

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

**REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS PLAINTIFF-APPELLANT**

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INTRODUCTION

The teenage claimants here endured horrific abuse from a man twice their age while working at Defendants' restaurant. Thompson trapped Page in the restaurant's walk-in refrigerator and groped her breasts and genitals, stuck his hand down Bentz's pants, tried to grab Holdcraft's butt, and demanded to "touch up on" Sharp. EEOC's opening brief explained that, contrary to the district court's ruling, a jury could find that this outrageous conduct was objectively and subjectively hostile and that Defendants acted unreasonably by taking inadequate steps to prevent harassment and by refusing to keep Thompson away from the victims or promptly investigate his conduct. And EEOC explained that the district court erred in rejecting the constructive-discharge claim because a jury could find that forcing sixteen-year-old Page to continue working with the man who repeatedly sexually assaulted her created intolerable work conditions.

Defendants' response brief largely repeats the district court's erroneous analysis without acknowledging – let alone refuting – EEOC's arguments. Defendants ignore the record evidence EEOC catalogued

reflecting the teens' subjective distress, provide no explanation for allowing the investigation to languish over a two-week period, and cursorily deny any obligation to prevent harassment. The bulk of Defendants' response instead rests on minimizing the psychological and emotional toll of the harassment on the victimized teens. Defendants argue that Thompson's encroachments on Holdcraft and Sharp were not objectively hostile because his attempts to grope the teens were unsuccessful, that their failure to keep Thompson away from the teens was harmless because his physical harassment fortuitously ceased, and that Page's fear and anxiety in being forced to work alongside the man who repeatedly sexually assaulted her were not intolerable because he did not assault her again. This Court should reject Defendants' callous position.

ARGUMENT

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

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

1. A jury could find Thompson's conduct objectively hostile.

EEOC's opening brief detailed Thompson's outrageous conduct towards all four teenage claimants. EEOC.Br.5-7, 21-24. He sexually

assaulted Page on four occasions – trapping her in the restaurant’s walk-in refrigerator and shed, forcefully kissing her, fondling her breasts, and groping her genitals – and sent her a photo of his penis. EEOC.Br.5-6, 21-22. He stuck his hand down Bentz’s pants and tried to grab Holdcraft’s butt. EEOC.Br.6-7, 22. And he accosted Sharp in the walk-in, getting in her face and demanding to “touch up on it.” EEOC.Br.6, 22. He also subjected the teens to relentless sexual comments, stared them up and down, and tried to “ride his hand over [them]” as they walked by. EEOC.Br.7, 23-24.

Defendants appear to concede objective hostility as to Page and Bentz, Opp.Br.42 (defending district court’s ruling only “as to Holdcraft and Sharp”),¹ but claim this Court has found “even worse conduct” than Thompson’s harassment of Holdcraft and Sharp “insufficient to establish objective hostility.” Opp.Br.43. As EEOC explained, however, these cases are inapposite because they involved neither (1) teenage victims nor (2) conduct as aggressive or threatening as Thompson’s. EEOC.Br.24-26.

¹ Defendants nonetheless minimize this harassment by suggesting it was “merely rude or unpleasant,” Opp.Br.39 (citation omitted), and, remarkably, by questioning whether Thompson even sent the photo of his penis to Page despite the fact that Defendants’ own investigator confirmed as much. App.1260-61, R.Doc.60-13 at 51-52 (201-04); *see* Opp.Br.10, 11, 29 (stating that Thompson “*allegedly* sent” Page this photo (emphasis added)).

Defendants dispute both premises, arguing first that age is irrelevant to the objective-hostility analysis under this Court’s precedent. Opp.Br.40-42. While this Court has not yet addressed objective hostility in the context of teenage victims, it has never affirmatively deemed age irrelevant to the analysis. To the contrary, this Court has embraced the context-specific standard set forth in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), which requires that objective hostility be “judged from the perspective of a reasonable person in the plaintiff’s position.” *Id.* at 81; *Ellis v. Houston*, 742 F.3d 307, 321 (8th Cir. 2014) (objective-hostility inquiry “is deeply context dependent”). Defendants dismiss *Oncale* as merely “a same-sex harassment case” that “did not ... address ... ‘age’ ... or otherwise alter the standard for objective hostility.” Opp.Br.41. But *Oncale* requires consideration of the *full* “constellation of surrounding circumstances,” 523 U.S. at 82, including “the ages of the harasser and the victim.” *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (discussing *Oncale* in Title IX context); *see also EEOC v. R&R Ventures*, 244 F.3d 334, 340 (4th Cir. 2001) (considering age among the “constellation of surrounding circumstances” *Oncale* contemplates); *EEOC v. Finish Line, Inc.*, 915 F. Supp. 2d 904, 921-22

(M.D. Tenn. 2013) (same); *EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 433 (7th Cir. 2012) (“age disparity” relevant to objective-hostility analysis).²

