ORIGINAL

IN THE SUPREME COURT
OF FLORIDA

S. CT. CASE NO. SC99-140
DCA CASE NO. 99-827
L.T. CASE NO. 94-18812 CA 30

ALINA GUERRA,

Petitioner,

v.

CITY OF MIAMI BEACH,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, Alina Guerra, filed a one count amended complaint for negligence alleging that she was hired by the City's police department, was subjected to a pattern of harassment and that she advised her supervisor that she was being harassed. Petitioner alleged that the City had a duty to ensure a safe work place and to protect her from harassment and a hostile work environment (Vol. 1 - pgs. 27-31).[1]

The City filed a motion for summary judgment contending that Florida law does not recognize a negligence cause of action for failing to maintain a workplace free of sexual harassment (Vol. 1- pgs. 59-60). On November 13, 1998, the trial judge denied the City's motion for summary judgment (Vol. 1 - pgs. 72-72A). The trial judge ultimately allowed the case go to the jury under a common law negligence claim for sexual harassment (Vol. 4, pg. 404, lines 13-15).The jury entered its verdict in favor of the Petitioner (Vol. 1 - pgs. 123-124) and the trial judge entered a final judgment in favor of the Petitioner(Vol. 1- pg. 196).

Respondent, pursuant to Fla.R.Civ.P. 1.530(b) and Fla.R.App.P. 9.020(h)(1), filed an authorized and timely Motion for New Trial and/or for Judgment Notwithstanding the Verdict (Vol. 1, pgs. 127-132). On March 4, 1999, the Circuit Court entered an Order denying

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[1] The Amended Complaint does not allege that the discrimination complained of was gender-based or that the harassment was "sexual" harassment.

Respondent's Motion for New Trial and/or for Judgment Notwithstanding the Verdict (Vol. 1, pg. 197) and on March 30, 1999, Respondent filed its Notice of Appeal (Vol. 1, pgs. 182-192).

On appeal to the Third District Court of Appeals, the City raised three arguments: 1) the trial judge erred in finding that there is a cognizable claim in Florida for negligent or common law sexual harassment; 2) there was insufficient evidence to support Plaintiff's claim of a hostile work environment; and 3) the cumulative effect of several errors denied the Defendant a fair trial. (Appellant's Initial Brief to the Third District, Page I). The Third District reversed the lower court based on the first argument in the City's appeal, holding that "Florida does not recognize a cause of action for sexual harassment under a common law negligence theory." City of Miami Beach v. Guerra, 746 So.2d 1159 (Fla. 3rd DCA 1999). Contrary to Petitioner's assertion, the Third District did not find it necessary to state an opinion concerning the City's two remaining arguments.[2]

Petitioner subsequently filed a suggestion that the Third District's order be certified to the Supreme Court of Florida as one of great public importance. That suggestion was denied by the Third District on January 12, 2000. On December 17, 1999,

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[2] Had the Third District reached the issue regarding the sufficiency of the evidence to support a claim of a hostile work environment, Petitioner's evidence of the creation of a hostile work environment was insufficient to support such a claim.

Petitioner filed a Notice to Invoke Discretionary Jurisdiction. This Court issued an order accepting jurisdiction on May 24, 2000.

SUMMARY OF ARGUMENT

The Third District correctly decided that there is no common law cause of action for negligent sexual harassment. Petitioner failed to comply with any of the state, federal or local laws prohibiting sexual harassment. No new cause of action was nor should be recognized. Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099 (Fla. 1989), held that workers' compensation is not a bar to common law intentional torts nor employer responsibility for them under traditional tort law. Vernon v. Medical Management Associates of Margate, Inc., 912 F.Supp. 1549 (S.D. Fla. 1996), whose analysis was cited by the Third District, analyzed Byrd and correctly concluded that no common law cause of action for negligent sexual harassment is cognizable under Florida law.

This analysis is consistent with the at-will framework of Florida caselaw which recognizes that the legislature can, and has created new statutory causes of action in the work place. The Florida legislature, and Congress, have passed comprehensive anti-discrimination statute that include sexual harassment and compensate victims. These laws have procedural mechanisms designed to provide a conciliation process, confidentiality, and other attempts to achieve results, in addition to allowing claimants who go through the process to bring suit for relief.

The Petitioner failed to follow the procedures of any

statutory process. It is unnecessary, and undesirable, to allow additional remedies beyond the carefully-constructed statutory framework.

