No. 25-3523

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant,

v.

BRINKER INTERNATIONAL PAYROLL COMPANY LP, BRINKER INTERNATIONAL, INC., AND BRINKER ARKANSAS, INC.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Arkansas
No. 4:22-cv-00820

OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS PLAINTIFF-APPELLANT

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SUMMARY OF THE CASE

Adult cook D.J. Thompson sexually harassed four teenage girls while working at Defendants' restaurant. Among other abuse, he trapped one in the restaurant's walk-in refrigerator and groped her breasts and genitals, stuck his hand down another's pants, tried to grab a third's butt, and demanded to "touch up on" a fourth, all in his first months of work. After the teens reported the harassment, Defendants failed to protect them and let the investigation of the harassment languish for weeks, prolonging the teens' exposure to their harasser.

The Equal Employment Opportunity Commission (EEOC) brought this Title VII action alleging that Defendants subjected the teens to a hostile work environment and constructively discharged one of them. The district court erroneously granted summary judgment for Defendants on both claims. A jury could find that Thompson's abuse created a hostile work environment that Defendants failed adequately to prevent or remedy. And a jury could find that forcing a teen victim to continue working alongside her adult harasser created intolerable working conditions for purposes of the constructive-discharge claim. This Court should thus reverse the district court's judgment. EEOC requests 20 minutes of oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

STATEMENT OF JURISDICTION

EEOC brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. The district court had jurisdiction under 28 U.S.C. § 1331. On September 30, 2025, the district court granted summary judgment to Defendants on all claims and entered final judgment. App.1936-80, R.Doc.73; App.1981-82, R.Doc.74.[1] On December 23, 2025, EEOC timely filed its notice of appeal. App.1986-87, R.Doc.82. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. In dismissing the hostile-work-environment claim, did the district court err by concluding that no reasonable jury could find that Thompson's sexually abusive conduct rendered the teenage claimants' work environment objectively and subjectively hostile?

Apposite authority:

- *Beran v. VSL N. Platte Ct. LLC*, 144 F.4th 1007 (8th Cir. 2025)
- *Beard v. Flying J, Inc.*, 266 F.3d 792 (8th Cir. 2001)

[1] The district court stayed all deadlines during the government shutdown in fall 2025. App.1984, R.Doc.77; App.1985, R.Doc.80.

- *Hathaway v. Runyon*, 132 F.3d 1214 (8th Cir. 1997)
- *EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422 (7th Cir. 2012)

2. Could a reasonable jury find that Defendants (a) negligently failed to prevent the harassment by taking inadequate steps to ensure the teenage claimants understood the company's anti-harassment policy, and (b) negligently failed to respond to the harassment by making the victims work with their harasser and unreasonably delaying the investigation into the harassment?

Apposite authority:

- *Vance v. Ball State Univ.*, 570 U.S. 421 (2013)
- *Nichols v. Tri-Nat'l Logistics, Inc.*, 809 F.3d 981 (8th Cir. 2016)
- *EEOC v. V&J Foods, Inc.*, 507 F.3d 575 (7th Cir. 2007)

3. In dismissing the constructive-discharge claim, did the district court err by concluding that forcing a teenage victim to continue working with her adult harasser did not give rise to intolerable work conditions?

Apposite authority:

- *Green v. Brennan*, 578 U.S. 547 (2016)
- *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612 (8th Cir. 2000)

STATEMENT OF THE CASE

A. Statement of Facts

1. The teenage claimants begin working at Chili's.

Claimants Emily Page, Chloe Holdcraft, Miranda Bentz, and Evening Sharp were all sixteen or seventeen years old when they began working for Defendants Brinker International Payroll Company LP; Brinker International, Inc.; and Brinker Arkansas, Inc. (collectively "Defendants") at a Chili's restaurant in Benton, Arkansas between October 2020 and January 2021. App.494-95; R.Doc.60 at 15-16 (¶¶ 18-19). None of the claimants had ever held a job before. App.617, R.Doc.60-2 at 11; App.961, R.Doc.60-7 at 26; App.1284, R.Doc.60-15 at 12; App.1764, R.Doc.60-35 at 12.

When the claimants began at Chili's, Defendants gave them roughly twenty minutes to review more than twenty company policies and then sign an acknowledgment form indicating they read and understood them. App.365-68; R.Doc.51-19; App.1347, R.Doc.60-15 at 75; App.1639, R.Doc.60-22 at 74; App.2074, R.Doc.60-24 at 6 (sealed).[2] The claimants testified that Defendants did not explain or review these policies but simply had them

[2] Sealed documents are contained in Volume 8 of the Joint Appendix and cannot be accessed through the district court docket. The R.Doc. citations are to the exhibit numbers that appear on the face of the sealed documents.

click through the policies on a tablet or computer. App.675, 681-82, R.Doc.60-2 at 69, 75-76; App.972, 1115-16, R.Doc.60-7 at 37, 180-81; App.1769-71, 1848, R.Doc.60-35 at 17-19, 96. According to Chili's General Manager Robert Brown and Assistant Manager Kyle Leonard, Defendants had no process to verify that employees actually read and understood the policies apart from requiring them to sign the form. App.800; R.Doc.60-4 at 43; App.1497-98, R.Doc.60-21 at 34-35. None of the claimants received hard copies of the policies or recalled seeing any of the relevant information—like the hotline for reporting harassment—posted in the restaurant. App.626, 674, R.Doc.60-2 at 20, 68; App.982-83, R.Doc.60-7 at 47-48; App.1292, 1350, R.Doc.60-15 at 20, 78; App.1848-49, R.Doc.60-35 at 96-97.

2. The teenage claimants experience harassment by a co-worker twice their age.

The claimants held a variety of positions, with Sharp working as a server and Page, Bentz, and Holdcraft eventually working as "To-Go Specialists," responsible for tasks like retrieving customers' takeout orders. App.616, R.Doc.60-2 at 10; App.964, R.Doc.60-7 at 29; App.1285, R.Doc.60-15 at 13; App.1764-65, R.Doc.60-35 at 12-13. Their managers described them as professional, hard-working, and sometimes quiet or shy. App.850,

R.Doc.60-4 at 93; App.1434, R.Doc.60-20 at 78; App.1539-43, R.Doc.60-21 at 76-80.

The To-Go Specialist position required frequent contact with kitchen staff, including D.J. Thompson, a thirty-two-year-old man who began working as a non-managerial cook in December 2020. App.494-95, R.Doc.60 at 15-16 (¶¶ 18-20); App.920, R.Doc.60-5 at 2 (¶ 10); App.1197, R.Doc.60-12 at 3 (¶ 15).

During March and April 2021, Thompson sexually assaulted Page on four occasions. App.1744, R.Doc.60-30 at 2 (Page's EEOC charge); App.1786-88, R.Doc.60-35 at 34-36 (Page deposition confirming accuracy of the charge). First, in late March, Thompson trapped Page in the restaurant's walk-in refrigerator. App.1744, R.Doc.60-30 at 2. Because of the kitchen's open layout, cooks like Thompson could see when To-Go Specialists like Page retrieved supplies from the walk-in. App.1437, R.Doc.60-20 at 81. On that first occasion, Thompson followed Page into the walk-in and forcefully kissed her and groped her private areas for more than five minutes despite her efforts to pull away. App.1744, R.Doc.60-30 at 2. A few days later, Thompson again trapped Page in the walk-in for more than five minutes, forcefully kissing her, fondling her breasts under her shirt, and trying to

remove her belt. *Id.* Several days after that, Thompson followed Page to an outdoor shed in the dark during a night shift and forced his hands down the front of her pants, fondled her bare breasts, forcefully kissed her, and fought her when she tried to push him off. *Id.* A few days later, Thompson again trapped Page in the walk-in, forcefully kissing and groping her. *Id.* Thompson also pressured Page for her phone number and then texted her a photo of his bare penis and demanded that she "let [him] see [her] pussy." App.1260-61, R.Doc.60-13 at 51-52 (201-02); App.1789, 1825, R.Doc.60-35 at 37, 73. Thompson also threatened to follow Page home and sometimes stood outside the restaurant waiting for her at the end of her shift. App.1825, 1853, R.Doc.60-35 at 73, 101. Page eventually confided in Holdcraft about Thompson's harassment, and they made a plan to walk everywhere together so Page would not be alone with him. App.633, 662, R.Doc.60-2 at 27, 56.

Thompson similarly accosted Sharp in the walk-in refrigerator in March or April 2021, getting in her face and saying, "come on let me touch up on it" and "come on little girl." App.1308, R.Doc.60-15 at 36. Sharp was "very assertive" in rejecting these advances, and he eventually backed off. *Id.* Thompson also groped Bentz and Holdcraft. Once, when Bentz was

filling a spray bottle, Thompson stuck his hand down her pants on top of her vagina over her underwear for several seconds. App.1060, R.Doc.60-7 at 125. Bentz was frozen in shock, and Thompson eventually stopped when someone came nearby. App.1060, 1120, R.Doc.60-7 at 125, 185. Thompson also once tried to grab Holdcraft's butt. App.632, R.Doc.60-2 at 26.

Thompson routinely made comments about the teens' bodies, telling them, "[']][O]h, you're hot.[']] Like just being a pig looking at some child like a piece of meat." App.630, R.Doc.60-2 at 24. Thompson stared suggestively at them and gave them flirtatious looks. Sharp explained Thompson would "[l]ook you up and down …. [Y]ou knew you were being looked at and then you turn around and sure enough you're being stared at … in all the wrong places." App.1299, R.Doc.60-15 at 27. As Holdcraft put it, "you couldn't even walk past him without him … looking at your butt" or trying to "kind of just ride his hand over you." App.678, R.Doc.60-2 at 72.