Defendants are also incorrect that Thompson’s conduct towards Holdcraft and Sharp was not “physically violent or overtly threatening.” Opp.Br.44. Thompson tried to grope Holdcraft’s butt and cornered Sharp in the walk-in refrigerator, demanding to “touch up on it.” EEOC.Br.6-7, 22. Defendants attempt to minimize these actions by asserting Thompson “made a single unsuccessful attempt to grab” Holdcraft and “backed off” when Sharp “was very assertive with him.” Opp.Br.42 (citation omitted). But the fact that Thompson did not succeed in groping one teenager and the other ultimately fought him off hardly diminishes the aggressive and threatening nature of his actions. A jury could find that Thompson’s attempts to grope Holdcraft and Sharp—even if unsuccessful—were more aggressive and threatening than the physical touch at issue in many of the cases Defendants cite. See *Anderson v. Fam. Dollar Stores of Ark., Inc.*, 579

² Defendants note that *Racine* and *Finish Line* involved both an age and rank disparity. Opp.Br.41. But neither case deemed age not independently relevant; indeed, *Finish Line* noted it may be determinative. 915 F. Supp. 2d at 922 (conduct that may not be actionable “for an adult female” could be actionable given that victims were “juveniles”).

F.3d 858, 862 (8th Cir. 2009) (describing physical contact as “rubbing [plaintiff’s] shoulders or back”); *McMiller v. Metro*, 738 F.3d 185, 188 (8th Cir. 2013) (describing physical contact as “kiss[ing] [plaintiff’s] face” and “plac[ing] ... arms around her”); *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 977 (8th Cir. 2003) (stating that harasser “never touched [plaintiff] in any area other than her arm”).

Nor do the cases EEOC cited finding a triable issue regarding objective hostility “involve conduct far more severe than what Holdcraft and Sharp allege.” Opp.Br.44. While some of these cases involve conduct more analogous to Thompson’s assaults against Page and Bentz (which Defendants now apparently concede were objectively hostile), *see Beran v. VSL N. Platte Ct. LLC*, 144 F.4th 1007, 1012 (8th Cir. 2025) (grabbing plaintiff’s breasts and shoving her against wall); *Beard v. Flying J, Inc.*, 266 F.3d 792, 798 (8th Cir. 2001) (touching plaintiff’s breasts), others involve conduct akin to that directed towards Holdcraft and Sharp, such as vulgar comments, attempts to grab the victims as they passed by, and harassment of others in the victims’ presence. *See Hathaway v. Runyon*, 132 F.3d 1214, 1217, 1222 (8th Cir. 1997) (two instances of touching plaintiff’s buttocks; suggestive noises; and fear of “pass[ing] within grabbing range” of

harassers); *Jenkins v. Univ. of Minn.*, 838 F.3d 938, 946 (8th Cir. 2016) (“repeated advances, ... comments, innuendos, and suggestions of contact”); *Wright v. Rolette Cnty.*, 417 F.3d 879, 885-86 (8th Cir. 2005) (harasser did not “touch[]” or “ma[k]e sexual advances toward [plaintiff]” but instead “made extremely vulgar, sexual comments about her”); *EEOC v. BNSF Ry. Co.*, 150 F.4th 948, 965-66 (8th Cir. 2025) (“frequent vulgar and sexist comments and jokes” and “humiliating or intimidating acts to other women,” among other conduct).

Defendants’ contrary argument merely recites the facts of these cases without explaining why a jury could not deem Thompson’s conduct comparably severe. For example, they do not explain why Holdcraft witnessing Thompson try to kiss or grab Page, *see* App.635-36, R.Doc.60-2 at 29-30, is less severe than the plaintiff in *BNSF Railway* being shown a naked photo of a colleague, or why the teens here were any less vulnerable working alongside a harasser twice their age than the geographically isolated plaintiff in *Jenkins*. *See* Opp.Br.45-46. In any event, these precedents “do not establish a baseline that subsequent plaintiffs must reach in order to prevail.” *Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 606 (2d Cir. 2006) (internal quotation marks omitted); *see Harris v. Forklift Sys., Inc.*, 510

U.S. 17, 22 (1993) (cautioning that “[t]he appalling conduct” found actionable in prior caselaw “merely present[s] some especially egregious examples” rather than “mark[ing] the boundary of what is actionable”).

Finally, Defendants do not defend the district court’s erroneous conclusion that the teens’ ability “to perform their jobs” despite the harassment defeats objective hostility. App.1957, R.Doc.73 at 22. As EEOC explained, harassment need not interfere with work performance to be objectively hostile. EEOC.Br.26-27; *Hathaway*, 132 F.3d at 1223.

