Investigative Report Concerning June 2, 2025 Workplace Complaint

Date of Report: October 27, 2025

Rembolt | Ludtke

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Executive Summary

This report arises from a formal investigation of a workplace harassment complaint submitted on June 2, 2025 pursuant to the Legislature's Workplace Harassment Policy. Initial efforts to resolve the matter informally were taken through the Chair of the Executive Board of the Legislative Council. On September 12, 2025, I was retained by the Special Personnel Panel appointed by the Chair of the Executive Board on September 12, 2025 to conduct a formal investigation. In particular, the Special Personnel Panel requested an investigation into whether a senator's alleged conduct on and after May 29, 2025 relative to an employee of the Nebraska Legislature[1] violated the Nebraska Legislature's Workplace Harassment Policy and/or constituted sex discrimination or retaliation, as well as to identify potential remedial actions the Legislature may take to address any substantiated violations or improper conduct.

In connection with the investigation, I interviewed five individuals,[2] sought to obtain video footage of the alleged conduct on May 29, 2025,[3] reviewed the Legislature's workplace policies, and reviewed the documentation of steps taken during the informal investigation process.

As set forth more fully below, I conclude that the senator's conduct does not constitute actionable sexual harassment as it was not sufficiently severe or pervasive enough to create an objectively hostile or abusive work environment under applicable legal standards under Title VII (the federal nondiscrimination in employment law statute) or the Nebraska Fair Employment Practice Act (the state nondiscrimination in employment statute). Further, I conclude the senator's conduct after the complaint was made was retaliatory, but not actionable given that no adverse employment action against Complainant occurred. However, actionable is not tantamount to acceptable. Given that the senator's conduct gives rise to violations of the Legislature's Workplace Harassment Policy, I find the Special Personnel Panel, Executive Board, and Legislature may, in their discretion, censure, reprimand, or expel the senator for his conduct and comments.

Organization of the Nebraska Legislative Council

The Nebraska Legislative Council consists of 49 senators who are elected to a maximum of two consecutive four-year terms. Sessions begin in January. In 2025, the session consisted of 90 working days. This year the session ended on June 2, 2025.

The Legislature is governed by the Executive Board, which supervises all legislative services and employees. At the beginning of each legislative session, six (6) members are designated by the Chair of the Executive Board to serve on the pool for selection of any Special Personnel Panel. In selecting members to serve on the Special Personnel Panel, the Chair is responsible for selecting members who can act impartially with respect to a matter and, to the extent practicable, to maintain a gender balance on the Special Personnel Panel.

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[1] The employee will be referred herein as "Complainant" consist with the Legislature's Workplace Harassment Policy.

[2] The Legislature's Workplace Harassment Policy instructs that I take proper care to protect the identity of Complainant and the accused party, so this report will not include their names.

[3] There was no video footage depicting the area where the alleged conduct on May 29, 2025 occurred.

Summary of Report of Workplace Harassment Policy Violation

On June 2, 2025, Complainant initiated a complaint under the Legislature's Workplace Harassment Policy. The complaint alleged a senator engaged in inappropriate dialogue and inappropriate touching on May 29, 2025. The alleged conduct took place at the sine die party at the Country Club of Lincoln hosted by a lobbying firm. Those in attendance at the sine die party included employees of the Legislature, senators, and lobbyists. More specifically, Complainant alleged the senator made a joke about going to Hawaii to "get laid" and smacked her rearend after delivering the joke. On the same day, June 2, 2025, the Chair of the Executive Board met with the senator to discuss the allegations. The senator was instructed to have no further contact with Complainant and to make efforts to avoid attending gatherings where Legislature employees would be present.

The Special Personnel Panel promptly retained the law firm, Rembolt Ludtke LLP, to investigate the complaint after attempts to resolve the matter informally were unsuccessful. As part of the formal investigation, the Special Personnel Panel asked me to render a legal opinion about whether the senator's conduct violated the Legislature's Workplace Harassment Policy and/or constituted sex discrimination or retaliation under applicable law.