3. The teenage claimants report the harassment.

On April 16, after arguing with a co-worker about Thompson's conduct, Holdcraft was visibly upset and crying. App.631-32, R.Doc.60-2 at 25-26. Alyssa Downie, a Certified Shift Leader who oversaw the To-Go Specialists' shifts, spoke with Holdcraft and elicited information suggesting

Thompson had behaved inappropriately. App.630, R.Doc.60-2 at 24; App.733-34, R.Doc.60-3 at 47-48.

That night or the next morning, Downie told General Manager Brown "there was something going on inappropriate with the to-go team members and [Thompson]." App.737, R.Doc.60-3 at 51. Brown told Downie he would call Team Member Relations (TMR), a corporate division responsible for investigating harassment and other workplace claims. *Id.* Brown, however, did not contact TMR on April 17. *See* App.496, 498-99, R.Doc.60 at 17, 19-20 (¶¶ 22, 27-28). Page worked shifts with Thompson that day and the day after. App.920, 924-27, R.Doc.60-5 at 2 (¶ 9), 6-9.

During her April 18 shift, Page was outside during her break when she saw Bentz, who was coming to work. App.1004, R.Doc.60-7 at 69. They began discussing how they "didn't want to go into work, but we wouldn't tell each other why." *Id.* Page eventually "told [Bentz] her situation, and [Bentz] said … it happened to me too." *Id.* Assistant Manager Jacob Hefner then called Bentz to ask why she was late, and she told him "we were scared to go to work." *Id.* Hefner and Brown came outside and Bentz told them she and Page "were both being harassed by [Thompson] and that we didn't want to return to work that day if he was going to be there."

App.1794, R.Doc.60-35 at 42; *see* App.1006-07, R.Doc.60-7 at 71-72. According to Bentz and Page, Brown said he already knew and was waiting for them to come forward. App.1098, R.Doc.60-7 at 163; App.1794, R.Doc.60-35 at 42. Brown and Hefner then sent Thompson home from his shift. App.855, R.Doc.60-4 at 98.

At some point the following evening or the morning of April 20, Brown contacted Brandon Sanders, a TMR employee who told Brown to contact TMR's hotline. App.816, 847, R.Doc.60-4 at 59, 90. On April 20, Brown emailed TMR, stating that Holdcraft and Page "indicated that one of our Cooks DJ has attempted to kiss them in the walk-in." App.340, R.Doc.51-15 at 9. The email says that Holdcraft and Page are "minors and DJ is in his 30s" but that "age doesn't have anything to do with sexual harassment[]" except that "because of the two being minor[s], we didn't want to place DJ in a situation where parents may create a scene." *Id.* The email does not mention Bentz's allegations. *Id.*

4. Defendants continue to schedule the teenage claimants to work with Thompson.

Defendants let Thompson return to work on April 20, the same day Brown sent the email to TMR. App.927, R.Doc.60-5 at 9. That day, Brown

sent a text message to Page, Bentz, and Holdcraft stating that corporate is "opening a full investigation" and that Thompson would continue working "as it is unfair to only penalize half of the party with loss of hours." App.2085, R.Doc.60-25 at 1 (sealed). Brown said, "As of right now, DJ will work opposite shifts of you three just to ensure there is no opportunity for interaction." *Id.* Page responded on April 21 that she was "okay with working my shifts as long as, like you said, dj's not there. [I] don't want to lose hours just because there's nothing that can be done about it yet." App.2087, R.Doc.60-25 at 3 (sealed).

Defendants, however, continued to schedule the teenage claimants to work with Thompson. Between April 20 and Thompson's eventual termination on May 5, Thompson overlapped with Page on six shifts and on four shifts each with Bentz and Holdcraft. App.920-21, 924-27, R.Doc.60-5 at 2-3 (¶¶ 11-16), 6-9; App.1181-82, 1184-86, R.Doc.60-11 at 2-3 (¶¶ 9-14), 5-7; App.1196, 1198, 1209, R.Doc.60-12 at 2 (¶¶ 9-12), 4, 15. Defendants scheduled the majority of these shifts, but some of these shifts the claimants asked to "pick up." App.920-21, R.Doc.60-5 at 2-3 (¶¶ 11-13, 15-16); App.1181-82, R.Doc.60-11 at 2-3 (¶¶ 13-14); App.1196, R.Doc.60-12 at 2 (¶¶ 10, 12). When asking to pick up a shift, the claimants could not see

whether Thompson was scheduled to work at the same time, and Brown generally approved their requests without telling them whether Thompson would be there. App.921, R.Doc.60-5 at 3 (¶ 17); App.1181, R.Doc.60-11 at 2 (¶ 13); App.1196, R.Doc.60-12 at 2 (¶¶ 9, 13). While Thompson did not touch or make sexual comments towards the teens during these shifts, they testified that he continued to stare suggestively at them and that they had to work closely with him to retrieve food orders, which made them fearful and anxious. App.640, R.Doc.60-2 at 34; App.921, R.Doc.60-5 at 3 (¶¶ 18, 19); App.1182, R.Doc.60-11 at 3 (¶ 15); App.1197, R.Doc.60-12 at 3 (¶¶ 14-16).

When the teenage claimants objected to working with Thompson, Defendants told them they had to find coverage on their own for any schedule changes or face consequences for missing work. App.1015-16, R.Doc.60-7 at 80-81; App.1858, R.Doc.60-35 at 106. According to a contemporaneous text Bentz sent to Page, Bentz told Brown she thought it was unfair that Thompson "still got to work there while we did, because yes, he had a life, he had to pay for support, but he should've thought about that before. We are minors …." App.1029, R.Doc.60-7 at 94. But in a text exchange Brown told Bentz:

> If a [co-worker] told me that you touched their butt, would you want me to jump straight to termination of you? Or investigate properly? It's the same thing for this situation, but every conversation I have had is people only seeing one side of the story and expecting something to be done immediately[.] So yes, I'm done with the conversation because I have a team of legal advisers that are simply going to tell me what to do[.]

App.347, R.Doc.51-15 at 16. Ultimately, "because [Brown] said that we could still possibly work with [Thompson]," Bentz took a week-long leave of absence. App.1021-22, R.Doc.60-7 at 86-87. Upon her return, however, she had to work three more shifts with Thompson. *Id.*; App.1181-82, 1184-86, R.Doc.60-11 at 2-3 (¶¶ 13-14), 5-7.

5. Defendants ultimately terminate Thompson after weeks of inaction.

Following Brown's April 20 email, TMR opened an investigation and assigned it to BJ Marshall, a new TMR specialist who had started working a few weeks prior. App.1247, R.Doc.60-13 at 38 (148). Marshall contacted Holdcraft and Page by text message and phone call on April 20. App.1248, R.Doc.60-13 at 39 (152-53). Holdcraft answered the call but hung up because she was in a high-school class. App.645, R.Doc.60-2 at 39. Marshall then sent a text, but it did not identify who he was. App.393, R.Doc.51-23 at

2. Page did not receive the text or call because her parents had confiscated her phone. App.325, R.Doc.51-13 at 9.

Marshall did not attempt to contact Holdcraft or Page again until two weeks later, on May 4. App.1255-58, R.Doc.60-13 at 46-49 (180-83, 189-91). On that day, he texted Holdcraft, who responded within minutes and provided details about the harassment. App.393-94, R.Doc.51-23 at 2-3; App.1256-57, R.Doc.60-13 at 47-48 (185-88). Marshall then visited Page at the restaurant, at which point she told him about Thompson's assaults and the photo of his penis. App.1258-60, R.Doc.60-13 at 49-51 (192-99). Upon receiving a screenshot of the photo on May 5, Marshall recommended that Defendants fire Thompson. App.1260-61, R.Doc.60-13 at 51-52 (201-04).

Marshall testified that he ultimately could substantiate only the explicit photo because the other harassment was not corroborated by two additional witnesses, which he believed to be required based on his training. App.1232, R.Doc.60-13 at 23 (86-89). For sexual harassment allegations lacking two additional witnesses, Defendants would at most require alleged harassers to review and sign the anti-harassment policy and to sign a form allowing them to "explain a little bit more" about what happened. App.1233, R.Doc.60-13 at 24 (91).

6. Page's parents discover the harassment, and Page stops working at Chili's.

Until May 4, Page's parents had been unaware of the harassment. App.324, R.Doc.51-13 at 8. Page was embarrassed to tell them, and Defendants did not inform them. *Id.*; App.1851, 1862-63, R.Doc.60-35 at 99, 110-11.

On May 3, Page's parents—who were still unaware of the harassment—spoke with Downie and suggested Page stop working at Chili's because her grades were slipping.[3] App.319, R.Doc.51-13 at 3; App.349-50, R.Doc.51-16 at 2-3 (¶ 4). Downie did not disclose the harassment their daughter experienced. App.752-53, R.Doc.60-3 at 66-67; App.1745, R.Doc.60-30 at 3. Page's stepfather then texted Downie to ask if Page's schedule could be adjusted to remove school hours, and Downie responded in the affirmative. App.353-54, R.Doc.51-16 at 6-7. Page's

[3] Page's mother later recalled during her deposition that Page's grades and behavior changed dramatically in the weeks prior to disclosure of the harassment—corresponding with the time of Thompson's assaults. App.321, R.Doc.51-13 at 5. While Page had previously been getting good grades and going to school regularly, she started "not caring about school, not focusing on her grades," and skipping school during the period of the harassment. *Id.*

stepfather thanked Downie for "help[ing] retain" Page and did not mention resignation again. *Id.*

On May 4, after Marshall asked to see Thompson's explicit photo, Page told her parents about the harassment so she could access the photo from the phone her parents confiscated. App.324, R.Doc.51-13 at 8; App.1878, R.Doc.60-35 at 126. Page's parents immediately went to Chili's and called the police from the parking lot. App.324, R.Doc.51-13 at 8; App.2099, R.Doc.60-33 at 4 (sealed). The police arrived and interviewed Page, her parents, Brown, and Bentz. App.2099-2100, R.Doc.60-33 at 4-5 (sealed). The police report notes that Brown said "he did not appreciate the way the parents came into the store asking for information" and that "if he wanted to press harassment charges on the parents … he could, based on how they spoke to him." *Id.* The police advised Page not to return to work, and she never worked at Chili's again. App.1746, R.Doc.60-30 at 4.