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

EEOC’s brief explained that the district court improperly drew multiple inferences against EEOC at the summary-judgment stage by attributing certain of the teenage claimants’ actions to a subjective belief that Thompson’s conduct was non-severe, rather than to alternative explanations a jury could credit. EEOC.Br.27-37. In response, Defendants simply recite the district court’s analysis without acknowledging EEOC’s arguments at all, effectively conceding the merit of EEOC’s positions. *See Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (failure to respond to appellant’s nonfrivolous argument constitutes acquiescence);

Harlow v. United States, 720 F. App'x 805, 807 (8th Cir. 2018) (per curiam) (“[Appellee] has failed to sufficiently respond to [Appellant’s] arguments, and we decline to do so on its behalf.”).

First, Defendants, like the district court, emphasize that the teenage claimants did not immediately report Thompson’s harassment. Opp.Br.46-47; App.1959, R.Doc.73 at 24. But, as EEOC pointed out, the teens offered multiple explanations for their initial hesitation to report, including their fear of Thompson, fear of their parents finding out, and embarrassment about disclosing sensitive details of the harassment. EEOC.Br.28. And while Defendants claim that Holdcraft did not report “of her own volition” but rather “in response to Downie’s efforts,” Opp.Br.46, there is no indication Holdcraft was unwilling to answer Downie’s questions or was unbothered by Thompson’s conduct; instead, the impetus for Downie’s inquiry was Holdcraft’s visible distress when discussing Thompson’s conduct with a co-worker. App.731-32, R.Doc.60-3 at 45-46.

Second, Defendants, like the district court, assert that Page “told management she did not care if she was scheduled to work with Thompson.” Opp.Br.47; App.1959, R.Doc.73 at 24. But Page never indicated a general willingness to work with Thompson. Instead, she sent a single

text to Brown on April 25 that she was willing to pick up a shift the next day even if Thompson was working and explained she did so only because Brown “was already scheduling [her] with [Thompson] anyways.”

EEOC.Br.32. Indeed, Defendants scheduled Page to work with Thompson on April 23, 24, and 25, despite Page telling Brown on April 21 that she was only “okay with working my shifts as long as ... [Thompson’s] not there.”

Id. Defendants ignore this evidence, instead doubling down with the inaccurate assertion that “Page, Bentz, and Holdcraft all picked up and worked shifts that overlapped with Thompson’s without complaint or incident.” Opp.Br.47. As EEOC explained, only a handful of the shifts the teens worked with Thompson were ones they picked up, and they could not see whether Thompson was scheduled when making pick-up requests.

EEOC.Br.40-41. Nor did these shifts unfold “without complaint or incident.” Opp.Br.47. Instead, the teenage claimants 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. EEOC.Br.41. Bentz, in particular, was so upset working alongside Thompson that she took a week-long leave of absence.

EEOC.Br.41-42.

Third, Defendants, like the district court, emphasize that Bentz told the police “she did not care about the situation and nothing really happened.” Opp.Br.47 (citations omitted); App.1960, R.Doc.73 at 25. But, as EEOC explained, Bentz testified she felt uncomfortable speaking to the officer because Brown was standing next to her (an account the police report corroborates). EEOC.Br.34. Bentz later sought help from her school to give a police statement because she did not want Thompson’s harassment “to happen to anyone else.” *Id.* Defendants do not even acknowledge this evidence, much less explain why a jury could not credit it.

Fourth, Defendants, like the district court, note that “Bentz told management she did not want Thompson fired because it would be ‘unfair.’” Opp.Br.47 (citation omitted); App.1959, R.Doc.73 at 24. But, as EEOC explained, 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.” EEOC.Br.35. And while Defendants assert that no claimant “express[ed] any dissatisfaction with or concerns about Thompson’s

continued employment,” Opp.Br.9, they ignore Bentz’s contemporaneous texts doing just that. EEOC.Br.31 (detailing Bentz’s texts to Page saying she told Brown it was unfair Thompson “still got to work there while we did” and complaining that “[t]hey’re not doing anything ab[out]” the harassment and “[t]here’s no point why [Thompson’s] still working there”).

Fifth, Defendants, like the district court, note that Holdcraft initially “declined to speak with the EEOC.” Opp.Br.47; App.1960, R.Doc.73 at 25. But, as EEOC explained, Holdcraft testified 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. EEOC.Br.36. Defendants fail to explain why a jury could not credit this testimony.

