IN THE SUPREME COURT OF
THE STATE OF FLORIDA

CASE NO. 72,788
DCA CASE NO. 87-1368

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PENNY BYRD, MARJORIE K. HENSLEY,
JANEY MAINARD SWAHN, DEBBIE K. SMITH,
MARY ANN VANLANDEGHEM, AND DENISE LARSON
all individuals,

PETITIONERS,

v.

RICHARDSON GREENSHIELD SECURITIES, INC.,
a New York corporation, authorized to do
business in the State of Florida,
and INTERSTATE SECURITIES CORPORATION,
a North Carolina corporation,
authorized to do business in
the State of Florida,

RESPONDENTS.

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On Certified Question From the District Court of Appeal,
Second District, State of Florida

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# RESPONDENTS' ANSWER BRIEF ON THE MERITS

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## STATEMENT OF THE CASE AND OF THE FACTS

### A. Nature of Case

The liability of an employer under the Florida Workers' Compensation Act ("the Act") is "exclusive and in place of all other liability of such employer . . . to the employee . . . ." § 440.11 Fla. Stat. (1987) The certified question is whether Petitioners' common law tort claim against Respondent employers for intentional infliction of emotional distress by their supervisory employees, is precluded by this exclusivity provision.[1/] The District Court of Appeal for the Second District, in an opinion by Judge Lehan reported at 527 So.2d. 899, concluded that the Act provides the exclusive remedy for these workplace torts and that these claims were therefore properly dismissed by the circuit court.

### B. Course of Proceedings

In the First Amended Complaint under review here Petitioners sued Howard Jenkins and the Respondents below, alleging that, while acting as local manager for respondents' Fort Myers office, Jenkins and his predecessor Charles Gill (not a defendant) had committed three torts against them: assault,

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1/ The district court explicitly found that the Petitioners' claims of negligent hiring and retention were "clearly" subject to this employer-immunity statute but certified the question in the context of claims of intentional tort. Byrd v. Richardson-Greenshields Securities, Inc., 527 So.2d 899, 900, n.1 (Fla. 2d DCA 1988).

battery and intentional infliction of emotional distress. They asserted that Respondents were liable for his alleged misconduct through their negligence and their failure to prevent the managers' misconduct was itself an intentional infliction of emotional distress. (R.39-50)[2/] The order from which Petitioners appealed to the Second District is an order of the Circuit Court of Lee County granting respondents' motion to dismiss petitioners' first amended complaint as against them.[3/] (R. 96-97)

Respondents' motions asserted Petitioners' failure to state a cause of action for intentional tort as against them. They also asserted that the trial court lacked subject matter jurisdiction because of the exclusive remedy provisions of § 440.11(1), Fla. Stat. (1987). The circuit court denied Petitioners' request that it confine its order of dismissal to the latter basis. (R. 102) The court's order of dismissal was entered on February 2, 1987. (R. 96-7) Petitioners moved for rehearing on February 11, 1987. (R. 98-101) However, in their motion they specifically stated that they did not seek any substantive change in the court's disposition. They failed to file a notice of appeal within thirty (30) days of the court's order of dismissal. On April 22, 1987 the court denied their

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2/ References to the Record on Appeal shall be indicated by "R. _____ ".

3/ The initial complaint had been dismissed on similar grounds. (R. 1-6)

motion for rehearing. (R. 102) Petitioners then noticed an appeal to the Second District on May 1, 1987, eighty-seven (87) days after the court's original order of dismissal from which the appeal was taken.

Respondents moved to dismiss Petitioners' appeal because of untimeliness, but the Second District denied the motion by order of August 24, 1987. Respondents briefed the issue to the court of appeal.

After oral argument, the Second District affirmed the circuit court's dismissal of the complaint without addressing the jurisdictional issue. It held that negligence claims against Respondents were clearly precluded by § 440.011 and analyzed the Petitioners' intentional tort claim in light of this Court's decisions in Fisher v. Shenandoah Construction Co., 498 So.2d 882 (Fla. 1986) and Lawton v. Alpine Engineered Products, Inc., 498 So.2d 879 (Fla. 1986). The Second District held that Petitioners' exclusive remedy for the alleged torts was under the Workers' Compensation Act. Byrd v. Richardson-Greenshields Securities, supra, 527 So.2d at 901. Petitioners have misquoted the Second District's decision on page 10 of their brief to this Court. It is therefore appropriate to quote the district court's rationale here:

> The workers' compensation laws cover emotional injuries resulting from not insubstantial physical contacts, and the exclusivity of workers' compensation remedies against an employer is not precluded by an intentional tort committed by an employee who was the active tort-feasor -- and was not the

> alter ego of the employer -- when the involvement of the employer is no more than its having had notice of prior such conduct by the active tortfeasor.

Id. at **900** (emphasis added). The court held that petitioners' alleged injuries are covered exclusively by the Act.

Nevertheless, and despite the absence of pleadings sufficient to support an intentional tort claim against Respondents, the district court certified the following question to this Court:

> We certify to the Florida Supreme Court, as of great public importance, the contention in this case concerning the exclusivity of workers' compensation remedies.

Id. at **902.** Petitioners filed their brief on the merits September **12, 1988.**

## C. Facts of Record

In Petitioners' Brief at p.7, they state that Counts 111, IV and V of the First amended complaint are the "only claims germane to this appeal". In Count III they assert claims against Richardson Greenshields (and Howard Jenkins) for intentional infliction of emotional distress. These allegations depend on the "extreme and outrageous character of Defendant Jenkins' conduct'' (R.44, ¶19). In Count **IV**, styled Negligent Hiring and Retention of Employees by Richardson Greenshields, Petitioners allege that Richardson Greenshields knew or should have known of misconduct by Jenkins and its former employee,

Charles Gill.[4] In Count V, Petitioners claim against Interstate Securities for negligent hiring and retention of Mr. Jenkins. This claim also depends on the misconduct of Howard Jenkins with respect to Marjorie Hensley during the two-week period when both of them were employed by Interstate.

