No. ----

In The

Supreme Court of the United States

JENNIFER PASKERT,
Petitioner,

v.

KEMNA-ASA AUTO PLAZA, INC., etc., et al.

Respondents

On Petition for A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Under *Harris v. Forklift Systems, Inc.*, sexual harassment is unlawful under Title VII, inter alia, if the harassment created an objectively hostile work environment. The question presented is:

Assuming the other elements of a Title VII claim are present, is sexual harassment

(1) unlawful if a reasonable person would conclude, in light of all the circumstances, that the harassment created a hostile environment, the rule in most circuits, or

(2) unlawful only if the harassment is "more egregious" than the worst harassment ever held lawful in any prior decision in the relevant court of appeals, the rule in the Eighth and Fifth Circuits?

PARTIES

The petitioner is Jennifer Paskert. The respondents are Kemna-Asa Auto Plaza, Inc., doing business as Auto Smart of Spirit Lake, Brent Burns, Brent Weringa, Auto$mart, Inc. Kenneth Kemna, and Kemna Motor Company.

DIRECTLY RELATED CASES

Paskert v. Kemna-ASA Auto Plaza, Inc., No. C17-4009LTS, N.D. Iowa, Judgment Entered November 17, 2018, 2018 WL 5839092

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Petitioner Jennifer Paskert respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 13, 2020

OPINIONS BELOW

The February 13, 2020, opinion of the court of appeals, which is reported at 950 F.3d 538, is set out at pp. 1a-9a of the Appendix. The November 7, 2018 order of the district court, which is unofficially reported at 2018 WL 5839092 (N.D. Iowa), is set out at pp. 10a-38a of the Appendix.

JURISDICTION

The decision of the court of appeals was entered on February 13, 2020. On March 19, 2020, the Court extended the time for filing future petitions to 150 days. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

STATUTORY PROVISION INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, provides in pertinent part that it is "unlawful . . . for an employer to . . . discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

STATEMENT OF THE CASE

Legal Background

Meritor Savings Bank, FSB, v. Vinson, 477 U.S. 57 (1986), held that a plaintiff may establish a violation of Title VII by proving that harassment based on sex, race, national origin or religion has created a "hostile or abusive work environment." 477 U.S. at 66. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21-22 (1993), explained that there are two separate elements of a discriminatory harassment case; the plaintiff must subjectively perceive the environment as hostile, and the environment must be

sufficiently severe or pervasive to objectively hostile. A work environment is objectively hostile if "a reasonable person would find [it] hostile or abusive." *Id*.

Most of the subsequent litigation in sexual harassment and other hostile environment cases has concerned whether a plaintiff has sufficient evidence to establish that objective element. In *Harris*, the Court set out a non-exclusive list of circumstances that should be considered, stressing that the fact-bound determination of whether harassment created a hostile environment required "looking at all the circumstances," and that "no single factor is required." 510 U.S. at 23. The circumstances to be considered "may include 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." *Id*. *Oncale v. Sundowner Offshore Services, Inc.,* 523 U.S. 75, 81 (1998), explained that "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" (Quoting *Harris,* 510 U.S. at 23).

A majority of the courts of appeals implement *Meritor* and its progeny in a case-specific fact-bound manner, attempting to assess how the harassment would be perceived by a person in the plaintiff's position, themselves determining that the harassment is permissible as a matter of law only when a reasonable jury would not conclude that the misconduct had created a hostile work environment. But the Eighth Circuit has an entirely different standard for deciding when sexual harassment violates Title VII, and for resolving summary judgment motions. Rather than considering how a reasonable person, or a jury, would assess the specific harassing conduct involved, judges in the Eighth Circuit themselves compare each case with the harassment in a 2002 appellate decision. Harassment is permissible as a matter of law if a judge concludes that it is "less egregious" than the harassment in that controlling precedent. This case presents a particularly stark application of that Eighth Circuit standard.

Factual Background

Jennifer Paskert worked in 2015 for Auto$mart, Inc., a "buy here, 'pay here" used car dealer in Iowa. During her six months of employment, plaintiff alleges, she was subject to a barrage of sexual and misogynistic harassment by Brent Burns, the manager of the lot where she worked.[1] Paskert's account was largely corroborated by testimony by a fellow employee, James Bjorkland. The court of appeals acknowledged that "[e]vidence . . . shows Burns's treatment of women was demeaning, sexually suggestive, and improper." App. 3a.

"Burns frequently . . . referred to female customers using derogatory names." App. 3a. Paskert could hear Burns's outbursts, because her office adjoined his, and Burns insisted that the door between the offices be kept open. App. 21a. Paskert testified that "Burns . . . would hang up the phone with delinquent accounts, calling them bitches and cunts." App. 21a. "Bjorkland testified that he heard Burns refer to female customers as 'bitches' and 'cunts' upwards of 20 times but never heard Burns refer to a male customer by a degrading or offensive name." App. 20a. "Burns recall[ed] using the words 'bitch' and 'cunt' in the office . . . ." App. 23a.

"Burns discussed his sexual conquests frequently at work." App. 20a; see App. 3a ("Burns . . . openly bragged at work about his purported sexual conquests."). "Brent would tell us about all the sexual things he would do at his dad's job . . . And how perky [name omitted]'s boobs were. And all the girls that he would have sex with in cars at his parents' dealership . . . ." Paskert Dep. 116-17; *id.* 119-20 ("Q. . . . [Y]ou contended . . . that Brent would talk about sexual things during these lunches? A. Correct. . . . Q. . . . And he would talk about . . .when he could do certain sexual things? A. Yes. Q. . . . And he'd talk about females and their characteristics? A. Yes.); Bjorkland Dep. 66-67 ("Q. Did Mr. Burns ever say anything offensive during one of those lunches, at least that offended you? A. . . . The conquests that he had with women in his car and stuff like that in front of all of us, . . . Q. He was talking about sexual

[1] The text sets out the facts testified to by plaintiff and a male sales associate. The employer's witness disputed a number of the details. See App. 2a n. 2.

conquests when he was younger? A. Yes."). Burns talked about his sexual conquests, and the bodies of women, on a regular basis, particularly when he had lunch with Paskert and Bjorkland. Paskert Dep. 119-20; see *id*. 120 ("Q. How many times would he talk about things like that? A. I can't even tell you. I'm going to be honest, numerous times."); Bjorkland Dep. 68 ("Oh, it was any time").