The Third District's opinion should be affirmed.

ARGUMENT

INTRODUCTION

Petitioner failed to avail herself of any of the multiple avenues of relief available to her pursuant to state and federal laws. Petitioner failed to follow any of those procedures required before pursuing a claim. Those multiple avenues provide remedies for discrimination including sexual harassment. Petitioner instead argues that a new common law cause of action should be recognized. Petitioner's argument should be rejected.

I. THE THIRD DISTRICT CORRECTLY HELD THAT THERE IS NO COMMON LAW CAUSE OF ACTION FOR NEGLIGENT SEXUAL HARASSMENT.

Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099 (Fla. 1989) did not create a new common law cause of action for negligent failure to prevent sexual harassment. Rather, the Court concluded that traditional common law intentional torts such as battery and intentional infliction of emotional distress and employer responsibility for those torts are not barred by the workers' compensation statute even if they can be characterized as involving sexual harassment.

The Third District relied on the analysis of Byrd in Vernon v. Medical Management Associates of Margate, Inc., 912 F.Supp. 1549 (S.D. Fla. 1996). There, the Court addressed the issue of whether an employer, under Florida law, can be held liable in negligence for failing to stop sexual harassment. In Vernon, the plaintiff, a receptionist at a medical office, alleged that she was subjected

to repeated acts of sexual harassment. She alleged that a co-employee, without her consent and over her objections, repeatedly touched her buttocks and breasts, picked up her legs to look under her skirt, blew on her neck and remarked about the size of his penis. Id. at 1560. Vernon informed her supervisor of the harassment and the supervisor, despite being on notice, failed to take any action and told Vernon to deal with it herself. Vernon also alleged that her supervisor told her to stop complaining about the sexual harassment or she would be discharged. Because of these events, Vernon quit her employment. Id. at 1553.

Vernon, in Count VI of her complaint, sued her employer for negligence alleging that it failed to use reasonable care in responding to her complaints that she was being sexually harassed. Id. at 1553. The trial judge, Stanley Marcus[3], held:

> As a threshold matter, we note that Florida law does not recognize a common law cause of action for negligent failure to maintain a workplace free of sexual harassment....These allegations assert nothing more than a failure on the part of Margate (employer) and Ebersold (supervisor) to use reasonable care to prevent the commission of the alleged acts constituting sexual harassment. The Plaintiff has pinpointed no case law whatsoever to support the existence of a cause of action based on the alleged omissions.
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> Id. at 1563-64.

The Court dismissed the negligence claim reasoning that there

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[3]The Honorable Stanley Marcus was invested to the United States Court of Appeals for the Eleventh Circuit on January 29, 1998.

was no cognizable cause of action for an employer's negligence in failing to eliminate sexual harassment. Id. at 1564.

In Vernon, Judge Marcus considered Byrd and held:

> Although the Court's opinion [in Byrd] contains expansive language which might suggest that it was recognizing a new tort, when read carefully and considered in the context of the specific facts of Byrd, it appears clear that the Florida Supreme Court did not intend to establish a new common law tort related to sexual harassment. Rather, it appears that the Court simply adopted the more narrow position that corporations that allow employees to commit intentional torts such as battery, intentional infliction of emotional distress or assault as part of a sexually harassing environment can no longer hide behind the workers' compensation exclusion rule to escape liability.

Id. at 1364.

All three United States District Courts in Florida support the Third District's ruling that Byrd did not create a common law or negligence cause of action for sexual harassment under Florida law. Ball v. Heilig-Meyers Furniture Co., 35 F.Supp. 1371, 1375 (M.D.Fla. 1999)(reviewed many of the cases which were decided post Byrd and dismissed a Plaintiff's claim based on common law sexual harassment concluding that Byrd did not establish a new tort of sexual harassment); Monteverde v. Baby Superstore, Inc., 1995 WL 381876 (M.D.Fla. 1995)(under Florida law, there is no common law cause of action based upon sexual harassment); Robertson v. Edison Bros. Stores, Inc., 1995 WL 356052 (M.D. Fla. 1995)(holding that claim based on common law sexual harassment could not withstand motion to dismiss where Florida did not recognize tort of sexual

harassment); Urquiola v. Linen Supermarket, Inc., 1995 WL 266582 (M.D.Fla. 1995)(same); Yeary v. Florida Dept. of Corrections, 1995 WL 788066 (M.D. Fla. 1995)(holding that because Florida does not recognize common law cause of action for sexual harassment, plaintiff could not maintain claim characterized as "negligence action based on common law sexual harassment"); Maiorella v. Golf Academy of the South, 1993 WL 463211 (M.D.Fla. 1993)(holding that there is no common law cause of action for sexual harassment). See also Ponton v. Scarfone, 468 So.2d 1009 (Fla. 2d DCA 1985), rev. denied, 478 So.2d 54 (1985).