Sixth, Defendants, like the district court, claim that Sharp “didn’t have a problem” with Thompson after “she was very assertive” with him when he accosted her. Opp.Br.47; App.1960, R.Doc.73 at 25 (citation omitted). But, as EEOC explained, Sharp instead *rejected* the premise that she had no further problems with Thompson after this incident. EEOC.Br.36-37. And her “assertive[ness]” with Thompson *bolsters* a

subjective-hostility finding by suggesting she found his conduct too severe to leave unaddressed. Defendants do not respond to this argument.³

Rather than disputing this detailed analysis of the record, Defendants accuse EEOC of simply putting “its own spin on and interpretation of” the facts. Opp.Br.48. But the susceptibility of the evidence to multiple interpretations is precisely the point: where a reasonable jury could accept the plaintiff’s interpretation of the evidence, summary judgment is inappropriate. *See Chenette v. Trs. of Iowa Coll.*, 431 F.2d 49, 53 (8th Cir. 1970) (“Evaluative judgment between two rationally possible conclusions from facts cannot be engaged in on summary judgment.”). Defendants fail to

³ Defendants also note that the claimants apart from Page did not file their own charges, that none intervened as a plaintiff, and that Holdcraft purportedly “minimized the situation’s severity in a social media post.” Opp.Br.47-48. The district court did not rely on these considerations, and they do not suggest a lack of subjective hostility. Given EEOC’s authority to seek relief on the claimants’ behalf, there was no reason for them to file their own charges, let alone incur the expense of retaining an attorney to intervene in this lawsuit. And Holdcraft’s post did not minimize Thompson’s harassment; it simply acknowledged there had been no harassment besides Thompson’s while also highlighting her own distress about “[t]he innocent 16 year old girl ... that this happened to.” App.417, R.Doc.51-28 at 3. Defendants also vaguely accuse EEOC of relying on “[c]laimants’ late-filed declarations contradicting their prior sworn deposition testimony,” but Defendants neither identify the declaration testimony to which they object nor explain how it contradicts the claimants’ depositions. Opp.Br.48.

explain why a jury could not interpret the evidence in the manner described above.

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

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

As EEOC's brief explained, a jury could find Defendants' response to the harassment deficient because they: (1) failed to keep Thompson away from the teenage claimants, prioritizing his interests over theirs; and (2) unreasonably delayed in investigating his conduct. EEOC.Br.38-50. In response, Defendants: (1) all but concede they failed to separate Thompson from the teens; and (2) provide no explanation for their delays in reporting and investigating the teens' allegations.

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

EEOC's brief explained that Defendants continued to schedule the teenage claimants to work with Thompson, over their objections, after they reported the harassment. EEOC.Br.38-43. Between Holdcraft's April 16 report and Thompson's eventual termination on May 5, Thompson worked eight shifts overlapping with Page and four shifts each overlapping with Bentz and Holdcraft. App.920, R.Doc.60-5 at 2 (¶10); App.1181, R.Doc.60-11

at 2 (¶9); App.1196, R.Doc.60-12 at 2 (¶7). And the teens made clear they did not want to work with Thompson: Page texted Brown that she was only okay working without Thompson there, and Bentz asked Brown “if I could not work” because “I was scared” and told Brown it was unfair that Thompson continued “work[ing] there while we did.” EEOC.Br.32, 41 (detailing claimants’ objections). But Brown told the teens it was *their* responsibility to find coverage for any shift changes and said he was “done with the conversation,” emphasizing that it would be unfair for *Thompson* to miss additional shifts because of the allegations. EEOC.Br.41, 48; App.347, R.Doc.51-15 at 16. Because Brown continued to insist that the teens “could still possibly work with [Thompson],” Bentz felt compelled to take a leave of absence. EEOC.Br.41.

Defendants ignore this argument, effectively conceding that they continued to schedule the teens with Thompson over their objections. *See Cincinnati Ins.*, 260 F.3d at 747. Instead, Defendants appear to contend that the teens’ continued exposure to Thompson is irrelevant because he ultimately stopped touching them or speaking to them sexually. Opp.Br.29-30. This argument suffers from two critical flaws.

First, as EEOC explained, even where harassment ends following an employer's remedial response, this does not necessarily show the employer acted appropriately. EEOC.Br.51-52. "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." *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999). Here, a jury could find that forcing the teens to work with their adult harasser over their repeated objections was not reasonably designed to protect them from harassment, even if further physical contact and sexual comments fortuitously ceased. This Court's decision in *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958 (8th Cir. 1999), is not to the contrary. *Contra* Opp.Br.30. *Scusa* found the employer's remedial response adequate not simply because "the incidents were not repeated" but also because the employer "responded to [plaintiff's] satisfaction" "every time she complained" and transferred her away from her harasser. 181 F.3d at 968.

Second, Defendants are incorrect that the mere fact that Thompson stopped touching or making sexual comments to the claimants means the hostile work environment was remedied. Instead, "[t]he continued presence" of the harasser — even without ongoing harassment — "can

render the workplace objectively hostile” by “exacerbat[ing] and reinforc[ing] the severe fear and anxiety suffered by the victim.” *Lapka v. Chertoff*, 517 F.3d 974, 984 (7th Cir. 2008) (collecting cases) (visits to workplace by rapist or rapist’s brother could alone give rise to objective hostility); *Ellison v. Brady*, 924 F.2d 872, 883 (9th Cir. 1991) (“[I]n some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment.”).

