

No. 17-1015

**In The
Supreme Court of the United States**

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BOBBETTE M. BLAKE,

Petitioner,

v.

MJ OPTICAL INC.,

Respondent.

—————◆—————
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

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**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

—————◆—————
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QUESTION PRESENTED

Whether the District Court and the Eighth Circuit properly found that Petitioner failed to present evidence of “unwelcome” conduct sufficient to survive summary judgment on a hostile work environment claim.

CORPORATE DISCLOSURE STATEMENT

Respondent MJ Optical, Inc. is a privately held company with no parent corporation and states that no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES.....	v
STATUTES AND RULES INVOLVED	vi
STATEMENT OF THE CASE.....	1
A. Petitioner Had a Working and Social Relationship With the Alleged Harasser and His Family for Over Forty Years Without Ever Expressing Any Problem With His Conduct.....	1
B. Petitioner Resigned from MJ Optical For Reasons Unrelated to the Alleged Harassment.....	2
C. The Eighth Circuit Correctly Concluded that Petitioner Did Not Meet Her Burden of Proof and Her Claims Must Fail as a Matter of Law	3
REASONS FOR DENYING CERTIORARI	4
I. PETITIONER MISSTATES AND MISCONSTRUES THE EIGHTH CIRCUIT'S OPINION	5
A. The Eighth Circuit Did Not Impose an Element Requiring Reporting of Alleged Harassment.....	5
B. Neither the District Court nor the Eighth Circuit Ever Made a Finding That Petitioner “Invited” Harassing Conduct.....	8

TABLE OF CONTENTS – Continued

	Page
II. PETITIONER ERRONEOUSLY ARGUES THE EIGHTH CIRCUIT MISAPPLIED THE <i>ELLERTH-FARAGHER</i> AFFIRMA- TIVE DEFENSE, WHICH IS NOT AT IS- SUE IN THIS CASE AND WAS NOT DISCUSSED BY THE EIGHTH CIRCUIT....	9
III. THE EIGHTH CIRCUIT’S DECISION WAS CORRECT.....	10
CONCLUSION.....	11

TABLE OF AUTHORITIES

	Page
CASES	
<i>Ammons-Lewis v. Metro. Water Reclamation Dist. of Greater Chi.</i> , 488 F.3d 739 (7th Cir. 2007)	6
<i>Bales v. Wal-Mart Stores, Inc.</i> , 143 F.3d 1103 (8th Cir. 1998).....	7
<i>Beach v. Yellow Freight Sys.</i> , 312 F.3d 391 (8th Cir. 2002)	7
<i>Burlington Industries, Inc. v. Ellerth</i> , 524 U.S. 742 (1998)	9
<i>Crawford v. BNSF Ry. Co.</i> , 665 F.3d 978 (8th Cir. 2012)	9
<i>Faragher v. City of Boca Raton</i> , 524 U.S. 775 (1998).....	9
<i>Jenkins v. Univ. of Minn.</i> , 838 F.3d 938 (8th Cir. 2016)	8
<i>Meritor Sav. Bank, FSB v. Vinson</i> , 477 U.S. 57 (1986).....	6
<i>Quick v. Donaldson Co.</i> , 90 F.3d 1372 (8th Cir. 1996)	6
<i>Ryan v. Capital Contractors, Inc.</i> , 679 F.3d 772 (8th Cir. 2012).....	5
<i>Scusa v. Nestle U.S.A. Co.</i> , 181 F.3d 958 (8th Cir. 1999)	6
<i>Sellers v. Deere & Co.</i> , 791 F.3d 938 (8th Cir. 2015)	5

TABLE OF AUTHORITIES – Continued

	Page
<i>Souther v. Posen Constr., Inc.</i> , 523 F. App’x 352 (6th Cir. 2013).....	6
<i>Stuart v. General Motors Corp.</i> , 217 F.3d 621 (8th Cir. 2000).....	7
<i>Williams v. Herron</i> , 687 F.3d 971 (8th Cir. 2012)	7

STATUTES AND RULES INVOLVED

28 U.S.C. § 1331
28 U.S.C. § 1367
42 U.S.C. §§ 2000e <i>et seq.</i>
Neb. Rev. Stat §§ 48-1001 <i>et seq.</i>
Sup. Ct. R. 10

STATEMENT OF THE CASE

This petition involves an appeal from the District Court's grant of summary judgment to Respondent MJ Optical, Inc. ("MJ Optical") on Petitioner Bobbette M. Blake ("Petitioner")'s claims of hostile work environment and discrimination, based on both gender and age. The Eighth Circuit affirmed the District Court's ruling. Petitioner appeals only her claim of hostile work environment based on gender.

A. Petitioner Had a Working and Social Relationship With the Alleged Harasser and His Family for Over Forty Years Without Ever Expressing Any Problem With His Conduct.

