No. 24-2082

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Equal Employment Opportunity Commission,
Plaintiff-Appellant,

v.

BNSF Railway Company,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Nebraska

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

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SUMMARY OF THE CASE

BNSF Railway Company subjected Rena Merker and other women to a sex-based hostile work environment at its railyard in Alliance, Nebraska. That environment included widespread verbal abuse, unwanted advances, sexist imagery, and other offensive conduct. The Equal Employment Opportunity Commission (EEOC) thus brought this Title VII action, seeking relief for Merker and a defined class of women who worked at BNSF's Alliance railyard. The district court dismissed the EEOC's claim for classwide relief and later granted summary judgment to BNSF on the EEOC's claim seeking relief for Merker.

Contrary to the district court's rulings, the EEOC's operative complaint alleges facts sufficient to state a plausible claim for classwide relief and genuine issues of material fact preclude summary judgment on the EEOC's claim seeking relief for Merker. In holding otherwise, the district court misstated and misapplied the proper standards for pleading class claims in EEOC enforcement actions and for proving hostile-work-environment claims.

Accordingly, this Court should reverse and remand for further appropriate proceedings. The EEOC requests 20 minutes of oral argument.

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STATEMENT OF JURISDICTION

The 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. The district court partially dismissed the EEOC's operative complaint with prejudice on August 23, 2022. App. 0276-0310, R. Doc. 74. The district court granted summary judgment to BNSF on the EEOC's remaining claim on March 27, 2024. App. 3357-3415, R. Doc. 152. The district court entered final judgment on the same day. App. 3416, R. Doc. 153. The EEOC timely appealed on May 24, 2024. App. 3417-18, R. Doc. 159. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the EEOC's operative complaint alleges facts sufficient to state a plausible hostile-work-environment claim seeking relief for a defined class of women who worked at BNSF's Alliance railyard.

Apposite authority:

- *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318 (1980).
- *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).
- *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015).
- *EEOC v. Tesla, Inc.*, __ F. Supp. 3d __, No. 23-cv-04984, 2024 WL 1354530 (N.D. Cal. Mar. 29, 2024).

2. Whether genuine issues of material fact preclude summary judgment on the EEOC's hostile-work-environment claim seeking relief for Rena Merker.

Apposite authority:

- *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).
- *Cottrill v. MFA, Inc.*, 443 F.3d 629 (8th Cir. 2006).
- *Williams v. Gen. Motors Corp.*, 187 F.3d 553 (6th Cir. 1999).

STATEMENT OF THE CASE

Rena Merker worked for BNSF as a train conductor from October 2011 through March 2022, and she was based out of the company's railyard in Alliance, Nebraska. App. 1512, R. Doc. 134 at 2 (¶ 4). On January 17, 2018, Merker filed a charge of discrimination with the EEOC on behalf of herself and other women employed at BNSF, alleging sex-based harassment, disparate treatment, and retaliation. App. 0235-38, R. Doc. 41-1. When the EEOC was unable to secure a conciliation agreement with BNSF, it filed this action asserting a hostile-work-environment claim under Title VII and seeking relief for Merker and a class of women who worked out of BNSF's Alliance railyard. App. 0015-25, R. Doc. 1.

A. Dismissal orders.

1. First amended complaint.

In its First Amended Complaint (FAC),[1] the EEOC alleged that from October 2011 onward, BNSF subjected Merker and other women at its Alliance railyard "to a near daily barrage of sexually harassing conduct by both coworkers and supervisors." App. 0059, R. Doc. 10 at 3 (¶ 16). The FAC provided specific examples, which "included sexual comments, derogatory comments and slurs about women, circulation of nude pictures and photographs, and other sexual and hostile actions toward female employees." App. 0059, R. Doc. 10 at 3 (¶ 16).

For instance, male employees frequently made derogatory statements to or about women—often in public settings to which all women were exposed—and made unwanted advances on women. App. 0061-62, R. Doc. 10 at 5-6 (¶¶ 22-23). BNSF's facilities and locomotives were saturated with sexual graffiti and pictures that sexualized and demeaned women. App. 0062-64, R. Doc. 10 at 6-8 (¶¶ 24-26). And male employees often purposefully soiled unisex locomotive restrooms and other facilities with

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[1] The EEOC filed the FAC as of right after BNSF moved to dismiss the initial complaint. *See* App. 0004, R. Doc. 13.

urine, feces, and (on one occasion) a dead bird. App. 0064, R. Doc. 10 at 8 (¶¶ 27-28).

These allegations made clear that sex-based harassment at the Alliance railyard was omnipresent, inescapable, and extreme.

2. First dismissal order.

On BNSF's motion, the district court dismissed the EEOC's claim seeking classwide relief. App. 0165-77, R. Doc. 28 at 12-24.[2] The court held that to plead a claim for classwide relief, the EEOC must (1) "allege[] sufficient factual content for the Court to draw a reasonable inference that discrimination is occurring to a group of 'persons aggrieved,' because they suffered similar acts of discrimination," and (2) "indicate[] the size of this group." App. 0172, R. Doc. 28 at 19. The court further reasoned that "[s]imilar acts of discrimination means that the employees suffered from the same unlawful conduct perpetrated by the same actors (or group of actors) in the same timeframe." App. 0172, R. Doc. 28 at 19.

[2] The court separately held that the EEOC had properly pled a hostile-work-environment claim seeking relief for Merker. App. 0162-65, R. Doc. 28 at 9-12. That ruling is not at issue.

Applying this standard, the court initially stated that the EEOC had "allege[d] sufficient factual content for the Court to draw a reasonable inference that discrimination is occurring to a group of 'persons aggrieved' and that the EEOC can therefore seek relief from BNSF." App. 0173, R. Doc. 28 at 20. The court nonetheless concluded that the EEOC had not "adequately plead[ed] that all the female employees referenced in the [FAC] suffered similar acts of similar discrimination by the same actors during the same time frame or indicated the size of this group." App. 0175, R. Doc. 28 at 22. The court granted the EEOC leave to amend to offer allegations on these points. App. 0176, R. Doc. 28 at 23.

3. Second amended complaint.

The EEOC thereafter filed a Second Amended Complaint (SAC). App. 0215-34, R. Doc. 41. The SAC provided additional factual allegations in five critical respects.

First, the SAC narrowly defined the group of aggrieved persons to include only women who worked in specified positions during a specified timeframe—specifically, women who worked in "TY&E" (Trainmen, Yardmen, and Engineers) and Yard Master positions at BNSF's Alliance railyard from March 23, 2017, to the present. App. 0218-19, R. Doc. 41 at 4-5

(¶ 22). The SAC also provided details regarding the size of that group. It alleged that BNSF employed "approximately 485 individuals in TY&E positions" and "approximately 8 to 10 individuals in Yard Master positions" at the Alliance railyard. App. 0218, R. Doc. 41 at 4 (¶ 21). It further alleged that "the number of individuals employed in those positions … have remained relatively steady since at least 2016," and that "approximately five percent or fewer of the individuals employed in these positions … at any given time since 2016 were or are female." App. 0218, R. Doc. 41 at 4 (¶ 21). These figures suggested that at any given time, BNSF employed roughly twenty-five women who fell within the defined group.

Second, the EEOC provided additional details about the harassment that women experienced at BNSF's Alliance railyard. To start, the SAC identified four anonymized exemplars: Jane Doe, Sally Doe, Karen Doe, and Tina Doe. App. 0222-27, R. Doc. 41 at 8-13 (¶¶ 42-71). Consistent with the allegations in the FAC, the SAC explained that these exemplars suffered harassment in many forms. BNSF exposed them to sexual or derogatory statements to or about women, including unwanted and

sometimes intimidating advances;[3] sexual graffiti and other imagery that demeaned women;[4] and/or locomotive restrooms and other facilities that

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[3] *E.g.*, App. 0223, R. Doc. 41 at 9 (¶ 45) ("Jane Doe was frequently forced to listen to vulgar, sexual jokes and discussions about sex from male colleagues."); App. 0223, R. Doc. 41 at 9 (¶ 48) (male engineer "tried to enter [Jane Doe's] hotel room," forcing Jane Doe to "put a chair up to the door to prevent [the engineer] from coming in her room"); App. 0224, R. Doc. 41 at 10 (¶ 53) ("[A] male employee constantly refer[red] to Sally Doe and other women working in the yard as 'baby' or 'baby girl' and t[old] them 'you smell so good' and 'baby you look good today.'"); App. 0225, R. Doc. 41 at 11 (¶ 56) ("[A] male TY&E employee told [Sally Doe] 'you ain't my momma, you ain't shit to me and you're not going to tell me what to do.'"); App. 0226, R. Doc. 41 at 12 (¶ 60) ("[A] male coworker said he was Italian and asked if Karen Doe had ever been with an Italian Guy, telling Karen Doe how big his male parts were."); App. 0226, R. Doc. 41 at 12 (¶ 63) (Karen Doe "found that male employees often try to intimidate female workers," saying, for example, "'This is a man's job, I'm surprised you want to work out here,' and 'I wouldn't want my wife being out here; it's dirty and guys are gross—how do you pee on a motor?'"); App. 0227, R. Doc. 41 at 13 (¶ 67) (male employee "began openly accosting [Tina Doe] in [BNSF's] parking lot before and after work").