Here, the claimants testified that working closely with Thompson after reporting the harassment caused them significant fear and anxiety – an understandable reaction given Thompson’s repeated sexual propositions and attempts to trap and grope them. Page explained that “Thompson’s presence and the fact I had to continuously communicate with him to do my job[] made me very uncomfortable. I was scared every time I went to the kitchen to ask for something for a To-Go order.” App.921, R.Doc.60-5 at 3 (¶19). Bentz similarly testified that “[c]ontinuing to work with the man who put his hands down my pants caused me extreme anxiety and fear.” App.1182, R.Doc.60-11 at 3 (¶15). Indeed, Bentz was so upset after working with Thompson that she took a leave of absence and later suffered an anxiety attack when Thompson returned to the

restaurant after being fired. EEOC.Br.51. A jury could find that Defendants' remedial response – which forced the teens to endure continued contact with their adult harasser – was deficient. *See Ellison*, 924 F.2d at 883 n.19 (“If harassers are not removed from the workplace when their mere presence creates a hostile environment, employers have not fully remedied the harassment.”); *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 304, 312 (6th Cir. 2016) (concluding that employer's failure to separate harasser from plaintiff – who suffered anxiety and difficulty concentrating when working with him – was evidence of deficient remedial response); *Nichols v. Tri-Nat'l Logistics, Inc.*, 809 F.3d 981, 987 (8th Cir. 2016) (failure to separate victim from harasser was one factor suggesting unreasonable remedial response).⁴

⁴ Defendants contend that *Ellison* deemed separation necessary only “if [the harasser's] mere presence would render the working environment hostile,” but they fail to explain why Thompson's presence did not have that impact here, given the “particularly severe” nature of his harassment. Opp.Br.35; *Ellison*, 924 F.2d at 883. And while Defendants argue that *Nichols* and *Rock-Tenn* involve “key facts” not present here – namely, the *Nichols* plaintiff's vulnerable position of being confined in a truck cab with her harasser and the *Rock-Tenn* employer's failure “to take any action whatsoever for *ten days*” following the plaintiff's complaint, Opp.Br.34, 36-37 – a jury could find these facts present here too, given the teens' vulnerable position working alongside a harasser twice their age who repeatedly attempted to trap and grope them, and given Marshall's total inaction for *fourteen days* after his single attempt to contact the victims. *Infra* pp. 22-23.

Defendants ignore the teenage claimants' testimony about ongoing fear and anxiety, insisting they instead made only "vague" complaints of "continued 'staring'" by Thompson. Opp.Br.31. This mischaracterizes their testimony. To be sure, Thompson's ongoing stares compounded the fear and anxiety the teens experienced. *E.g.*, App.921, R.Doc.60-5 at 3 (¶19) (Page explaining she "was scared every time I went to the kitchen" because Thompson "would just stare at me"). But this was just one component of the psychological toll they suffered working with their harasser. Nor must these "continued stares qualif[y] as actionable harassment" to render Defendants' remedial response deficient. Opp.Br.31. "To show that a hostile work environment has continued after an employer's remedial action, a plaintiff need not prove an entire accumulation of harassing acts, amounting to a new and free-standing hostile work environment." *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1124 (8th Cir. 2007) (citing fact that harasser continued leering as evidence hostile work environment continued).⁵

⁵ Defendants claim *Engel* is inapposite because there the employer "had notice of the alleged continued staring and failed to act." Opp.Br.33. But again, the ongoing harm claimants experienced here stemmed not merely from Thompson's stares but also from the fear and discomfort his presence

Finally, Defendants argue that the claimants' declarations detailing ongoing fear, anxiety, and stares contradict their prior deposition testimony that Thompson's harassment ended. Opp.Br.29-31. But the claimants' deposition testimony said only that Thompson stopped touching them and speaking to them inappropriately, *see* Opp.Br.29-30 (summarizing testimony to this effect), not that his staring ceased or that they experienced no fear or anxiety working with him. *E.g.*, App.640, R.Doc.60-2 at 34 (Holdcraft deposition testimony that although Thompson did not touch or speak to her, she "[s]till got ... stares" from him). Because claimants' declarations detail harm *apart from* physical touching or sexual comments, they in no way contradict this prior testimony. *E.g.*, App.921, R.Doc.60-5 at 3 (¶19) (Page explaining she was "very uncomfortable" and "so nervous" in Thompson's presence despite lack of additional physical touching or sexual comments).

engendered. And the claimants *did* report this fear and discomfort by objecting to working with Thompson; Brown responded he was "done with the conversation." *Supra* p. 15.

ii. *Defendants unreasonably delayed their investigation of Thompson.*

EEOC's brief explained that a jury could find Defendants unreasonably delayed in both (1) initially conveying the harassment allegations to TMR; and (2) conducting the investigation into Thompson's conduct. EEOC.Br.43-48. Defendants offer no persuasive justification for either delay.