Summary of Nebraska Legislature's Workplace Policies

The Legislature amended its Workplace Harassment Policy in March 2025. The Workplace Harassment Policy states that it is a violation of the Policy for any member of the Legislature or any employee of the Legislature to engage in workplace harassment or for any member of the Legislature or supervisor to knowingly permit workplace harassment of any employee of the Legislature or third party.

The workplace Harassment Policy defines "workplace harassment" as:

(1) Sexual harassment as defined in the policy;

(2) Inflammatory comments, jokes, printed material, electronic/social media content, and/or innuendo based, in whole or in part, on race, color, religion, age, gender, disability, national origin, or sexual orientation, when: (a) submission to such conduct is made either explicitly or implicitly a term of an individual's employment or a condition to receipt of services by a recipient of the agency's services, or (b) submission to or rejection of such conduct by an individual is used as the basis for employment or agency decisions affecting an employee or a recipient of the agency's services; or (c) such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or the receipt of services by a recipient of the agency's services, or of creating an intimidating, hostile, or offensive environment; or

(3) Retaliation, coercion, intimidation, or threat of reprisal against any person who has made or participated in the investigation and resolution of any allegation of workplace harassment.

The Workplace Harassment Policy defines "sexual harassment" as any unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when:

(1) Submission to such conduct is made either explicitly or implicitly a term of an individual's employment or a condition to receipt of services by a recipient of the agency's services; or

(2) Submission to or rejection of such conduct by an individual is used as the basis for employment or agency decisions affecting an employee or a recipient of the agency's services; or

(3) Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or the receipt of services by a recipient of the agency's services, or of creating an intimidating, hostile, or offensive environment.

Additionally, the Workplace Harassment Policy states that conduct which may constitute sexual harassment includes, but is not limited to:

1. Sexual contact, intercourse, or assault;
2. Kissing, touching, patting, pinching, or intentionally brushing against a person;
3. Repeated, offensive sexual flirtations, advances, or propositions;
4. Verbal abuse of a sexual nature;
5. Graphic verbal commentaries about a person's body, clothing, or sexual activity;
6. Sexually oriented jokes, stories, or discussions;
7. Distribution or display of sexually oriented cartoons, drawings, photographs and/or other printed material, or electronic/social media content; and
8. Requesting or demanding sexual favors or suggesting explicitly or implicitly that there is any connection between sexual behavior and any term or condition of employment.

Reference to "employee" in the Workplace Harassment Policy includes members (i.e, Senators) of the Legislature.

If an allegation of workplace harassment is found to be substantiated, the Special Personnel Panel may recommend to the Legislature and/or Executive Board that appropriate corrective action be taken including a reprimand, censure, or expulsion.

Finally, the Workplace Harassment Policy provides that individuals who make complaints and those involved in an investigation of an allegation of workplace harassment cannot be subjected to retaliation, coercion, intimidation, or threat of reprisal. Any retaliation coercion, intimidation, or threat is considered a violation of the Workplace Harassment Policy.

Summarized Facts and Credibility Determinations

On May 29, 2025, an event was held at the Country Club of Lincoln hosted by a lobbying firm celebrating the end of the legislative session (i.e., sine die). Attendees included employees of the Legislature, senators, and lobbyists. Alcohol was served. The event included food, entertainment, and mingling/networking.

The alleged conduct occurred during an interaction outside of the ballroom on an outside patio involving two employees of the Legislature and a senator. There was a discussion about summer vacation plans and the senator made a joke to Complainant about whether Complainant was going to Hawaii to "get laid."[4] Upon making the joke, the senator touched Complainant's backside.[5] The senator admitted consuming alcohol prior to the interaction, potentially three to four drinks, but was not intoxicated. All witnesses interviewed, including the senator, shared the senator was known for or had a reputation for making jokes and that some of those jokes are unprofessional and/or inappropriate for the workplace.