To the extent that the Petitioners' Brief spins a narrative of the misconduct alleged against Howard Jenkins below, this Court should take note of the disposition of those claims against Howard Jenkins in the trial court. After the decision by the District Court of Appeal, and based on the deposition testimony of the Petitioners in the case against Jenkins below, the Circuit Court has issued an order granting summary judgment in favor of Jenkins on their claims of intentional infliction of emotional distress and assault. (Appendix A to this Brief). Subsequently, Plaintiffs have also voluntarily dismissed their only remaining claim against Mr. Jenkins. (See Appendix B to this Brief). There remains no pending claim against Jenkins in the trial court.[5]

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4/ Petitioners allege that respondent Richardson Greenshields received notice of Gill's conduct nine months after Gill was discharged. (R.46, 111126, 29, 31).

5/ Petitioners indicate, by footnotes 1 and 2 on pages 1 and 7 of their Brief respectively, that the Court should assume that the allegations of the First Amended Complaint are true for purposes of review. They also point out in footnote 2 that the Petitioners refiled their Complaint against Mr. Jenkins in the Court below. In that light, Respondents point out that on p.4 of the Petitioners' Brief they assert as a fact that "Jenkins made verbal sexual advances consisting of threats to force the women to have sexual (Continued)

Therefore, although Petitioners spend a great deal of print in their brief on the allegations of misconduct by Messrs. Jenkins and Gill, it is the claims against Respondent employers that are under review here, not those against Jenkins that have already been denied on the merits. The claims against Respondents are simply: that they took no action to investigate claims of the misconduct alleged in the Complaint under review against Jenkins; that by doing so they ratified his alleged misconduct; that they violated their duty to provide a safe work place for the Petitioners; and that by their "tacit approval" and "failure to investigate" they inflicted emotional distress on the Petitioners. (R. **39-50**, at **¶¶ 21, 29-33, 44, 45.**

Respondents' arguments that the certified question is not ripe for determination will focus only on the record allegations against Respondent employers, a focus which is particularly appropriate in view of the fact that the trial court has now found that the conduct they "tacitly approved" or "failed to investigate" has been judicially determined not to have occurred.

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relations..." (Petitioners Brief at p.4). Months prior to the filing of that brief all Petitioners had explicitly admitted that this allegation is not true. Based in part on these admissions the Circuit Court granted summary judgment in Mr. Jenkins' favor.

## SUMMARY OF ARGUMENT

Respondents will first argue that the District Court of Appeal lacked jurisdiction over this case because of the untimely filing of a notice of appeal by the Petitioner, more than 30 days after the trial court issued its Order dismissing the First Amended Complaint. Therefore, Respondents will argue that this Court has no jurisdiction over the certified question.

Second, Respondents will argue that the question certified to this Court is one more properly addressed to the Legislature. The Petitioners seek a specific exclusion from the employer immunity provisions of the Workers' Compensation Act that is not consistent with long standing judicial interpretation of that statute, and this Court should decline to exercise legislative authority as requested.

Third, Respondents will argue that, to the extent that the question certified is whether there is an intentional tort exception to the immunity provisions of the Workers' Compensation Act, this record does not present the Court with sufficient allegations to describe an intentional tort by the Respondents. The Court should therefore decline to answer the certified question.

Finally, Respondents will reply to the arguments made by the Petitioners in their Brief by arguing that all injuries occurring in the course and scope of employment are encompassed by the Workers' Compensation Act, that the case law cited by the Petitioners does not support the positions they have taken in

this Court, and that the mere fact that there is a sexual component to the alleged wrong does not remove the claim from the Workers' Compensation Act.

## ARGUMENT

### POINT I

**THIS COURT DOES NOT HAVE JURISDICTION BECAUSE PETITIONERS FAILED TO FILE A TIMELY NOTICE OF APPEAL WITH THE DISTRICT COURT.**

Assuming this Court does accept the question certified[6/], it may then review the entire case, and is not limited to the certified question alone. In another case involving a certified question, this Court stated:

> We deem it our prerogative to consider any error in the record once we have it properly before us for our review.

Lawrence v. Florida East Coast Railway Co., 346 So.2d 1012, 1014 n.2 (Fla. 1977). See Tillman v. State, 471 So.2d 32, 34 (Fla. 1985) (Court may review "any issue" properly preserved and presented): Zirin v. Charles Pfizer, supra, 128 So.2d at 596.

Thus, although this Court may initially decide to accept jurisdiction from the court below by granting the petition, it should nevertheless inquire, as a preliminary matter, whether the district court of appeal had jurisdiction to render the decision that is the subject of the petition.

Respondents contend that the district court of appeal did not have jurisdiction over this case because Petitioners did

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6/ This Court is not required to exercise jurisdiction over this case, despite the fact that the district court of appeal has directed a certified question to this Court, and may exercise its discretion to determine whether an opinion is justified or required. Zirin v. Charles Pfizer & Co., 128 So.2d 594, 596-97 (Fla. 1961).

not timely file a notice of appeal. Respondents both moved in the district court of appeal for dismissal on that ground, and argued the issue to the district court in its brief on the merits. The district court denied Respondents' motion without written opinion, and did not address this issue in its written opinion on the merits. This Court should address this issue, as it was preserved in the record and is dispositive.