Petitioner worked at MJ Optical and its predecessor, a family-owned and operated store, for a combined 40 years. (Petitioner Appendix ("App.") at 6). Petitioner knew Martin Hagge ("Marty") from the time he was 12 and she was in her thirties – a relationship spanning her 40-year career at MJ Optical. (*Id.*). At the time of Petitioner's resignation, Marty worked as a Vice President of MJ Optical and reported to his mother, the President of MJ Optical. (*Id.*). Petitioner and Marty had a "good" relationship that sometimes extended outside the workplace. For example, Petitioner attended Marty's daughter's wedding, Marty took college courses with Petitioner's grandson, and Petitioner introduced Marty to her pastor after Marty lent Petitioner's church a hog cooker. (App. at 6; 24 ¶ 4).

Although Petitioner alleges that Marty would frequently pat Petitioner's bottom, Petitioner admits she never complained of that conduct, nor did Petitioner ever tell Marty to stop. (App. at 24, ¶¶ 5, 7). Petitioner also alleged Marty would occasionally make comments to Petitioner that she "needed a man" or that her disposition would improve if she "had a man." (App. at 25, ¶ 8). Petitioner likewise never complained to anyone, including Marty, about these comments. (App. at 25, ¶ 9). Petitioner alleges that on one occasion, Marty commented on Petitioner's breasts, prompting Petitioner to purchase padded undergarments. (App. at 7; 25, ¶ 9). When Petitioner asked Marty why he was "keeping her around," Marty would respond that it was so he could "watch her die." (App. at 25, ¶ 11). Petitioner admitted to their jesting tone and never complained to anyone, including Marty, about Marty's comments. (*Id.*).

Even after the alleged harassing conduct occurred, Petitioner and Marty would say "I love you" to each other, Petitioner would touch Marty on the back between his shoulders, and Petitioner would joke around with Marty. (App. at 8; 24, ¶ 6).

B. Petitioner Resigned from MJ Optical For Reasons Unrelated to the Alleged Harassment.

Petitioner resigned from MJ Optical on May 15, 2013, a few days after a problem arose with eyeglass frames being ruined and Petitioner being asked to perform alternate work while the framing issue was

assessed. (App. at 26-27, ¶¶ 14-19). Petitioner alleged that when she attempted to perform her work again, Marty lost his temper and yelled at her. (App. at 27, ¶ 17). Petitioner immediately sought out Mary Hagge, the president of MJ Optical and Marty's mother, to discuss Marty's anger. (App. at 8; 27, ¶ 18). Petitioner resigned because she was afraid of Marty's anger issues and because she presumed Marty would not let her continue working on the frames because he thought she was the source of the frame problem. (App. at 28, ¶¶ 19, 20). Petitioner testified that her resignation had nothing to do with Marty's alleged discriminatory or harassing conduct. (App. at 28, ¶ 20).

C. The Eighth Circuit Correctly Concluded that Petitioner Did Not Meet Her Burden of Proof and Her Claims Must Fail as a Matter of Law.

After resigning, Petitioner filed a lawsuit alleging sex discrimination, age discrimination, and a hostile work environment based on gender and age. The District Court granted summary judgment in favor of MJ Optical on all claims. On appeal, the Eighth Circuit considered the issue of whether Petitioner presented sufficient evidence to create a genuine issue of fact regarding whether Marty's conduct was unwelcome and whether Petitioner was constructively discharged. (App. at 11-19). In finding that Petitioner had failed to present *any* evidence indicating she believed Marty's conduct was unwelcome, the Eighth Circuit affirmed summary judgment for MJ Optical on Petitioner's

hostile work environment claims. (App. at 19). The Eighth Circuit also found that Petitioner had not given her employer sufficient time to rectify any reported problems, which was detrimental to Petitioner's constructive discharge claims. (App. at 12-13).



REASONS FOR DENYING CERTIORARI

Petitioner misstates and misconstrues the Eighth Circuit's Opinion. Petitioner's appeal is focused largely on an allegation that the Eighth Circuit misapplied the *Faragher-Ellerth* defense. However such a defense was not at issue in this case and was not assessed by the Eighth Circuit. Rather, on Petitioner's harassment claim, the Eighth Circuit solely assessed whether or not the elements of a hostile work environment claim were met. (App. at 14-15). Such elements require that the conduct be considered unwelcome. After reviewing all of the evidence presented on summary judgment, both the District Court and the Eighth Circuit confirmed that the Petitioner failed to present any evidence that the alleged offensive conduct was unwelcome. (App. at 17-18). Defendant, however, presented evidence that the conduct was welcome, including evidence that Petitioner never reported a problem, never told the alleged harasser to quit, had a social relationship with the harasser outside of work, and resigned for entirely different reasons. Given Petitioner's lack of evidence that the conduct was unwelcome, the Court held that the Petitioner could not sustain a hostile work environment claim as a matter of law. (App.