"Burns frequently stated that he 'wondered if I can make [Paskert] cry today,' and thought it was funny to make Paskert cry. . . . Burns did not attempt to make male employees cry." App. 20a. "His goal that he repeatedly told [Bjorkland] and myself was to see how many times in a day he could make me cry." App. 21a (quoting Paskert deposition).

> A. . . . [H]e told [Bjorkland] and I one day . . . that his goal was to see how many times he could make me cry in one day because I'm an emotional person. And—and that his wife informed him that women are emotional, that he should not have ever hired her. And he said, "My wife was right."
> Q. When did that conversation occur?
> A. That wasn't a one-time thing for that. That was regularly. . . .
> Q. How many times did he say that?
> A. Depended on the day. He could say it one day and then go a day or two without saying it, and say it again two or three days later.

Paskert Dep. 115-16. "Bjorkland and Paskert both testified to hearing Burns remark that he 'never should have hired a woman' . . . ." App. 3a; see App 20a ("Burns . . . at times attributing the joke [sic] to his wife."). Although Burns could be unpleasant to the male employees, Paskert and Bjorkland testified that Burns's treatment of Paskert was worse. App. 20a, 22a; Bjorkland Dep.125 ("mainly it was directed at her"); Paskert Dep. 100 ("It was more me than [Bjorkland]").

During the summer, Burns frequently adjusted his private parts in front of Paskert and Bjorkland.[2]

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[2] Bjorkland Dep.121:

> Q. It was in the summer. He was wearing shorts and it was in front of both of us; and I don't know if it was something he was unaware of he was doing, but he was doing it all the time was in the crotch area, adjusting himself in front of both of us. Too many times where I can't even . . .
> Q. Did he do it to the point where you became uncomfortable?
> A. It got kind of weird. I'll just put it that way, yeah.
> Q. Did [Paskert] become uncomfortable with him doing that to your knowledge?
> A. Yes.

On one occasion, "Paskert criticized the way Burns treated women and wondered how his wife tolerated such behavior" (App. 3a.); "I don't even know how your wife can put up with you. I don't know how she can tolerate the way you are to women." App. 20a-21a. "Burns replied, 'Of, if you weren't married and I wasn't married, I could have you . . . You'd be mine . . . I'm a closer.'" App. 3a, 21a. "Burns repeated this remark a second time." App. 21a. On another occasion, after Burns had directly a particularly harsh outburst at Paskert, he then rubbed her shoulders and insisted that she hug him to indicate he was forgiven. App. 3a, 21a; Paskert Dep. 93-94.

Paskert was told that she was being hired as a sales associate. But during her period of employment, she was never permitted to sell cars. App. 19a. She was instructed that she could not engage in sales until she had been trained to do so, and Burns prevented her from obtaining that training.[3] Paskert was never given the company sales manual. App. 18a. Training consisted primarily of "shadowing" Burns or Bjorkland, when one of them was with a customer. But whenever one of them was with a customer on the lot, Burns would order Paskert to go inside the office to answer the phone. App. 2a, 19a' Paskert Dep. 68, 70, 72, 75, 158. After several months, higher company officials realized that Paskert had not sold any cars. At Burns suggestion, Paskert was then given a different job, restricted to calling customers to collect payments, and her pay was reduced by about 20%. App. 3a, 23a-26a.

Both Paskert and Bjorkland repeatedly complained to higher level company officials about the gender-based harassment of Paskert. App. 3a, 22a. Paskert specifically told one of those officials that Burns had repeatedly referred to a customer as a "bitch or cunt." Paskert Dep. 112. One official promised to address the harassment problem. App. 22. Burns, however, insisted that he was not told that there had been any complaints about his treatment of Paskert. App. 23a. In late 2015, after the abuse of Paskert had gone on for six months, Burns fired Paskert, under circumstances that remain in dispute.

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[3] Paskert Dep. 68, 70, 72, 75.

App. 4a, 25a-26a. "Bjorkland . . . quit shortly after Paskert was discharged because he thought Paskert had been mistreated." App. 20a.

Proceedings Below

After exhausting her administrative remedies, Paskert filed suit in federal court, alleging that the she had been subjected to gender-based harassment in violation of Title VII.[4] After a period of discovery, the district court granted summary judgment.

The district court concluded that "the environment described by Paskert and Bjorkland was certainly hostile and a great deal of the incidents described by Paskert was motivated by her sex. Such behavior in the workplace is obviously harmful . . . ." App. 35a. "Assuming such behavior occurred, it was obnoxious and disgusting." App. 37a. But the district judge did not undertake to decide whether a reasonable person in the plaintiff's position, or a reasonable jury, could conclude that the harassment had created a hostile environment. Nor did the judge inquire, more specifically, whether a reasonable person would have regarded the harassment as severe, or as pervasive.

Rather, the district judge explainedthat he was limited to determining whether the behavior had reached the level of illegality under the standards previously established by "Eighth Circuit case law." App. 35a. "[T]he issue here is whether the alleged conduct meets the 'severe and pervasive' standard applied by the Eighth Circuit . . . ." App. 37a. Eighth Circuit decisions, the judge understood, established a circuit-specific standard for determining when sexual harassment violates Title VII.

To identify that Eighth Circuit's legal standard, the district judge looked to the facts of several decisions in which the court of appeals had held that the harassment in question was *not* bad enough to violate Title VII. The district described the particular acts of harassment that had been held lawful in

[4] Paskert also asserted a claim under Iowa law. The courts and parties below assumed that the Iowa law would be construed in the same manner as Title VII. App. 4a, 37a. The complaint also alleged that Paskert had been the victim of unlawful retaliation. The courts below rejected that retaliation claim, and Paskert does not seek review of that issue.

Duncan v. General Motors Corp., 300 F.3d 928 (8th Cir. 2002), *LeGrand v. Area Resources for Community and Human Services*, 394 F.3d 1098 (8th Cir. 2005), and *Anderson v. Family Dollar Stores of Ark., Inc*., 579 F.3d 858 (8th Cir. 2009). *Duncan*, *LeGrand* and *Anderson* established the "circuit precedent." App. 36a.