The circuit court dismissed Petitioners' first amended complaint on February 1, **1987**, and Petitioners filed notice of appeal on May 1, **1987**, almost ninety **(90)** days later. In the intervening period they filed a motion with the circuit court, asking it to rewrite its order to "assist" appellate review. The motion explicitly eschewed any intention of "seeking to overturn the substance of the dismissal, simply the form, in order to facilitate appellate review." (R. **98-101)** On these facts, notice of appeal was not timely filed.

There are two critical legal principles at work. The first is that a trial court's order dismissing an action will be sustained so long as there is any legal basis for doing so. See Applegate v. Barnett Bank of Tallahassee, 377 So.2d 1150 (Fla. **1979)**; Swanson v. Gulf West International Corp., **429** So.2d 817 (Fla. 2d DCA **1983)**. Therefore, a trial court is under no obligation to specify in an order which among alternative theories it has chosen as the basis for its order of dismissal.

The second rule is that a motion for rehearing on an order of dismissal in the circuit court does not toll the strict

requirement that a notice of appeal be filed within 30 days unless the motion seeks an alteration of the trial court's order on an issue that has been left in "genuine ambiguity," or it seeks an amendment on a matter of "substance." St. Moritz Hotel v. Daughty, 249 So.2d 27, 28 (Fla. 1971). The motion for rehearing must address a particular reason why the trial court's initial disposition was "erroneous." Elmore v. Palmer First National Bank of Sarasota, 221 So.2d 164, 166 (Fla. 2d DCA 1969).

The motion which, Petitioners claimed below, tolled the 30-day appeal period, explicitly disavowed any effort to have the circuit court alter the "substance" of its February 1, 1987 order, and sought only to have the judge identify the basis for his ruling. Such an amendment is not a matter of "substance", and would not "correct an error" in the circuit court's disposition of the case. Even if the circuit court had specified, as appellants requested, that its ruling was based only on the employer-immunity argument, the district court could have sustained the ruling on alternative grounds that were not stated. See Applegate, supra. Therefore, whether or not the circuit court stated the rationale for its decision would not alter its disposition on a matter of substance or correct any perceived error. The circuit court's order was clear, simple and unambiguous. (R. 96-7) Petitioners requested that the circuit court issue an order identical in substance, but in language that they believed would "facilitate" appellate review. Such a motion is not of a kind that will stop the appeals clock.

As Petitioners did not file a notice of appeal until three months after the circuit court issued the order on which Petitioners seek review, and because Petitioners' motion did not toll the appeal period, notice was not timely filed. As a result, the district court did not have jurisdiction over this case. Since this Court's jurisdiction is derivative of the jurisdiction of the district court of appeal, the petition here should be dismissed.

## POINT II

**ANY EXCLUSION OF BENEFITS UNDER THE WORKERS' COMPENSATION ACT FOR INJURIES ARISING OUT OF SEXUAL ASSAULTS BY CO WORKERS IN THE WORKPLACE MUST BE ADOPTED BY THE LEGISLATIVE BRANCH OF THE GOVERNMENT.**

Particularly on the record brought to this Court, the certified question is an invitation to this Court to enact amendments to a long existing Florida statutory immunity for employers who are covered by workers' compensation insurance. The Constitution of the State of Florida assigns that function exclusively to the legislative branch, and the Court should reject this invitation to exercise legislative power. Art. 11, §3, Fla. Const. See Rotwein v. Gersten, 160 Fla. 736, 36 So.2d 419, 421 (1948).

Despite the frequent allusions in Petitioner's Brief to "sexual harassment" as the cause of action they seek to pursue in the circuit court, the claims asserted sound in common law assault, battery and outrage. There is no common law remedy for "sexual harassment". Like workers' compensation benefits, remedies for "sexual harassment" as a cause of action are creatures of legislation. Both the federal and state legislatures have adopted statutory schemes prohibiting discrimination in employment on the basis of gender, and those statutes have been interpreted by the courts to prohibit making sexual favors a condition of employment. 42 U.S.C. §2000e-4 (1987); § 760.10, Fla. Stat. (1987). See Meritor Savings Bank v. Vinson, 477 U.S.

57, 106 S.Ct. 2399; 91 L.Ed. 2d 49 (1986). Far from leaving victims of sex discrimination without remedy, those statutes have created elaborate administrative and investigative procedures and agencies to deal with this problem found by the legislatures to exist in the workplace. The statutes have enabled government agencies and private plaintiffs to sue for injunctions, backpay and other affirmative equitable relief as may be appropriate to the circumstances of each case. S760.10, Fla. Stat. (1987); 42 U.S.C. § 2000e-5 (1988 West Supp).

However, where Plaintiffs seek to invoke common law causes of action, such as assault, battery and intentional infliction of emotional distress, and where the underlying facts leading to such causes of action arise out of and in the course of employment, the comprehensive no-fault scheme of the Workers' Compensation Act is the employee's exclusive remedy against his or her employer. § 440.11 Fla. Stat. (1987). The Florida appellate courts which have considered requests to legislate cases of "sexual harassment" out of the workers' compensation scheme have consistently referred the parties to the legislative branch. See Byrd v. Richardson Greenshields, Inc., 527 So. 2d 899, 902 (Fla. 2d DCA 1988); Schwartz v. Zippy Mart, Inc., 470 So.2d 720, 723 (Fla. 1st DCA 1985) (en banc); Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla. 1st DCA 1985) (en banc).