On June 2, 2025, Complainant made a report to counsel for the Executive Board. In response, the Chair of the Executive Board immediately met with the senator that same day (i.e., June 2, 2025) to confront the senator about the allegations. The senator admitted he made reference to a joke about Hawaii and to making other inappropriate jokes. The senator denied touching the employee at this time. The Chair of the Executive Board instructed the senator to have no further contact with Complainant, provided the senator with a copy of the Legislature's Workplace Harassment Policy, and instructed the senator to not attend social gatherings where employees are present.[6]

Despite this conversation with the Chair of the Executive Board on June 2, 2025, the senator did attend an event that evening at the Scottish Rite Temple. The event was another celebration of the end of the session. This event was primarily organized by employees and only employees and senators attended. When questioned why the senator attended this event after the senator's conversation with the Chair of the Executive Board, the senator did not have a response. Complainant alleged that the senator intentionally placed himself within eye shot of Complainant throughout the evening at the Scottish Rite Temple and later at bars. Both the senator and Complainant indicated they did not have any other interactions or communications on June 2, 2025. The senator does not recall seeing Complainant on June 2, 2025.

On July 28, 2025, the senator wrote Complainant a note regarding the interaction and conduct that occurred on May 29, 2025. The senator wrote this note at the suggestion of the Chair of the Executive Board. The senator explained his intent was to accept responsibility

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[4] The senator admitted making the joke, but the senator's version of the verbiage used was that the senator hoped while Complainant was in Hawaii Complainant gets a Hawaiian lei. The senator admitted this was a joke he has made in the past, but cannot recall other instances when using this joke with other employees of the Legislature. Complainant was not vacationing in Hawaii so this comment was inconsistent with the discussion of vacation plans.

[5] There was conflicting testimony on where the senator touched Complainant. Video footage was not recovered as a part of this investigation and upon inquiry I was told the footage did not show the location where this interaction took place. Testimony received in this investigation concluded the senator touched Complainant's back after telling the joke or touched Complainant's low back after telling the joke or touched Complainant's rearend after telling the joke. The senator admitted to patting Complainant's back and that it could have been lower back or even rearend but indicating there was no intent to make a sexual touching.

[6] The senator does not recall being instructed not to attend gatherings where staff are present, but admitted he volunteered not to attend gatherings where staff are present.

for what he was alleged to have done.[7] Complainant did not receive the note favorably and shortly thereafter asked that the matter be formally investigated.

On August 7, 2025, the senator sent a text message to another employee of the Legislature whom Complainant shares an office with and referred to Complainant as "seems to be difficult to work with" and wanted to know the employee's thoughts. Upon my questioning, the senator admitted he had no issues with Complainant's performance and this reference to Complainant as being "difficult to work with" was the senator's reaction to learning Complainant did not receive the July 28, 2025 letter favorably and that Complainant wanted to pursue the investigation process further.

I found Complainant credible. Complainant admitted she is a very private person and wanted appropriate safeguards to protect Complainant's identity. Complainant is skeptical the senator will abide by the admonition that the senator avoid any contact with Complainant because the senator attended the June 2, 2025 gathering. Complainant is aware the senator referred to Complainant as "difficult to work with."

I found the senator's demeanor during the investigation to be puzzling. During my questioning, the senator responded in a joking and noticeably lackadaisical manner, a demeanor that was also observed and commented on by all witnesses interviewed. While it is possible that the senator's behavior reflected discomfort with the interview process, it is equally plausible that it demonstrated a lack of appreciation for the seriousness of the investigation. The inability to discern whether the senator understood the gravity of the proceeding was, in itself, troubling.

Legal Standards

In conducting this investigation, I was mindful of the applicable legal frameworks for unlawful harassment and retaliation under federal, state, and local law.

Title VII of the Civil Rights Act of 1964 ("Title VII") "outlaw[s] discrimination in the workplace on the basis of . . . sex."[8] Title VII's prohibition on sex discrimination prohibits gender-based harassment in the workplace.[9] Like federal law, the Nebraska Fair Employment Practice Act ("FEPA") forbids workplace harassment on the basis of sex as it is a form of sex discrimination.[10]

The law generally recognizes two categories of unlawful harassment: hostile work environment harassment and quid pro quo harassment.

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[7] I did not read the note with the same intent as the senator claims the senator had. The note reads that Complainant should find it within herself to forgive the senator because that is what the Bible instructs people to do and in my opinion, it does not suggest the senator is taking responsibility for the senator's conduct.

[8] *Bostock v. Clayton Cty., Georgia,* 140 S.Ct. 1731, 1737 (2020).

[9] *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986); 29 CFR §1604.11.