The district judge concluded that the harassment of Ms. Paskert was lawful because (he believed) it was *less* serious than the harassment in *Duncan*, *LeGrand* and *Anderson*; if the gender-based abuse of the victims in those precedential Eighth Circuit cases was lawful, the judge reasoned, the less serious abuse of Paskert was necessarily legal as well. "Under the legal standards by which I am bound, Paskert's allegations do not come close to establishing that Burns' conduct was so severe or pervasive as to alter the terms and conditions of her employment." App. 37a.

On appeal[5], the Eighth Circuit analyzed Paskert's claim in the same way. The appellate court did not purport to consider whether a reasonable person, or a reasonable jury, would conclude that the harassment of Paskert had created a hostile work environment. Instead, the court of appeals explained, "we may only ask whether the[] behavior meets the severe or pervasive standard applied by this circuit, and it does not." App. 6a. The Eighth Circuit "standard" was determined by identifying the level of abuse that prior opinions in that circuit had held was *not* severe or pervasive. "[S]everal cases illustrate[] conduct that [is] not sufficient to amount to actionable severe or pervasive conduct." App. 5a. The appellate court spelled out and relied on the facts of *Duncan* and *LeGrand*. App. 5a-6a.

The harassment of Paskert was legal, the court of appeals concluded, because it was less serious than the harassment that had been held lawful in *Duncan* and *LeGrand*. "Burns['s] . . . behavior . . . is not nearly as severe or pervasive as the behavior found insufficient in *Duncan* and *LeGrand*." App. 6a. "In

[5] AutoSmart's central argument on appeal was that "under this Court's precedent, Paskert failed to show an actionably hostile workplace." Brief of Appellees, 23 (capitalization omitted); see *id*. at 21 ("This court has consistently rejected harassment claims involving conduct more egregious than that of Burns"), 23 ("under this Court's cases [Burns's] . . . conduct . . . was not so severe or pervasive as to 'poison' Paskert's environment.").

light of these precedents," the court reasoned, "Burns's alleged behavior, while certainly reprehensible and improper, was not so severe or pervasive as to alter the terms and conditions of Paskert's employment." "[O]ur Eighth Circuit precedent sets a high bar for conduct to be sufficiently severe or pervasive to trigger a Title VII violation." App. 5a.

REASONS FOR GRANTING THE WRIT

I. THE EIGHTH AND FIFTH CIRCUIT STANDARD FOR DETERMINING WHETHER SEXUAL HARASSMENT VIOLATES TITLE VII CONFLICTS WITH THE STANDARD IN THE OTHER COURTS OF APPEALS

This case presents a straight-forward and exceptionally important circuit conflict regarding the standard governing what types of sexual harassment are forbidden by Title VII. In most circuits, the legality of harassing conduct turns on whether a reasonable person in the position of the victim would conclude that the conduct had created a hostile work environment. Courts on those circuits review the harassing conduct from the perspective of a reasonable person in the position of the victim, with due attention to the social context, considering a wide variety of factors, including those identified by this Court in *Harris*. Subsidiary disputes of fact are assumed to be resolved in favor of the plaintiff. The actual determination as to whether a hostile environment was created is made by a jury, unless no rational jury could conclude that a reasonable person would regard the environment as hostile.

The Eighth and Fifth Circuits repeatedly use a different standard. The legality of harassing conduct is simply measured against a circuit-specific standard, deriving from one or more earlier cases in which particular harassing conduct had been held lawful. In any given case, so long as the harassment at issue was not "more egregious" than in one or more of the circuit precedents, that harassment too is lawful. Comparative egregiousness is often determined fairly summarily, as the instant case illustrates.

A. The Eighth and Fifth Circuits Determine The Legality of Harassing Conduct By Comparing It To Circuit Precedents Upholding The Legality of Other Harassing Conduct

(1) The Eighth Circuit Precedent-Comparison Standard

This case is the most recent of a long line of Eighth Circuit decisions that establish and apply an avowedly circuit-specific standard as to what type of sexual harassment is, and is not, permitted by Title VII. The nature and stringency of that Eighth Circuit standard is clearly illustrated by the decision below.

Like almost two decades of decisions in that circuit, the court of appeals explained that the Eighth Circuit's legal standard is delineated by the facts in earlier cases that had upheld the legality of the harassment on those prior cases. The panel described the facts of two earlier cases, *Duncan* (2002) and *LeGrand* (2005), which had been ruled lawful in earlier decisions. The court of appeals reasoned that the harassment in the instant was also lawful because "it was not nearly as severe or pervasive as the behavior found insufficient in *Duncan* and *LeGrand*." App. 6a. Because the harassment found lawful in *Duncan* was quite serious, and in the panel's words "even more outrageous" in *LeGrand*, those decisions and other Eighth Circuit precedent "set[] a high bar for conduct . . . to trigger a Title VII violation." App. 5a.

Duncan is the most important of the Eighth Circuit's precedents defining the standard of illegality in that circuit. The standard in *Duncan* derives from the facts of that case, which since 2002 have been repeatedly described and deemed precedential in scores of appellate and district court decisions in the Eighth Circuit, just as those facts were summarized and then relied on in this case. See App. 5a, 36a. The plaintiff in *Duncan* had been subjected to a barrage of sexual and misogynistic abuse. Duncan's supervisor sexually propositioned her shortly after she started work. App. 5a, 36a; 300 Fed.3d at 931. He "requested that she draw an image of a phallic object to demonstrate her qualification for a position" and "repeatedly touched her hand." App. 5, 36a; 300 F.3d. at 931. The supervisor directed Duncan to work on his own computer, knowing that the screen saver was a picture of a naked woman. 300 F.3d at 931.

> [The supervisor] had a planter in his office that was shaped like a slouched man. . . [with] a hole in the front of the man's pants that allowed for a cactus to protrude. The planter was in plain view to anyone entering [his] office. [The supervisor] also kept a child's pacifier that was shaped like a penis in his office . . . and specifically showed it to Duncan on two occasions.