Action by the latest session of the Florida Legislature demonstrates that this is appropriate constitutional deference. The Legislature was specifically aware of the decision of this

Court on a workers' compensation issue and moved promptly to enact a curative amendment. This Court had interpreted the Act to allow common law remedies against managerial employees in Streeter v. Sullivan, 509 So.2d 268 (Fla. 1987). Streeter held that the corporate officers of a bank could be liable to a teller who was robbed, allegedly because of the failure of the officer to arrange for adequate security. The Legislature acted swiftly, during the 1988 session, to express its intent more explicitly and to close the opening it believed Streeter had caused for excessive litigation against persons who act in certain managerial capacities. See House Commerce Committee Final Staff Analysis And Economic Impact Statement On CS/HB 1288 (May 31, 1988). 7/

The en banc decisions of the First District in Winn-Dixie and Zippy Mart, have been matters of public record since 1985. See Studstill v. Borg Warren Leasing, 806 F.2d 1005 (11th Cir. 1986). No other appellate court in the state has ruled to the contrary, and the Legislature has made no effort to amend the statute to alter the Zippy Mart and Winn-Dixie interpretations of the Act. Such a specific exception to the provisions of the Act as Petitioners seek here require legislative attention and is not appropriate for judicial action. This Court should assume that the Legislature is aware of the judicial interpretations of the

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7/ A copy of this report and the amendment enacted are attached as Appendix "C" to this brief.

Act, particular on timely issues like sexual harassment, and that it has perceived no compelling reason to "cure" them.

Petitioners' policy arguments concerning the alleged inadequacy of the remedies under the Act do not consider the fact that there are strong policy reasons for maintaining the integrity of the exclusive remedy aspect of the Act. In rejecting similar arguments that it should judicially create an exception for this type of claim from the exclusivity of the Act, the court in Brown v. Winn-Dixie explained that:

> Such immunity is the heart and soul of this legislation which has, over the years been of highly significant social and economic benefit to the working man, the employer and the State.

Id. So.2d at 157. Petitioners' invitation to create an exception for certain types of assaults from the "heart and soul" of the statute is an invitation to legislate in violation of the constitutional separation powers in Florida.

Accordingly, this Court should decline the invitation implicit in the certified question to effect an amendment to the Florida Workers' Compensation Act and should leave that decision to the legislative branch consistent with the separation of government powers required by the Florida Constitution.

## POINT III

**THE RECORD IN THIS CASE DOES NOT FURNISH THE COURT WITH A BASIS FOR RESPONDING TO THE CERTIFIED QUESTION AS TO INTENTIONAL TORTS.**

The Second District correctly observed that, insofar as two of the three counts upon which Petitioners rely here are in negligence, there is no question that they are covered by the Workers' Compensation Statute and precluded by employer immunity, Byrd v. Richardson Greenshields, supra, 527 So.2d at **900,** n.1. In that context, it is clear that the question certified to this Court is whether a claim that the employer has engaged in intentionally tortious misconduct against an employee invokes an exception to the exclusive remedy provisions of the Act that would permit an action at common law. The record furnishes the Court with no opportunity to evaluate that question. Only two years ago, this Court declined the invitation to respond to that certified question from the Fourth District Court of Appeal in Fisher v. Shenandoah General Construction Company, **498** So.2d 882 (Fla. **1986).**

In Fisher, this Court declined to answer the certified question whether intentional misconduct of the employer removed the employer's immunity under the Act. The Court *so* ruled that the complaint in that case did not allege an intentional tort against a corporate employer where it alleged only that the employer knew "in all probability" that its actions would cause injury or death. **498** So.2d at **883.** Fisher held that

> [i]n order for an employer's actions to amount to an intentional tort, the employer must either exhibit a deliberate intent to injure or engage in conduct which is substantially certain to result in injury or death.

Id. (Emphasis added). This requires that the risk injury be substantial, or a "virtual certainty,'' and not merely a strong probability. Id. at 883-84.

In following a number of leading jurisdictions on workers' compensation law on this issue, this Court correctly noted that

> [s]uch a strict reading is necessary because nearly every accident, injury, and sickness occurring at the workplace results from someone intentionally engaging in some triggering action.

Id. at 884. Accord, Millison v. E.I. duPont de Nemours & Co., 101 N.J. 161, 501 A.2d 505 (1985), appeal after remand, 226 N.J. Super. 572, 545, A.2d 213 (1988); Johns-Mansville Products Co. v. Superior Court, 27 Cal. 3d 465, 165 Cal. Rptr. 858 (1980). In Fisher, this Court unequivocally stated that the "failure to provide a safe workplace . . . does not constitute an intentional tort." Id. at 883. The Court reaffirmed that position in Lawton v. Alpine Engineered Products. Inc., 498 So.2d 879, 880 (Fla. 1986), where it stated that an employer's "willful and wanton disregard for the safety of its employees'' was not sufficient to support a finding that the employer committed an intentional tort.

Petitioners have failed to state a cause of action in intentional tort against either of the Respondents under the

standard adopted in Fisher and Lawton or even to describe one in their "worst case" narrative before this Court. In Count III of the First Amended Complaint, where Richardson-Greenshields Securities is itself accused of intentional infliction of emotional distress, Petitioners allege only that the Respondents "fail[ed] to investigate" their complaints of Howard Jenkins' alleged misconduct and thereby "gave tacit approval to said actions," which "foreseeably contributed" to their injuries. (R. Vol. 11, p. 44, ¶ 21; p. 49, ¶ 53). The court of appeal correctly found that this alleged "tacit approval" is far short of the specific intent to injure required under Fisher. As the California Supreme Court has also recently held, an employee cannot circumvent the workers' compensation scheme by merely characterizing such conduct as "intentional," or "unfair" or "outrageous." Cole v. Fair Oaks Fire Protection District, 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743, 749-750 (1987) (allegations of workplace harassment not sufficient to remove case from exclusive remedy provisions of the California workers' compensation statute).