First, while Brown learned of the harassment allegations from Downie on April 16 or early April 17, he did not email TMR until April 20. EEOC.Br.43-45. Defendants try to sidestep this delay by claiming that Downie only alerted Brown to "*potentially inappropriate interactions,*" Opp.Br.26, but the very point of the reporting requirement was to allow TMR to investigate the allegations' validity. And while Defendants assert that Downie did not provide "*specific details,*" Opp.Br.26, Brown testified that he understood Downie to be reporting sexual-harassment allegations concerning Page but declined to ask for further information. App.843, R.Doc.60-4 at 86.

Defendants further suggest that Brown was justified in ignoring Downie's initial report until Page herself came forward to report the harassment a second time. *See* Opp.Br.27 (emphasizing that it was not until

April 18 that Page reported Thompson's harassment "*for the first time*"). But Defendants do not explain why it was reasonable for Brown to "wait[] for [Page] to come forward" after he already learned of harassment allegations from Downie. App.1098, R.Doc.60-7 at 163; App.1794, R.Doc.60-35 at 42. Nor do they explain why Brown did not act promptly even after Page's report. They emphasize that Brown "immediately call[ed] PeopleWorks" after speaking with Page, Opp.Br.27, but PeopleWorks just told Brown to contact TMR, which he did not do until April 20. App.816, R.Doc.60-4 at 59.

Defendants also offer no explanation for Marshall's delay in conducting the investigation once Brown finally reported the allegations to TMR.⁶ They focus solely on Marshall promptly *commencing* the investigation, but concede he did nothing for two weeks after his single, unsuccessful attempt to contact Page and Holdcraft. *See* Opp.Br.27-28 (Defendants' timeline reflecting no steps by Marshall between April 20 and May 4). Defendants suggest Marshall's delay was due to the claimants'

⁶ Nor do Defendants respond to the evidence that Marshall failed to escalate the allegations of workplace violence to corporate security (as required under Defendants' policy) "[b]ecause it was sexual harassment" and refused to substantiate Thompson's assaults of Page because he could not find two additional corroborating witnesses. EEOC.Br.49-50.

“active obstruction,” Opp.Br.28, but there is no evidence the claimants impeded Marshall in any way. Neither Page nor Holdcraft refused to respond to Marshall; they were simply unaware that he called (Page because her parents confiscated her phone; Holdcraft because Marshall called her during class and left no message identifying himself). EEOC.Br.12-13, 45-46. Marshall then failed to take further steps to contact the claimants; when he finally tried again fourteen days later, they immediately cooperated. *Id.* (detailing that Holdcraft responded to Marshall within minutes and Page cooperated when Marshall spoke to her). Defendants’ editorializing that Marshall was “*finally* able to get ahold of Page ... and Holdcraft” on May 4 and that Page “still did not want to speak with [him],” Opp.Br.14 (emphasis added), lacks any record support.

Nor do Defendants persuasively distinguish EEOC’s cited authority holding that a jury could find similar delays unreasonable. *See Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 414-15 (6th Cir. 2021) (jury could find nine-day delay in forwarding to HR and subsequent three-week delay in investigating “explicit and specific sexual harassment complaint” to be unreasonable); *Rock-Tenn*, 813 F.3d at 312 (jury could find ten-day delay in investigating harassment allegations unreasonable). They claim *Wyatt* is

distinguishable because Brown “took remedial action” prior to his TMR report by speaking with the claimants, contacting PeopleWorks, and sending Thompson home. Opp.Br.36. But Brown only spoke with the claimants because *they* came forward despite his inaction, further delayed after PeopleWorks told him to contact TMR, and brought Thompson back to work a mere two days later. *Supra* pp. 21-22. While Defendants attempt to distinguish *Wyatt* and *Rock-Tenn* on the grounds that Marshall did not delay in *commencing* the investigation, Opp.Br.34, 36, they offer “no answer for what [Marshall] did” to actually “investigate the complaint” in the fourteen days after his initial, ineffectual attempt at contact. *Wyatt*, 999 F.3d at 414; *see Rock-Tenn*, 813 F.3d at 312 (emphasizing employer’s “total inaction for ten days”). This differs from the caselaw Defendants cite finding delay of a few weeks reasonable where the employer used that time to actually “investigat[e] the complaint and formulat[e] a remedy.” *Alvarez v. Des Moines Bolt Supply, Inc.*, 626 F.3d 410, 421 (8th Cir. 2010).