B. District Court's Decision

EEOC brought this Title VII action alleging that Defendants subjected the teenage claimants to a hostile work environment and constructively discharged Page. The district court granted Defendants' motion for summary judgment on both claims.

As to the hostile-work-environment claim, the court ruled that no jury could find objective or subjective hostility. App.1960, R.Doc.73 at 25. Regarding objective hostility, the court acknowledged that between the time Thompson was hired on December 21, 2020, and when Holdcraft complained on April 16, 2021, "Thompson groped Page's private areas, grabbed her breast[s], and kissed her on the mouth" on four occasions; "stuck his hand in Ben[t]z's pants for a few seconds over her underwear"; followed Sharp into the walk-in refrigerator and "got up in her face and said 'come on let me touch up on it'"; and tried to grab Holdcraft's butt. App.1956-57, R.Doc.73 at 21-22 (citations omitted). But the court deemed this conduct insufficient to meet what it described as this Court's "high bar" for objective hostility. App.1959, R.Doc.73 at 24. With respect to subjective hostility, the court relied on several considerations—including that the teenage claimants did not initially report the harassment, that Holdcraft "couldn't tell" precisely when Thompson tried to grab her butt, and that Sharp "didn't have a problem" with Thompson after "she was very assertive" with him when he accosted her—to conclude that the claimants did not "subjectively perceive[] their work environment as abusive." App.1959-60, R.Doc.73 at 24-25.

The court next found that EEOC failed to prove a basis for employer liability. First, as to Defendants' response after receiving actual notice on April 16, the court concluded that Brown's four-day delay in reporting to TMR "was not unreasonable under the circumstance[s]" and that Marshall had acted promptly by contacting Holdcraft and Page on April 20. App.1967, R.Doc.73 at 32. The court did not consider whether Marshall's failure to take further investigative steps until May 4 or Defendants' failure to keep Thompson away from the teenage claimants rendered Defendants' remedial response deficient. Second, the court rejected EEOC's argument that Defendants negligently failed to prevent harassment by taking inadequate steps to ensure their teenage employees understood the company's anti-harassment policy. The court concluded that Defendants had to *respond* to allegations of harassment but had no underlying duty to *prevent* harassment in the first place. App.1968-69, R.Doc.73 at 33-34.

The court also dismissed the constructive-discharge claim. App.1979, R.Doc.73 at 44. The court concluded that although "management's efforts to separate Page from … Thompson were less than ideal"—resulting in Page working with Thompson for several shifts even after she complained—no reasonable jury could find those conditions objectively

intolerable. App.1977, R.Doc.73 at 42. The court also found it significant that Page's parents raised no concerns about Thompson when suggesting that she stop work due to her grades and behavior, though her parents learned of the harassment only after that conversation occurred. App.1975, R.Doc.73 at 40.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo, viewing all evidence and drawing all reasonable inferences in favor of the nonmoving party. *Odom v. Kaizer*, 864 F.3d 920, 921 (8th Cir. 2017). Summary judgment is appropriate only "when there is no genuine dispute of material fact and the prevailing party is entitled to judgment as a matter of law." *Id.* (citation omitted).

SUMMARY OF ARGUMENT

The district court erred by granting summary judgment to Defendants.

1. First, as to the hostile-work-environment claim, a jury could find, contrary to the district court's conclusion, that the work environment was both objectively hostile and subjectively perceived as abusive. As for objective hostility, the court failed to explain why teenage girls who

endured invasive and aggressive conduct like forceful kissing, fondling of their breasts, and groping of their genitals by a man twice their age would not reasonably perceive that conduct as hostile. And as for subjective hostility, the court erred by drawing inferences against the teenage claimants at the summary-judgment stage, attributing their behavior to a subjective belief that Thompson's conduct was not severe rather than to alternative explanations a jury could credit, like their young age, fear, and embarrassment.

The district court also erred in concluding that no basis for employer liability existed as a matter of law. Contrary to the court's conclusion, a reasonable jury could find that Defendants acted negligently by failing to adequately prevent and respond to the harassment. A jury could find that Defendants both: (1) failed to respond adequately or promptly upon learning of the harassment because they did not keep Thompson away from the teenage claimants and prolonged their exposure to him by unreasonably delaying the investigation; and (2) failed to exercise reasonable care to prevent harassment from occurring because they did not meaningfully communicate the company's anti-harassment policy and reporting procedures.

2. The district court also erred in granting summary judgment on the constructive-discharge claim. The court misapprehended the relevant facts surrounding Page's separation and erroneously concluded that forcing the teenage Page to continue working alongside her adult harasser merely gave rise to "less than ideal" working conditions, when a reasonable jury could instead find those conditions objectively intolerable.

ARGUMENT

I. The district court erred in granting summary judgment on the hostile-work-environment claim.

A sex-based hostile-work-environment claim requires a showing that: (1) an employee is a member of a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of her employment (which requires showing an "objectively hostile" work environment that is "subjectively perceived as abusive"); and (5) a basis for employer liability exists. *Gibson v. Concrete Equip. Co.*, 960 F.3d 1057, 1063 (8th Cir. 2020) (cleaned up). The district court found the fourth and fifth elements unsatisfied. This was error because a reasonable jury could find that: (1) Thompson's invasive and aggressive conduct rendered the teenage

claimants' work environment both objectively and subjectively hostile; and (2) Defendants were liable because they negligently failed to prevent and respond to the harassment.

A. The district court erred in finding no objective or subjective hostility.

1. A reasonable jury could find that Thompson's conduct made the teens' work environment objectively hostile.

The district court erred in concluding that no reasonable jury could find the teenage claimants' work environment objectively hostile. As an initial matter, it is unclear whether the court's objective-hostility finding was limited to Holdcraft and Sharp or instead applied to all the claimants. *Compare* App.1960, R.Doc.73 at 25 (finding no objective hostility "at least as to Holdcraft and Sharp"), *with* App.1956-57, R.Doc.73 at 21-22 (discussing Thompson's conduct towards all claimants in analyzing objective hostility).

To the extent the court made a blanket finding of no objective hostility as to all claimants, that finding was incorrect in light of the aggressive and invasive conduct the teens endured. Page, in particular, was sexually assaulted by Thompson on four occasions, with him forcefully kissing her, fondling her breasts, and groping her private areas. App.1744, R.Doc.60-30 at 2. He also sent her a photo of his bare penis and demanded

to "let [him] see [her] pussy." App.1260-61, R.Doc.60-13 at 51-52 (201-02). Bentz, Sharp, and Holdcraft also experienced unwanted physical advances. Thompson tried to grab Holdcraft's butt and accosted Bentz by "st[icking] his hand down [her] pants on top of [her] underwear, on the front side … next to [her] vagina, like, on top of it," for several seconds. App.632, R.Doc.60-2 at 26; App.1060, R.Doc.60-7 at 125. Thompson also trapped Sharp in the walk-in refrigerator, getting in her face and saying "come on let me touch up on it" and "come on little girl," backing off only when she was "very assertive" with him. App.1308, R.Doc.60-15 at 36. The sort of physically aggressive conduct all four claimants endured is sufficient to create a triable issue as to objective hostility. *E.g.*, *Beran v. VSL N. Platte Ct. LLC*, 144 F.4th 1007, 1012 (8th Cir. 2025) (evidence that harasser "shoved [plaintiff] against a wall and groped her breasts was a single incident of sufficient seriousness to submit the case to a jury"); *Beard v. Flying J, Inc.*, 266 F.3d 792, 798 (8th Cir. 2001) (jury could find objective hostility based on "numerous incidents" over a three-week period where plaintiff's "breasts had been touched"); *Hathaway v. Runyon*, 132 F.3d 1214, 1217, 1222 (8th Cir. 1997) (jury could find conduct objectively severe where harasser twice touched plaintiff's buttocks).

To the extent the court instead limited its no-objective-hostility finding to Holdcraft and Sharp based on the notion that they did not experience sufficient unwanted touching, this too was error. As noted, both Holdcraft and Sharp did experience unwelcome physical advances, with Thompson trying to grab Holdcraft's butt and demanding to "touch up on" Sharp after accosting her in the walk-in refrigerator. App.632, R.Doc.60-2 at 26; App.1308, R.Doc.60-15 at 36. In any event, however, "physical contact is not required to make out a hostile-work-environment claim." *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 947 (8th Cir. 2016). Instead, sexual comments, stares, and other lewd behavior can give rise to objective hostility. *E.g.*, *Wright v. Rolette Cnty.*, 417 F.3d 879, 885 (8th Cir. 2005) (explaining that "verbal harassment of a sexual nature" can constitute sexual harassment). Thompson engaged in such conduct here. Sharp testified that Thompson would "[l]ook you up and down …. [Y]ou knew you were being looked at and then you turn around and sure enough you're being stared at … in all the wrong places." App.1299, R.Doc.60-15 at 27. And Holdcraft explained that Thompson would make "comments about our butts, about our figure, of how we look. … [L]ike ['']oh, you're hot.['] Like just being a pig looking at some child like a piece of meat." App.630, R.Doc.60-2 at 24. As Holdcraft

noted, "you couldn't even walk past him without him … looking at your butt or if he could walk past you, he couldn't help it but kind of just ride his hand over you or something." App.678, R.Doc.60-2 at 72; *see Hathaway*, 132 F.3d at 1222 (fear of "pass[ing] within grabbing range" of harassers contributed to abusive working conditions). And Holdcraft also witnessed Thompson's inappropriate conduct towards Page, which further compounds the hostility of the work environment. *See* App.635-36, R.Doc.60-2 at 29-30 (Holdcraft frequently saw Thompson try to "grab [Page's] boobs, her butt" and try to "grab her and kiss her"); *EEOC v. BNSF Ry. Co.*, 150 F.4th 948, 964-65 (8th Cir. 2025) ("evidence of humiliating or intimidating acts to other women" contributes to hostile work environment).