Although Vernon recognized that a properly plead claim for negligent hiring or retention of an employee is cognizable, in Vernon, as in the instant case, no such claim was plead. Vernon at 1564. Further, claims for negligent hiring or retention require independent tortious behavior of an employee. In Byrd that consisted of battery, physical assault and intentional infliction of emotional distress. Since there was no claim of any independently actionable conduct under Florida common law no claim for negligent sexual harassment was plead. Similarly, in the instant case the Petitioner only plead negligent sexual harassment and no independently tortious behavior by an employee. Nor did Petitioner plead negligent hiring or retention.

Florida case law before and after Byrd has consistently held that in Florida, as an at-will employment state, no common law

cause of action exists for "wrongful discharge" or other non-tort claim against the employer unless the legislature creates a statutory cause of action.

For example, in the absence of a statutory cause of action, it has been held that an employee can be terminated for suing an employer on behalf of the employee's child, DeMarco v. Publix Super Markets, Inc., 360 So.2d 134 (Fla. 3d DCA 1978), or for reporting an employer to governmental authorities for environmental violations, Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327 (Fla. 3d DCA 1985).

The legislature, however, can and has created new statutory causes of action in the workplace. For example, the legislature created a new statutory cause of action for retaliatory discharge for filing a worker's compensation claim. Smith v. Piezo Technology, 427 So.2d 182 (Fla. 1983). See also McElrath v. Burley, 707 So.2d 836 (Fla. 1st DCA 1998) (no common law action for retaliatory discharge but legislature could create cause of action and did so in enacting the Florida Civil Rights Act); Hullinger v. Ryder Truck Rental, Inc., 548 So.2d 231 (Fla. 1989) (no common law cause of action for age discrimination but legislature could, and did create one); Scott v. Otis Elevator Co., 572 So.2d 902 (1990)(Florida does not recognize retaliatory discharge common law cause of action but legislature can and has done so by statute).

As the Court observed in Ellis v. N.G.N. of Tampa, Inc., 586

So.2d 1042, 1047 (Fla. 1991):

> when the legislature has actively entered a particular field and has clearly indicated its ability to deal with such a policy question, the more prudent course is for this Court to defer to the legislative branch. The issue of civil liability for a social host has broad ramifications, and as we recently observed, "of the three branches of government, the judiciary is the least capable of receiving public input and resolving broad public policy questions based on a societal consensus."
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> (Citations omitted.)

II. IT WOULD BE UNNECESSARY TO CREATE A NEW COMMON LAW CAUSE OF ACTION FOR NEGLIGENT SEXUAL HARASSMENT BECAUSE THE LEGISLATURE AND CONGRESS, INTER ALIA, HAVE CREATED COMPREHENSIVE STATUTES TO ADDRESS THE ISSUE.

A. AGGRIEVED EMPLOYEES HAVE MORE THAN ADEQUATE REMEDIES UNDER THE STATE, FEDERAL, AND LOCAL LAWS ENACTED TO COMBAT EMPLOYMENT DISCRIMINATION INCLUDING SEXUAL HARASSMENT.

Byrd correctly noted the strong public policy against sexual harassment and other forms of discrimination. In Florida, the legislature created the Florida Civil Rights Act, modeled after Title VII. Fla. Stat. Sec. 760.01 et seq.; 42 U.S.C. Sec. 2000e et seq. Under both statutes' comprehensive framework, persons believing they have been discriminated against file a complaint of discrimination with the appropriate agencies created to investigate such complaints. There is no filing fee and complainants do not need an attorney.

Each agency is legislatively charged with attempting to resolve claims through informal means, and subsequently investigate them, all in a confidential setting for both parties. At a later

stage the claimant may proceed through an administrative hearing or into court and seek compensatory and punitive damages. Under the Florida statute, complainants have more time to file their complaints and a greater availability of damages than even under Title VII. Similarly, Miami-Dade County (Code Ch. 11A Sec. 25 et. seq.)(and other counties and municipalities in Florida) have additional anti-discrimination ordinances to combat sexual harassment and other forms of employment discrimination.