[4] *E.g.*, App. 0223, R. Doc. 41 at 9 (¶ 46) ("Jane Doe was forced to work in the presence of sexual and sexually hostile graffiti, including drawings of male genitalia, on trains on an almost daily basis."); App. 0226, R. Doc. 41 at 12 (¶ 62) ("Karen Doe has seen sexualized graffiti around the workplace."); App. 0227, R. Doc. 41 at 13 (¶ 70) ("The locomotives where Tina Doe performs her job [were] riddled with sexualized graffiti."); App. 0227, R. Doc. 41 at 13 (¶ 71) ("Tina Doe observed the words 'Lick it Linda' written on a locomotive, … and the words 'S. Kramer likes cock' written on a locomotive….").

men had intentionally soiled.[5] The SAC further alleged that other women at the Alliance railyard generally experienced similar forms of harassment almost daily, and the SAC offered a collection of supporting examples. App. 0227-30, R. Doc. 41 at 13-16 (¶¶ 72-87).

Third, the EEOC provided a timeframe during which the harassment occurred, namely, from October 2011 through the present. App. 0217, 0219, 0232, R. Doc. 41 at 3, 5, 18 (¶¶ 16, 23, 101).

Fourth, the EEOC generally identified the harassers as men who worked out of BNSF's Alliance railyard in TY&E and Yard Master positions, and in related supervisory and management positions. App. 0218-19, R. Doc. 41 at 4-5 (¶¶ 17, 22).

Finally, the EEOC again alleged that BNSF was aware of the harassment and failed to take prompt remedial action. App. 0230-31,

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[5] *E.g.*, App. 0223, R. Doc. 41 at 9 (¶ 44) ("Jane Doe was routinely unable to use the unisex restrooms on the locomotives because of the unsanitary conditions—including soiling with feces and urine—created by employees for the purpose of making the restrooms unusable by women."); App. 0228, R. Doc. 41 at 14 (¶ 78) ("Merker, the exemplars, and many other female employees in TY&E and Yard Master positions were forced to use restrooms that male employees purposefully soiled to make them unsanitary and unusable by women.").

R. Doc. 41 at 16-17 (¶¶ 88-95). Indeed, the EEOC alleged, BNSF not only took no meaningful action, but also "contributed to creating a sexually charged atmosphere at its workplace by issuing t-shirts with sexualized 'double-entendre' messages," where "[t]he front of the T-shirts said 'Shoving' and the back said, 'Got Protection?'" App. 0230-31, R. Doc. 41 at 16-17 (¶ 92).

4. Second dismissal order.

Despite these detailed factual allegations, the district court again dismissed the EEOC's claim seeking classwide relief, this time with prejudice. App. 0310, R. Doc. 74 at 35. It did so on two principal grounds.

First, applying the standard it crafted in the first dismissal order, the court held that the EEOC had not sufficiently alleged that female employees suffered the same harassment, by the same actors, during the same timeframe. App. 0297-0304, R. Doc. 74 at 22-29. The court focused on minute differences between the harassment women experienced. The court reasoned, for example, that offensive comments "about a particular woman's body" were materially different than comments "about the harasser's own body or sexual exploits" or "about other women's bodies"; that referring to "women as 'cunts,' 'bitches,' and 'stupid whores,'" was

materially different than "a man bragg[ing] about the 'bitches [he] f**cked,' their body types, and their breasts"; that offensive graffiti and images targeted at "no particular individual" were materially different than pictures or images "targeted at particular individuals"; and that a male employee "urinating on a locomotive['s] steps and handrails" was materially different than "inexcusably unsanitary conditions created by male employees who soiled restrooms with feces or urine." App. 0299-0301, R. Doc. 74 at 24-26.

Second, the court held that the EEOC had not alleged facts indicating class size. App. 0304-09, R. Doc. 74 at 29-34. It acknowledged that the SAC provided "an estimate of the total number of employees in the Alliance railyard in the relevant positions at any given time and an estimate of the percentage of those employees who were female at any given time." App. 0305, R. Doc. 74 at 30. But it faulted the EEOC for not supplying a "rate of turnover." App. 0305, R. Doc. 74 at 30. Without that, the court reasoned, the class size could range from "twenty-five (no turnover during the period)" to "137.5 (5.5 years x 25 female employees, based on complete turnover annually during the period), or even larger (if turnover actually exceeds the

average number of female employee[s], *i.e.*, any one position turns over more than once during a year)." App. 0305-06, R. Doc. 74 at 30-31.

B. Summary judgment order.

1. Statement of facts.

At summary judgment, the EEOC presented ample evidence that BNSF subjected Merker to a sex-based hostile work environment. App. 1535-43, R. Doc. 134 at 25-33 (¶¶ 61-72).

Male employees discussed Merker's body in overtly sexual terms—for example, telling her men had voted she had "the best ass out here" and that they had "heard her 'tits' were 'nice,'" assuring her that they were "not staring at [her] ass," and spreading rumors that she was "sleeping around." App. 1524-28, R. Doc. 134 at 14-18 (¶ 45(a)-(b), (e), (k)). Male employees made sexist comments to Merker—telling her, for example, that "women are cunts," "women are bitches," and "women should not be working here." App. 1524-25, R. Doc. 134 at 14-15 (¶ 45(c)-(d)). Male employees made unwanted advances—often calling Merker "baby girl" and telling her she smelled good. App. 1526-27, R. Doc. 134 at 16-17 (¶ 45(g)). On one occasion, a male coworker approached Merker from behind—in a full room—and asked whether she was ticklish, apparently stopping only

when Merker told him not to touch her. App. 1527, R. Doc. 134 at 17 (¶ 45(h)); App. 0480-81, R. Doc. 127-3 at 70-71.

Merker was exposed to sexist and demeaning graffiti and pictures. App. 1529, R. Doc. 134 at 19 (¶ 47). She frequently saw drawings of penises or naked women in the workplace, including in her workspace and the women's locker room. App. 1529-30, 1545-46, R. Doc. 134 at 19-20, 35-36 (¶¶ 47(a), 47(c), 91); App. 0467, R. Doc. 127-3 at 57. She saw a framed picture of a man with his penis exposed on a cabinet near the spot where employees clocked in and out, and in view of supervisors and employees. App. 1534-35, 1541, 1553-54, R. Doc. 134 at 24-25, 31, 43-44 (¶¶ 60(b), 61(nn), 144). In 2018, she witnessed "#TITSFORTOOTS" and "#TOOTSFORTITS" written on a locomotive. App. 1534, R. Doc. 134 at 24 (¶ 60(a)); App. 0466-67, R. Doc. 127-3 at 56-57. Male employees circulated—and showed Merker—nude or topless pictures of other female employees. App. 1539, R. Doc. 134 at 29 (¶ 61(x)-(y), (aa)).[6]

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[6] Some of the pictures discussed here were filed under seal in the district court. *See* R. Doc. 132.

Merker had to use locomotive restrooms that male employees intentionally soiled, and she overheard men brag about "shit[ting] all over the bathroom." App. 1530, R. Doc. 134 at 20 (¶ 50); App. 0560-62, R. Doc. 127-3 at 150-52. She was aware of one instance in which someone left a dead bird on a toilet used by another female employee. App. 0520, 0564, R. Doc. 127-3 at 110, 154. In January 2018, Merker discovered a fake camera in a locomotive restroom next to the words "for research purposes only." App. 1529, R. Doc. 134 at 19 (¶ 47(b)).

BNSF employees harassed Merker outside the workplace as well. In a Facebook group called "The Rail Pail," which had more than 4,700 members, BNSF employees posted sexual and derogatory comments and images about women. App. 1541, R. Doc. 134 at 31 (¶ 61(oo)). Merker was a group member and thus saw what was posted there. App. 2576-77, R. Doc. 135-38 at 106-07. On one occasion, a coworker messaged Merker on Facebook, telling her, "Found u… hear u have a man I respect that But OMFG UR HOT! That's all lol. See ya around." App. 1542, R. Doc. 134 at 32 (¶ 61(qq)); App. 1646, R. Doc. 135-9 at 2. On another, a supervisor told Merker that he was "stalking" her on Facebook. App. 1535, R. Doc. 134 at 25 (¶ 61(c)); App. 0568-69, R. Doc. 127-3 at 158-59.

Although Merker could not recall the exact dates of certain conduct, *e.g.*, App. 0500, 0504, 0521, R. Doc. 127-3 at 90, 94, 111, she made clear that the incidents she identified were merely examples, that other harassment had occurred, and that much of the harassment was persistent and took place throughout her time at BNSF from 2011 to 2022. *E.g.*, App. 0469-70, R. Doc. 127-3 at 59-60 (Merker saw sexual graffiti in women's locker room "every time [she] worked" for six years); App. 0487-88, R. Doc. 127-3 at 77-78 (Merker testifying that although she could not recall other individuals who harassed her at BNSF, she "know[s] that there are more"); App. 0491, R. Doc. 127-3 at 81 (coworker made offensive comments "all the time"); App. 0565, R. Doc. 127-3 at 155 (demeaning comments occurred "[o]ften," up to "three times a week"); App. 0579-81, R. Doc. 127-3 at 169-71 (catcalls and whistling were "persistent").