The district court made three errors in reaching a contrary conclusion. First, the court refused to consider the age and power disparity between the thirty-two-year-old Thompson and the teenage claimants when analyzing objective hostility. Because evaluating "the objective severity of harassment" requires "consideration of the social context in which particular behavior occurs and is experienced by its target," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998), an age or power

disparity can compound the conduct's severity. *E.g., EEOC v. R&R Ventures*, 244 F.3d 334, 340 (4th Cir. 2001) (explaining that severity of harassment "was compounded by" fact that harasser "was an adult male in a supervisory position over young women barely half his age" and finding that "incessant … innuendos[] and leers directed at … young women" could create objectively hostile environment); *EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 433 (7th Cir. 2012) (given "age disparity" between harasser and victim, jury could find that inappropriate comments, sexual propositions, and harasser brushing up against victim created objectively hostile environment); *EEOC v. Finish Line, Inc.*, 915 F. Supp. 2d 904, 922 (M.D. Tenn. 2013) (conduct that might not be actionable when directed at "an adult female" could still be found "sufficiently severe" for teenage employees).

Second, the court believed that Thompson's conduct could not clear what it described as this Court's "high bar" for objective hostility. App.1959, R.Doc.73 at 24. But the cases the court cited to support that conclusion, App.1957-58, R.Doc.73 at 22-23, did not involve teenage victims and were not found to implicate the sort of exceptionally aggressive and invasive conduct that occurred here. *See LeGrand v. Area Res. for Cmty. &*

Hum. Servs., 394 F.3d 1098, 1102 (8th Cir. 2005) ("None of the incidents was physically violent or overtly threatening."); *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 935 (8th Cir. 2002) (conduct involved "a single request for a relationship, … four or five isolated incidents of [harasser] briefly touching [plaintiff's] hand, a request to draw a planter, and teasing"); *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 977 (8th Cir. 2003) (harasser "never sexually propositioned [plaintiff], and never touched her in any area other than her arm"); *Vajdl v. Mesabi Acad. of KidsPeace, Inc.*, 484 F.3d 546, 552 (8th Cir. 2007) (plaintiff did "not allege that she felt physically threatened by the offensive conduct"); *Anderson v. Fam. Dollar Stores of Ark., Inc.*, 579 F.3d 858, 862 (8th Cir. 2009) (only physical conduct involved "rubbing [plaintiff's] shoulders or back"); *McMiller v. Metro*, 738 F.3d 185, 186-87 (8th Cir. 2013) (only physical conduct involved putting arm around plaintiff's shoulders and kissing side of her face).

Third, the court suggested there was no objective hostility because the claimants "continued to perform their jobs." App.1957, R.Doc.73 at 22. But harassment need not interfere with work performance to be objectively hostile. *See Hathaway*, 132 F.3d at 1223 ("The test is not whether work has been impaired, but whether working conditions have been discriminatorily

altered." (alteration omitted) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Scalia, J., concurring))). Instead, "the fact that [the victims] continued to work under difficult conditions is to [their] credit, not the harasser's." *EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 330 (4th Cir. 2010).

2. A reasonable jury could find that the teenage claimants subjectively perceived Thompson's conduct as abusive.

The district court also erred in concluding that none of the claimants subjectively perceived their work environment as abusive. In reaching this conclusion, the court improperly drew multiple inferences against EEOC at the summary-judgment stage by disregarding evidence that Thompson's harassment deeply disturbed the teenage claimants and attributing their behavior to a subjective belief that the conduct was non-severe, rather than to alternative explanations that a jury could credit. *See Odom*, 864 F.3d at 921 (court must "draw[] all reasonable inferences in favor of the nonmoving party" (citation omitted)).

i. The teenage claimants' purported failure to report the harassment

First, the court determined that "none of the [claimants] perceived … Thompson's behavior as severe enough to report it voluntarily to

management." App.1959, R.Doc.73 at 24. This is factually incorrect: Holdcraft, Page, and Bentz each reported Thompson's conduct to management a few weeks after it began, with Holdcraft disclosing the harassment to Downie on April 16 and Page and Bentz reporting it to Hefner and Brown on April 18. App.630, R.Doc.60-2 at 24; App.1006-07, R.Doc.60-7 at 71-72; App.1793-94, R.Doc.60-35 at 41-42. And a jury could attribute any delay in reporting to the teenage claimants' fear of Thompson, embarrassment, and young age, rather than to a subjective perception that the conduct was not "severe enough to report." App.1959, R.Doc.73 at 24. Page testified that she did not initially report because "I was 16 and I was scared"; she was embarrassed to give explicit details about the harassment and for her parents to find out, afraid of losing her job, and fearful that Thompson would follow her home from work—particularly because he had threatened to do so and sometimes waited outside the restaurant after her shift. App.1851-52, 1871, R.Doc.60-35 at 99-101, 119. Bentz similarly explained that she and Page were initially reluctant to disclose the harassment to Hefner and Brown because "[i]t's not something a female wants to tell a male. … It's just uncomfortable." App.1091, R.Doc.60-7 at 156.

Even before Page reported, she and Holdcraft took matters into their own hands by creating a safety plan where Holdcraft accompanied her everywhere so she would never be alone with Thompson. App.662, R.Doc.60-2 at 56; *see* App.1750, R.Doc.60-34 at 1 (text from Holdcraft to Page's mother telling her "I did everything in my power at the time to keep [Page] safe. I just want you to know she was never alone."). And Downie and Hefner agreed that Holdcraft and Page were visibly distraught when they did disclose the harassment. App.732, R.Doc.60-3 at 46; App.1421, R.Doc.60-20 at 65; *see also* App.1533-34, R.Doc.60-21 at 70-71 (Assistant Manager Leonard recounting that Page, Bentz, and Holdcraft were upset when discussing Thompson's conduct). These actions, a jury could find, are not those of individuals untroubled by the conduct at issue.

ii. Page and Bentz's feelings about the TMR investigator

The court next noted that Page and Bentz said "they would not speak with the TMR investigator." App.1959, R.Doc.73 at 24. As an initial matter, neither Bentz nor Page *actually* refused to cooperate with the TMR investigator; instead, they texted one another discussing their reluctance to do so. App.397, R.Doc.51-24 at 2. The investigator never contacted Bentz at all because Brown did not notify TMR of her allegations. App.340,

R.Doc.51-15 at 9; App.1270, R.Doc.60-13 at 61 (238). Bentz in fact took the initiative to ask Brown why the investigator had not contacted her, and Brown said her allegations were not "as serious" as Page's. App.1118, R.Doc.60-7 at 183. And while Page missed the investigator's initial contact because her parents confiscated her phone, she cooperated fully as soon as he came to the restaurant to speak with her, even disclosing the harassment to her parents (despite great discomfort) so she could obtain the corroborating evidence he requested. App.325, R.Doc.51-13 at 9; App.1258-60, R.Doc.60-13 at 49-51 (192-99); App.1878, R.Doc.60-35 at 126.

In any event, Page and Bentz offered other explanations for their reluctance to speak with the investigator that a jury could credit. Page indicated she was embarrassed and did not want to give details about the assaults. App.1865-66, R.Doc.60-35 at 113-14. Bentz explained she was afraid of Thompson retaliating against them, as reflected in a contemporaneous text to Page stating, "I feel like if we did [speak to the investigator], he would [probably] do [something] to us." App.397, R.Doc.51-24 at 2; App.1037, R.Doc.60-7 at 102.