at 17-19). The Eighth Circuit explicitly noted that reporting harassment was not required and that it was not imposing any such reporting requirement. (App. at 18, footnote 13). The Court did discuss reporting requirements in reference to Petitioner's constructive discharge claim, but Petitioner does not argue that claim on appeal. (App. at 12-13). Given that the Eighth Circuit's decision was based solely on sufficiency of the factual evidence needed to survive summary judgment, the Petition for Writ of Certiorari should be denied because there is no compelling reason this case should be heard by the United States Supreme Court. See Sup. Ct. R. 10.

I. PETITIONER MISSTATES AND MISCONSTRUES THE EIGHTH CIRCUIT'S OPINION.

Contrary to Petitioner's assertions, the Eighth Circuit did not impose a reporting requirement on Petitioner's hostile work environment claim, nor did it ever hold that Petitioner "invited" harassing conduct.

A. The Eighth Circuit Did Not Impose an Element Requiring Reporting of Alleged Harassment.

To survive summary judgment, Petitioner had the burden to prove that she "was subject to unwelcome harassment" on her claim of a hostile work environment. *Sellers v. Deere & Co.*, 791 F.3d 938, 945 (8th Cir. 2015) (quoting *Ryan v. Capital Contractors, Inc.*, 679

F.3d 772, 778 (8th Cir. 2012)). When analyzing whether the alleged misconduct was unwelcome, “[t]he proper inquiry is whether the plaintiff indicated by [her] conduct that the alleged harassment was unwelcome.” (App. at 15) (quoting *Quick v. Donaldson Co.*, 90 F.3d 1372, 1378 (8th Cir. 1996) (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986))).

Here, the Eighth Circuit considered whether Petitioner informed MJ Optical of Marty’s conduct in the context of analyzing whether Petitioner created a genuine issue of fact that she considered Marty’s conduct “unwelcome.” (App. at 15). As Petitioner quoted in her Petition, the Eighth Circuit explicitly stated it was not creating a “bright-line rule requiring a plaintiff to have reported the alleged harassment to management in order to prove conduct was unwelcome.” (App. at 18, n.13). Rather, the Eighth Circuit looked to precedent that had evaluated “the plaintiff’s behavior, relationship with the alleged harasser, and history with the company to conclude the plaintiff could not prove the conduct was unwelcome.” (App. at 16) (citing *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 962, 966 (8th Cir. 1999); *Souther v. Posen Constr., Inc.*, 523 F.App’x 352, 355 (6th Cir. 2013) (unpublished); and *Ammons-Lewis v. Metro. Water Reclamation Dist. of Greater Chi.*, 488 F.3d 739, 746-47 (7th Cir. 2007)).

The Eighth Circuit considered the factual circumstances that Petitioner and Marty’s had a 40-year, mostly positive relationship; the occasional extension of their relationship beyond the workplace; Petitioner and Marty’s joking with each other and exchanging

“I love you” even after the alleged misconduct; and Petitioner’s occasional touching Marty “between the shoulders” even after the alleged misconduct. (App. at 17-18). The fact that Petitioner never once told Marty to stop and never once told anyone else at MJ Optical about Marty’s conduct is an additional fact relevant to finding that there was insufficient evidence that Marty’s conduct was “unwelcome.” See also *Stuart v. General Motors Corp.*, 217 F.3d 621, 632 (8th Cir. 2000) (finding that an employee cannot show she subjectively considered her behavior unwelcome if she did not complain about it).

Petitioner contends in her petition that despite denying the creation of a bright-line rule, the Eighth Circuit “premised” its decision “on precisely this proposition.” (Petition at 8). This is incorrect. The Eighth Circuit stated simply that there was no indication that Petitioner felt the conduct was unwelcome at the time it occurred. (App. at 18-19). As the Eighth Circuit chronicled, precedent establishes that Petitioner could have indicated the conduct was unwelcome in a variety of ways, such as telling Marty she found the conduct offensive, reporting the conduct, or showing that the bad actor acknowledged his conduct was unwelcome. (App. at 17) (citing *Williams v. Herron*, 687 F.3d 971, 975 (8th Cir. 2012) (finding a plaintiff adequately communicated to her harasser that his conduct was unwelcome); *Beach v. Yellow Freight Sys.*, 312 F.3d 391, 396 (8th Cir. 2002) (finding a plaintiff’s repeated complaints sufficient evidence of unwelcome conduct); *Bales v. Wal-Mart Stores, Inc.*, 143 F.3d 1103, 1108 (8th

Cir. 1998) (finding a harasser’s admission that his conduct was unwelcome sufficient to prove the conduct was unwelcome); and *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 945 (8th Cir. 2016) (finding a plaintiff satisfied her burden of proving the conduct was unwelcome when she confronted him, reported him, and he admitted she found his advances unwelcome). Thus, the Eighth Circuit’s opinion cannot be construed as establishing a reporting requirement.