Merker repeatedly reported harassment to BNSF managers and supervisors. App. 1547-49, R. Doc. 134 at 37-39 (¶¶ 99-114).[7] Additionally,

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[7] *E.g.*, App. 1547-48, R. Doc. 134 at 37-38 (¶ 99) ("Merker reported a drawing of a penis ejaculating above an eye wash station to [her supervisor] William Boness."), (¶ 100) ("Merker reported a picture of a vagina in a train bathroom to William Boness."), (¶¶ 102-03) (Merker reported male coworker's comments that women were "cunts" and

managers and supervisors often witnessed or personally knew about the harassment. App. 1545-47, R. Doc. 134 at 35-37 (¶¶ 91-98).[8]

Days after the EEOC filed its summary judgment brief, Merker passed away. At the district court's direction, the parties submitted supplemental briefing to address whether and how Merker's passing would affect the litigation. App. 3318-19, R. Doc. 142; App. 3320-34, R. Doc. 146; App. 3335-50, R. Doc. 148.

2. District court's decision.

In its summary judgment ruling, the district court agreed that the EEOC could continue prosecuting the case notwithstanding Merker's

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"shouldn't be working out here" to multiple managers and a trainmaster), (¶ 106) (Merker reported male coworker's comments referring to women as "ugly, stupid whores" and "bitches").

[8] *E.g.*, App. 1546, R. Doc. 134 at 36 (¶ 97) ("Human Resources Manager Brooke Owens was aware of graffiti before Merker's charge of discrimination; she carried wipes in her bag to remove graffiti, including sexual graffiti[,] and told Merker to do the same"), (¶ 95) ("Supervisor Sam Roberts has seen sexual graffiti in the workplace, specifically inside locomotive bathrooms used by employees. Roberts noticed this graffiti for the first time in 2006 and saw the graffiti ten to twenty times in total."), (¶ 93) ("Terminal Superintendent Jeff Stevens knew of sexual graffiti in the workplace for decades."); *see also, e.g.*, App. 0499, R. Doc. 127-3 at 89 (supervisor was present at training where offensive comments occurred).

passing. App. 3366-67, R. Doc. 152 at 10-11.[9] The court likewise agreed that a reasonable jury could find that Merker had suffered unwelcome harassment based on her sex. App. 3400-07, R. Doc. 152 at 44-51.[10] The court nonetheless granted summary judgment to BNSF on two principal grounds.

First, the court held that the EEOC could not establish a "continuing violation" that would allow it to seek relief for harassment before the limitations period (i.e., 300 days before Merker filed her charge of discrimination in January 2018) because the earlier harassment was not "similar in nature" to the later harassment. App. 3389-95, R. Doc. 152 at 33-39.

Second, the court held that the EEOC could not show that the harassment Merker experienced was severe or pervasive. App. 3407-15, R. Doc. 152 at 51-59. The court reasoned that although the conduct Merker endured was "vile or inappropriate," its severity was tempered by the fact

[9] The court declined to address whether Merker's passing might affect evidentiary issues or what relief the EEOC could seek. App. 3367-68, R. Doc. 152 at 11-12.

[10] The court found insufficient evidence of supervisor harassment. App. 3371-83, R. Doc. 152 at 15-27. The EEOC does not challenge that ruling.

that the harassment occurred "on locomotives or in railyard facilities where most of the workforce are members of the same sex (male), as opposed to a professional office." App. 3410, 3414, R. Doc. 152 at 54, 58.

STANDARD OF REVIEW

This Court reviews de novo the district court's dismissal and grant of summary judgment. *Ibson v. United Healthcare Servs., Inc.*, 877 F.3d 384, 387 (8th Cir. 2017).

SUMMARY OF ARGUMENT

I. The EEOC's operative complaint states a plausible hostile-work-environment claim seeking relief for a defined class of women who worked at BNSF's Alliance railyard. The complaint generally identified or described (1) the group of aggrieved persons, (2) the nature of the harassment those individuals experienced, (3) the relevant timeframe during which the harassment occurred, (4) the source of the harassment, and (5) some basis for employer liability. No more was required. In holding otherwise, the district court imposed novel pleading requirements, which have not been adopted by any other court and find no support in the statute or precedent. Those requirements are inconsistent with the plausibility pleading standard that governs in all civil actions,

misapprehend the function of EEOC enforcement actions, and rest on fundamental misunderstandings about hostile-work-environment claims.

II. Genuine issues of material fact preclude summary judgment on the EEOC's hostile-work-environment claim seeking relief for Merker. The EEOC supplied ample evidence that Merker suffered severe or pervasive sex-based harassment, which included a steady stream of sexist and degrading remarks, unwanted sexual advances, sexual graffiti and pictures, intentionally-soiled restrooms, and online harassment. Contrary to the district court's ruling, the acts of harassment Merker experienced over the years comprised a single unlawful employment practice because they were sufficiently related to one another. And the overwhelming weight of authority from other circuits has rejected the district court's holding that sexual harassment is somehow less severe when it takes place in a "physical" and male-dominated industry.

For these reasons, this Court should reverse the district court's judgment, and remand for further appropriate proceedings.

ARGUMENT

I. The EEOC's operative complaint alleges facts sufficient to state a plausible hostile-work-environment claim seeking relief for a defined class of women who worked at BNSF's Alliance railyard.

It is well settled that Title VII authorizes the EEOC to seek classwide relief for a group of aggrieved individuals. *See* 42 U.S.C. § 2000e-5(f)(1). The key question here concerns how much factual detail the EEOC must provide in its complaint to state a plausible claim for groupwide relief.

Although this Court has not squarely resolved that question, persuasive caselaw from courts across the country supplies the appropriate standard: Where, as here, the EEOC asserts a hostile-work-environment claim seeking relief for a group of aggrieved persons, the EEOC states a plausible claim for relief—and thereby gives adequate notice to the defendant—when the allegations in its complaint generally identify or describe (1) the group of aggrieved persons, (2) the nature of the harassment those individuals experienced, (3) the relevant timeframe during which the harassment occurred, (4) the source of the harassment, and (5) some basis for employer liability.

Here, the EEOC's SAC readily met this standard. Moreover, in the alternative, the SAC met the district court's novel and overly-stringent standard.

A. Under the proper pleading standard, the operative complaint plausibly alleges a claim for classwide relief.

1. Guiding principles.

Three core principles frame the applicable analysis. First, the plausibility pleading standard that governs all civil actions applies with equal force to EEOC enforcement actions. *See EEOC v. Roark-Whitten Hosp. 2, LP*, 28 F.4th 136, 146 (10th Cir. 2022); *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 254 (2d Cir. 2014); *Serrano & EEOC v. Cintas Corp.*, 699 F.3d 884, 897 (6th Cir. 2012). Under that standard, a complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint "need not set forth 'detailed factual allegations,' or 'specific facts' that describe the evidence to be presented[.]" *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009) (en banc) (citations omitted). Instead, it need only give the defendant "fair notice of what the plaintiff's claim is and the grounds upon

which it rests." *Cook v. George's, Inc.*, 952 F.3d 935, 938-39 (8th Cir. 2020) (citation omitted).

Discrimination claims are not subject to a "heightened pleading standard," and a plaintiff need not allege facts sufficient to make out a prima facie case of discrimination. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-15 (2002); *see also Warmington v. Bd. of Regents of the Univ. of Minn.*, 998 F.3d 789, 796 (8th Cir. 2021) ("At the pleading phase, a plaintiff need not plead facts establishing a prima facie case for their Title VII claim."); *Cook*, 952 F.3d at 938 ("The complaint is not required to fit any specific model since there is no 'rigid pleading standard for discrimination cases.'" (citation omitted)).

The second principle is that EEOC enforcement actions function differently than other types of class or collective actions. Title VII authorizes the agency to "bring suit in its own name." *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 324 (1980). Thus, even when the EEOC seeks "relief for a group of aggrieved individuals," it "is not merely a proxy for the victims of discrimination," but instead "acts also to vindicate the public interest in preventing employment discrimination." *Id.* at 324, 326. The EEOC's claims are not "merely derivative" of an aggrieved individual's

claims, and the agency "does not stand in the employee's shoes." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002).

For this reason, the EEOC "may seek specific relief for a group of aggrieved individuals without first obtaining class certification pursuant to Federal Rule of Civil Procedure 23." *Gen. Tel.*, 446 U.S. at 333-34; *see also EEOC v. Bass Pro Outdoor World, L.L.C.*, 826 F.3d 791, 797 (5th Cir. 2016) ("[T]he EEOC is not required to adhere to Rule 23 when bringing 'an enforcement action ... in its own name.'" (citation omitted)); *Serrano*, 699 F.3d at 898 n.3 ("Rule 23 does not apply to suits brought by the EEOC."); *EEOC v. United Parcel Serv.*, 94 F.3d 314, 318 (7th Cir. 1996) (EEOC "need not obtain class certification to bring an action on behalf of a class of unidentified individuals"); *EEOC v. United Parcel Serv.*, 860 F.2d 372, 374 (10th Cir. 1988) (EEOC may seek relief for "unidentifiable members of a known class").