Bentz also explained that she and Page were frustrated with management's response and "believed that nothing was going to get done

either way." App.1035, R.Doc.60-7 at 100. This frustration is documented in contemporaneous texts between Page and Bentz. Page texted Bentz that "ive been mad at [Brown] since this started …. [A]s soon as [he] was told he said '[I know] [Downie] told me[.]' [L]ike ok then do something about it[.]" App.1742, R.Doc.60-27; *id.* (Bentz agreeing that "[t]hey're not doing anything ab[out] it" and "[t]here's no point why [Thompson's] still working there"). And, after Brown "said that the reason why he couldn't fire [Thompson] is because he had a life and that he needed the support," Bentz texted Page that she told Brown she thought it was unfair that Thompson "still got to work there while we did, because yes, he had a life, he had to pay for support, but he should've thought about that before. We are minors …." App.1029, R.Doc.60-7 at 94. Furthermore, as discussed *infra* at pp. 39-42, Brown continued to schedule Page and Bentz to work with Thompson over their objections, telling Bentz he was "done with the conversation" when she pushed back. App.347, R.Doc.51-15 at 16. A jury could find that Bentz and Page's text exchange about not wanting to speak with the investigator—a desire they never actually acted upon—stemmed from embarrassment, fear of Thompson, and frustration with Brown's inaction rather than a belief that Thompson's conduct was not severe.

iii. Page's purported willingness to work with Thompson

The court next observed that "Page told Brown that she did not care if she was scheduled to pick-up a shift where she worked with D.J. Thompson." App.1959, R.Doc.73 at 24. Although Page did text Brown on April 25 that she was willing to pick up a shift the next day even if Thompson was working, App.2089, R.Doc.60-25 at 5 (sealed), she explained she did so only because Brown "was already scheduling me with him anyways." App.1796, R.Doc.60-35 at 44. Indeed, Defendants scheduled Page to work with Thompson on April 23, 24, and 25, App.920-21, 924-27, R.Doc.60-5 at 2-3 (¶¶ 11-16), 6-9, despite Page having told Brown on April 21 that she was only "okay with working my shifts as long as … [Thompson's] not there."[4] App.2087, R.Doc.60-25 at 3 (sealed); *id.* (Page texting Brown that she was okay with being on the schedule only after learning "my shifts were opposite of [Thompson's]"). A jury could

[4] The court said that, prior to sending this text, Page only worked with Thompson once, on April 24. App.1973, R.Doc.73 at 38 n.13. However, Page's declaration and the attached time sheets indicate overlapping shifts on April 23 and April 25 as well. App.920-21, 924-27, R.Doc.60-5 at 2 (¶¶ 11, 13), 6-9.

conclude that Page simply believed she had no other choice but to work with Thompson if she wanted to work additional hours.

The court acknowledged that Page's April 25 text was "contradicted somewhat" by her declaration stating that she was "uncomfortable" and "scared" working with Thompson, but the court deemed these "subjective fears" irrelevant because Page had supposedly not "reported [them] to management at the time." App.1959, R.Doc.73 at 24. This is both factually and legally incorrect. Page did make management aware that she was uncomfortable working with Thompson at least twice: once when she and Bentz told Brown and Hefner they were scared to work their April 18 shift with Thompson, and again through her April 21 text saying she did not want to work with him. App.1004, R.Doc.60-7 at 69; App.2087, R.Doc.60-25 at 3 (sealed); App.1794, R.Doc.60-35 at 42. Further, such subjective fears are directly relevant to the question here—whether the victim perceived her co-worker's conduct as hostile—even if such fears might not "alleviate the employee's duty … to alert the employer" in the separate context of an affirmative defense to a supervisory-harassment claim. App.1959, R.Doc.73 at 24 (alteration in original) (quoting *Weger v. City of Ladue*, 500 F.3d 710, 725 (8th Cir. 2007) (addressing second element of affirmative defense)). The

district court erred by importing the affirmative-defense standard into the subjective-hostility analysis.

iv. Bentz's statements to the police

The court also noted that Bentz told the police "she did not care about the situation and nothing really happened." App.1960, R.Doc.73 at 25 (citation omitted). But Bentz explained she "did not feel comfortable talking to the officer" because "Brown was standing right next to me" and she "was afraid to voice any concerns around him" because he "previously told me he was done with the conversation when I voiced concerns about working with my harasser." App.1182, R.Doc.60-11 at 3 (¶ 18). Indeed, the police report notes that Brown "stood a few feet behind" Bentz and that she "would periodically turn around and look at [Brown]" while the officer spoke with her. App.2100, R.Doc.60-33 at 5 (sealed).

The next day, Bentz sought help from her high school to contact the police because "after thinking on it, I didn't want [what Thompson did] to happen to anyone else, … so I thought I needed to step up." App.1093, R.Doc.60-7 at 158. Bentz then went to the police station and made a statement. App.2103, R.Doc.60-33 at 8 (sealed). These actions, a jury could find, are hardly those of someone unconcerned with Thompson's conduct.

Instead, a jury could credit Bentz's testimony that she simply felt uncomfortable discussing the harassment in Brown's presence.

v. Bentz's text message about firing Thompson

The court also relied on Bentz's text message to Brown that it would be "unfair" to fire Thompson. App.1959, R.Doc.73 at 24. But Bentz said this only after Brown told *her* it would be unfair to "jump straight to termination" and said he was "done with the conversation" because "every conversation I have had is people only seeing one side of the story and expecting something to be done immediately." App.347, R.Doc.51-15 at 16. Bentz also testified that she believed Thompson should have been placed on leave rather than terminated. App.1029-30, R.Doc.60-7 at 94-95. Because the text exchange in the record is incomplete, it is unclear whether she clarified this to Brown. App.347, R.Doc.51-15 at 16; App.1027, R.Doc.60-7 at 92. Regardless, a jury could conclude, in light of Brown's brusque, unsympathetic statements to Bentz, that the seventeen-year-old said she did not want Thompson terminated simply to keep the peace with her older General Manager.

vi. Holdcraft's initial decision not to speak with EEOC and recollection of when Thompson tried to grope her

The court next observed that Holdcraft initially declined to speak with EEOC and "couldn't tell" precisely when Thompson tried to grab her butt. App.1960, R.Doc.73 at 25 (citation omitted). But a jury could reasonably credit Holdcraft's explanation that she waited until she turned eighteen to speak with EEOC because EEOC required parental permission and she did not want to involve her parents. App.668, R.Doc.60-2 at 62. Nor would a jury be required to find that Holdcraft perceived Thompson's conduct as non-abusive merely because she could not recall during her deposition several years later the precise date when he tried to grab her butt. *See Scott v. Hopkins*, 82 F. Supp. 2d 1039, 1047 (D. Neb. 1999) (witness's "inability to remember exact dates" of events that "occurred several years" before testimony "simply does not abate her credibility").

vii. Sharp's assertiveness with Thompson

Finally, the court found significant that Sharp "didn't have a problem" with Thompson after she "was very assertive" with him when he accosted her. App.1960, R.Doc.73 at 25 (citation omitted). But the court's description is factually incorrect. When asked whether she "didn't have

any problems" with Thompson after this incident, Sharp answered in the negative, testifying that, while he did not accost her again, she still felt uncomfortable because he continued to "look at me weird." App.1328, R.Doc.60-15 at 56.

Moreover, the court failed to explain how Sharp's "assertive[ness]" with Thompson in any way suggests she perceived his attempted assault as non-severe. Standing up for oneself should be encouraged; it should not be interpreted as conceding a lack of severity. *See Fairbrook Med. Clinic*, 609 F.3d at 330. If anything, the fact that Sharp had to assert herself shows how severe she thought the harassment was—she could not simply leave it unaddressed.

B. The district court erred in finding no basis for employer liability.

The district court also erred in finding that no basis for employer liability existed as a matter of law. Because Thompson was not a supervisor, a negligence standard for employer liability applies. *Sellars v. CRST Expedited, Inc.*, 13 F.4th 681, 696 (8th Cir. 2021). An employer can act negligently by (1) failing to take reasonable corrective action in response to harassment about which it knew or should have known; and/or (2) failing

to exercise reasonable care to prevent harassment from occurring in the first instance. *See id.*; *Vance v. Ball State Univ.*, 570 U.S. 421, 448-49 (2013). A jury could find that Defendants were negligent on both scores, as they: (1) failed to respond adequately or promptly upon receiving actual notice of the harassment; and (2) failed to exercise reasonable care to prevent harassment from occurring.

1. A jury could find that Defendants failed to respond adequately or promptly after learning of the harassment.

A jury could find that Defendants' response following actual notice of the harassment was deficient because they failed to keep Thompson away from the teenage claimants, unnecessarily prolonged the teens' exposure to him by unreasonably delaying the investigation into his conduct, and prioritized the interests of the company over the teens' well-being.

i. Defendants failed to keep Thompson away from the teenage claimants.

First, a jury could find that Defendants' remedial response was deficient because they failed to keep Thompson away from the teens while investigating his conduct. The district court did not consider this argument in evaluating Defendants' remedial response but agreed, in discussing the

constructive-discharge claim, that "management's efforts to separate Page from D.J. Thompson were less than ideal." App.1977, R.Doc.73 at 42.

A jury could find that Defendants made insufficient effort to protect Page and the other claimants from Thompson after discovering the harassment. Although Holdcraft disclosed the harassment on April 16, Defendants made no effort to keep Thompson away from her or Page on April 17 or 18. App.920, 924-27, R.Doc.60-5 at 2 (¶ 9), 6-9; App.1196, R.Doc.60-12 at 2 (¶ 8). And although Defendants initially sent Thompson home after Page and Bentz's April 18 report, they allowed him to return two days later. App.927, R.Doc.60-5 at 9 (Thompson April 20 shift). Brown said he planned to schedule Thompson separately from the teens upon Thompson's return, App.2085, R.Doc.60-25 at 1 (sealed), but Bentz explained that after "a couple of days," these efforts "kind of evaporated …. [I]t got hard to [make opposite schedules], so it just went away …." App.1021, R.Doc.60-7 at 86; *see* App.1795, R.Doc.60-35 at 43 (Page explaining that "[t]hey said they would" schedule Thompson separately but ultimately did not).