Numerous courts, both state and federal have required complainants who wish to avail themselves of the benefits of these laws to comply with their provisions or have their claims dismissed. See, e.g., Blount v. Sterling Healthcare Group, Inc., 934 F. Supp. 1365 (S.D. Fla. 1996) and Desai v. Time Kingdom, Inc., 944 F. Supp. 876 (M.D. Fla. 1996).

In the instant case, the Petitioner's Brief concedes that Petitioner never filed a charge of discrimination with any agency—state, federal or county. (p. 4) No new cause of action need be created.

B. THE LEGISLATURE HAS OCCUPIED THE FIELD OF EMPLOYMENT DISCRIMINATION INCLUDING SEXUAL HARASSMENT IN A WAY WHICH IS HARMONIOUS WITH THE AT-WILL EMPLOYMENT FRAMEWORK ESTABLISHED BY FLORIDA CASE LAW.

The Florida case law of the workplace operates in an at-will structure, which recognizes and endorses the power of the legislature to create new statutory causes of action. In the area

of employment discrimination, the legislature (and Congress) have chosen a comprehensive approach that addresses the problem of workplace discrimination. To create a new tort claim for negligent sexual harassment without the requirement of following the carefully crafted process created by the legislature for dealing with claims that did not exist at common law would contravene the important policies of conciliation and non-court mechanisms and affect the framework created between employees and employers.

Further, if an additional cause of action was created for sexual harassment beyond the legislature's framework, additional causes of action for other equally improper behavior would be created for race and all other types of discrimination without the countervailing protections created by the legislature.

Petitioner's failure to comply with the legislative requirements for pursuing a claim should not lead to such a result.

III. THE OPINION OF THE THIRD DISTRICT DOES NOT CONFLICT WITH UNITED STATES SUPREME DECISIONS.[4]

Petitioner attempts to raise Burlington Industries, Inc.v. Ellerth, 524 U.S. 742(1998), and Faragher v. City of Boca Raton, 524 U.S. 775 (1998), as supporting her position. To the contrary,

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[4]The other cases cited by Petitioner (Brief p. 10), Watson v. Bally Mfg. Corp., 844 F.Supp. 1533 (S.D.Fla. 1993), aff'd, 84 F.3d 438 (11th Cir. 1996), Liberti v. Walt Disney World Co., 912 F.Supp. 1494, 1501 (M.D. Fla. 1995), and Gomez v. Metro Dade County, 801 F.Supp. 674 (S.D. Fla. 1992)(Appendix, Findings of Fact par. 13 and 15), all involve claims of independent tortious conduct by fellow employees such as physical assaults so that they fall under the principles discussed supra at p.9.

those decisions are interpretation's of Title VII and use negligence analysis to determine when under Title VII employees may be held liable for sexual harassment. They do not create a common law cause of action for sexual harassment, but rather show how a statutory cause of action should be applied.[5]

If either of the plaintiffs in those cases had not followed the procedures required by the statute, they would not have been able to pursue a claim for sexual harassment. See, e.g. Delaware State College v. Ricks, 449 U.S. 250 (1980) (Title VII requires timely compliance with prerequisites).

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[5]The same analysis applies to Dees v. Johnson Controls, 168 F.3d 417 (11th Cir. 1999) cited by Petitioner.(Brief p. 10).

CONCLUSION

Based on the foregoing, this Court should affirm the opinion of Third District Court of Appeals.[6]

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[6]Alternatively, this Court could conclude that there is no express and direct conflict between the Third District Court's opinion and Byrd and dismiss the Petition. Times Publishing Co. v. Russell, 615 So.2d 158 (Fla. 1993). Even if the Third District Court's opinion conflicted with dicta in Byrd, that would be insufficient grounds for jurisdiction. See Pinkerton-Hays Lumber Co., Inc. v. Pope, 127 So.2d 441 (Fla. 1961).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof was mailed to Donna Ballman, Esquire, 13899 Biscayne Blvd., Suite 154, North Miami Beach, Florida 33181, this 27th day of June, 2000.

BY: _____
DONALD M. PAPY

CERTIFICATE OF FONT

In accordance with Fla.R.App.P. 9.210 and this Court's Administrative Order of July 13, 1998, this brief uses twelve point type, proportionately-spaced Courier New font, with less than 27 lines of text per page.

BY: _____
DONALD M. PAPY