The third principle is that hostile-work-environment claims inherently focus on overall circumstances rather than discrete incidents. A hostile work environment exists when "the workplace is permeated with 'discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create

an abusive working environment.'" *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 67 (1986)). Although a hostile work environment is "composed of individual acts," it constitutes "a single unlawful employment practice under Title VII." *Rowe v. Hussmann Corp.*, 381 F.3d 775, 782 (8th Cir. 2004); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 118 (2002) ("[T]he incidents constituting a hostile work environment are part of one unlawful employment practice….").

In assessing whether a work environment was hostile enough to be actionable, courts consider the totality of the circumstances, focusing on the overall workplace milieu rather than considering discrete incidents in isolation. As this Court has explained, "[a] work environment is shaped by the accumulation of abusive conduct, and the resulting harm cannot be measured by carving it 'into a series of discrete incidents.'" *Hathaway v. Runyon*, 132 F.3d 1214, 1222 (8th Cir. 1997) (citation omitted); *see also Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 (8th Cir. 1994) ("Just as a play cannot be understood on the basis of some of its scenes but only on its entire performance, a discrimination analysis must concentrate not only on individual incidents but on the overall scenario." (cleaned up)). Thus,

"when a pattern of discriminatory conduct is alleged, specific individual acts should be viewed as illustrative rather than as isolated incidents." *Ellis v. Houston*, 742 F.3d 307, 320 (8th Cir. 2014).

Importantly, "[h]arassing conduct can affect an employee's work environment even if it is not directed at that employee." EEOC, *Enforcement Guidance on Harassment in the Workplace*, § III(C)(2)(a) (Apr. 29, 2024), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace ("Harassment Guidance"). For example, harassment directed toward other employees can create or contribute to a hostile work environment. *See Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 578 F.3d 787, 802 (8th Cir. 2009) ("When judging the severity and pervasiveness of workplace sexual harassment, this court has long held harassment directed towards other female employees is relevant and must be considered."). Similarly, widespread use of gendered epithets in the workplace can create a hostile work environment even if they are only "directed at women as a group" rather than a particular individual. *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811-12 (11th Cir. 2010) (en banc); *see also Sharp v. S&S Activewear, LLC*, 69 F.4th 974, 977 (9th Cir. 2023)

(harassment "need not be directly targeted at a particular plaintiff in order to pollute a workplace and give rise to a Title VII claim").

So too can offensive imagery, like racist or sexist graffiti, even if not clearly directed at any particular individual. *See Watson v. CEVA Logistics U.S.*, Inc., 619 F.3d 936, 942-44 (8th Cir. 2010) (racist graffiti in workplace could contribute to hostile work environment); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 795 (8th Cir. 2004) (similar); *Petrosino v. Bell Atl.*, 385 F.3d 210, 224 (2d Cir. 2004) (sexist graffiti at worksites could contribute to hostile work environment); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1144-46 (10th Cir. 2008) (racist graffiti could contribute to hostile work environment); *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 982 (4th Cir. 1997) (discussing "profusion of graffiti and pornography that covered the walls and contributed to the sexually hostile environment").

2. The proper pleading standard.

Guided by the foregoing principles, district courts have consistently held that allegations like those the EEOC made in this case are sufficient to state a claim seeking relief for a group of aggrieved persons. As the decisions discussed below demonstrate, it is sufficient for the EEOC to generally identify or describe (1) the group of aggrieved persons, (2) the

nature of the harassment those individuals experienced, (3) the relevant timeframe during which the harassment occurred, (4) the harassment's source, and (5) some basis for employer liability.

The district court's decision in *EEOC v. Tesla, Inc.*, __ F. Supp. 3d __, No. 23-cv-04984, 2024 WL 1354530 (N.D. Cal. Mar. 29, 2024), is instructive. There, the court held that the EEOC's allegations were sufficient to state a hostile-work-environment claim seeking groupwide relief where the EEOC: (1) identified the victims (Black employees at Tesla's Fremont Factory); (2) described the alleged harassment (frequent use of "racial slurs, epithets, and insults openly in high-traffic work areas," and exposing employees to "graffitied swastikas, nooses, the N-word, death threats and other abusive language and imagery directed at Black people across desks, elevators, bathrooms, and equipment"); (3) provided a timeframe during which the harassment occurred ("[s]ince May 2015"); (4) identified the harassers in general terms ("non-Black managers, non-managerial employees, and temporary workers"); and (5) alleged a basis for employer liability (Tesla's awareness of the harassment and failure to take appropriate remedial action). *Id.* at *6.

Other courts have taken the same approach in considering EEOC hostile-work-environment claims seeking classwide relief. *See, e.g.*, *EEOC v. Justine Vineyards & Winery LLC*, No. 2:22-cv-06039, ECF No. 36, at 4-5 (C.D. Cal. Jan. 22, 2023) (EEOC stated hostile-work-environment claim seeking groupwide relief when it "provide[d] a general description of the class of aggrieved individuals," "identifie[d] the protected basis for the discrimination (female sex)," "detail[ed] the types of alleged discrimination" and "provide[d] examples of the alleged harassment," identified "the point in time at which the discrimination began," and "describe[d] the perpetrators as 'male supervisors'"); *EEOC v. JBS USA, LLC*, 481 F. Supp. 3d 1204, 1216, 1219 (D. Colo. 2020) (EEOC stated hostile-work-environment claim seeking groupwide relief where it alleged "the bases upon which the aggrieved parties were allegedly discriminated," "the types of conduct to which the aggrieved parties were subjected," "the time frame in which this harassment occurred," and the source of harassment as "management, supervisors, and co-workers"); *EEOC v. 5042 Holdings Ltd.*, No. 3:09-cv-00061, 2010 WL 148085, at *2 (N.D. W.Va. Jan. 11, 2010) (EEOC stated hostile-work-environment claim seeking groupwide relief where it identified "the time frames of the alleged violations," "the

alleged perpetrators," "a description of the class of aggrieved persons," and "the types of defendant conduct to which [the charging party] and the class were subjected"); *see also EEOC v. Spoa, LLC*, No. 13-cv-1615, 2013 WL 5634337, at *6 (D. Md. Oct. 15, 2013) (EEOC stated claim for groupwide relief where complaint alleged "detailed facts showing unwelcome, severe, and pervasive conduct, for which [the employer] may be held accountable").[11]

Courts apply roughly the same standard in assessing other types of class claims in EEOC enforcement actions. *E.g.*, *EEOC v. Geisinger Health*, No. 21-cv-4294, 2022 WL 10208553, at *17 (E.D. Pa. Oct. 17, 2022) (disability-discrimination and failure-to-accommodate case); *EEOC v. N.M. Dep't of Corr.*, No. 15-cv-879, 2017 WL 6001752, at *5 (D.N.M. Dec. 4, 2017) (age-discrimination and failure-to-promote case); *EEOC v. United Parcel Serv., Inc.*, No. 09-cv-5291, 2013 WL 140604, at *5-6 (N.D. Ill. Jan. 11, 2013) (disability-discrimination and failure-to-accommodate case).

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[11] Some decisions suggest that the EEOC must also identify the statute the defendant allegedly violated and the remedies sought. *E.g.*, *JBS USA*, 481 F. Supp. 3d at 1216; *5042 Holdings*, 2010 WL 148085, at *2. If those allegations were required, the EEOC provided them here. App. 0217, 0232-33, R. Doc. 41 at 3, 18-19.

3. The EEOC's SAC satisfied the proper standard.

Under the foregoing standard, the EEOC's allegations in the SAC readily check all five boxes.

First, the SAC identifies the group of aggrieved individuals: "women who worked in TY&E and Yard Master positions from March 23, 2017 to the present" at BNSF's Alliance railyard. App. 0218-19, R. Doc. 41 at 4-5 (¶ 22).

Second, the SAC provides extensive details—more than necessary—about the nature of the harassment these women experienced, which included sexual or derogatory statements to or about women; sexual advances; sexual graffiti and images that demeaned women; and locomotive restrooms and other facilities that were intentionally soiled with urine or feces. App. 0222-30, R. Doc. 41 at 8-16 (¶¶ 42-87).

Third, the SAC identified the relevant timeframe during which the harassment occurred: "October 2011 through the present." App. 0217, R. Doc. 41 at 3 (¶ 16).

Fourth, the SAC generally identified the harassers as "men who … worked out of the Alliance railyard in TY&E and Yard Master Positions,

and in supervisory and management positions related to and above the TY&E and Yard Master jobs." App. 0218, R. Doc. 41 at 4 (¶ 17).

Finally, the SAC alleged a basis for employer liability, namely, that BNSF was aware of the harassment and failed to take prompt remedial action. App. 0230-31, R. Doc. 41 at 16-17 (¶¶ 88-95).

In short, the SAC alleged a compilation of facts that, taken as true, both stated a plausible sex-based hostile-work-environment claim seeking classwide relief and provided BNSF with fair notice of the grounds for that claim.

B. The district court applied an incorrect pleading standard.

In reaching a contrary result, the district court imposed a new standard—heretofore unrecognized by *any* court—which required the EEOC to (1) allege that the aggrieved persons "suffered similar acts of discrimination," where "[s]imilar acts of discrimination means that the employees suffered from the same unlawful conduct perpetrated by the same actors (or group of actors) in the same time frame," and (2) "indicate[] the size of this group." App. 0277, R. Doc. 74 at 2. These "sameness" and "class-size" prongs are fatally flawed.

1. The EEOC need not allege facts showing that every aggrieved person suffered the same acts of harassment, by the same harassers, at the same time.