[10] The Nebraska Fair Employment Practice Act is patterned after Title VII of the Civil Rights Act of 1964. *See, e.g., City of Fort Calhoun v. Collins,* 243 Neb. 528, 532 (1993).

Hostile Work Environment: A hostile work environment exists when unwelcome sexual advances, requests for sexual favors, sexually abusive or vulgar language, or other verbal, visual, or physical conduct unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive working environment.[11] To establish sexual harassment under a hostile work environment claim, an employee must demonstrate the following elements: "1) the employee is a member of a protected group; 2) she was subject to unwelcome harassment; 3) there was a causal nexus between the harassment and her membership in the protected group; 4) the harassment affected a term, condition, or privilege of employment".[12] The fourth prong includes both objective and subjective components, requiring an environment that a reasonable person would find hostile and one that the victim actually perceived as abusive.[13]

"In determining whether the conduct is sufficiently severe or pervasive, [courts] look to the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance,"[14] rather than isolated instances of misconduct.

Usually, "[m]ore than a few isolated incidents are required."[15] This does not mean that there is a rule of law holding a single incident can never be sufficient to support claim of sexual harassment.[16] To the contrary, a single incident has been found to be enough to constitute sexual harassment.[17] However, the United States Supreme Court has concluded that single or isolated incidents are insufficient to effect a change in the terms and conditions of employment "unless extremely serious."[18]

In a hostile environment case, courts will "impute liability to an employer who anticipated or reasonably should have anticipated that the plaintiff would become a victim of sexual harassment in the workplace and yet failed to take action reasonably calculated to prevent such harassment."[19]

It is important to note that neither Title VII nor FEPA is a general civility code.[20]

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[11] *Meritor Savings Bank*, 477 U.S. at 65-67.

[12] *Turner v. Gonzales*, 421 F.3d 688, 695 (8th Cir. 2005) (internal citations omitted).

[13] *Duncan v. General Motors Corp.*, 300 F.3d 928, 934 (8th Cir. 2002).

[14] *Id.*

[15] *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568, 573 (8th Cir.1997).

[16] *Moring v. Ark. Dep't of Corr.*, 243 F.3d 452, 456 (8th Cir.2001).

[17] *See, e.g., Barrett v. Omaha Nat'l Bank*, 584 F.Supp. 22, 30 (D.Neb.1983) ("While the usual rule is that trivial or isolated events do not give rise to liability, this Court feels that the instant case warrants a different result.").

[18] *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

[19] *Paroline v. Unisys Corp.*, 879 F.2d 100, 107 (4th Cir. 1989), *opinion vacated in part on other grounds on reh'g*, 900 F.2d 27 (4th Cir. 1990).

[20] *Carter v. Tomlinson Restraurant Group, LLC et al.* 2022 WL 993082, at *3 (D. Neb. Apr. 1, 2022)(citing *Jackman v. Fifth Jud. Dist. Dep't of Corr. Servs.*, 728 F.3d 800, 806 (8th Cir. 2013)("The standard for demonstrating a hostile work environment under Title VII is demanding, and does not prohibit all verbal or physical harassment and it is not a general civility code for the American workplace.")

Quid Pro Quo: Quid pro quo sexual harassment occurs when submission to or rejection of unwelcome sexual conduct by an individual is used as the basis for employment decisions affecting such individual (*e.g.*, termination, denying or granting a promotion).[21]

"Under Title VII, an employer's liability for such harassment may depend on the status of the harasser."[22] If the harasser is an employee's supervisor and the "harassment culminates in a tangible employment action" (*e.g.*, a quid pro quo situation), "the employer is strictly liable."[23]

Further, when an employer is aware of harassment and fails to act, management has a good reason to press an investigation and prevent recurrence or expansion.[24] An employer's imperative to investigate is particularly strong considering the risks that unremedied harassment poses to other employees. Therefore, prudent employers will compel harassing employees to cease all such conduct and will not, even at a victim's request, tolerate inappropriate conduct that may, if not halted immediately, create a hostile environment.[25]