Id. The supervisor posted on an office bulletin board a poster that portrayed Duncan as the president and EO of the "Man Hater's Club of America." The purported qualifications for the "Club," parodied in the

poster, were beliefs that "[m]en must always do household chores," "always be[ing] in control of . . . Checking [and] Savings", "[r]aising children our way!," and "[c]onsidering T.V. Dinners a gourmet meal." Id at 932. Finally, the supervisor directed Duncan to type the beliefs of a purported "He-Men Women Hater's Club." Those doctrines included "[the] constitutional Amendment . . . giving women [the] right to vote should be repealed," "[w]omen [a] the cause of 99.9 per cent of stress in men," "[a]ll great chiefs of the world are men," and"[w]omen really do have coodies [sic] and they can spread." *Id*. Duncan refused to type that insulting document, and quit. A jury found that this harassment had created a hostile work environment. The Eighth Circuit overturned that verdict, hold that "as a matter of law" those events did not create a hostile environment. *Id*. at 934.

When the plaintiff in *Duncan* sought review by this Court, the respondent assured this Court that "[b]ecause of the nature of the subject matter, the decision below has limited precedential value. . . . Each case is intensely fact-specific."[6] That prediction has proved profoundly mistaken. The decision in *Duncan* has been the controlling Eighth Circuit precedent since 2002; the decisions below both expressly characterized *Duncan* as establishing the "precedent" in this case (App. 5a, 27a), as did the defendant in its brief below. See n.5-, supra. The specific pattern of abuse which *Duncan* held was lawful under Title VII is of central importance in Title VII harassment litigation in that circuit, because it sets the controlling

[6] Respondent's Brief in Opposition, No. 02-201, 13, available at 2003 WL 21699531.

legal standard. The court of appeals[7] and district courts[8] in that Eighth Circuit have repeatedly compared the claims before them with the facts in *Duncan*, concluded that the harassment in *Duncan* wasmore egregious, and on that basis dismissed large numbers of claims asserting sexual, racial, and religious harassment.

The precedent-creating holding and facts in *Duncan* have spawned an ever-growing body of additional Eighth Circuit precedents. The facts of each of decisions, relying on the precedent-creating facts of *Duncan* and its progeny, are themselves accorded precedent-creating status, and are then summarized and cited in yet later decisions, whose own facts next are accorded precedential status. For example, the facts in *Duncan* were summarized and relied on by decisions in *Ottman v. City of Independence*, 341 F.3d 751, 760 (8th Cir. 2003), and *Alagna v. Smithville R-II Sch. Dist*., 324 F.3d 975, 980 (8th Cir. 2003). The facts in *Alagna*, as well as those in *Duncan*, were relied on in *Meriwether v. Caraustar Packaging Co*., 326 F.3d 990, 993 (8th Cir. 2003). The facts in *Duncan*, Alagna and *Ottman* were next relied on in *Tuggle v. Mangan*, 348 F.3d 714, 720 (8th Cir. 2003). All of those fact patterns were then cited as controlling precedents in *LeGrand*.

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[7] *McMiller v. Metro,* 738 F.3d 185, 188-89 (8th Cir. 2013) ("Four decisions help to illustrate the boundaries of a hostile work environment claim under circuit precedent. . . . . In light of these precedents, Brown's alleged conduct was not so severe or pervasive as to alter the terms and conditions of McMiller's employment.") (summarizing facts in *Duncan*, *Anderson* and *LeGrand*.); *Vajdl v. Mesabi Academy of KidsPeace, Inc,* 484 F.3d 54, 521 (8th Cir. 2007) ("The objective standard for evaluating harassment is set forth in this circuit in *Duncan* . . . . Objectively, the behavior Vajdl alleges does not reach the *Duncan* threshold."); *Powell v. Yellow Book USA, Inc.,* 455 F.3d 1074, 1077 (8th Cir. 2006) ("[i]n other cases, we have held that conduct more egregious than what is alleged to have occurred here could not support a sexual harassment claim. For instance, in *Duncan* . . . ."); *Tuggle v. Mangan,* 348 F.3d 714, 720 (8th Cir. 2003) ("In deciding whether Tuggle's sexual harassment claim clears the high threshold of actionable harm, we must compare Mangan's conduct to the harassing conduct discussed in other cases. Last year, this court decided more egregious misconduct did not constitute sexual harassment. *See* Duncan . . . The facts of *Duncan* are worth describing in detail, because Mangan's harassing conduct was not as extreme."); *Alagna v. Smithville R-II School Dist*., 324 F.3d 975, 980 (8th Cir. 2003) ("Yates's conduct, however inappropriate, was not sufficiently severe or pervasive to satisfy the high threshold for actionable harm. . . . His conduct was far less objectionable than that which we found insufficiently severe or pervasive to support the plaintiff's hostile environment claim in *Duncan*.").

[8] A list of such district court decisions is set out in the Appendix to the petition.

LeGrand has been of particular precedential importance in the Eighth Circuit because, as the court below observed, it involved "more outrageous conduct" than *Duncan* (App. 5a), and thus established an even more stringent legal standard. The court of appeals in *LeGrand* set out a lengthy summary of the precedent-creating facts in *Duncan*, *Alagna*, *Ottman*, *Meriwether*, and *Tuggle*, and then concluded that Mr. LeGrand's claim failed "in light of the demanding standard set by . . . *Duncan* and its progeny" 394 F.3d at 1102. "Compared to other cases in which . . . our circuit h[as] found the harassing conduct did not constitute sexual harassment, we believe the harassment alleged in this case did not create an actionable hostile work environment." *Id*.

The facts of *LeGrand* have in turn been accorded precedential weight, and for years have been summarized and cited alongside *Duncan* as establishing the Eighth Circuit standard[9], as they were by both lower courts in the instant case. App. 5a-6a, 36a. The harasser in *LeGrand*, a priest, was a high-level official of the non-profit agency where Mr. LeGrand worked. On one occasion, when LeGrand visited the harasser's church, the harasser "asked LeGrand to watch pornographic movies with him and 'to jerk off with him' . . . ." 394 F.3d at 1100. At a subsequent meeting in LeGrand's office, the harasser

> (1) mentioned the pornographic movies again; (2) suggested LeGrand would advance in the company, if he watched "these flicks" and "jerk[ed the harasser's] dick off", (3) "kissed [LeGrand] in the mouth"; (4) grabbed LeGrand's buttocks; and (5) "reached for [LeGrand's genitals."