Accordingly, this record presents the Court with no occasion for responding to the question whether intentional tortious misconduct of a corporate employer removes the immunity of the employer from suit in tort.

## POINT IV

**INJURIES ARISING OUT OF *AN* IN THE COURSE OF A PLAINTIFF'S EMPLOYMENT ARE COVERED BY WORKERS' COMPENSATION EVEN THOUGH THEY *ARE* ALLEGED TO HAVE RESULTED FROM "SEXUAL HARASSMENT".**

Petitioners' effort to litigate an exception into the Workers' Compensation Act flies in the face of all the Florida case law and the better reasoned decisions around the nation. Conversely, Petitioners rely on a selected few cases from other states, many of which do not stand for the propositions for which they have been cited.[8/]

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8/ Petitioners have incorrectly cited decisions from at least four jurisdictions in footnote 10 at page 24 of the brief and again on page 29. They are misquoted as follows:

Garvin v. Shewbart, 442 So.2d 80, 83 (Ala. 1983) (cited for rule that claim for emotional distress not barred; but also found that claim was barred because of tenuous connection to employment);

Hollrah v. Freidrich, 634 S.W.2d 221 (Mo. App. 1982) (cited for rule that sexual harassment claims not barred; case actually held that summary judgment was not appropriate because record not clear that injury was covered); cf. Harrison v. Reed Rubber Co., 603 F.Supp. 1456 (E.D. Mo. 1984) (emotional distress arising from workplace sexual harassment is covered by workers' compensation); ~~but cf.~~ Pryor v. U.S. Gypsum Co., 585 F.Supp. 311, 316 (W.D. Mo. 1984) (court not inclined to find injuries covered by workers' compensation, but unable to decide based on pleadings);

O'Connell v. Chasdi, 400 Mass 686, 511 N.E.2d 349 (1987) (cited for rule that harassment claims not excluded: actually held that claims against fellow employee not barred); compare Foley v. Polaroid Corp., 381 Mass 545, 413 N.E.2d 711 (1980) and Crews v. Memorex Corp., 588 F.Supp. 27, 30 (D. Mass. 1984) (claims for emotional distress precluded by exclusivity rule in Mass. statute).
(Continued)

Petitioners argue that despite their inability to state an intentional tort against Respondents, their claims are not preempted by the exclusive remedies under the Act because they have suffered neither a "type of wrong," nor a "type of injury" covered by the Act. Their argument would have the court ignore the fact that the complaint sounds in common law tort, (assault, battery and emotional distress) and focus only on "sexual harassment" as if that was a common law tort. However, even a cursory examination of Petitioners' First Amended Complaint shows that it sounds in common law and asserts claims long held to be covered by the Act. Phrased another way, the question is simply whether Petitioners could have recovered benefits under the Act if they had suffered compensable loss as a result of the alleged conduct. The allegations of the First Amended Complaint, viewed in light of established precedent under the Act, shows that Petitioners' alleged injuries are covered exclusively by the Act.

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Petitioners' citation to Renteria v. County of Orange, 82 Cal.App.3d 831, 147 Cal. Rptr. 447 (1978) at p. 29 of this Brief ignores changes in that jurisdiction. Renteria was expressly abrogated by Hart v. National Mortgage & Land Co., 189 Cal. App.3d 1420. 235 Cal. Rptr. 68 (1987); see also Cole v. Fair Oaks Fire Protection Dist., 43 Cal. 3d 148, 233 Cal. Rptr. 308, 729 P.2d 743, 747 (1987) (emotional distress caused by workplace harassment in violation of labor laws covered by workers' compensation). In any event emotional injuries caused by any physical touching in the workplace are covered under the Florida Act. See Prahl Bros. v. Phillips, infra.

### A. The Florida Workers' Compensation Act Covers Assaults by Co-employees.

The thrust of Petitioners' "type of wrong'' argument is that "sexual harassment" is not covered by the Act because it is not "an inherent risk of danger of the employment . . . ." Petitioners' Brief on the Merits at 21. This entire argument overlooks the statutory language that the Act covers "injury arising out of and in the course of employment." § 440.09(1) Fla. Stat. (1987). The essence of Petitioners' claims is that their supervisors abused their positions of supervisory authority and that Respondents did not act to prevent this from happening. From this alone it is clear that Petitioners' alleged injuries arose out of and occurred in the course of their employment. Indeed, this is the very source of the extreme emotional distress that Petitioners allege they have suffered in Count III. Petitioners state:

> The extreme and outrageous character of defendant Jenkins' conduct arises in part from the despicable nature of his actions, and in part from his abuse of his position as plaintiffs' supervisor, which position afforded him actual authority over plaintiffs, and the direct power to affect plaintiffs' interests.

First Amended Complaint, R. Vol. 11, p. 44, ¶ 19 (emphasis added).

Moreover, Petitioners' claims against Respondents for intentional infliction of emotional distress and negligence are predicated merely on the allegation that Respondents knew about the alleged harassment but did not act to stop it. Petitioners

have failed to explain how this faulty personnel administration can be divorced from the context of the workplace. The fallacy of Petitioners' argument can be illustrated by comparing this case with Petitioners' available remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. The First Amended Complaint reads like a claim for sex discrimination in employment under that statute. Title VII has been applied to prohibit conduct such as they allege precisely because it creates a "hostile work environment" and thereby adversely affect terms and conditions of employment within the meaning of that statute. See Meritor Savings Bank v. Vinson, supra.