Retaliation: To make out a prima facie case of retaliation, an employee must show: (1) the employee engaged in protected conduct; (2) reasonable employees would have found the challenged retaliatory action materially adverse; and (3) the materially adverse action was causally linked to the protected conduct. *See Burlington Norther and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Under this standard, to prove retaliation, an employee must show that the employer's actions resulted in some harm that would dissuade a reasonable worker from making or supporting a charge of discrimination. *Id.* "[T]o be materially adverse, retaliation cannot be trivial; it must produce some injury or harm." *Littleton v. Pilot Travel Ctrs., LLC* 568 F.3d 641, 644 (8th Cir. 2009). Whether an action is "materially adverse" is a "flexible standard" that "often depends on the particular circumstances." *AuBuchon v. Geithner*, 743 F.3d 638, 644 (8th Cir. 2014). However, it is clear that "not everything that makes an employee unhappy is an actionable adverse action." *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). Mere idiosyncrasies are not sufficient. *See, e.g., DiIenno v. Goodwill Indus.*, 162 F.3d 235, 236 (3d Cir.1998). Moreover, "[a] bruised ego, mere inconvenience or an alteration of job responsibilities is not enough to constitute an adverse employment action." *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). Slights such as "not being listened to," "getting a cold shoulder from management," and even being called a "trouble maker," a "cry baby," and a "spoiled child" also do not constitute materially adverse employment actions. *Brown v. Advoc. S. Suburban Hosp.*, 700 F.3d 1101, 1107 (7th Cir. 2012).

Legal Analysis

Both Title VII and NFEPA prohibit employers from harassing an employee because of the employee's sex. NFEPA contains an express definition of "harass because of sex" mirroring Title VII's regulations:

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[21] 29 C.F.R. § 1604.11(a)(2); 29 C.F.R. § 1604.11(a)(3).
[22] *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).
[23] *Id.* at 431.
[24] *Weger v. City of Ladue*, 500 F.3d 710, 719 (8th Cir. 2007).
[25] *Malik v. Carrier Corp.*, 202 F.3d 97, 106 (2d Cir. 2000).

> Harass because of sex shall include making unwelcome sexual advances, requesting sexual favors, and engaging in other verbal or physical conduct of a sexual nature if (a) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (b) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Neb. Rev. Stat. § 48-1102(14); 29 C.F.R. § 1604.11.

As there is no allegation or evidence to suggest that *quid pro quo* sexual harassment has occurred (*i.e.*, subsections (a) and (b) of Section 48-1102(14)), the focus of the remaining analysis is on subsection (c), *i.e.*, hostile work environment sexual harassment.

Hostile work environment sexual harassment occurs when: (1) the employee is a member of a protected group; (2) the employee was subject to unwelcome harassment; (3) there was a causal nexus between the harassment and the employee's membership in the protected group; and (4) the harassment was so severe and pervasive as to alter a term, condition, or privilege of employment." *Turner v. Gonzales*, 421 F.3d 688, 695 (8th Cir. 2005); *Duncan v. Gen. Motors Corp.*, 300 F.3d 928, 933 (8th Cir. 2002).

The fourth element includes both objective and subjective components, requiring an environment that a reasonable person would find hostile and one that the victim actually perceived as abusive. *Duncan v. General Motors Corp.*, 300 F.3d 928, 934 (8th Cir. 2002)(citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). "In determining whether the conduct is sufficiently severe or pervasive, [courts] look to the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* To clear the high threshold of actionable harm, [a plaintiff] must show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." *Id.*

Assuming, but without deciding, the aggrieved party can meet the first three elements of the test, the focus is on the fourth element, *i.e.*, whether the harassment, when viewed objectively and subjectively, was so severe and pervasive as to alter a term, condition, or privilege of employment.

"There is no bright line between sexual harassment and merely unpleasant conduct . . . ." *Hathaway v. Runyon*, 132 F.3d 1214, 1221 (8th Cir.1997). Harassment "standards are demanding—to be actionable, conduct must be extreme and not merely rude or unpleasant." *Alagna v. Smithville R-II Sch. Dist.*, 324 F.3d 975, 980 (8th Cir. 2003). More than a few isolated incidents are required, and the alleged harassment must be so intimidating, offensive, or hostile that it poisoned the work environment. *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 967 (8th Cir. 1999). Viewing the totality of the circumstances, I conclude that the

comments and conduct at issue here were not "so severe or pervasive as to alter a term, condition, or privilege of employment."