394 F.3d at 1100. At a later office meeting, the harasser "gripped LeGrand's thigh while each were seated at a table." *Id.* Those facts, which the Eighth Circuit held insufficient to constitute a violation of Title VII, now are precedential, and are repeatedly recounted, and relied on as establishing the standard of legality, in decisions in the Eighth Circuit, including by both courts below. App. 5a-6a, 36a.[10]

This body of Eighth Circuit case law includes a second, equally important precedential. In light of the serious nature of the harassment held lawful in *Duncan* and its progeny, later appellate opinions in

[9] A list of those decisions is set out in the Appendix to the petition.

[10] A list of decisions applying the *LeGrand* standard is set out in the Appendix.

that circuit have held that Title VII forbids sexual (or other) harassment only in the most extreme cases. The court below insisted that "our Eighth Circuit precedent sets a high bar." App. 5a; see *Brannum v. Missouri Dept. of Corrections,* 518 F.3d 542, 548 (8th Cir. 2008) (8th Cir. 2016) (same).[11] Other decisions have described *Duncan* as setting a "high threshold," quoting that phrase from the opinion in *Duncan* itself.[12] See *Miller v. Board of Regents of University of Minnesota*, 2018 WL 659851 at *5 (D. Minn. Feb. 1, 2018) ("[t]he Eighth Circuit has often described this as a 'high threshold,' *Duncan* . . . and the Eighth Circuit has meant it.").[13] On several occasions the Eighth Circuit has explained that to establish a violation of Title VII a plaintiff must point to sexual harassment that was more than merely "vile."[14]

A number of dissenting opinions in the Eighth Circuit have objected to this body of standard creating precedents. In *McMiller* v. Metro, 738 F.3d 185 (8th Cir. 2013), Judge Murphy disagreed with this entire method of deciding the legality of one harassment in one case by comparing it to the harassment adjudicated in earlier decisions. "The facts of any alleged harassment should first and lastly be considered on their own merit without comparing them line by line to a summation of facts in some other case which the court has or has not considered to be triable." 738 F.3d at 190-91. Judicial administration of this precedent-based method of resolving harassment claims has led to, and turned on, disputes about whether the harassment in one case was more or less egregious than in earlier cases. *E.g. McMiller*, 738 F.3d at190- (Murphy, J., dissenting) (disagreeing with majority that harassment in that case was less egregious than in *Duncan*, *LeGrand* and *Anderson*); *id*. at n. *5 (five members of the Eighth Circuit would have granted rehearing en banc).

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[11] *Campbell v. St. Jude Medical, S.C., Inc*., 2018 WL 5779482 at *8 (D. Minn. Nov. 2, 2018) ("high bar").

[12] A list of Eighth Circuit decisions reiterating this "high threshold" standard is set out in the Appendix.

[13] *Farrar v. Arkansas Dept. of Human Services*, 2019 WL 7813826 at *7 (E.D. Ark. Aug. 19, 2019) ("the Eighth Circuit has set a high standard"); *Abdel-Ghani v. Target Corp.,* 2016 WL 1134994 at *9 (D. Minn. Feb. 11, 2016) ("the Eighth Circuit sets a high standard").

[14] *Blomker v. Jewell*, 831 F.3d at 1058 (8th Cir. 2016); *Duncan v. County of Dakota, Nebraska,* -687 F.3d 955, 960 (8th Cir. 2012).

(2) The Fifth Circuit Precedent-Comparison Standard

The Fifth Circuit has also established a circuit-specific standard for determining when harassment is and is not lawful under Title VII. The most important precedent in the Fifth Circuit is *Sheperd v. Comptroller of Public Accounts,* 168 F.3d 871 (5th Cir. 1999). The facts in *Sheperd* have been repeatedly cited in that circuit as illustrating the level of harassment that is lawful under Title VII.

> [O]n one occasion [the harasser] stood in front of Shepherd's desk and remarked "your elbows are the same color as your nipples." Shepherd testified that [the harasser] remarked once "you have big thighs" while he simulated looking under her dress. Shepherd claimed [the harasser] stood over her desk on several occasions and attempted to look down her clothing. According to Shepherd, [the harasser] touched her arm on several occasions, rubbing one of his hands from her shoulder down to her wrist while standing beside her. Shepherd alleged additionally that on two occasions, when Shepherd looked for a seat after coming in late to an office meeting, [the harasser] patted his lap and remarked "here's your seat." . . . The conduct about which Shepherd complains allegedly took place for almost two years.

168 F.3d at 872. District court and appellate decisions in the Fifth Circuit repeatedly refer to the harassment found lawful in *Shepherd* as establishing the governing legal standard in that circuit.[15]

The standard set in *Shepherd* led to a second widely cited Fifth Circuit decision, *Hockman v. Westward Communications,* 407 F.3d 317, 321-22 (5th Cir. 2004). *Hockman* recounted the facts in *Shepherd*, and explained that the harassment in *Hockman* itself was necessarily legal because "[t]his conduct is perhaps even less egregious than that alleged in *Shepherd.*" 407 F.3d at 328. The facts of *Hockman* are standard setting in the Fifth Circuit:

> First, [the harasser] commented on the body of a former Westward employee, . . . Specifically, Hockman claims that "[the harasser] would tell her that [the former employee] had a nice behind

[15] *E.g., Morris v. Baton Rouge City Constable's Office*, 2018 WL 3041189 at *4 (M.D. La. June 19, 2018) ("the comments are not as severe as those that the Fifth Circuit has held to be insufficient to support a hostile work environment claim. For instance, in *Shepherd* . . . .") (describing harassment found lawful in *Shepherd*); *Gibson v. Potter,* 264 Fed.Appx. 397, 401 (5th Cir. 2008) ("Gibson's other allegations are . . . analogous to the 'boorish and offensive' comments in *Shepherd*; they do not rise to the level of severity or pervasiveness required by the law"); *Wilkinson v. Potter*, 236 Fed.Appx. 892, 893-94 (5th Cir. 2007) ("The instant case presents circumstances that are even less offensive than those in *Shepherd*"); *Vallecillo v. U.S. Department of Housing & Urban Development,* 155 Fed.Appx. 764, 767 n. 2 (5th Cir. 2005) ("Vallecillo's allegations are on the same plane as those in *Shepherd*. Shepherd's allegations were insufficient to succeed on summary judgment in that case, *id.,* and Vallecillo's are insufficient here.").