The courts of the first and second appellate districts in Florida, as well as other courts, have understood that claims for "workplace sexual harassment" necessarily arise out of, and occur in the course of, employment. In Brown v. Winn-Dixie, supra, plaintiff alleged that a male supervisor grabbed her breast while she was on duty at the defendant's grocery store, and that the defendant had been made aware of previous similar acts by the supervisor against other female employees. 469 So.2d at 157. No relationship existed between the supervisor and the employee outside of the work setting. Id. Consequently, in its per curiam opinion, the court found "[t]here can be little doubt that the attack on [plaintiff] arose out of her employment" and was therefore covered exclusively by the Act. Id. at 158.

In Schwartz v. Zippy Mart, supra, both plaintiffs alleged that while a male employee was performing his supervisory

duties over them, he "intentionally pinched, grabbed and patted [their] shoulders, buttocks and other parts of [their bodies] against their will.'' 470 So. 2d at 721. One plaintiff testified that this supervisor once attacked her while she was stocking a cooler, tore her clothes, grabbed her breasts and french-kissed her. In holding that plaintiffs' tort actions against Zippy Mart, but not those against the alleged assailant, were precluded by their exclusive remedies under the Act, the court noted that there was "no dispute between the parties that the alleged assaults and batteries occurred during the course and scope of [plaintiffs'] employment with Zippy Mart." Id. at 722. The decision below is consistent with these holdings, and no district court has held to the contrary.

Other courts have reached the same conclusion. For example, in O'Brien v. King World Productions, Inc., 669 F.Supp. 639 (S.D.N.Y. 1987), plaintiff claimed that her employer intentionally and negligently caused her physical and mental injury "by committing or encouraging physical, sexual, and psychic assault and by permitting the use of controlled substances in the workplace. . . ." Id. at 640. The federal court held that this claim was governed by New York's Workers' Compensation Law, and therefore dismissed plaintiff's claims against her employer, because it was clear that plaintiff's physical and mental injuries arose in the course of her employment. Id. at 641. See Baker v. Wendy's of Montana, Inc., 687 P.2d 885, 892 (Wyo. 1984) (employee's injuries from supervisor's

sexual advances and touching covered by workers' compensation, since there was a "causal connection between the injury and the course of employment"); Lui v. Intercontinental Hotels Corp., 634 F. Supp. 684, 687-88 (D. Hawaii 1986); Zabkowicz v. West Bend Co., 789 F.2d 540, 544-45 (7th Cir. 1986). See also Harrison v. Reed Rubber Co., 603 F. Supp. 1456, 1456 (E.D. Mo. 1984).

The courts in both Schwartz v. Zippy-Mart and Brown v. Winn-Dixie, as well as the lower court in this case, implicitly recognized that the assaultive conduct alleged in this case cannot rationally be distinguished from other workplace assaults, equally unlawful, that are routinely held to be within the Act. Whether an assault arises out of and occurs in the course of employment is judged under a very liberal standard in Florida. In Tampa Maid Seafood Products v. Porter, 415 So.2d 883, 884-85 (Fla. 1st DCA 1982), the First District Court of Appeal stated that as to whether an assault arose out of employment,

> The determinative legal principles are set forth in San Marco Company, Inc. v. Langford, 391 So.2d 326 (Fla. 1st DCA 1980), quoting from Professor Larson [1 A. Larson, The Law of Workmen's Compensation, § 11.21 (1978)] in his treatment of the subject:
>
> When the animosity or dispute that culminates in an assault is imported into the employment from claimant's domestic or private life, and is not exacerbated by the employment, the assault does not arise out of the employment under any test.
>
> * * * * * *
>
> When it is clear that the origin of the assault was purely private and personal,

> and that the employment contributed nothing to the episode, whether by engendering or exacerbating the quarrel or facilitating the assault, the assault should be held noncompensable even in states fully accepting the positional-risk test, since that test applies only when the risk is "neutral."

In Tampa Maid, gossip over a "love triangle" erupted into a fight at work between the two women involved in the affairs, and claimant was stabbed in the fight. The court affirmed the workers' compensation award to claimant on the ground that "by facilitating an assault which would not otherwise have been made, the employment became a contributing factor." Id. at **885.**

> The dispute culminating in the assault was exacerbated by the employment because of the close proximity between the claimant and her assailant; the relationship between them and Mr. Fields originated at work; and the knife used in the assault was used at work, thus "facilitating the assault." It was not merely fortuitous that the assault occurred on the premises of the employer.

Id. See Carnegie v. Pan American Linen, 476 So.2d **311,** 312 (Fla. 1st DCA **1985)** ("compensation may be appropriate for injuries which result from a personal altercation if the employment is in some way a contributing factor").

In the case at bar, it is plain from the First Amended Complaint that Petitioners believe it was "not merely fortuitous" that the alleged assaults occurred on Respondents' premises. Rather, their claims state explicitly that the proximity of Petitioners to their supervisors, combined with the relationship

of superior and subordinate that existed between them, was at a minimum a "contributing factor," and indeed "facilitated the assault" within the meaning of Tampa Maid and Pan American Linen. See Schwartz v. Zippy-Mart, supra, 470 So.2d at 885; Brown v. Winn-Dixie, supra, 469 So.2d at 158.

Petitioners offer no principled reason for this court to hold that workplace assaults with sexual motives are sui generis. Instead, they offer a fractured recitation of "the history, intent and policy behind workers' compensation acts.'' Petitioners' reasoning is best summarized by the concurring opinion of Arizona Judge Feldman in Ford v. Revlon, Inc., 734 P.2d 580, 591 (Ariz. 1987) (which is cited at p. 22 of Petitioners' brief). Judge Feldman states that where the "essence" of a wrong is sexual harassment, a tort claim for intentional infliction of emotional distress against an employer is outside the coverage of that state's workers' compensation act, because:

> (b]y law, exposure to sexual harassment is not an inherent or necessary risk of employment, even though it may be or may have been endemic. The cost of such conduct ought not to be included in the cost of the product and passed to the consumer.