Instructive is *DaSilva v. Indiana House of Representatives*, 641 F. Supp. 3d 513 (S.D. Ind. 2022). Therein, three female employees of the Indiana House and Senate filed a complaint alleging they were subjected to sexual harassment at the annual "Sine Die" party celebrating the end of the legislative session for the Indiana General Assembly. Specifically, the employees alleged they were subjected to inappropriate comments and touching by Indiana's then attorney general, including allegations that the attorney general:

- Put his hand on a female representative's bare back and then slid his hand down to grab her butt;
- Put his arm around one of the female employees while standing at a bar stating, "don't you know how to get at drink? You have to show your knee, you have to show a little skin."
- While sitting an employee was at the bar with a co-worker, the attorney general pulled up a bar stool and put his hand on the employee's back and began rubbing her entire back, up and down, slowly; and
- Told one of the female employees "you're really hot," after which he put his arm around the female's waist and brought her closer to him to hug her. The attorney general then put his hand on the employee's back and began moving down her back. The employee tried to move the attorney general's hand with her free hand, but he grabbed it and pulled her hand and arm down with his and touched her butt. After the attorney general touched her butt, he let go of her hand and stared at her, smirking.

Id. at 536–37. The House and Senate retained outside counsel to conduct an investigation, the result of which was issuance of a joint statement condemning the attorney general's actions. The employees subsequently filed suit for, among other things, hostile work environment sexual harassment. Despite the egregious and despicable conduct alleged, the court granted summary judgment for the employer and dismissed the employees' claims. Applying the same standards set forth above, the trial court found as follows:

> First, the acts upon which Plaintiffs base their hostile work environment claims all took place on one evening at the Sine Die Event – an event that was an informal gathering, outside of the workplace, and after working hours. The acts did not occur over a period of time and, indeed, there is no evidence that any of the Plaintiffs had any one-on-one encounters with [the attorney general] thereafter. . . . The frequency of the offensive conduct – which took place at one event, and not over a period of time – does not support a finding that the conduct was severe or pervasive. *See Ford v. Marion Cnty. Sheriff's Off.*, 942 F.3d 839, 851 (7th Cir. 2019) ("A hostile work environment occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.") (quotation and citation omitted).

> Second, while [the attorney general's] conduct toward Plaintiffs was offensive to be sure, [federal] precedent warrants the conclusion that it was not offensive enough to be actionable under Title VII. *See, e.g., Davis v. Papa John's USA, Inc.*, 2021 WL 5154105, at *2 (7th Cir. 2021) (holding that "an isolated touch on the shoulder and one crude insult are not objectively severe or pervasive enough to be actionable under Title VII"). In fact, [federal courts have] found that conduct that was objectively more offensive than that displayed by [the attorney general] at the Sine Die Event was not actionable under Title VII. *See, e.g., Swyear*, 911 F.3d at 879 (co-worker touched plaintiff's arm and lower back, invited her to go skinny dipping, and climbed into plaintiff's hotel bed and asked her to cuddle); *McPherson v. City of Waukegan*, 379 F.3d 430, 434-35 (7th Cir. 2004) (plaintiff's supervisor asked her what color bra she was wearing, asked if he could "make a house call," and pulled back her tank top so he could see her bra); *Hilt-Dyson*, 282 F.3d at 463-64 (supervisor rubbed plaintiff's back, squeezed her shoulder and stared at her chest, and told her to raise her arms and open her blazer during a uniform fitting).
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> Fourth, [the attorney general's] conduct did not unreasonably interfere with Plaintiffs' job performance. . . .

Id. at 537.