> and body." Next, Hockman claims that beginning in July of 2001, [the harasser] would brush up against her breasts and behind. Third, Hockman claims that on one occasion, [the harasser] "slapped [her] behind with a newspaper." Fourth, [the harasser] once attempted to kiss Hockman. Fifth, on more than one occasion, [the harasser] asked Hockman to come in early so that they could be alone together. Finally, [the harasser] once stood in the doorway of the ladies' restroom as Hockman was washing her hands.

407 F.3d at 321-22. Decisions in the Fifth Circuit repeatedly refer to the harassment found lawful in *Hockman* as establishing the governing legal standard. For example, *Paul v. Northrop Grumman Ship Systems,* 309 Fed.Appx. 825, 829 (5th Cir. 2009), explained that

> in circumstances where the alleged conduct was either similar, or more objectionable and frequent than, [the harasser's], this court has held that non-pervasive conduct involving physical touching—including unwanted touching of intimate body parts—was not actionable under Title VII. *See* . . . *Hockman* [summarizing harassment found lawful, including touching victim's breasts and buttocks]

309 Fed. Appx. at 829.[16]

Frequently, *Shepherd* and *Hockman* are cited together is establishing the standard of legality. For example, in *Barnett v. Boeing Co.,* 306 Fed. Appx. 875, (5th Cir. 2009), the court explained

> [t]here is sufficient evidence for purposes of summary judgment to show that [the harasser] leered at Barnett, touched her in sexually inappropriate and unwelcome ways, and allegedly actively intimidated her after she complained of his actions. Looking at the totality of the circumstances, this Court's decisions in *Shepherd* and *Hockman* . . . make clear that Barnett failed to demonstrate that her working environment was objectively hostile or abusive within the meaning of Title VII.

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[16] *E.g. Friend v. City of Greenwood, Mississippi,* 202 WL 2306112 at *6 (N.D. Miss. May 5, 2020) ("conduct more severe than the alleged conduct here was found insufficient to establish a cognizable claim of sexual harassment.") (citing and describing harassment held lawful in *Hockman*); *Scott-Benson v. KBR, Inc.,* 2019 WL 5894313 at *6 (E.D .La. Nov. 12, 2019) ("the case law on when workplace behavior gives rise to a sexually hostile work environment claim shows a far greater degree of harassment than the record discloses here, both in terms of the frequency and the nature of the offensive conduct.") (citing and describing harassment held lawful in *Hockman*); *Mire v. Texas Plumbing Supply Co.,* 286 Fed.Appx. 138, 142 (5th Cir. 2008) ("none of these individual alleged incidents of harassment may rise to the level of severity we have required") (citing *Hockman* and summarizing harassment fond lawful in that case); *Russell v. University of Texas*, 234 Fed. Appx. 195, 205 (5th Cir. 2007) ("These actions are no more severe than those in previous cases where this court has held that the employee did not demonstrate a hostile work environment. . . . At best, Dr. Russell's allegations are on the same plane as those we found insufficient to establish "severe or pervasive" harassment in *Hockman.*").

306 Fed. Appx. at 879. (summarizing harassment found lawful in *Shepherd* and *Hockman*).[17]

The Fifth Circuit, like the Eighth Circuit, insists that its precedents establish a high bar in hostile environment cases. *Patton v. Jacobs Engineering Group, Inc*., 863 F.3d 419, 427 (5th Cir. 2017) ("high threshold"); *Molden v. East Baton Rouge Parish School Bd*., 715 F.3d 310, 316 (5th Cir. 2017) ("high bar"); *Watson v. Kroger Texas*, L.P., 576 Fed. Appx. 392, 393 (5th Cir. 2014) ("high threshold"); *see Gowesky v. Singing River Hosp. Systems*, 321 F.3d 503, 509 (5th Cir. 2003) ("[t]he legal standard for workplace harassment in this circuit is . . . high.").

B. Other Circuits Assess Harassing Conduct From The Perspective of The Victim, Evaluate All of The Circumstances, Do Not Apply Special Stringency Standards, and Permit Juries To Resolve Claims About Which Reasonable People Could Differ

Most circuits, of course, do not construe or implement in this manner the Title VII prohibition against sexual harassment. Rather, those circuits generally apply four principles, derived from the decisions of this Court, each of which is inconsistent with the precedent-comparison method in the Eighth and Fifth Circuits.

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[17] *E.g., Ivey v. Brennan,* 770 Fed.Appx. 661, 665 (5th Cir. 2019) ("Defendants' Fifth Circuit authority which shows that the alleged conduct of both Hodges and Hebert, even if taken as true, is not enough to create a hostile work environment as a matter of law. *See e.g., Hockman* [summarizing harassment found lawful]; *Shepherd* [summarizing harassment found lawful]"); *Hatfield v. Bio-Medical Life Applications of Louisiana, LLC,* 2017 WL 4976801 at *4 (W.D.La. Oct. 31, 2017) ("[c]omparing these instances of harassment to instances set forth in cases decided by courts in the Fifth Circuit, . . . the harassment Plaintiff suffered, even if proved, is not so severe or pervasive [as to violate Title VII]") (citing *Shepherd* and *Hockman* and and summarizing harassment found lawful in those cases); *Haynes v. Brennan,* 2016 WL 2939074 at *3 (S.D.Tex. May 20, 2016) ("the harasser's actions "were likely offensive to Haynes, but not sufficiently severe or pervasive to be actionable under Fifth Circuit standards.") (citing *Shepherd* and *Hockman* and summarizing harassment found lawful in those cases); *Wiggins v. St. Luke's Episcopal Health System,* 517 Fed.Appx. 249, 251 (5th Cir. 2013) ("our prior holdings, as cited by the district court, indicate that such conduct was not so severe or pervasive as to rise to the level of actionable harassment in this circuit. *See e.g., Shepherd* [summarizing harassment found lawful]; *Hockman* [summarizing harassment found lawful]"); *Kebiro v. Walmart,* 193 Fed.Appx. 365, 369 (5th Cir. 2006) ("This court has upheld district courts' summary judgments on the ground that the plaintiff has not produced evidence of an abusive work environment on facts far more egregious than these. *See Hockman* . . . . ; *Shepherd* . . . .").