The sameness prong runs headlong into the three guiding principles outlined above. *Supra* Part I.A.1. As an initial matter, it is inconsistent with the plausibility pleading standard. *Supra* at 20-21. That standard "does not require great detail or recitation of all potentially relevant facts in order to put the defendant on notice of a plausible claim," *Hamilton v. Palm*, 621 F.3d 816, 819 (8th Cir. 2010), and it "does not oblige a plaintiff to set forth in the complaint every fact of relevance to an otherwise properly pled claim, let alone every fact of relevance to an as-yet-unfiled summary judgment motion that aims to defeat that same claim," *Soto-Feliciano v. Villa Cofresi Hotels, Inc.*, 779 F.3d 19, 26 (1st Cir. 2015); *see also Faulconer v. Centra Health, Inc.*, 808 F. App'x 148, 154 (4th Cir. 2020) ("[A] plaintiff does not have to allege in his complaint every fact on which he will rely at summary judgment.").

Furthermore, a complaint need not allege enough facts to make out a prima facie case or to establish each element of a claim. *Warmington*, 998 F.3d at 796; *Cook*, 952 F.3d at 939. Even at summary judgment, a plaintiff is not required to identify every act of harassment. Instead, "[s]pecific

examples cited as discriminatory and alleged to be part of a pattern of hostile treatment are to be viewed as 'examples of the offensive … incidents' experienced by the [victims], not as 'an exhaustive litany of every offensive … slur or incident' which occurred." *Ellis*, 742 F.3d at 319 (quoting *Ways v. City of Lincoln*, 871 F.2d 750, 755 (8th Cir. 1989)); *see also Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1456 (7th Cir. 1994) (court not "limited to the … incidents [plaintiff] has detailed" where plaintiff "maintains that she was subjected to almost daily comments, gestures, and innuendo of a sexual nature").

The sameness prong turns the plausibility standard on its head. It would effectively require the EEOC to provide enough details in its complaint to *prove* a hostile-work-environment claim and to provide particularized facts about nearly every class member. That requirement cannot be squared with Rule 8, which demands only "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)(2).

The sameness prong is also incompatible with the function and nature of EEOC enforcement actions. As explained above, *supra* at 21-22, the EEOC can seek classwide relief without satisfying Rule 23's prerequisites, including "commonality" and "typicality." *Gen. Tel.*, 446 U.S.

at 330-31; *see also Bass Pro*, 826 F.3d at 797 ("In *General Telephone*, the Supreme Court observed that the prerequisites to class certification under Rule 23—'numerosity, commonality, typicality, and adequacy of representation'—would inhibit the EEOC's ability to 'proceed in a unified action' bringing all available claims." (citations omitted)). Accordingly, "a suit by the EEOC is not confined 'to claims typified by those of the charging party.'" *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005) (quoting *Gen. Tel.*, 446 U.S. at 331). By requiring the EEOC to allege that *all* aggrieved individuals suffered the *same* acts, by the *same* actors, at the *same* time, the district court effectively introduced Rule 23's commonality and typicality requirements into the analysis. Those requirements have no place in an EEOC enforcement action.

The district court purported to derive the sameness prong from the statutory term "persons aggrieved," reasoning that because Title VII allows such persons to "intervene in a civil action brought by the [EEOC]," 42 U.S.C. § 2000e-5(f)(1), someone other than the charging party must meet the intervenor standard to qualify as a "person aggrieved." App. 0170-71, R. Doc. 28 at 17-18. In other words, under the court's reasoning, the EEOC

may seek relief only for individuals who could seek relief on their own behalf by intervening in the enforcement action.

The Supreme Court has rejected similar reasoning in other contexts, repeatedly holding that the EEOC's ability to seek relief for an individual is not "merely derivative" of, and thus does not turn on, the individual's ability to bring her own suit. *See Waffle House*, 534 U.S. at 297 (EEOC may seek relief for employee who signed arbitration agreement preventing her from filing own lawsuit); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (EEOC not precluded from seeking classwide relief for employee who signed arbitration agreement); *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 368-71 (1977) (EEOC need not comply with state statute of limitations that governs individual litigants).

Likewise, this Court has correctly recognized that the EEOC may seek relief for individuals who cannot assert their own claims in litigation, holding, for example, that "[u]nder *Waffle House* a court cannot judicially estop the EEOC from bringing suit in its own name to remedy employment discrimination simply because the defendant-employer happened to discriminate against an employee who, herself, was properly judicially estopped." *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 682 (8th Cir.

2012); *see also EEOC v. Sidley Austin LLP*, 437 F.3d 695, 696 (7th Cir. 2006) (EEOC can obtain relief for individuals whose individual suits were time-barred because its "enforcement authority is not derivative of the legal rights of individuals even when it is seeking to make them whole"); *EEOC v. Jefferson Dental Clinics, PA*, 478 F.3d 690, 697 (5th Cir. 2007) ("[U]nder *Waffle House* the EEOC's interest 'in eradicating workplace discrimination' is unique and 'incompatible with a finding that the EEOC's authority to bring and maintain an enforcement action can be extinguished by a judgment in a private suit to which it was not a party.'").

Perplexingly, the district court itself recognized as much, stating that "the EEOC's ability to sue is not dependent on an employee's ability to sue for discrimination." App. 0169, R. Doc. 28 at 16. But the court failed to follow that premise to its logical conclusion: because the EEOC's claims are not derivative of private individuals' claims, it follows that the EEOC may bring suit even when an individual lacks the ability to file her own lawsuit or intervene in the EEOC's action. Accordingly, the district court's reliance on the intervenor standard was wholly misplaced.

The sameness prong also rests on fundamental misunderstandings about hostile-work-environment claims. The sameness prong would

require the EEOC to allege facts showing that each and every aggrieved person suffered (i) the same acts of harassment, (ii) by the same actors, and (iii) in the same timeframe. Not only is the EEOC not required to *allege* such facts, but it is also not required to *prove* such facts to ultimately prevail.

(i) same acts

To start, the "same acts" requirement improperly focuses on "individual instance[s] of harassment" rather than the overall work environment. *Ellis*, 742 F.3d at 321. What matters is whether the harassment plaintiffs experienced, perceived, or became aware of was "part of a larger pattern of hostility" toward their protected group. *Id.*; *see also supra* at 22-24; *Hathaway*, 132 F.3d at 1222.

Aside from missing the forest for the trees, the "same acts" requirement implicitly assumes that each aggrieved person must have been directly and personally targeted by "acts" of harassment. That assumption is wrong. *Supra* at 24-25. As the Ninth Circuit explains, "harassment, whether aural or visual, need not be directly targeted at a particular plaintiff in order to pollute a workplace and give rise to a Title VII claim." *Sharp*, 69 F.4th at 977; *see id.* at 979-81 (collecting cases). Instead, a plaintiff may have a viable hostile-work-environment claim when the workplace is

permeated with "discriminatory intimidation, ridicule, and insult." *Harris*, 510 U.S. at 21; *Meritor Sav. Bank*, 477 U.S. at 65.

(ii) same actors

Because the EEOC need not show that each person suffered the same acts of harassment, it logically follows that it need not show that the same actors harassed each person. Just as individual acts can accumulate over time to create a hostile work environment, so too can the acts of different individuals. *See Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383, 386 (7th Cir. 2007). Indeed, focusing on individual harassers makes little sense in hostile-work-environment cases "because the employer—not its employees—must comply with Title VII." *Milligan-Grimstad v. Stanley*, 877 F.3d 705, 712 (7th Cir. 2017). Thus, the proper focus is on "the employer's response to allegations of misconduct rather than the contours of the misconduct itself." *Id.*

The "same actor" requirement is also incompatible with courts' recognition that anonymous harassment—like the sexist graffiti here—can create or contribute to a hostile work environment. *Supra* at 25; *Watson*, 619 F.3d at 942-44; *see also Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 951 (7th Cir. 2005) (plaintiff's "inability to verify the authorship of the racist graffiti

poses no obstacle to his establishing that this graffiti produced or contributed to a hostile work environment"); Harassment Guidance § III(C)(2)(a) ("anonymous harassment," like derogatory graffiti, "may create or contribute to a hostile work environment, even if it is not clearly directed at any particular employees"). Requiring the EEOC to identify anonymous perpetrators—at the *pleading* stage, no less—would both impose an impossible burden and immunize employers from liability for failing to remedy anonymous harassment. *See Pryor v. United Air Lines, Inc.*, 791 F.3d 488, 498 (4th Cir. 2015) ("An employer is not subject to a lesser standard simply because an anonymous actor is responsible for the offensive conduct.").

The "same actor" requirement would also have "troubling implications." *Tademy*, 614 F.3d at 1143. It would allow an employer to "escape liability for a [sexually] hostile work environment by employing a legion of bigots, each of whom committed but a solitary act of [sexism]." *Id.* And "requiring proof of repeat perpetrators would also provide employers with a reason to avoid conducting thorough investigations aimed at rooting out the culpable party." *Id.*

(iii) same time

Finally, the "same timeframe" standard effectively imposes a temporal proximity requirement, mandating that all aggrieved persons suffer the same harassment at roughly the same time. No caselaw supports that requirement. As the authorities canvased above demonstrate, the EEOC need only provide a date range during which the alleged harassment occurred, which may encompass multiple years. *See, e.g.*, *Tesla*, 2024 WL 1354530, at *6 (EEOC appropriately identified timeframe as "since May 2015"); *JBS USA*, 481 F. Supp. 3d at 1210, 1215-16 (EEOC appropriately identified timeframe as "December 2007 through July 2011").