The fallacy of this reasoning is readily apparent. First, the fact that sexual harassment may be proscribed by

statute is irrelevant.[9/] The the Act contains no exceptions for injuries resulting from actions, such as assault and battery, see §§ 784.011, 784.03, Fla. Stat. (1987), that may also violate a statute (although an employee would be free to pursue whatever statutory remedies might be available). Thus, in Fisher v. Shenandoah Construction, supra, 498 So.2d at 883, this Court refused to except the death of plaintiff's decedent from the Act, even though it was alleged that his death resulted from the employer's failure to comply with Federal standards set by the Occupational Safety and Health Administration (OSHA) and a deliberate evasion of OSHA inspections. See Cole v. Fair Oaks Fire District, supra, 729 P.2d at 749-51 (injuries for harassment based on union activities covered by workers' compensation). A huge loophole would exist if injuries were outside of the Act simply because they may have been caused by "wrongful" conduct.

Second, there is no requirement that an injury be "an inherent or necessary risk of employment" to be covered by the Act, only that it "arise[] out of, and [occur] in the course of employment" -- statutory language that has traditionally been interpreted broadly. Workplace injuries are covered by the Act regardless of whether they are common or uncommon, unavoidable or preventable. Indeed, to insist that particular injuries be expected would be contrary to the statutory definition of

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9/ Except, of course, to the extent that the availability of statutory remedies undermines Petitioners' argument that a judicially created tort exception to the Act is necessary for the vindication of their rights.

"accident" as meaning "an unexpected or unusual event or result." See § 440.02(1), Fla. Stat.

As shown in Tampa Maid and Pan American Linen, supra, the approach urged by Petitioners is not followed by the Florida courts. Moreover, this ephemeral inquiry into whether an assault is a "natural" as opposed to an "unnatural" workplace occurrence would be inconsistent with, and would undermine the purposes of, the Act, which is to provide swift and sure relief for workplace injuries.[10/] Such nice distinctions were rejected as early as 1940, in the leading case of Hartford Accident & Indemnity Co. v. Cardillo, 112 F.2d 11 (D.C. Cir. 1940), where, after reviewing the case law of the era regarding whether workers' compensation should cover workplace assaults, the court stated:

> No common dominator for the cases can be found in the nature of the specific act or event which is the immediate cause of the injury. Whether it is 'natural' or abnormal, occurs on or off the employer's premises, consists in the action of physical or human agencies and, if the latter, is reflex or volitional, lawful or unlawful, by one deranged or responsible, the common element is to be found in a broader and more fundamental principle. It is stated by Cardozo, J., in Leonbruno v. Champlain Silk Mills,

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10/ The conclusion that Petitioners' claims against Respondents for intentional infliction of emotional distress and negligent hiring/retention, are governed exclusively by the Act, does not mean that workplace sexual harassment is "normal" or "acceptable," any more than the death of plaintiff's decedent in Fisher v. Shenandoah, was normal or acceptable: it merely acknowledges the reality that it sometimes happens. See Lui v. Intercontinental Hotels Corp., supra, 634 F. Supp. at 686-7.

1920, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 522, as follows:

> 'The claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life.'
>
> Not the particular or peculiar character of the associations and conditions, but that the work creates and surrounds the employee with them is the basic thing.

112 F.2d at 14.

Third, Judge Feldman's objection to the fact that "the cost of such conduct will be passed on to the consumer," which Petitioners also make much of, is simply inapplicable to this case. Petitioners' argument that the workers' compensation laws were designed to provide compensation for workplace injuries, while the cost of such injuries is added to the cost of the product and passed on to the consumer, must be viewed in context. As Petitioners note, workers' compensation laws were passed in response to the fact that under early common law, employees frequently received no compensation for workplace injuries.[11/] Thus, workers' compensation was viewed as progressive legislation that would shift the cost of workplace injuries from the injured workers to the consuming public. In

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11/ One treatise on the subject notes that various commentators have estimated the failure of workers to recover for such injuries under common law at anywhere from 70 to 94 per cent. W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on the Law of Torts, § 80 at 572 n.43 (5th ed. 1984).

contrast, Petitioners are not here seeking to carve out a specific type of workplace tort from the Act because they expect that tort law will provide them with no remedy. To the contrary, Petitioners obviously hope that a modern-day jury will award them a large cash award. It is simply fallacious for Petitioners to suggest that Respondents would not be required to pass the cost of such an award on to their customers.

### B. The Florida Workers' Compensation Act Covers Non-Physical Injuries

Petitioners also argue that because their alleged injuries are emotional, they are outside of the Act. However, as was recognized in both Winn Dixie and Zippy Mart, the Act excludes from coverage "[a] mental or nervous injury due to fright or excitement only . . . ." § 440.02(1) Fla. Stat. (emphasis added).

Florida courts have recognized that mental distress or psychiatric disorders which are caused by a blow or some other type of physical contact are covered injuries under the Act, even where the physical contact is relatively minor. For example, in Prahl Brother, Inc. v. Phillips, 429 So.2d 386 (Fla. 1st DCA 1983), the court ruled that an employee's emotional injury caused by having a gun placed to her head during an armed robery was compensable under the Act because it was not due to fright or excitement only. Id. at 387. The court reasoned that

> It is well established that compensation for neurosis must be predicated upon an underlying physical injury or trauma. . . . However, the underlying physical injury or trauma need not

> be itself disabling for the ensuing mental or nervous injury to be compensable. See Watson v. Melman Inc., 106 So.2d 433 (Fla. 3d DCA 1958), cert. denied, 11 So.2d 40 (Fla. 1959).