Indeed, as early as April 21, the claimants began working with Thompson again. App.1181, R.Doc.60-11 at 2 (¶ 11) (Bentz April 21 shift

with Thompson); App.920, R.Doc.60-5 at 2 (¶ 11) (Page April 23 shift with Thompson); App.1196, R.Doc.60-12 at 2 (¶ 9) (Holdcraft April 23 shift with Thompson). Between that date and Thompson's eventual termination on May 5, he worked six shifts overlapping with Page and four shifts each overlapping with Bentz and Holdcraft. App.920-21, 924-27, R.Doc.60-5 at 2-3 (¶¶ 11-16), 6-9; App.1181-82, 1184-86, R.Doc.60-11 at 2-3 (¶¶ 9-14), 5-7; App.1196, 1198, 1209, R.Doc.60-12 at 2 (¶¶ 9-12), 4, 15. Defendants scheduled all but four of these shifts. App.920-21, R.Doc.60-5 at 2-3 (¶¶ 11-13, 15-16); App.1181-82, R.Doc.60-11 at 2-3 (¶¶ 13-14); App.1196, R.Doc.60-12 at 2 (¶¶ 10, 12). While the remaining four shifts were ones the claimants asked to "pick up," they explained they could not see whether Thompson was working when making these requests because they did not have the code for the cooks' schedules in the app they used. App.921, R.Doc.60-5 at 3 (¶ 17); App.1181, R.Doc.60-11 at 2 (¶ 13); App.1196, R.Doc.60-12 at 2 (¶¶ 9, 13); *see* App.2087, R.Doc.60-25 at 3 (sealed) (Page telling Brown she picked up certain shifts "because [I] didn't expect [Thompson] to be there"). Moreover, Brown confirmed that management received a notification whenever a team member tried to pick up a shift, App.871, R.Doc.60-4 at 114, but management approved the claimants' requests

without telling them if Thompson would be working. App.1181, R.Doc.60-11 at 2 (¶ 13); App.1196, R.Doc.60-12 at 2 (¶ 13).

The teenage claimants made clear that they objected to working with Thompson, but Defendants told them they would have to find coverage on their own for any schedule changes or face consequences for missing work. App.1858, R.Doc.60-35 at 106; *see* App.1801-02, R.Doc.60-35 at 49-50 (when Page asked to be taken off the schedule after disclosing Thompson's harassment, Brown responded "[r]elease and cover your shifts on your own"); App.1016, R.Doc.60-7 at 81 (Bentz "asked [Brown] if I could not work" because "I was scared" but "he said it's my responsibility to find someone to pick up the shift, and … if I couldn't find someone to cover it, I had to come in"). Bentz told Brown she thought it was unfair that Thompson was allowed to continue "work[ing] there while we did," App.1029, R.Doc.60-7 at 94, but Brown later told her he was "done with the conversation." App.347, R.Doc.51-15 at 16. Ultimately, "because [Brown] said that we could still possibly work with [Thompson]," Bentz felt she had no choice but to take a week-long leave of absence. App.1021-22, R.Doc.60-7 at 86-87 ("I told [Brown] no, and … I would handle it and so I went on a leave of absence."); *see* App.2088, R.Doc.60-25 at 4 (sealed)

(contemporaneous text from Bentz to Page explaining that "I called [Brown] … and told him I'm taking a leave of absen[c]e [because] it's not fair"). Even after her return, however, she had to work three more shifts with Thompson. App.1022, R.Doc.60-7 at 87; App.1181-82, R.Doc.60-11 at 2-3 (¶¶ 13-14).

Based on this record, a reasonable jury could find that Defendants did not respond appropriately to protect the teenage victims. *See Ellison v. Brady*, 924 F.2d 872, 883 & n.19 (9th Cir. 1991) (recognizing that "in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment," such that employer cannot adequately remedy the harassment without separating victim from harasser); *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 312 (6th Cir. 2016) (jury could find that employer's failure to separate victim from harasser pending investigation rendered its response deficient); *Nichols v. Tri-Nat'l Logistics, Inc.*, 809 F.3d 981, 987 (8th Cir. 2016) (jury could find employer's remedial response deficient where, *inter alia*, it did not promptly separate victim from harasser); *cf. EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 693 (8th Cir. 2012) (employer's response adequate where it immediately "removed the wom[e]n" from harasser

"within 24 hours of the harassment being reported, and often much sooner").

ii. Defendants delayed in their investigation of Thompson.

A jury could also find that Defendants unreasonably delayed in their investigation of Thompson, unnecessarily prolonging the teenage claimants' exposure to him. To begin, a jury could find that Brown unreasonably delayed in initiating the investigation. Despite learning of the harassment from Downie on April 16 or early April 17, Brown took no remedial steps at all until Page and Bentz again reported the harassment on April 18, at which point he said he had been "waiting for [them] to come forward." App.1794, R.Doc.60-35 at 42; App.1098, R.Doc.60-7 at 163. Indeed, although Brown acknowledged in his deposition that Downie had alerted him to allegations of sexual harassment concerning Page, App.843, R.Doc.60-4 at 86, his declaration disregards Downie's report, stating that prior to the April 18 conversation with Bentz and Page "nobody (including the Accusers) had come forward to report any inappropriate conduct, let alone harassment, by Mr. Thompson." App.334, R.Doc.51-15 at 3 (¶¶ 8-9). Brown provided no explanation for what appears to be his complete inaction between Downie's report and April 18. In the interim, Page

worked with Thompson on April 17, and Page and Holdcraft were both scheduled to work with him on April 18. App.920, 924-27, R.Doc.60-5 at 2 (¶ 9), 6-9; App.1196, R.Doc.60-12 at 2 (¶ 8). Even after the April 18 conversation, Brown waited two more days to email TMR. App.340, R.Doc.51-15 at 9.

The district court concluded that Brown's "four-day delay in beginning the investigation was not unreasonable under the circumstance[s]" but did not explain what "circumstances" justified the delay. App.1967, R.Doc.73 at 32. The court cited *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 421 (8th Cir. 2010), for the proposition that employees must "tolerate some delay" to allow an employer to "gauge the credibility of the complainant and the seriousness of the situation." App.1967, R.Doc.73 at 32. But there was no evidence that Brown took any steps to gauge credibility or seriousness during this four-day period. Instead, unbeknownst to Page, he was simply waiting for her "to come forward." App.1794, R.Doc.60-35 at 42; App.1108, R.Doc.60-7 at 163. Defendants' own 30(b)(6) deponent, senior manager of TMR Kristen Abraira, testified that the company's policies require managers immediately to report sexual harassment allegations to TMR and that even

a three-day delay would be a serious violation warranting disciplinary action. App.1731-33, R.Doc.60-22 at 166-68. A jury could find Brown's four-day delay here to be similarly problematic. *See Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 414-15 (6th Cir. 2021) (jury could find manager's nine-day delay in reporting harassment complaint unreasonable, especially where company policy required managers to report immediately).

A jury could also find that, once Brown finally alerted TMR to the harassment allegations, TMR did not act with reasonable promptness in carrying out the investigation. While TMR investigator BJ Marshall initially acted promptly by contacting Page and Holdcraft on April 20—attempts that were unsuccessful because Page's phone had been confiscated and because he called Holdcraft during the school day, while she was in class, App.325, R.Doc.51-13 at 9; App.645, R.Doc.60-2 at 39—he then unreasonably delayed by taking no further action until two weeks later, on May 4. App.1255-58, R.Doc.60-13 at 46-49 (180-83, 189-91). Marshall agreed he could have tried to reach Page and Holdcraft by alternative means—such as emailing them, calling the restaurant, or checking their schedules and visiting them during their shifts—but he did not do so. App.1255-58, R.Doc.60-13 at 46-49 (181-83, 189-91). When Marshall did finally make a

second attempt at contact on May 4 by texting Holdcraft and visiting Page at the restaurant, Holdcraft responded within minutes, and Page cooperated fully by providing details to Marshall and disclosing the harassment to her parents so she could obtain the corroborating explicit photo. App.393-94, R.Doc.51-23 at 2-3; App.1258-60, R.Doc.60-13 at 49-51 (192-99); App.1878, R.Doc.60-35 at 126. A jury could find Marshall's complete inaction over this two-week period to be unreasonable. *See Wyatt*, 999 F.3d at 415 ("Nissan's three-week delay in investigating explicit allegations of unwanted physical invasions creates a question of reasonableness that should be resolved by a jury."); *Smith*, 813 F.3d at 312 (jury could find unreasonable "Defendant's total inaction for ten days" after harassment allegations).

The district court appeared to attribute the delay following Marshall's initial April 20 contact to Page, Page's mother, and Bentz, rather than to Marshall himself. App.1966, 1976, R.Doc.73 at 31, 41. But that conclusion cannot be squared with the record evidence. First, the court did not explain how "Page's admitted unwillingness to speak with Defendants' investigator" delayed the investigation. App.1976, R.Doc.73 at 41. While Page did express reluctance to speak to the investigator in a text message to

Bentz, App.397, R.Doc.51-24 at 2, this had no impact on Marshall's conduct of the investigation. Page did not refuse to respond to Marshall's initial attempt at contact; instead, she was unaware of it because her parents confiscated her phone. App.325, R.Doc.51-13 at 9. As noted, it was Marshall who then failed to take further steps to contact Page; once he did ultimately make the effort, she cooperated fully. App.1255-60, R.Doc.60-13 at 48-51 (180-83, 189-99). The record refutes the notion that Page interfered with Marshall's investigation.

Second, the court faulted Page's mother for only "agree[ing] to speak with Marshall" on May 4. App.1976, R.Doc.73 at 41. But Page's mother was unaware of the investigation until that date because Defendants never disclosed the harassment to her. App.324, R.Doc.51-13 at 8; App.1745, R.Doc.60-30 at 3. As soon as she learned of the harassment, she agreed to speak with Marshall and provided the explicit photo he requested (that she had just discovered). App.325-26, R.Doc.51-13 at 9-10; App.395, R.Doc.51-23 at 4. The record contains no indication that Page's mother delayed Marshall's investigation.

Finally, the court suggested that Bentz contributed to Marshall's "difficulty" investigating by not speaking to him until May 4 at Chili's.