The conclusion and high threshold applied in *DiSilva* is in line with decisions from the federal decisions. *See, e.g., Henthorn v. Capitol Communications, Inc.*, 359 F.3d 1021, 1028 (8th Cir. 2004) (supervisor's actions were inappropriate, immature, and unprofessional but did not cross the high threshold required to support a claim of sexual harassment where the supervisor "asked her out every day," "made comments to other employees outside of her presence that she was 'hot,'" made late-night telephone calls, and told her that he would destroy a negative performance evaluation if she "would have a drink with him"); *Alagna, supra*, 324 F.3d at 977-78, 980 (concluding the employee's conduct was inappropriate, but not sufficiently severe or pervasive where it included calls to the plaintiff's home, frequent visits to her office, discussions about relationships with his wife and other women, touching the plaintiff's arm, saying he "loved" her and she was "very special," placing romance novels in her faculty mailbox, and invading her personal space); *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 738 (8th Cir. 2000) (employee could not maintain hostile work environment claim based on four incidents including a company official telling her she had "great legs" during a presentation plaintiff was giving, a meeting in which an official made sexual comments regarding three female employees, a company official expressing negative views about the feminist movement, and another official calling plaintiff a "bitch"); *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990 (8th Cir. 2003) (the incidents of male coworker grabbing the female plaintiff's buttock with force and making a joke the next day about the incident and briefly blocking the plaintiff's path at work did not rise to the level of severe or pervasive conduct to alter the conditions of plaintiff's employment and create an abusive working environment); *Adusumilli v. City of Chicago*, 164 F.3d 353, 361–62 (7th Cir.1998) ("four isolated incidents in which a co-worker briefly touched her arm, fingers, or buttocks" insufficient to establish severe or pervasive conduct as a matter of law); *Koelsch v. Beltone*

Elecs. Corp., 46 F.3d 705, 706–08 (7th Cir.1995) (finding that, while untimely, one instance where supervisor rubbed foot against plaintiff's leg and another where he grabbed plaintiff's buttocks along with other sexually suggestive and derogatory jokes did not demonstrate the existence of a hostile work environment); *Gibson v. Potter*, 264 Fed.Appx. 397, 398 (5th Cir. 2008) (per curiam) (affirming summary judgment and finding that supervisor's conduct in grabbing the plaintiff's buttocks and making suggestive comments was an isolated incident and did not rise to the level of severe or pervasive harassment); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1247 (11th Cir. 1999) (affirming trial court's grant of judgment as a matter of law on the plaintiff's sexual harassment claim because the conduct of rubbing the plaintiff's hip with his own hip and making comments about "getting fired up" along with making sniffing sounds while looking at the plaintiff's crotch "fell well short of the level of severe or pervasive conduct" required to constitute an alteration of the terms and conditions of employment).

As noted above, there were slight discrepancies in the testimony surrounding the verbiage used by the senator in making a joke about going to Hawaii as well as concerning the area of Complainant's body that was touched. Even assuming the most concerning version of the testimony, in light of the investigation findings and review of the applicable law, I conclude the senator's comments and conduct were not so severe or pervasive as to alter the terms and conditions of Complainant's employment. Accordingly, there is no reasonable cause to believe that the senator's comments or conduct rose to the level of actionable hostile work environment sexual harassment.

Another component of the legal analysis is regarding a claim for retaliation. Applying the above standards to the facts uncovered by this investigation, I conclude Complainant engaged in protected activity by submitting the complaint at issue herein. Moreover, I find that Complainant's protected activity motivated the senator to take action against Complainant, specifically the senator's text to another employee stating Complainant was difficult to work with. I find the intentional positioning of himself within Complainant's eye sight on June 2, 2025 not actionable. *See e.g., Lopez v. Whirlpool,* 989 F.3d 656, 665 (8th Cir. 2021) (finding two staring incidents did not constitute retaliation by intimidation). Similarly, without an adverse employment action, such as a failure to promote, the text message referring to Complainant as "difficult to work with" is also not actionable because Complainant has not be subjected to a materially adverse action. *See e.g., Wilson v. Miller,* 821 F.3d 963, 969-970 (8th Cir. 2016). As a result, an actionable claim of retaliation does not exist.

However, as discussed below, actionable is not tantamount to acceptable. The Legislature has remedies at its disposal to hold the senator accountable for his conduct.

Violation of Legislature's Workplace Harassment Policy

Regardless of the precise version of events accepted, the senator's conduct was inappropriate. The joke, in any form, was inappropriate. The physical conduct, under any described circumstances, was likewise inappropriate. Moreover, irrespective of whether Complainant experienced a materially adverse action, the senator acknowledged sending a text message referring to Complainant as "difficult" in response to her decision to pursue this process.