Prahl Bros., supra at 387. Thus, a psychiatric impairment is covered by the Act where a nondisabling physical trauma is a "significant causative factor." Id. See Sheppard v. City of Gainsville Police Department, 490 So.2d 972, 974 (Fla. 1st DCA 1986) (fright and excitement plus trauma of being grabbed by accident victim).

Petitioners allege that they were subjected to repeated instances of unwelcome touching of a sexual nature, which was sufficient for them to invoke common law remedies for battery, and which caused each of them severe emotional distress. It is apparent from the First Amended Complaint that, as in Schwartz v. Zippy Mart, supra, 470 So.2d at 722, what they allege "were more than 'mere' touchings or technical batteries.'' See Brown v. Winn-Dixie, supra, 469 So.2d at 159 (intentional infliction of mental distress count covered by the Act because act of grabbing plaintiff's breast directly caused the mental distress). Indeed, as the Court of Appeals of the Eleventh Circuit pointed out in a similar case, Studstill v. Borg Warner Leasing, 806 F.2d 1005, 1008 (11th Cir. 1986), claims of physical contact are essential to an emotional distress claim based on sexual harassment under Florida law. See Ponton v. Scarfone, 468 So.2d 1009, 1011 (Fla. 2d DCA 1985) (employer's pleas for sexual favors do not amount to intentional infliction of emotional distress). Metropolitan Life Insurance Co. v. McCarson, 467 So.2d 277, 278 (test for

intentional infliction of emotional distress is whether behavior is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency"). Thus, Petitioners' alleged injuries are not due to fright or excitement only, and are therefore within the Act.

Petitioners further argue that because they did not suffer emotional distress severe enough to be compensable under the Act, they should be allowed to proceed with their tort claims against Respondents. This rationale, however, is contrary to the legislative compromise of the Act, which anticipates that some workplace injuries will not be compensable, while others will be compensable on a no-fault basis. The court in Grice v. Swannee Lumber Manufacturing Co., summarized this aspect of the Act as follows:

> Every accidental injury suffered by an employee which arises out of and in the course of his employment is within the scope of the Act if it is of such character that it results, or might have resulted in a loss or diminution of earning capacity, either temporary or permanent, or for which the employer is obligated to furnish medical or other benefits. The fact that in a particular case the injury suffered does not in fact result in a loss or diminution of earning capacity is immaterial.

113 So.2d 742, 746 (Fla. 1st DCA 1959) (emphasis added).

The injuries of which Petitioners complain might have resulted in compensable losses, and are therefore within the exclusivity provision of the Act. That such injuries may not have resulted in compensable loss in this case is not a valid

reason for judicially creating a specific exemption for a narrow class of workplace torts, the implications of which would be unknown and possibly far-reaching. As was noted by the California Supreme Court in Cole v. Fair Oaks Fire District, supra, 729 P.2d at 747, to rule otherwise would be to create the anamolous situation where emotional distress is actionable in tort if it does not result in physical injury or disability, while more serious cases of emotional distress are precluded by the employers' immunity under workers' compensation.

C. Workplace Injuries and Wrongs Are Covered by the Workers' Compensation Act.

In this case, the record allegations in the First Amended Complaint make it clear that Plaintiffs affirmatively regard the incidents about which they complained to have been workplace torts. They complained that the respondents' managers, using their authority as supervisors, committed assaults, batteries and intentional inflictions of emotional distress on them precisely because of their workplace relationship. (R. 39-50, see ¶¶ 19, 24, 28, 29, 33, 34, 38, 40, 41, 45). The only factor distinguishing this from non-sexual claims that the courts have routinely held to be covered by workers' compensation statute is the fact that the batteries here are alleged to be sexually motivated, and that they did not cause physical injury.

But workers' compensation covers an employee's death that resulted from a supervisor's having directed him to crawl through a dangerous pipeline as in Fisher, supra, and workers' compensation benefits are available to employees assaulted and

robbed in the workplace through the negligence of an employer. See Prahl Bros. Inc. v. Phillips, 429 So.2d 386 (Fla. 1st DCA 1983). In that light, the correctness of the First District's analysis in Winn Dixie and Zippy Mart, and that of the Second District here, becomes clear. Without legislation to the contrary, workplace assaults, batteries and "outrages" involving physical contact, arising out of and in the course of employment entitle the employee to no-fault relief under the workers' compensation statute. The trade off is that the employee may not sue the employer in tort.

Accordingly, petitioners claims were properly dismissed consistent with the immunity afforded the employer under Florida law, and, even if the Court answers the certified question, it should find that dismissal was appropriate.

## CONCLUSION

For the foregoing reasons, the court should refuse to accept the certified question. However, should the court accept the certified question, it should affirm the judgment of the district court of appeal and answer the certified question by reaffirming that under the circumstances of this case Chapter 440, Fla. Stat. provides the exclusive remedy for an employee against an employer covered by workers' compensation.

Respectfully submitted,

MORGAN, LEWIS & BOCKIUS
Counsel for Respondents

By: _____
TERENCE G. CONNOR

## CERTIFICATE OF SERVICE

**IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was mailed to Robert Weisberg,** Esq., **Lipman & Weisberg, 5901 S.W. 7rth Street, Suite 304, Miami, Florida 33143-5186; and Rochelle Z. Catz, Esq.,** 13161 McGregor **Boulevard, Ft. Myers, Florida 33010, this** 10th day of October, 1988.

Terence G. Connor