B. Neither the District Court nor the Eighth Circuit Ever Made a Finding That Petitioner “Invited” Harassing Conduct.

Petitioner alleges that the District Court and Eighth Circuit both concluded Petitioner’s “failure to report sexual harassment . . . constituted an ‘invitation.’” Neither the District Court nor the Eighth Circuit made such a conclusion. To the contrary, the only time the word “invite” (or a derivative thereof) was used in either opinion was when the Eighth Circuit stated that “Marty invited Petitioner to his daughter’s wedding, and Petitioner attended.” (App. at 6).

II. PETITIONER ERRONEOUSLY ARGUES THE EIGHTH CIRCUIT MISAPPLIED THE *ELLERTH-FARAGHER* AFFIRMATIVE DEFENSE, WHICH IS NOT AT ISSUE IN THIS CASE AND WAS NOT DISCUSSED BY THE EIGHTH CIRCUIT.

Throughout her Petition, Petitioner asserts that the Eighth Circuit misapplied the *Ellerth-Faragher* affirmative defense, when in fact the Eighth Circuit never discussed or applied the *Ellerth-Faragher* defense at all.

The *Ellerth-Faragher* affirmative defense protects an employer otherwise vicariously liable for a harassing supervisor's conduct if the employer can show that (a) it exercised "reasonable care to prevent and correct promptly any sexually harassing behavior"; and (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."

Crawford v. BNSF Ry. Co., 665 F.3d 978 (8th Cir. 2012) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)).

Here, the question of whether the *Ellerth-Faragher* affirmative defense would apply to MJ Optical was never reached because the only issues preserved for the Eighth Circuit on appeal were whether Petitioner had presented sufficient evidence of harassment to survive summary judgment. The Eighth Circuit

found that Petitioner had not presented such sufficient evidence and that there was no harassment as a matter of law. (App. at 17-19). Since there was insufficient evidence to establish a hostile work environment, discussion on the *Ellerth-Faragher* affirmative defense is inapplicable. Thus, “[t]he Eighth Circuit did not bother with agency analysis” not because it was confusing elements of distinct doctrines, but because it would be incorrect to apply an agency analysis for liability when an actionable harassment case did not exist. (See Petition at 9).

Because the *Ellerth-Faragher* defense was not assessed by the Eighth Circuit, it is not a proper issue for appeal.

III. THE EIGHTH CIRCUIT’S DECISION WAS CORRECT.

In its analysis, the Eighth Circuit assessed the elements of a claim for hostile work environment and found that Petitioner had not created a genuine issue of fact regarding the element that the conduct was unwelcome. This consideration of whether a plaintiff may have reported the conduct is both necessary and proper to consider among all the facts and circumstances being adduced in a hostile work environment claim. Here, after considering all of the available evidence on the record, the Eighth Circuit concluded that even if Marty’s conduct could be offensive to a reasonable person, Petitioner had not met her burden of showing that it was unwelcome *to her* at the time it occurred. (App.

at 17-19). The Eighth Circuit reviewed a variety of cases and concluded that “[t]he evidence here puts Petitioner’s claims within” the category of cases of insufficient indication the conduct was unwelcome. (App. at 17). This conclusion squarely fits with the rules and principles of federal law and should be upheld.

Petitioner does not take issue with the Eighth Circuit’s use of or reliance on any of the cases cited in the opinion. Petitioner also does not proffer any case law supportive of her position. Rather, Petitioner misstates the Eighth Circuit’s ruling in an attempt to establish a colorable argument on appeal. As such, the Petition should be denied.

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CONCLUSION

Petitioner does not contend that the Eighth Circuit applied improper case law or misused precedent in evaluating the element of whether Petitioner was subject to “unwelcome” conduct as part of her hostile work environment claim. Instead, Petitioner attempts to manufacture an argument that the Eighth Circuit created a “new element,” when the Eighth Circuit did no such thing and even explicitly stated in a footnote that their Opinion should not be construed that way. Moreover, Petitioner argues the Eighth Circuit improperly assessed an affirmative defense, though no such defense was ever presented by MJ Optical or assessed by the Eighth Circuit. Petitioner’s misstatement of the Eighth Circuit’s Opinion and generation of

questions on appeal that are not at issue in this case does not warrant review by this Court. As such, Respondent respectfully requests the Petition for a Writ of Certiorari be denied.

DATED: February 22, 2018.

Respectfully submitted,

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