2. The EEOC need not allege facts indicating the size of the class.

The class-size prong suffers from similar deficiencies. Among the numerous district court cases discussed above, *supra* Part I.A.2, *none* held or even suggested that the EEOC must plead facts concerning approximate class size. That makes sense because at the pleading stage, the only relevant inquiry is whether the EEOC alleged sufficient factual matter, taken as true, to state a claim that is plausible on its face. Class size has no bearing on that inquiry. Even in the Rule 23 context, courts have explained that "challenges

to class size allegations are irrelevant in a 12(b)(6) motion because the sufficiency of a legal claim is not contingent on the class size allegation." *Panacci v. A1 Solar Power, Inc.*, No. 15-cv-00532, 2015 WL 3750112, at *6 (N.D. Cal. June 15, 2015); *see also Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 184 (N.D. Ill. 1992) ("The complaint need not allege the exact size of the proposed class nor the identity of the class members.").

In urging otherwise, BNSF argued that the EEOC "can pursue claims only on behalf of individuals it actually identified while investigating before issuing a determination and engaging in conciliation." App. 0244, R. Doc. 44 at 1. BNSF principally relied on *CRST*, which held that the EEOC had not satisfied its pre-suit obligations in a case concerning class allegations of sexual harassment where, among other things, the EEOC did not provide the employer with the "names of all class members" or "an indication of the size of the class" during conciliation. 679 F.3d at 676.

But *CRST* did not establish a pleading standard or even attempt to do so. As the district court here explained, because *CRST* "concern[ed] the issue of whether the EEOC ha[d] adequately investigated and conciliated purported claims of discrimination," it did "not propound minimum pleading standards for the EEOC" and does not govern "whether the

EEOC has stated a plausible claim for relief on behalf of the other female employees." App. 0166, R. Doc. 28 at 13.

Putting aside that problem, the Supreme Court cast doubt on *CRST*'s continued viability in *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015). There, the Court held that, to fulfill its obligation to attempt conciliation, the EEOC need only give an employer notice describing "both what the employer has done and which employees (*or what class of employees*) have suffered as a result." *Id.* at 494 (emphasis added). To the extent *CRST* required the EEOC to do more, it is no longer good law. *See Bass Pro*, 826 F.3d at 805 ("[I]n deeming the EEOC's conciliation efforts insufficient, the *CRST* court engaged in precisely the kind of 'deep dive' the Court prohibited in *Mach Mining*."); *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1200 n.5 (9th Cir. 2016) (noting that *CRST* "was decided prior to *Mach Mining*").[12]

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[12] This Court has not considered whether *CRST* survived *Mach Mining*. In a later decision in the *CRST* litigation, this Court appeared to endorse its "prior observation that the EEOC '*wholly failed* to satisfy its statutory presuit obligations.'" *EEOC v. CRST Van Expedited, Inc.*, 944 F.3d 750, 757 (8th Cir. 2019). But that decision did not cite or discuss *Mach Mining* or address whether the EEOC may seek relief for a defined class of unidentified persons.

Nor is the EEOC required to determine the approximate size of a putative class before filing an enforcement action. To the contrary, Title VII allows the EEOC to seek relief for a defined class of unidentified persons and to use civil discovery to uncover additional claimants who fall within the class. *See Geo Grp.*, 816 F.3d at 1200-02; *Bass Pro*, 826 F.3d at 803-06; *Serrano*, 699 F.3d at 904-05. As the Ninth Circuit explains: "Civil litigants in private class actions may discover additional aggrieved employees who may wish to participate in the class." *Geo Grp.*, 816 F.3d at 1200. Given the EEOC's "broad enforcement authority," the court explained, "it would be illogical to limit [its] ability to seek classwide relief to something narrower than the abilities of private litigants." *Id.* That holding is consistent with the fact that when the EEOC settles class claims, it often identifies claimants entitled to relief *after* the settlement. *See, e.g.*, *Binker v. Pennsylvania*, 977 F.2d 738, 743 (3d Cir. 1992) (after settlement, "claimants determined to be eligible for settlement funds received a notice from the EEOC, informing them of the agreement and explaining that EEOC would meet with each claimant to discuss proposed individual awards").

In imposing the class-size prong at the pleading stage, the court reasoned that BNSF had "a right to have reasonable notice of the number of

people who are 'persons aggrieved'" so it could "determine the defenses it can muster, the evidence it should investigate, and the potential amount of its liability." App. 0172, R. Doc. 28 at 19. None of these rationales supports the court's conclusion.

As an initial matter, *Mach Mining* requires that the EEOC identify the "class of employees" during conciliation, which provides the employer with "notice" of the "specific allegation." 575 U.S. at 494. The potential class size has no impact on which legal defenses BNSF can assert in an answer; whatever defenses BNSF can assert with respect to a one-member class, it can assert with respect to any-other-sized class. Given the scope of the EEOC's allegations and class definition, the precise class size would not meaningfully impact the scope of discovery. And neither Rule 8 nor the plausibility standard requires a complaint to allege enough facts for a defendant to estimate the amount or extent of the plaintiff's damages. *Cf. EEOC v. PMT Corp.*, 40 F. Supp. 3d 1122, 1129-30 (D. Minn. 2014) (holding that EEOC stated claim seeking relief for unidentified victims where it "specifically detailed the scope of the claim by identifying the time period at issue, the alleged perpetrator of the discrimination and the alleged discriminatory conduct," but making no mention of damages).

C. Even under the standard the district court articulated, the EEOC alleged a plausible claim for classwide relief.

Even assuming for the sake of argument that the district court's standard was correct, the SAC still satisfied it.

The EEOC sufficiently alleged that women at BNSF's Alliance railyard suffered similar acts of discrimination. The women generally experienced or became aware of similar harassment, which included sexist comments, unwanted advances, sexist graffiti and imagery, and soiled or defaced restrooms and other facilities. *See Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014-15 (8th Cir. 1988) (rejecting employer's "contention that the district court erroneously considered all of the women's claims together in determining that the harassment was sufficiently pervasive and severe to constitute a violation of Title VII" because "[a]ll of the women were subjected to sexual insults that were systematically directed to them throughout their employment"). The fact that each individual might not have suffered every form of harassment is not dispositive. *See id.* at 1015 ("Although [one plaintiff] was not subjected to sexual propositions and offensive touching, evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment.").

Furthermore, the fact that the harassment included graffiti that was readily observable by all women necessarily means that at least some of the same harassers were involved and that the harassment occurred in the same timeframe.

The EEOC also indicated the approximate class size. The SAC alleged that BNSF employed approximately 485 individuals in TY&E positions and eight to ten individuals in Yard Master positions at its Alliance railyard, and that five percent or fewer of those individuals were women. App. 0218, R. Doc. 41 at 4 (¶ 21). These allegations show that at any given time, BNSF employed roughly twenty-five women who fell within the defined group.

In concluding otherwise, the district court implausibly assumed that the annual turnover rate might have equaled *or exceeded* one hundred percent, App. 0305-06, R. Doc. 74 at 30-31, thereby failing to draw all reasonable inferences in the EEOC's favor. *See Coons v. Mineta*, 410 F.3d 1036, 1039 (8th Cir. 2005) (court must "draw all reasonable inferences in favor of the nonmoving party"). In any event, the class definition gives BNSF sufficient information to confirm the potential class size from its own records. *See Al v. Van Ru Credit Corp.*, No. 17-cv-1738, 2018 WL 4603284, at *2 (E.D. Wis. Sept. 25, 2018) ("[T]he determination of who should be

included in the class … could be easily accomplished by a review of Defendant's own records."); *Fenza's Auto, Inc. v. Montagnaro's, Inc.*, No. 10-cv-3336, 2011 WL 1098993, at *12 (D.N.J. Mar. 21, 2011) (given plaintiff's allegations, "Defendants could have, by reference to their own records, ascertained the approximate size of the putative class").

II. Genuine issues of material fact preclude summary judgment on the EEOC's hostile-work-environment claim seeking relief for Merker.

To establish a sex-based hostile-work-environment claim, a plaintiff must show that: (1) she is a member of a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment was based on sex; and (4) the harassment was so severe or pervasive that it affected a term, condition, or privilege of her employment. *Nichols v. Tri-National Logistics, Inc.*, 809 F.3d 981, 985 (8th Cir. 2016). When the claim is based on harassment by someone other than a supervisor (e.g., coworkers), the plaintiff must also show that "her employer knew or should have known of the harassment and failed to take appropriate remedial action." *Id.*

There should be no reasonable dispute that Merker is a member of a protected group (women), that she was subjected to unwelcome[13] harassment, and that the harassment was based on sex. Accordingly, the central disputes here turn on whether: (i) the EEOC could seek relief for harassment before the limitations period, (ii) the harassment Merker experienced was severe or pervasive, and (iii) BNSF knew or should have known about the harassment and failed to take prompt remedial action.