App.1966, R.Doc.73 at 31. This is factually incorrect: Bentz never spoke with Marshall because Brown did not notify TMR of her allegations. App.340, R.Doc.51-15 at 9; App.1270, R.Doc.60-13 at 61 (238) (Marshall confirming he "didn't know" about Bentz during investigation). Bentz in fact expressed interest in aiding the investigation; when she asked Brown why the investigator had not contacted her, he responded that her allegations were not "as serious" as Page's. App.1118, R.Doc.60-7 at 183. The court's conclusion that Bentz, Page, and Page's mother—rather than Marshall—bore responsibility for the investigative delay cannot be squared with the record.

iii. A jury could find that Defendants prioritized the interests of Thompson and the company over those of the teenage claimants.

Considering the totality of events, a jury could find that Defendants prioritized perceived fairness to Thompson and concern with the restaurant's operations over the teenage claimants' well-being. Brown repeatedly told the claimants it would be unfair for Thompson to lose hours due to the allegations. App.347, R.Doc.51-15 at 16; App.1029, R.Doc.60-7 at 94; App.2085, R.Doc.60-25 at 1 (sealed). He volunteered to TMR that he considered the claimants' age irrelevant apart from a concern

about "plac[ing] [Thompson] in a situation where parents may create a scene at the restaurant." App.340, R.Doc.51-15 at 9. Neither he nor anyone else at the restaurant informed Page's parents about the harassment, even when they came in to express concerns about her grades and behavior. App.752-53, R.Doc.60-3 at 66-67; App.1745, R.Doc.60-30 at 3; *see Doe v. Oberweis Dairy*, 456 F.3d 704, 718 (7th Cir. 2006) ("An employer of teenagers is not *in loco parentis*, but he acts at his peril if he fails to warn their parents when he knows or should know that their children are at substantial risk of [sexual assault or harassment]."). And when Page's parents ultimately confronted Brown after discovering the harassment, Brown threatened to bring charges against *them* for harassment rather than displaying any concern about the abuse their daughter experienced. App.2100, R.Doc.60-33 at 5 (sealed).

A jury could also find that Marshall displayed a lack of concern about the teenage claimants' allegations. For example, although company policy dictated contacting corporate security for any allegations of workplace violence, Marshall did not do so here "[b]ecause it was sexual harassment" at issue. App.1226, R.Doc.60-13 at 17 (62-63). He failed to interview key witnesses like Brown or Downie, App.1249, 1255, R.Doc.60-13 at 40 (157),

46 (179), or to ask Holdcraft or Page key questions about the harassment. App.1235, 1257, 1259, R.Doc.60-13 at 26 (98-99), 48 (188), 50 (196) (agreeing he did not ask Page or Holdcraft whether they knew of other victims, whether Thompson threatened them, or what they meant by Thompson being "touchy" or trying "to make out with" them). And Marshall believed he could not corroborate Thompson's assaults of Page because he could not find two additional witnesses to that conduct. App.1232, R.Doc.60-13 at 23 (86-89). A jury could find Marshall and Brown's behavior further probative of Defendants' laissez-faire attitude regarding the harassment and lack of urgency in conducting the investigation.

iv. The cessation of Thompson's physical contact and sexual comments does not render Defendants' response adequate as a matter of law.

The district court determined that Defendants' remedial response was adequate as a matter of law because it ended Thompson's harassment in that he "stopped physically touching and speaking to [the claimants] in a sexual manner." App.1969-70, R.Doc.73 at 34-35. This was error.

First, Defendants' response did *not* fully remedy the harassment. While the physical contact and sexual comments ceased, Thompson continued to stare suggestively at the claimants when they worked

together. App.640, R.Doc.60-2 at 34; App.921, R.Doc.60-5 at 3 (¶ 19); App.1197, R.Doc.60-12 at 3 (¶ 16); *see Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1125-26 (8th Cir. 2007) (jury could find employer's response to harassment deficient where physical touching stopped but harasser "continued leering"). The claimants also continued to experience fear and anxiety working with Thompson. App.921, R.Doc.60-5 at 3 (¶ 18); App.1182, R.Doc.60-11 at 3 (¶ 15); App.1197, R.Doc.60-12 at 3 (¶ 14). The "To-Go" shifts they worked required "constant contact with … kitchen staff" like Thompson to retrieve customers' food orders. App.920, R.Doc.60-5 at 2 (¶ 10). Page explained she was "scared every time I went to the kitchen to ask for something for a To-Go order" because "[h]e would just stare at me" and "I was always afraid he would follow me and sexually harass me again." App.921, R.Doc.60-5 at 3 (¶ 19). Bentz, for her part, was so upset after working with Thompson that she took a leave of absence, and she later suffered an anxiety attack and had to leave her shift when Thompson once came to the restaurant after being fired. App.1021-22, 1047-49, R.Doc.60-7 at 86-87, 112-14; App.1181, R.Doc.60-11 at 2 (¶ 12).

Second, even if the harassment had ended following Defendants' response, this would not necessarily prove that Defendants had acted

appropriately. *See Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) ("Just as an employer may escape liability even if harassment recurs despite its best efforts, so it can also be liable if the harassment fortuitously stops, but a jury deems its response to have fallen below the level of due care."). A jury could find that forcing the teenage claimants to work with their adult harasser while taking no investigative or remedial steps over a two-week period was not a "reasonable" response "designed to remedy the illegal harassment," *id.*, even if further physical touching fortuitously ceased.

2. A jury could find that Defendants negligently failed to prevent harassment from occurring in the first instance.

A jury could also find that Defendants negligently failed to prevent harassment from occurring because they took inadequate steps to ensure their teenage employees understood and could utilize the company's anti-harassment policy and procedures. The district court rejected this argument by concluding that "Defendants did not have a duty to prevent harassment" but instead only had to "take reasonable remedial action *in response to* allegations of harassment"—in other words, that an employer can never be liable for the first act of harassment brought to its attention.

App.1969, R.Doc.73 at 34 (citation omitted). This understanding of employer negligence under Title VII is incorrect.

The Supreme Court has underscored that a plaintiff can prevail on a non-supervisor harassment claim "by showing that [the] employer was negligent in failing to prevent harassment from taking place," such as by failing to "monitor the workplace" or "provide a system for registering complaints." *Vance*, 570 U.S. at 448-49; *see id.* at 445 (a victim "will be able to prevail simply by showing that the employer was negligent in permitting … harassment to occur"); *Sellars*, 13 F.4th at 696-67 (citing *Vance* as establishing standard for "whether an employer was negligent in failing to prevent harassment"); *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 801 (8th Cir. 2009) (finding employer's exercise of "reasonable care to prevent" harassment relevant to negligence analysis). Prevention is necessarily part of the employer-liability inquiry because, "in evaluating employer liability" for claims of non-supervisor harassment, "Title VII adopts ordinary tort principles of negligence," *Sandoval*, 578 F.3d at 801, including causation and foreseeability, *Hirase-Doi v. U.S. W. Commc'ns, Inc.*, 61 F.3d 777, 783 (10th Cir. 1995), *abrogated on other grounds by Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*,

524 U.S. 775 (1998). Considering the employer's duty to prevent harassment as part of the employer-liability inquiry also comports with Title VII's "primary objective"—"not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 806 (citation omitted); *id.* (recognizing "the employer's affirmative obligation to prevent violations" and noting that EEOC has long advised employers to "take all steps necessary to prevent sexual harassment from occurring, such as … informing employees of their right to raise and how to raise the issue of harassment" (alteration in original) (quoting 29 C.F.R. § 1604.11(f))).

Much of the case law on what constitutes a negligent failure to prevent harassment arises in the context of the *Faragher-Ellerth* defense to a supervisory-harassment claim, which requires the employer to show in part that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139, 1145 (8th Cir. 2007).[5] In that context, this Court has noted that

[5] Although this case law arises in the context of supervisory harassment, it is apposite here because it examines the same central issue: whether an employer has exercised reasonable care to prevent harassment from occurring. *Compare Brenneman*, 507 F.3d at 1145 (*Faragher-Ellerth* affirmative defense to claim of supervisory harassment incorporates "prevention prong" examining whether employer "exercised reasonable care to prevent

"having an anti-harassment policy is not in itself enough to show that [the employer] exercised reasonable care." *Id.* Instead, courts also consider whether the employer "properly communicated" the anti-harassment policy to its employees, *Adams v. O'Reilly Auto., Inc.*, 538 F.3d 926, 932 (8th Cir. 2008), and "provide[d] for training regarding the policy," *Clark v. United Parcel Serv., Inc.*, 400 F.3d 341, 349-50 (6th Cir. 2005); *see Brenneman*, 507 F.3d at 1145 (employer exercised reasonable care where it provided "training specifically about" anti-harassment policy). Where the employer fails to adequately communicate the anti-harassment policy to its employees, it may be found to abdicate its duty of reasonable care. *E.g.*, *Agusty-Reyes v. Dep't of Educ. of P.R.*, 601 F.3d 45, 55 (1st Cir. 2010); *Pullen v. Caddo Par. Sch. Bd.*, 830 F.3d 205, 211-13 (5th Cir. 2016).

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sexual harassment"), *with Vance*, 570 U.S. at 448-49 (non-supervisor harassment claim incorporates inquiry into whether employer "was negligent in failing to prevent harassment from taking place"). To be sure, the two claims differ in their allocation of burdens: for a non-supervisor harassment claim, the plaintiff must show the employer's failure to exercise reasonable care, while the employer bears the burden of showing reasonable care when it invokes the *Faragher-Ellerth* defense. *See Curry v. Dist. of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999). But in both contexts the substance of the reasonable-care inquiry is identical. *Id.* (explaining that "the reasonableness of an employer's [actions]" is at issue in both contexts).