According to the Legislature's Workplace Harassment Policy, conduct which may constitute sexual harassment includes (2) kissing, touching, patting, pinching, or intentionally brushing against a person and (6) sexually oriented jokes, stories, or discussion. The Legislature's

Workplace Harassment Policy states that conduct which amounts to either of these examples may constitute sexual harassment as defined in such policy. The senator's conduct here can be defined as intentionally brushing against someone and telling a sexually oriented joke. In light of the Legislature's Workplace Harassment Policy, it is the opinion of this outside investigator that the senator's conduct and comments should not be tolerated because they may lead to or foster a hostile work environment. The Legislature's Workplace Harassment Policy provides that those who initiate complaints under the Policy and those who are involved in the investigation of allegations of workplace harassment must not be subjected to retaliation, coercion, intimidation, or threat of reprisal. If any of these occur, it is considered a violation of the policy. In my assessment, the senator's conduct following the submission of the complaint reflects a lack of awareness and appreciation for the seriousness of the process and may reasonably be regarded as retaliatory. The senator's conduct has exposed the Legislature to potential legal action and unfortunately the senator does not appear to appreciate the gravity of his behavior.

Recommended Remedial Action

The Special Personnel Panel would be on firm footing to consider and/or recommend the following forms of corrective action:

- Communication to the employee and the senator of the findings of the investigation. It is especially important that the employee be reminded of the Legislature's policy prohibiting retaliation and the complaint procedure in the event she believes she has been retaliated against for lodging this complaint or participating in this investigation.
- Directive to the senator that the senator's conduct exposed the Legislature to a potential claim of sexual harassment and retaliation. In light of the Legislature's obligation to provide a workplace free from discrimination and harassment, the senator must abide by the following: (a) attend external training under the supervision of legal counsel for the Executive Board, specifically including workplace discrimination, harassment, and retaliation training,[26] complete such training within ten days of receiving the directive, and submit written conformation to the Chair of the Executive Board of the senator's completion of the training; (b) have no communication with or about the employee[27], and (c) not engage in physical contact with any employees or members of the Legislature. It should be explained to the senator that violation of these directives will push the Chair of the Executive Board to consider making the body aware of the senator's conduct and that reprimand, censure or expulsion may be called for by the body.[28]

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[26] Some external training suggestions found here: https://www.traliant.com/courses/sexual-harassment-training/, https://www.traliant.com/courses/retaliation-training/, https://cerificpedge.com/CourseFinder/CourseDetails/17678?msclkid=18d2b59805181b25977bdd67bf081825&utm_source=bing&utm_medium=cpc&utm_campaign=NonTM%20-%20DSA%202025&utm_term=cerificpedge&utm_content=All%20Webpages%202025, and https://hsi.com/solutions/employee-training-and-development/harassment-prevention-and-respectful-workplace.

[27] Consideration should be given by the Chair of the Executive Board to moving the senator's office if proximity of the senator's office to Complainant is such that regular contact is likely. This also demonstrates to Complainant a visible and tangible action in response to this matter.

[28] During the investigation, I was made aware the senator hosts a fundraiser the title of which could be construed as sexual inuendo. Consideration should be given to instructing the senator to rename

- The Legislature has an obligation to protect its employees from workplace harassment, even if it occurs at off-site, third-party events, as that conduct may alter the work environment. Social functions where alcohol is served and employees are in attendance can present heightened exposure. It is recommended that the Legislature implement a comprehensive strategy aimed at preventing future occurrences. This strategy should include, among other measures, the consistent reinforcement of the Legislature's zero-tolerance policy through regular, mandatory training that addresses not only harassment, but also professional conduct and appropriate interpersonal interactions in all settings. Additionally, while the Legislature's authority to regulate events sponsored by third parties may be limited, consideration should be given to extending similar training requirements or expectations to lobbying firms and other external entities that host events attended by legislative employees.
- The Legislature should also consider a strategy around appropriate and inappropriate physical contact among and between members and employees of the Legislature.

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the fundraiser. This is another instance where a visible and tangible action may be seen by Complainant.