A. The pre-limitations harassment Merker experienced was sufficiently related to the post-limitations harassment.

A Title VII plaintiff generally may pursue relief only for discrimination that occurred within 300 days before she filed a charge of discrimination. 42 U.S.C. § 2000e-5(e)(1); *Worthington v. Union Pac. R.R.*, 948 F.2d 477, 479 & n.3 (8th Cir. 1991). Because a hostile work environment constitutes a single unlawful practice, however, a plaintiff can seek relief for all acts that cause or contribute to that environment—even acts that

[13] BNSF argued that the harassment Merker experienced was not "unwelcome" because she did not contemporaneously complain about it. App. 3401-02, R. Doc. 152 at 45-46. The district court correctly rejected that argument, concluding that "the EEOC has met its burden to generate genuine issues of material fact on the 'unwelcomeness' element." App. 3405-07, R. Doc. 152 at 49-51.

took place before the limitations period—as long as "at least one act falls within the [300-day] time period." *Morgan*, 536 U.S. at 122; *see also Slayden v. Ctr. for Behav. Med.*, 53 F.4th 464, 467 (8th Cir. 2022) ("Because a hostile work environment consists of a series of separate acts, [the plaintiff] only needed to file his charge within 300 days of at least one act that is part of the hostile work environment.").

The central inquiry is whether the harassment that occurred before the limitations period is "sufficiently related" to the harassment that occurred within the limitations period "to be part of the same claim for hostile work environment." *Cottrill v. MFA, Inc.*, 443 F.3d 629, 635 (8th Cir. 2006); *see also McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 77 (2d Cir. 2010) ("Under *Morgan*, a sexually offensive incident within the limitations period permits consideration of an incident preceding the limitations period only if the incidents are sufficiently related."); Harassment Guidance § III(C)(1) & n.207 (articulating "sufficiently related" standard and collecting cases); *cf. Chambless v. La.-Pac. Corp.*, 481 F.3d 1345, 1350 (11th Cir. 2007) ("Where the discrete act is sufficiently related to a hostile work environment claim so that it may be fairly considered part of the same claim, it can form the

basis for consideration of untimely, non-discrete acts that are part of the same claim.").

Here, the district court held that the EEOC could not pursue relief for harassment that occurred before March 23, 2017—300 days before Merker filed her EEOC charge on January 17, 2018—because the harassment before that date was not "similar in nature" to the harassment after that date. App. 3389-95, R. Doc. 152 at 33-39. That holding is legally and factually flawed.

On the legal front, pre- and post-limitations harassment does not need to be "similar in nature" to be part of the same hostile-work-environment claim. Instead, the harassment need only be "*sufficiently related* to be part of the same claim for hostile work environment." *Cottrill*, 443 F.3d at 635 (emphasis added). While one way to show that harassment is sufficiently related is to demonstrate that "the pre- and post-limitations period incidents involved the same type of employment actions, occurred relatively frequently, and were perpetrated by the same managers," *Morgan*, 536 U.S. at 120 (cleaned up), such a showing is not required. As the Tenth Circuit recently explained, "*Morgan* does not limit the relevant criteria or set out factors or prongs," and courts "must remain flexible in a

context as fact-specific and sensitive as employment discrimination and as amorphous as hostile work environment." *Ford v. Jackson Nat'l Life Ins. Co.*, 45 F.4th 1202, 1229 (10th Cir. 2022) (cleaned up); *see also McGullam*, 609 F.3d at 77 ("*Morgan* requires courts to make an individualized assessment of whether incidents and episodes are related.").

This Court has likewise recognized that different forms of harassment perpetrated by different individuals can nonetheless contribute to the same hostile work environment. *See Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 965 (8th Cir. 1993) (male employee's "conduct fit[] into the continuum of harassment against" the plaintiff, and "[t]he fact that [his] harassment differed from [another male employee's] sexual advancements is immaterial"); *see also Maliniak v. City of Tucson*, 607 F. App'x 626, 628 (9th Cir. 2015) (offensive sign posted within limitations period was sufficiently related to the offensive signs posted before limitations period where both sets of signs denigrated women).

On the factual front, the district court incorrectly assumed that only one act of harassment—a July 2017 event in which a male engineer screamed at Merker—occurred within the limitations period and that there were years' long gaps in harassment. App. 3390-94, R. Doc. 152 at 34-38.

The record contradicts those assumptions. To be sure, as the court observed, Merker often could not recall precise dates. But a plaintiff is not required to provide "exact date[s]." *Rivera-Rivera v. Medina & Medina, Inc.*, 898 F.3d 77, 92 (1st Cir. 2018); *see also Torres v. Pisano*, 116 F.3d 625, 631 (2d Cir. 1997) ("If a jury were to credit [plaintiff's] general allegations of constant abuse, … it could reasonably find pervasive harassment, even in the absence of specific details about each incident."); *Fernot v. Crafts Inn, Inc.*, 895 F. Supp. 668, 677 (D. Vt. 1995) ("The fact that the testimony indicated that [the harasser] was 'always' making sexual remarks and regularly leered at [plaintiff], rather than giving specific dates, does not negate its role in establishing a work environment of sufficiently pervasive sexual harassment.").

Here, Merker repeatedly confirmed that much of the harassment was ongoing and persistent. *E.g.*, App. 0469-70, R. Doc. 127-3 at 59-60 (Merker saw sexual graffiti in women's locker room "every time [she] worked" for six years); App. 0491, R. Doc. 127-3 at 81 (coworker made offensive comments "all the time"); App. 0565, R. Doc. 127-3 at 155 (demeaning comments occurred "[o]ften," up to "three times a week"); App. 0579-81, R. Doc. 127-3 at 169-71 (catcalls and whistling were "persistent"). Other

women similarly confirmed that harassment occurred on a regular, sometimes daily, basis. App. 1683-85, R. Doc. 135-12 at 1-3; App. 1688-89, R. Doc. 135-14 at 1-2; App. 1692-93, R. Doc. 135-16 at 1-2.

Merker also specifically cited several instances of harassment that occurred after March 2017 or after she filed her charge. *E.g.*, App. 0466-67, 0528-29, R. Doc. 127-3 at 56-57, 118-19 (Merker reported seeing sexist graffiti on locomotive in October 2018); App. 1540, R. Doc. 134 at 30 (¶ 61(ii)) (Merker discovered fake camera in a locomotive restroom next to the words "for research purposes only" in January 2018); App. 1541, R. Doc. 134 at 31 (¶ 61(jj)) (sexual comments occurring during January 2018 training); App. 1706-07, R. Doc. 135-23 at 1-2 (email describing whistling incidents in 2018); App. 1709-10, R. Doc. 135-25 at 1-2 (email describing Merker's complaints in 2018); *see also* App. 3411, R. Doc. 152 at 55-58 (discussing harassment that occurred after March 2017).

Given the ongoing nature of the harassment Merker experienced, a jury could reasonably infer that at least some of the earlier conduct continued into the limitations period. *See Winters v. ADAP, Inc.*, 76 F. Supp. 2d 89, 96 (D. Mass. 1999) (reasonable jury could find that discriminatory practice "continued into the limitations period" and plaintiff "need not

show a specific identifiable discriminatory act within the limitations period"); *Bampoe v. Coach Stores, Inc.*, 93 F. Supp. 2d 360, 369 (S.D.N.Y. 2000) (finding it "reasonable to infer" that statement contributing to hostile work environment "occurred within the 300–day limitations period").[14] That inference comports with this Court's holding that specific instances of harassment identified by a plaintiff are best viewed as illustrative or exemplary, not exhaustive. *Ellis*, 742 F.3d at 319-20.

In short, a reasonable jury could find both that much of the harassment Merker experienced (including sexist comments and graffiti) occurred during the limitations period and that it was sufficiently related to the harassment that occurred before the limitations period.

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[14] *See also Samuels v. City of N.Y.*, No. 22-cv-1904, 2023 WL 5717892, at *13 n.12 (S.D.N.Y. Sept. 5, 2023) (finding it reasonable to infer that relevant events "occurred within the limitations period," and noting that "[t]he precise timing of those events is a question of fact"); *Caison v. Thermo Fisher Sci.*, No. 5:22-cv-00013, 2023 WL 5938773, at *3 (W.D. Va. Sept. 12, 2023) ("[I]t is reasonable to infer that the actions described in the amended complaint occurred within [the] applicable 300-day time frame, even if not every allegation of an incident has a specific date.").

B. A reasonable jury could find that the harassment Merker suffered was severe or pervasive.

In assessing severity or pervasiveness, the district court stated that there was "no question that Merker was subjected to abusive language, gender-related jokes, and occasional teasing," and no "serious dispute that Merker described vile or inappropriate behavior." App. 3410, R. Doc. 152 at 54. The court nonetheless determined that the harassment Merker experienced was tempered by the fact that it occurred "on locomotives or in railyard facilities where most of the workforce are members of the same sex (male), as opposed to a professional office." App. 3414, R. Doc. 152 at 58. The court reasoned that "conduct that might be severe or pervasive in an office setting might not rise to that level in a rougher and more physical workplace in which the vast majority of the employees are of the same sex." App. 3409-10, R. Doc. 152 at 53-54.