2. A jury could find Defendants negligently failed to prevent harassment from occurring.

As EEOC explained, a jury could find that Defendants negligently failed to prevent harassment because they took inadequate steps to ensure

their teenage employees understood and could utilize the company's anti-harassment policies and procedures. EEOC.Br.52-59. Defendants offer no response to this argument other than to recite the district court's conclusion that "the law of the Eighth Circuit" imposes no "affirmative obligation ... to prevent ... harassment." Opp.Br.25 (quoting App.1968, R.Doc.73 at 33). Yet EEOC identified precedent from both this Court and the Supreme Court establishing just such an obligation. EEOC.Br.53-54; *see Vance v. Ball State Univ.*, 570 U.S. 421, 448-49 (2013) (employer can be liable for negligently failing to prevent harassment); *Sellars v. CRST Expedited, Inc.*, 13 F.4th 681, 696-67 (8th Cir. 2021) (citing *Vance* as establishing standard for "whether an employer was negligent in failing to prevent harassment").

Defendants do not engage with this caselaw other than asserting in a footnote that *Vance* "addressed the narrow question of who qualifies as a supervisor under *Faragher-Ellerth*, not the standard for employer liability in non-supervisor harassment cases." Opp.Br.25 n.7. But *Vance* did address this latter issue. In responding to the dissent's concern that a narrow definition of supervisor would "preclude employer liability" across many cases, the majority emphasized that, even where the harasser is not a supervisor, "a plaintiff could still prevail by showing that [the] employer

was negligent in failing to prevent harassment from taking place.” 570 U.S. at 448-49.

Defendants ignore this language from *Vance*, as well as EEOC’s argument that a jury could find them liable under *Vance*’s failure-to-prevent standard due to their deficient communication of the anti-harassment policies and complaint mechanisms to the teenage claimants. EEOC.Br.54-59. As EEOC explained, Defendants’ own managers testified that they neither reviewed the company’s anti-harassment policies with new employees nor had any process to verify that employees actually read and understood the policies apart from requiring signatures on an acknowledgment form. EEOC.Br.56-57. Despite recognizing that they employed many teenagers working their first jobs, EEOC.Br.58, Defendants did nothing to “suit [their] procedures to the understanding of the average teenager.” *EEOC v. V&J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir. 2007). A jury could find that Defendants’ failure to do so impeded the teens’ ability to use the complaint procedures, thus allowing Thompson’s harassment to continue unabated.

II. The district court erred by granting summary judgment on EEOC's constructive-discharge claim.

A. A jury could find Page's work conditions objectively intolerable.

EEOC's brief explained that a jury could conclude that a reasonable sixteen-year-old forced to work closely with a thirty-two-year-old man who trapped and assaulted her four times and texted her a photo of his penis would find these conditions intolerable. EEOC.Br.59-60. In response, Defendants again ignore the emotional and psychological toll of being forced to work with one's harasser, claiming that nothing "potentially intolerable" could have occurred because Thompson did not "physically touch ... or speak to [Page] sexually" during these shifts. Opp.Br.51 (citation omitted). But Defendants cite no authority holding that only physical harassment or sexual speech may constitute cognizable intolerability for a constructive-discharge claim. *Supra* pp. 16-17 (addressing Defendants' similar argument regarding hostile-work-environment claim).

Defendants also renew their strawman argument that Page complained only of "a few stares" of "indeterminate nature and duration." Opp.Br.51-52. But it was the fear and anxiety Page suffered working

alongside Thompson following the multiple assaults that was intolerable; Thompson's ongoing stares simply compounded this problem. *Supra* p. 19 (addressing similar argument).

Nor do Defendants persuasively respond to EEOC's cited authority suggesting that working alongside one's harasser can give rise to intolerable work conditions.⁷ EEOC.Br.59-60; *see Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 617 (8th Cir. 2000) (citing employer's failure to transfer harasser following severe harassment as contributing to intolerable work conditions); *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 work conditions). Defendants claim these cases involved "unmistakably severe misconduct" that employers "failed to remedy." Opp.Br.53. But Defendants do not explain how Thompson's conduct — cornering Page in a walk-in refrigerator and dark outdoor shed, forcefully

⁷ EEOC explained that *Tatum v. Arkansas Department of Health*, 411 F.3d 955 (8th Cir. 2005) — which the district court cited for the proposition that being forced to work with one's harasser is not intolerable — is inapposite because the conduct there "was not directly threatening," *id.* at 960, unlike Thompson's sexual assaults here. EEOC.Br.60-61. Defendants cite *Tatum* as apposite authority in their statement of issues, Opp.Br.2, but do not discuss the case in the body of their brief or address EEOC's argument.

kissing her, fondling her breasts, and groping her genitals while she tried to fight him off – can be characterized as anything other than “unmistakably severe.” Nor do Defendants explain how their refusal to separate Page from Thompson – after she reported the harassment and objected to working with him – amounts to anything less than a “fail[ure] to remedy” that harassment.

