 (11th Cir.1999) (per curiam) (noting that when an employer's sexual harassment policy clearly specifies the steps an employee should take to alert the employer of sexual harassment, the employer has, by the policy, “itself answered the question of when it would be deemed to have notice of the harassment sufficient to obligate it or its agents to take prompt and appropriate remedial measures”).

In Ms. Blake’s case, the Eighth Circuit protested in a footnote that “[its] hostile work environment cases ***do not yet*** recognize any bright-line rule requiring a plaintiff to have reported the alleged harassment to management in

order to prove conduct was unwelcome.” (emphasis added.) The Eighth Circuit conceded that it “create[d] no such rule here, either—to the extent the district court’s decision suggested otherwise, it was wrong (or at least premature).” (Opinion of Riley, Circuit Judge, Appendix at p. 18, n. 13.) Nonetheless, the Eighth Circuit decision is premised on precisely this proposition. Ms. Blake’s case was “too little, too late.” (Opinion of Riley, Circuit Judge, Appendix at p. 18.)

2. The Eighth Circuit Erred By Requiring Ms. Blake To Report Any Harassment By The Vice President Of Operations Who Was The Highest-Ranking Management Member Present At The Company Premises On A Daily Basis.

Both the District Court and the Eighth Circuit recite the noncontroversial proposition that when the alleged harasser is a non-supervisor, an employee must demonstrate “that the employer knew or should have known about the harassment and failed adequately to address it.” (Opinion of Riley, Circuit Judge, Appendix at p. 15.) Even though the Eighth Circuit acknowledged, “Those elements are not in play here, as [Ms. Blake’s harasser] was a supervisor,” the Eighth Circuit’s analysis is premised on the fact that Ms. Blake did not report unwelcome conduct to MJ Optical management and that fact was fatal to her claim. The analysis of this issue raises a paradoxical question: To whom would the Eighth Circuit have Ms. Blake report the Vice President of Operations’ conduct?

This analysis is inconsistent with this Court’s holding in *Meritor*. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, (1986). The *Meritor* Court was unwilling to provide a definitive rule on the issue of vicarious liability but rejected the two most extreme positions: (1) “that employers are always automatically liable for sexual harassment by their supervisors,” *Meritor*, 477 U.S. at 72, (citing Restatement

(Second) of Agency §§ 219-237), and (2) that "absence of notice to an employer ... necessarily insulate[s] that employer from liability." *Id.* (citing Restatement (Second) of Agency §§ 219-237 (1958)). The *Meritor* decision requires an examination of traditional principles of agency law in deciding whether an employer is liable for the harassing conduct of one of its employees.

Thus, the law in other circuits holds that employers are liable for an abusive work environment created by a supervisor if the supervisor uses his authority to further the harassment or is aided in accomplishing his harassment because of his agency relationship with the employer. *Torres v. Pisano*, 116 F.3d 625, 634 (2d Cir. 1997).

The Eighth Circuit did not bother with agency analysis, principally because it seemed to confuse an employer's elements under the *Faragher Ellerth* affirmative defense instead of concerning itself the plaintiff's requirements in stating an actionable harassment case. See *McCurdy v. Arkansas State Police*, 375 F.3d 762, 775-76 (8th Cir. 2004) ("Under the *Ellerth / Faragher* rubric, an employer is vicariously liable for a supervisor's actionable hostile environment sexual harassment of an employee ***unless the employer can prove both elements*** of the one and only affirmative defense now permitted by the Court.") (Melloy, J., dissenting) (emphasis added). See also *Indest v. Freeman Decorating, Inc.*, 168 F.3d 795, 796 (5th Cir.1999).

The Eighth Circuit required Ms. Blake to demonstrate that she reported the harassment to management, which was not her burden. Instead, the Eighth Circuit turned the *Faragher Ellerth* affirmative defense on its head, requiring ignoring she had no duty to establish that her employer knew or should have known about the harassment she suffered by reporting it to management. The principal problem, however, is Ms. Blake's harasser was the Vice President of Operations – the highest-ranking management member regularly on site. Management knew, the employer knew, and imposing a futile requirement of reporting the conduct to "management," is inconsistent with legal analysis

of any claim. The Eighth Circuit has recognized for more than a century that “The law never requires a thing to be done which is both useless and foolish.” *Grier v. Tucker*, 150 F.658, 661 (8th Cir. 1907).

3. Whether The District Court And The Eighth Circuit Erred By Concluding That Ms. Blake’s Failure To Report Sexual Harassment By The Vice President Of Operations Constituted An “Invitation” Where The Company Had Neither A Company Policy Or Handbook Providing Guidance On Reporting Such Harassment Or A Human Resources Department Or Representative.

Both the Eighth Circuit and the District Court effectively ignored Ms. Blake’s argument that MJ Optical had no written harassment or reporting policy. In a footnote, the Eighth Circuit commented that it was “unwise (even for a small, family-run company like MJ Optical),” not to have such reporting procedures in place. (Opinion of Riley, Circuit Judge, Appendix at p. 18.) Even though Ms. Blake’s harasser was the Vice President of Operations, the Eighth Circuit imposed on Ms. Blake a duty to report the unwelcome conduct, while claiming it was “creat[ing] no such rule here.”

In affirming the District Court, the Eighth Circuit Court of Appeals ignored this Court’s precedent, its own precedent, and that of other circuits. In *Hochhalter v. Stephens Group, Inc.* 276 Fed. Appx. 683, 685 (9th Cir. 2008), the Ninth Circuit summarized this Court’s *Ellerth* decision follows “[A]n employer is not entitled to the defense unless the employee unreasonably failed to utilize the corrective measures offered by the company’s antiharassment policy.” There is no question, and the Eighth Circuit acknowledged that MJ Optical had no anti-harassment policies, or even a Human Resources Department. Nonetheless, the Eighth Circuit effectively gave MJ the benefit of the *Faragher*

Ellerth affirmative defense when it found Ms. Blake's claim was defeated by her failure to report the unwelcome conduct to her employer's management.

Unless certiorari is granted, the Eighth Circuit will continue to ignore controlling precedent, thus subjecting Eighth Circuit, and District of Nebraska litigants to an erroneous standard for determining sexual harassment giving rise to a hostile work environment. The Eighth Circuit departed from this Court's controlling precedent by merely paying lip service to the principle that, there is no requirement for a plaintiff to report harassment to management in order to prove conduct was unwelcome while holding that the undeniable knowledge of Ms. Blake's harasser, the Vice President of Operations, failed to put the Company on notice that the continual acts of harassment were objectionable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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