Contrary to that reasoning, "Title VII contains no such 'crude environment' exception, and to read one into it might vitiate statutory safeguards for those who need them most." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 318 (4th Cir. 2008). Although this Court has not addressed the issue, nearly every circuit that has done so has squarely rejected the notion

that prohibitions on sexual harassment are more relaxed in male-dominated or labor-intensive industries. As the Sixth Circuit has explained:

> We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment; indeed, we find this reasoning to be illogical, because it means that the more hostile the environment, and the more prevalent the sexism, the more difficult it is for a Title VII plaintiff to prove that sex-based conduct is sufficiently severe or pervasive to constitute a hostile work environment. Surely women working in the trades do not deserve less protection from the law than women working in a courthouse.

Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999); *see also Reeves*, 594 F.3d at 810 ("[A] member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender…."); *Conner v. Schrader-Bridgeport Int'l, Inc.*, 227 F.3d 179, 194 (4th Cir. 2000) ("We are unable to discern an 'inhospitable environment' exception to Title VII's mandate that employers may not discriminate based on employees' gender…."); *O'Rourke v. City of Providence*, 235 F.3d 713, 735 (1st Cir. 2001) (finding "no merit" to argument

that harassment "should be evaluated in the context of a blue collar environment"); *Sharp*, 69 F.4th at 978-79, 982 ("a boorish and generally hostile workplace does not shield against Title VII liability," and "an employer cannot evade liability by cultivating a workplace that is broadly hostile and offensive"); Harassment Guidance § III(B)(3)(d) & n.197 (there is "no 'crude environment' exception to Title VII").[15]

Only one circuit has suggested otherwise. In *Gross v. Burggraf Construction Co.*, 53 F.3d 1531 (10th Cir. 1995), the Tenth Circuit stated that a "claim of gender discrimination" must be evaluated "in the context of a blue collar environment where crude language is commonly used by male and female employees." *Id.* at 1538. But even there, the court clarified that this context-driven inquiry does not excuse verbal harassment based on sex. As the court explained: "It is beyond dispute that evidence that a woman was subjected to a steady stream of vulgar and offensive epithets

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[15] *Cf. Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999) ("[W]e squarely denounce the notion that the increasing regularity of racial slurs and graffiti renders such conduct acceptable, normal, or part of 'conventional conditions on the factory floor.'"); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1359 (11th Cir. 1982) (rejecting contention that racial epithets that were common in defendant's industry could not establish a hostile work environment based on race).

because of her gender would be sufficient to establish a claim under Title VII based on the theory of hostile work environment." *Id.* at 1539. In any event, other circuits have flatly rejected *Gross*'s reasoning. *See Williams*, 187 F.3d at 564 ("[W]e disagree with the Tenth Circuit decision in *Gross*…."); *O'Rourke*, 235 F.3d at 735 ("We decline to adopt [*Gross*'s] rule for the same reasons the Sixth Circuit rejected it….").

Of course, assessing whether conduct is objectively offensive "requires careful 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); *see Jenkins v. Univ. of Minn.*, 838 F.3d 938, 945-46 (8th Cir. 2016) (context of workplace harassment contributed to its severity). But "nothing in *Oncale* even hints at the idea that prevailing culture can excuse discriminatory actions," and "[e]mployers who tolerate workplaces marred by exclusionary practices and bigoted attitudes cannot use their discriminatory pasts to shield them from the present-day mandate of Title VII." *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999). Simply put, "[t]here is no assumption-of-risk defense to charges of workplace discrimination." *Id.*

In the absence of a "crude environment" exception, a reasonable jury could readily find that the harassment Merker experienced was severe or pervasive. This Court has long recognized that frequent use of gendered and sexist epithets can create or contribute to a hostile work environment. *E.g.*, *Wright v. Rolette Cnty.*, 417 F.3d 879, 885 (8th Cir. 2005) ("[V]erbal harassment of a sexual nature which creates an offensive working environment fits the … definition of sexual harassment [in 29 C.F.R. § 1604.11]."); *Hathaway*, 132 F.3d at 1222 (pattern of abusive conduct, which included male employees' unwanted sexual advances on plaintiff followed by "laugh[ing], snicker[ing], and mak[ing] suggestive noises at her for a period of eight months," created hostile work environment); *Burns*, 989 F.2d at 964-65 (male employees' "steady stream" of "[v]ulgar and offensive epithets" about women—such as "bitch," "asshole," "slut," and "cunt"—created hostile work environment); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 267-69 (8th Cir. 1993) (evidence of abusive conduct, including

shouting and "using vulgar names to refer to … female hospital employees," precluded summary judgment).[16]

Here, that steady stream of verbal abuse—combined with the unwanted advances, sexual graffiti and pictures, intentionally-soiled bathrooms, and online harassment—was more than enough to create an objectively hostile work environment. *See Watson*, 619 F.3d at 943-44 (reasonable jury could find that victim "saw [offensive] graffiti on numerous occasions" and that "their mere awareness of its ongoing presence … could contribute to a hostile work environment"); *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 819 (6th Cir. 2013) (reasonable jury

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[16] *See also Howard v. Burns Bros., Inc.*, 149 F.3d 835, 837-39 (8th Cir. 1998) (affirming jury verdict where coworker used sexual innuendos, told plaintiff she had nice legs, brushed her buttocks, told jokes involving lewd gestures, and touched the buttocks of and talked "nasty" to other female employees); *Rorie v. United Parcel Serv.*, 151 F.3d 757, 761-62 (8th Cir. 1998) (reversing summary judgment against plaintiff where supervisor patted female employee on back, brushed up against her, told her she "smelled good," always "came-on" to her, and asked her about co-worker's penis size); *Hall*, 842 F.2d at 1012 (evidence of "verbal sexual abuse on … women," combined with unwelcome physical touching, precluded summary judgment). *But see Paskert v. Kemna-ASA Auto Plaza, Inc.*, 950 F.3d 535, 538-39 (8th Cir. 2020). Although some of these cases involved both verbal abuse and physical touching, this Court's caselaw "clearly establishes that physical contact is not required to make out a hostile-work-environment claim." *Jenkins*, 838 F.3d at 947.

could find that harassment was severe or pervasive when it included "constant demeaning name-calling," "presence of sexually explicit materials in [work] trucks," "lack of access to bathrooms at rural job sites," and comments intimating that plaintiff was having sex with coworkers); *Petrosino*, 385 F.3d at 224 ("[A] reasonable jury could conclude that the persistent sexually offensive remarks … and the graffiti at outdoor work sites were particularly insulting to women because these actions cast women in a demeaning role: as objects of sex-based ridicule and subjects for sexual exploitation."); *Okonowsky v. Garland*, 109 F.4th 1166, 1179-83 (9th Cir. 2024) (considering employees' harassing social media posts as part of totality of circumstances underlying hostile-work-environment claim).

C. A reasonable jury could find that BNSF knew or should have known about the harassment and failed to take prompt remedial action.

Because the district court did not reach whether BNSF knew or should have known about the harassment and whether it failed to take prompt remedial action, this Court need not do so either. Even if BNSF raises this issue as an alternative ground for affirmance, genuine fact disputes still preclude summary judgment.

An employer's knowledge of harassment can be actual or constructive. *Sandoval*, 578 F.3d at 802. Here, the record contains ample evidence that BNSF both knew and should have known about the harassment at issue. App. 1543-49, R. Doc. 134 at 33-39 (¶¶ 73-114). Indeed, some BNSF managers and supervisors admitted that they knew about some harassment, including the sexual graffiti, for decades, and Merker repeatedly reported the graffiti and other harassment to BNSF. App. 1546-49, R. Doc. 134 at 36-39 (¶¶ 93-114). Moreover, the harassment outlined above was so widespread and longstanding that any reasonable employer would have been aware of it.

Likewise, the record reflects genuine factual dispute as to whether BNSF took prompt remedial action. "[A]n employer is not liable if it takes prompt remedial action that is reasonably calculated to stop the harassment." *Engel v. Rapid City Sch. Dist.*, 506 F.3d 1118, 1123 (8th Cir. 2007). What constitutes prompt remedial action turns on the surrounding circumstances, and "[t]he promptness and adequacy of an employer's response will often be a question of fact for the factfinder to resolve." *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999); *see also Vance v. Ball State Univ.*, 570 U.S. 421, 449 (2013) ("Evidence that an employer did not monitor

the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant.”).

Here, the record demonstrates that BNSF failed to take corrective action that was both prompt and reasonably calculated to end the harassment at its Alliance railyard. App. 1549-55, R. Doc. 134 at 39-45 (¶¶ 115-49). Although the harassment went on for years, BNSF does not identify any corrective action it took before January 2018. *See* App. 1531-34, R. Doc. 134 at 21-24 (¶¶ 51-59). Even then, harassers went unpunished. Indeed, since January 2017, BNSF has not disciplined a single employee at its Alliance railyard for sexual harassment. App. 1554, R. Doc. 134 at 44 (¶ 148); *see Nichols*, 809 F.3d at 987 (employer failed to take prompt remedial action where, among other things, it did not reprimand harasser). Even after receiving Merker’s charge, BNSF made only a token effort to clean graffiti off trains, which proved entirely ineffective. App. 1552, R. Doc. 134 at 42 (¶¶ 136, 138).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court’s judgment and remand for further appropriate proceedings.

Respectfully submitted,

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This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,845 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 September 13, 2024, 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 Defendant-Appellee:

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