(1) Other circuits recognize that harassing conduct should not be evaluated in the abstract, but from the perspective of a reasonable person in the position of the victim. As the Ninth Circuit explained in *Ellison v. Brady*, 924 F.2d 878, 879 (9th Cir. 1991),

> in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim. . . . A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. *See, e.g., Lipsett v. University of Puerto Rico,* 864 F.2d 881, 898 (1st Cir.1988) ("A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive") . . . . We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. . . . [T]he reasonable victim standard . . . classifies conduct as unlawful sexual harassment even when harassers do not realize that their conduct creates a hostile working environment.

The seriousness of harassing conduct is evaluated from the perspective of the victim, not the perspective of the judges who decided an earlier case.

(2) In the majority of circuits, courts in sexual harassment cases pay careful attention to each of incidents complained of, evaluating whether it could be fairly understood to contribute to a hostile environment, explaining why, and considering what impact it might have on a reasonable person in the position of the plaintiff. Not so under the Eighth Circuit precedent-comparison standard; under that standard, the details of a plaintiff's claim often play little if any role in a conclusory determination that the harassment in her case was less egregious than in *Duncan* or some other precedential decision.

That difference in the standards is illustrated by the treatment in the courts below of the misogynistic language which Burns regularly inflicted on Paskert. Burns repeatedly denounced female customers as "bitches" and "cunts," language which Paskert have heard from her adjoining office. The district court noted the use of those epithets in its summary of the evidence (App. 20), but never mentioned those epithets in its analysis of the merits of Paskert's claim. The court of appeals recited vaguely that Burns had used "derogatory names" (App. 3a), but did not refer to that in summarily explaining that the harassing conduct in this case was less egregious than the conduct in earlier unsuccessful sexual harassment cases. App. 6a.

Other circuits, however, pay particular attention to this sort of language in a sexual harassment case. In *Costa v. Desert Palace, Inc.,* 299 F.3d 838, 861-62 (9th Cir. 2002) (en banc), the Ninth Circuit characterized "bitch" as a "sexual . . . epithet," "a derogatory term indicating sex-based hostility," a "sex-based slur[]," and "offensive sexual language." In *Reeves v. C.H. Robinson Worldwide, Inc.,* 594 F.3d 798 (11th Cir. 2010) (en banc), the Eleventh Circuit observed that

> when a co-worker calls a female employee a "bitch," the word is gender-derogatory. . . . [T]he terms "bitch" and "slut" are "more degrading to women than to men." . . . [T]he term "bitch['s]" . . . secondary meanings are . . . gender-specific: "a lewd or immoral woman" or "a malicious, spiteful, and domineering woman." . . . . Calling a female colleague a "bitch" is firmly rooted in gender. It is humiliating and degrading based on sex.

594 F.3d at 810. In *Passananti v. Cook County,* 689 F.3d 655, 659 (7th Cir. 2012), the Seventh Circuit held that a "jury could reasonably treat the frequent and hostile use of the word 'bitch' to be a gender-based epithet that contributed to a sexually hostile work environment." Similarly, the Ninth Circuit has correctly characterized the term "cunt" as an "offensive name[] based on gender . . ." (*Steiner v. Showboat Operating Co.,* 25 F.3d 1459, 1461 (9th Cir. 1994)), and a "[c]learly sexist" epithet. *Conklin v. City of Reno,* 433 Fed. Appx. 528, 531 (9th Cir. 2011); *Cordova v. State Farm Ins. Companies,* 124 F.3d 1145, 1149 (9th Cir. 1997).

Harassers have not infrequently used both of these terms about a targeted woman, and the courts have recognized their offensive nature in that context. *Forrest v. Brinker International Payroll Co., LP,* 511 F.3d 225, 229-30 (1st Cir. 2007) ("sexually degrading, gender-specific epithets"); *Winsor v. Hinckley Dodge, Inc.,* 79 F.3d 996, 1000 (10th Cir. 1996) ("intensely degrading to women."); *Franchina v. City of Providence,* 881 F.3d 32, 54 (1st Cir. 2018) ("inherently 'gender-specific'"); *State v. Baccala,* 326 Conn. 232, 252, 163 A.2d 1, 13 (2017) ("the words and phrases used by the defendant—'fat ugly bitch,' [and] 'cunt' . . . were "extremely offensive"; "[among] the most vulgar terms known in our lexicon to refer to[a woman]'s gender"). But under the Eighth Circuit precedent-comparison standard, the significance of these particular epithets simply did not matter.

(3) Appellate decisions applying the precedent-comparison method in the Eighth and Fifth Circuits have repeatedly held that hostile environment claims must overcomea "high bar" or satisfy a

“high threshold.” District courts in those circuits regularly apply this particularly stringent standard in rejecting whether sexual harassmentclaims. That is not, however, the rule in other circuits. In the First, Ninth and District of Columbia Circuits, for example, there are no appellate decisions establishing a “high bar” or “high threshold” standard in resolving disputes about whether harassment created a hostile environment.

(4) Most federal courts of appeals hold that whether harassment created a hostile environment is presumptively for a jury to determine. For example, the *Marrero v. Goya of Puerto Rico, Inc.,* 304 F.3d 7, 19 (1st Cir. 2002), held

> “[s]ubject to some policing at the outer bounds,” it is for the jury to weigh those factors and decide whether the harassment was of a kind or to a degree that a reasonable person would have felt that it affected the conditions of her employment.

*(*quoting *Gorski v. New Hampshire Dept. of Corrections,* 290 F.3d 466, 474 (1st Cir. 2002)). In *Raniola v. Bratton,* 243 F.3d 610, 621 (2d Cir. 2001) (opinion by Sotomayor, J.), the Second Circuit reasoned that

> [v]iewing the evidence in its totality, we conclude that there was sufficient proof for a reasonable jury to find that Raniola's abuse was so severe and pervasive as to constitute a hostile work environment in violation of Title VII. . . . A reasonable jury could find that these incidents were sufficiently continuous and concerted to have altered the conditions of Raniola's work environment.