Defendants also argue that Page’s working conditions were not as bad as those in *Henderson* because Page purportedly “did not complain” about working with Thompson. Opp.Br.54. But Page complained at least twice: when she and Bentz told Brown and Hefner they were scared to work their April 18 shift with Thompson, and again when she texted Brown on April 21 that she was only okay working without Thompson there. EEOC.Br.33. Defendants quibble that these complaints did not use magic words regarding fear or discomfort. Opp.Br.54-55. But Bentz *did* specifically tell Defendants that both she and Page were “scared to go to work” with Thompson, App.1004, R.Doc.60-7 at 69, and, regardless of semantics, Page’s complaints clearly reflect her overall unease working with Thompson. Defendants also claim that Page’s April 25 text that she was willing to pick up a shift even if Thompson was working shows “her

working conditions were fine, with or without Thompson present.”

Opp.Br.55. Again, this fails to acknowledge (much less explain why a jury could not credit) her testimony that she sent this text only because Defendants were “already scheduling [her] with [Thompson] anyways” over her objection. *Supra* pp. 9-10.

Nor do Defendants persuasively distinguish *Finish Line*. While Defendants emphasize that *Finish Line* involved “harassment by a supervisor” and a “tangible employment action,” Opp.Br.55-56, the court’s analysis highlighted instead the “intolerable working condition” created by “the 38 year-old [harasser’s] sexual harassment of the teenage [victims].” 915 F. Supp. 2d at 922-23. A jury could find that the thirty-two-year-old Thompson’s multiple sexual assaults of the teenage Page rendered her work environment similarly intolerable.⁸

⁸ EEOC explained that the district court misunderstood the record evidence by asserting that concerns about schoolwork rather than Thompson’s harassment motivated Page’s parents to resign on her behalf. EEOC.Br.61-63. Defendants do not respond to this argument but continue to insist, erroneously, that schoolwork concerns, rather than Thompson’s continued presence, motivated Page to quit. *See* Opp.Br.15, 52.

B. There is no subjective-intent requirement for a constructive-discharge claim.

Defendants also assert that EEOC failed to show they “intended to force Page to quit.” Opp.Br.52. But, as EEOC described, Supreme Court precedent establishes that no such showing is required. EEOC.Br.61. In *Green v. Brennan*, 578 U.S. 547 (2016), the Supreme Court explained that “[t]he whole point of allowing an employee to claim ‘constructive’ discharge is that in circumstances of discrimination so intolerable that a reasonable person would resign, we treat the employee’s resignation as though the employer actually fired him.” *Id.* at 560 (citation omitted). “We do not,” the Court emphasized, “also require an employee to come forward with proof — proof that would often be difficult to allege plausibly — that not only was the discrimination so bad that he had to quit, but also that his quitting was his employer’s plan all along.” *Id.*

In response, Defendants accuse EEOC of “mislead[ing] the Court with a truncated quote.” Opp.Br.52. But they do not explain why EEOC’s reliance on *Green* is misleading. Indeed, this Court has adopted precisely this reading of *Green*. *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");⁹ *Brokken v. Hennepin Cnty.*, 140 F.4th 445, 451 (8th Cir. 2025) (quoting *Green* for this proposition); see *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 144 (4th Cir. 2017) (concluding that “*Green*’s express holding abrogates our prior case law to the extent it” “appl[ied] [a] deliberateness requirement”).

Defendants instead propose a tortured reading of *Green* as having eliminated the subjective-intent requirement only at the motion-to-dismiss stage but not the summary-judgment stage. Opp.Br.53. This is wrong: “[T]he essential elements of a claim remain constant through the life of a lawsuit”; while the quantum of proof “may increase as a case progresses ..., the legal elements themselves do not change.” *Comcast Corp.*

⁹ Defendants claim *Sellars* embraced a subjective-intent requirement by stating that “the intolerable conditions must be attributable to the employer.” 13 F.4th at 700. But *Sellars* differentiated this showing from one that “the employer subjectively intended for the employee to quit,” which “*Green* makes clear ... is not required.” *Id.* Here, the intolerable work conditions were attributable to Defendants’ refusal to separate Page from her harasser; whether Defendants subjectively desired that Page quit is irrelevant. To the extent this Court has required subjective intent in other post-*Green* cases, see Opp.Br.53, *Green* controls. See *Young v. Hayes*, 218 F.3d 850, 853 (8th Cir. 2000) (circuit not bound by prior panel opinions inconsistent with intervening Supreme Court precedent); *Ne. Ohio Coal. for the Homeless v. Husted*, 831 F.3d 686, 720 (6th Cir. 2016) (collecting cases) (applying this principle “even in the unusual situation where binding circuit precedent overlooked earlier Supreme Court authority”).

v. Nat'l Ass'n of Afr. Am.-Owned Media, 589 U.S. 327, 332 (2020). The constructive-discharge elements include no subjective-intent requirement. *See Green*, 578 U.S. at 555 (articulating “two basic elements” for constructive-discharge claim without a deliberateness requirement); *Brokken*, 140 F.4th at 451 (adopting same elements).

CONCLUSION

For these reasons, the district court’s judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,497 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 June 18, 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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