Here, Defendants had an anti-harassment policy in place, but they provided neither proper communication nor training for their teenage employees on this policy and the procedures for reporting harassment. They disseminated the anti-harassment policy to the claimants only when they first began working, by directing them to review more than twenty policies in roughly twenty minutes and then sign an acknowledgment form indicating they read and understood them. App.365-68, R.Doc.51-19; App.1347, R.Doc.60-15 at 75; App.1639, R.Doc.60-22 at 74; App.2074, R.Doc.60-24 at 6 (sealed). The claimants testified that Defendants did not review or explain these policies, much less provide any training on them. App.675, 681-82, R.Doc.60-2 at 69, 75-76; App.972, 1115-16, R.Doc.60-7 at 37, 180-81; App.1769-71, 1848, R.Doc.60-35 at 17-19, 96.

Indeed, Assistant Manager Leonard confirmed that Defendants did not review the policies with new hires and that no manager was even present to answer questions. App.1515, 1525, R.Doc.60-21 at 52, 62. Both Leonard and Brown testified that Defendants had no process to verify that new employees actually read and understood the policies apart from requiring them to sign the acknowledgment form. App.800, R.Doc.60-4 at 43; App.1497-98, R.Doc.60-21 at 34-35. According to Bentz, Brown told her

that "we didn't have to read [the policies], he just needed a signature so we could continue working." App.984, R.Doc.60-7 at 49; *see* App.1125, R.Doc.60-7 at 190 ("[Brown] said it wasn't a matter of reading the policy, it was a matter of getting a signature so you could get a job there …."). This departs from the best practices identified by Abraira, who testified that managers should review the policies "to make sure that our team members are aware of what they're signing," rather than just having new hires click through them. App.1619, R.Doc.60-22 at 54. In contrast, Bentz testified that when she began work at a different Chili's restaurant in Little Rock, she had an interactive training requiring her to answer questions to ensure comprehension of the relevant policies. App.1117, R.Doc.60-7 at 182.

A jury could find that Defendants' failure to explain the policies impeded the teenage claimants' ability to use the complaint procedures. *See* App.1847-48, R.Doc.60-35 at 95-96 (Page found complaint procedures confusing and no one was available to answer questions); App.675, R.Doc.60-2 at 69 (Holdcraft did not understand what the sexual harassment policy was when she started). The claimants testified they never saw the hotline number for reporting harassment posted anywhere and never received a hard copy of the reporting procedures. App.626, 674, R.Doc.60-2

at 20, 68; App.982-83, R.Doc.60-7 at 47-48; App.1292, 1350, R.Doc.60-15 at 20, 78; App.1848-49, R.Doc.60-35 at 96-97. Moreover, Defendants recognized that a large portion of their workforce consisted of teenagers working their first jobs but failed to tailor their training to reflect that reality. *See* App.1620, R.Doc.60-22 at 55 (Abraira acknowledging that many of Defendants' employees were in their first jobs); App.800, R.Doc.60-4 at 43 (Brown agreeing it was not unusual for Chili's to have sixteen-year-old employees beginning their first jobs). The reasonableness of an employer's preventative steps "depends[,] … among other things, on the capabilities of the class of employees in question," including the "employee's age and education." *EEOC v. V&J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007). Here, because Defendants knew that "the employees who needed to be able to activate the complaint procedure were teenage girls," they were "obligated to suit [their] procedures to the understanding of the average teenager." *Id.*; *see Doe*, 456 F.3d at 717 (the fact that, *inter alia*, the employees were "inexperienced teenagers working part time … required [the] employer to take greater care" to prevent harassment); *id.* at 718 ("[S]exual harassment may be a particular problem in the restaurant industry because restaurants

often hire young, inexperienced workers." (alteration in original) (citation omitted)). A jury could find that Defendants failed to meet that obligation.

II. The district court erred by granting summary judgment on the constructive-discharge claim.

The district court also erred in dismissing the constructive-discharge claim, which requires a plaintiff to prove the employer "created 'working conditions … so intolerable that a reasonable person in [the employee's] position would have felt compelled to resign.'" *Garrison v. Dolgencorp, LLC*, 939 F.3d 937, 943 (8th Cir. 2019) (quoting *Green v. Brennan*, 578 U.S. 547, 555 (2016)). Here, the court agreed that Page's working conditions—having to work alongside Thompson for several shifts after reporting the harassment—were not "ideal," but deemed those conditions not objectively intolerable. App.1971, 1977, R.Doc.73 at 36, 42. This was error. A jury could instead conclude that a reasonable sixteen-year-old forced to work closely with a thirty-two-year-old man who assaulted her four times and texted her a photo of his penis would find these conditions intolerable. *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 617 (8th Cir. 2000) (citing employer's "poorly conducted investigation" and "failure to transfer" harasser following severe harassment as evidence of intolerable working

environment); *cf. Finish Line*, 915 F. Supp. 2d at 922-23 (jury could find that thirty-eight-year-old man's harassment of teenage victims created intolerable working conditions).

In reaching a contrary conclusion, the court improperly resolved factual disputes in favor of Defendants at the summary-judgment stage, rejecting Page's testimony that she was scared to continue working with Thompson because Page "never reported her fear to management and … voluntarily chose to pick-up a shift knowing that she would be working with D.J. Thompson." App.1975, R.Doc.73 at 40. But Page did twice "report[] her fear to management," when she and Bentz told Brown and Hefner they were scared to work their April 18 shift with Thompson and when she texted Brown on April 21 that she was only comfortable working without Thompson there. *Supra* pp. 32-33. Page did once tell Brown she was willing to pick up a shift even if Thompson was working, App.2089, R.Doc.60-25 at 5 (sealed), but a jury could credit her explanation that she did so only because Defendants were "already scheduling [her] with him anyways" over her objection. App.1796, R.Doc.60-35 at 44.

The court also relied on *Tatum v. Arkansas Department of Health*, 411 F.3d 955 (8th Cir. 2005), for the proposition that being forced to continue

working with one's harasser is not intolerable. App.1974, R.Doc.73 at 39. But *Tatum*, in finding the work conditions not objectively intolerable, emphasized that the harasser's conduct "was not directly threatening." 411 F.3d at 960. That differs markedly from Thompson's sexual assaults.

The district court also rejected the constructive-discharge claim because Defendants did not "deliberately create[] intolerable working conditions with the intention of forcing Page to quit." App.1979, R.Doc.73 at 44. But Supreme Court precedent establishes that there is no such subjective-intent requirement for a constructive-discharge claim. *See Green*, 578 U.S. at 560 ("We do not … require an employee to [prove] … that not only was the discrimination so bad that he had to quit, but also that his quitting was [the] employer's plan all along."); *Sellars*, 13 F.4th at 700 ("*[G]reen* makes clear that the employee is not required to show that the employer subjectively intended for the employee to quit ….").[6]

Finally, the court misunderstood the facts underlying the constructive-discharge claim in two critical respects. First, the court found

[6] *Tatum* also relied on this now-abrogated subjective-intent requirement. 411 F.3d at 960 ("More importantly, Tatum failed to provide any evidence that the Appellee intended to force her to quit.").

it significant that "when Page's mother resigned on her behalf on May 4, 2021," she cited concerns about poor grades and behavior rather than "a fear of D.J. Thompson or any other intolerable working condition." App.1975, R.Doc.73 at 40. But this timeline is incorrect. The conversation the court referenced occurred not on May 4 but on May 3, the day before Page's parents discovered the harassment. App.319, 324, R.Doc.51-13 at 3, 8. Thus, Page's mother could not have cited concerns about Thompson during this conversation.[7] In contrast, concerns about Thompson played a central role in Page's *actual* separation on May 4, when Page's parents discovered the harassment and called the police, who advised Page not to return to work. App.324, R.Doc.51-13 at 8; App.1745-46, R.Doc.60-30 at 3-4; *see* App.1818, 1863-64, R.Doc.60-35 at 66, 111-12 (Page's testimony that she stopped working at Chili's because of the harassment and Defendants' failure to take it seriously).

[7] Moreover, the text exchange between Page's stepfather and Downie suggests he withdrew any potential resignation shortly after their conversation. After Downie agreed to remove school hours from Page's schedule, Page's stepfather responded by thanking Defendants for "help[ing] retain" Page and asking them to continue encouraging her, and he did not mention resignation again. App.354, R.Doc.51-16 at 7.

Second, the court faulted Page for not giving Defendants "a reasonable opportunity to correct" the working conditions, noting that "the day that Page resigned was the day that Page and her parents first complained to Defendants about … her schedule and her schoolwork." App.1979, R.Doc.73 at 44. But this misunderstands the working conditions claimed to be intolerable. It was not Page's schedule and schoolwork that gave rise to intolerable working conditions—it was Defendants' refusal to take steps to protect her from her harasser. Defendants had ample opportunity to correct those conditions, given that Page made clear her discomfort with working alongside the man who sexually assaulted her. *Supra* pp. 32-33. Instead, they assigned her to another five shifts with him over the next two weeks. *Supra* pp. 39-40. Because a jury could find these working conditions were objectively intolerable, summary judgment was improper as to the constructive-discharge claim.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

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March 11, 2026

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,987 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I certify that on March 11, 2026, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

I further certify that, pursuant to 8th Cir. R. 28A(d), within five days of receipt of the notice that the brief has been filed by this Court, ten paper copies of the foregoing brief will be sent by Federal Express to the Clerk of the Court and one paper copy will be sent by Federal Express to the following counsel of record for Defendants-Appellees:

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