The Third Circuit agrees that juries can determine whether a hostile environment existed, so long as there is sufficient evidence to support that conclusion.

> the record contains evidence of harassment that a jury might well find severe or pervasive. . . . The[] incidents' severity and the insults' frequency combine to raise a material question of fact as to whether retaliatory harassment “permeated” the workplace and changed the terms or conditions of Jensen's employment.

Jensen v. Potter, 435 F.3d 444, 452 (3d Cir. 2006) (opinion by Alito, J.). The Ninth Circuit as well holds that when summary judgment is sought, the issue is whether “a reasonable trier of fact could conclude that . . . [the] conduct was sufficiently severe or pervasive to create a hostile work environment.” *Reynaga v. Roseburg Forest Products,* 847 F.3d 768, 686 (9th Cir. 2017). The Fourth, Sixth and Tenth Circuits have similarly concluded that juries should decide this issue if reasonable people could disagree. *Paroline v. Unisys Corp.,* 879 F.2d 100, 105 (4th Cir. 1989); *Smith v. Rock-Tenn Services, Inc.,* 813 F.3d

298, 310 (6th Cir. 2016); *O'Shea v. Yellow Technology Services, Inc.,* 185 F.3d 1093, 1098 (10th Cir. 1999) (10th Cir. 2008).

What Judge Weinstein wrote more than two decades ago remains true to this day:

> Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogenous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment . . . . The factual issues in th[ese] case[s] cannot be effectively settled by a decision of an Article III judge on summary judgment. Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications. . . . In this period of rapidly changing and conflicting views of appropriate gender relationships in the workplace, decisions by a jury in debatable cases are sound in policy and consonant with the Seventh Amendment.

Gallagher v. Delaney, 139 F.2d 338, 342-43 (2d Cir. 1998). Under the precedent-comparison method in the Eighth and Fifth Circuits, on the other hand, only Article III judges resolve this issue when summary judgment is sought.

II. THE PRECEDENT-COMPARISON STANDARD PRESENTS AN IMPORTANT ISSUE WHICH SHOULD BE RESOLVED BY THIS COURT

Sexual harassment of working women is a deeply troubling, and vexingly persistent, part of our society. It strikes at the heart of the guarantee of equal employment opportunity in the nation's laws, and betrays the expectation of simple decency to which every woman and man is entitled. Recent years have brought to light a series of stark reminders of the magnitude of this problem, little surprise to most women, but a revelation to many men, and doubtless to not a few members of the judiciary. The MeToo movement has been a wake-up call, both to our country, and to our legal system.

It has been thirty-four years since this Court's unanimous decision in *Meritor* declared that sexual harassment violates Title VII. The effect of this Court's decisions implementing that principal have, for complex reasons, fallen short of what the members of this Court, or the public, hoped would follow. Too many supervisors and co-workers have remained unwilling to resist the opportunity afforded by

workplace authority and proximity to inflict abusive conduct and language on unwilling victims. This Court did not shrink from addressing the massive resistance that greeted *Brown v. Board of Education*, and the Court should be no less persistent in assuring compliance with its decision in *Meritor*.

This Court's post-*Meritor* established important guideposts for the implementation of that decision. The determination of whether harassment altered the terms and conditions of the victim's workplace is to consider "all the circumstances"; no single factor was required. *Harris v. Forklift,* 510--- U.S. at *23*. Due consideration must be given to "the real social impact of workplace behavior." *Oncale,* 523 U.S. at 82. The assessment of the impact of harassment on the workplace environment is to be made from the perspective of "a reasonable person in the plaintiff's position." *Oncale*, 523 U.S. at 82. And both *Harris* and *Oncale* envisioned that the trier of fact would ordinarily resolve this issue. 510 U.S. at 22; 523 U.S. at 81. Most circuits have applied those standards.

But the legal regime that has prevailed in the Eighth Circuit for almost two decades bears little resemble to what this Court has required. The controlling issue in that circuit is not whether a reasonable person in the position of the victim would regard the harassment as creating a hostile environment, but whether a majority of the three-judge panel which decided *Duncan* in 2002 would have done so. Whether harassing conduct is determined from the perspective of a judge of the United States Court of Appeals for the Eighth Circuit. Notwithstanding *Harris*, one factor is indeed required under this precedent-based system: a showing that the harassment of which the plaintiff complains is more egregious than the harassment in *Duncan,* or in any of its progeny. Federal judges alone necessarily make the comparative determination, because a jury would not be competent to compare the harassment asserted by a given plaintiff with the circumstances of past judicial decisions.

This is not merely inconsistent with *Meritor*, *Harris*, and *Oncale*, it makes no sense. The real social impact of workplace behavior cannot be divined simply by reading old, or even more current, judicial decisions. Federal judges, either of the past or of our own era, are less able than a modern gender-diverse and age-diverse jury to understand the real effects of the wide variety of gender-related misconduct presented by sexual harassment claims. And it is impossible to understand the legal calculus

that is being used by the Eighth Circuit to determine cases as such as this, holding, for example, that being subjected in the instant case to repeated graphic tales of Paskert's supervisor's sexual escapades and tirades about "bitches" and "cunts," or being subjected in *LeGrand* to explicit sexual propositions from a supervisor, were less egregious—indeed, we are told, far less egregious—than being subjected in *Duncan* to a supervisor who liked to display various phallic symbols in his office.

No member of this Court could have foreseen, when certiorari was denied in *Duncan*, that that decision would become the precedent that dominated Eighth Circuit sexual harassment litigation in the decades to follow. Only the Fifth Circuit has joined the Eighth in adopting a precedent-comparison method for determining when sexual harassment is lawful under Title VII. But the Eighth Circuit shows no sign of departing from its ill-conceived legal standard. The truly obnoxious and persistent harassment that was held lawful in this case, and the almost cavalier tone of the decisions below, starkly illustrate the need for action by this Court. This has gone on long enough.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

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