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,

Appellant,

v.

The City of Miami Beach,

Appellee
_____/

INITIAL BRIEF ON THE MERITS OF ALINA GUERRA

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TABLE OF CITATIONS

Other

Note regarding record citations:

R = citation to the record on appeal

TR = citation to trial transcript

STATEMENT OF THE CASE AND FACTS

At the end of a four day jury trial, a jury found the employer negligent for failing to uphold its duty to maintain a workplace free of sexual harassment; to conduct a prompt, reasonable investigation of sexual harassment in the workplace; to supervise its employees; to discipline supervisors and employees who engaged in sexual harassment; and to not retaliate against an employee who complained of sexual harassment. The complaint specifically alleged a breach of duty to ensure a safe workplace, to protect Guerra from harassment and a hostile work environment, and to correct the situation. R-Vol. 1, pp. 27-31. While the words "supervision" and "retention" were not specifically used, the city's duty to protect, to correct the situation, and to ensure a safe workplace can only be accomplished through supervision and discipline of employees.

Alina Guerra was a dispatcher at the City of Miami Beach Police Department. From the moment she began working at the city, a supervisor, Randy Mazer, began a campaign of sexual harassment against Ms. Guerra. The city argued unsuccessfully in front of the jury and the Third DCA that the conduct was not sexual harassment. TR-Vol.IV p. 456 lines 12-13.; Appellant's Initial Brief below p. 7. The conduct included sexual innuendo, unwanted touching, comments about clothing and appearance, vandalism of a car, theft of lunches, anonymous calls at work, anonymous calls at home, and numerous other instances of sexual harassment that created a hostile and uncomfortable work environment.

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The city instituted an investigation of the sexual harassment long after Ms. Guerra's initial complaint to the departmental supervisor, Stanton Berlinsky, about the harassment. Ms. Guerra made several complaints to Mr. Berlinsky before the investigation was initiated. TR-Vol. II p. 155. The investigation arose when an anonymous letter was sent to Ms. Guerra's husband that contained graphic sexual language, sexual innuendo, and photos. TR-Vol. I p. 59-60. The letter stated that Ms. Guerra had had sexual relations with an officer or officers of the City of Miami Beach Police Department, and mentioned "Stan" (presumably Stanton Berlinsky). The letter also contained photos of Ms. Guerra's car in front of an apartment building. TR-Vol. I p. 62-63.

Randy Mazer also claimed to have received a copy of this anonymous letter. TR-Vol. I p. 29-30. Instead of taking the letter directly to Internal Affairs, as was required under the City's own procedures, Mazer proceeded to show it to family members, co-workers both in and outside the Communications Department, and finally to Berlinsky. TR-Vol. I p. 30-32, Vol. III pp. 300, 322-23. Each person testified that they told Mazer to take the letter to Internal Affairs. TR-Vol. III p. 303, 320-21. Mazer continued to show the letter around the office and outside the office until Berlinsky told her to take it to Internal Affairs. This created an atmosphere which was extremely uncomfortable for Guerra. TR-Vol. I p. 80, Vol. III p. 380.

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Although Internal Affairs was equipped with the ability to fingerprint the envelope, letter, and photos, this was not done. TR-Vol. I pp. 35-36, 81, 101-02, Vol. II pp. 152-53. Although Internal Affairs was equipped with the ability to compare the handwriting of the letter to the handwriting of people in the Communications Department, this was not done. TR-Vol. I pp. 36, 81, 102, Vol. II p. 153. The investigation took a year, during which time Ms. Guerra was fired. TR-Vol. II pp. 148-49. She had become extremely ill due to the sexual harassment, and was seeing the City's worker's compensation doctor for a work-related illness (although worker's compensation was later denied). She was fired for excessive absenteeism relating to these illnesses caused by the sexual harassment. TR-Vol. I pp. 96-97, Vol. III pp. 240-41.

The Internal Affairs investigation concluded that a violation of the City's own sexual harassment policy had occurred, that it was likely that a person employed by the City was the harasser, but made no conclusion as to the identity of the harasser. TR-Vol. II pp. 150-51; Plaintiff's Exhibit 9 p. 3. The City made no recommendations to how to remedy the harassment. Guerra was already gone from the Department when the investigation concluded.

Guerra attempted to mitigate her damages by obtaining another job. TR-Vol. II p. 262. During an investigation of Guerra's qualifications, Dade County sent an investigator to Miami Beach, where Berlinsky proceeded to state that Guerra was a trouble-

maker, that she was a problem employee, and made numerous disparaging remarks about Guerra. TR-Vol.II pp. 334-35, 347-48. When she successfully obtained a job from Dade County despite Berlinsky, the City of Miami Beach sent a letter to Dade County, unsigned, stating that Guerra had filed charges against the City. TR-Vol. II p. 257, 260. The county sent another investigator, to whom Berlinsky also made disparaging remarks about Guerra. TR-Vol. III p. 347-48. Guerra lost her job. TR-Vol. II p. 257-60. Subsequent attempts to find jobs were unsuccessful where Guerra listed the City of Miami Beach as a past employer. TR-Vol. II p. 262. The only jobs that she was offered were those where she left the city off her resume. TR-Vol. II p. 262.

This action was filed as a negligence action. R-Vol. 1 pp. 27-31. By the time the undersigned counsel came in the case, the time for filing under Title VII and the Florida Civil Rights Act had passed. The action proceeded to the jury after the trial court denied summary judgment. R- Vol. 1 pp. 72-72A. The jury found in favor of Guerra and awarded $275,000.00. They found Guerra 25% negligent, and the award was reduced accordingly. R-Vol. 1 pp.123-24, 196.

The Third District Court of Appeal reversed the judgment, finding that no action for negligence exists in Florida where sexual harassment occurs in the workplace. City of Miami Beach v. Guerra, 746 So. 2d 1159 (Fla. 3d DCA 1999).

SUMMARY OF ARGUMENT

The district court of appeal erred in reversing the jury verdict. The district court's decision conflicts with decisions of both the Supreme Court of Florida and the United States Supreme Court. Ms. Guerra's claim was for the negligence of her employer. The United States Supreme Court and the Florida Supreme Court have made clear that an employer is liable for its own negligence where its negligence is a cause of sexual harassment. Here, Ms. Guerra alleged that the City's retention of the harasser, its failure to discipline or supervise the harasser to assure that the harassment stopped, its supervision of the harasser, its investigation of the harassment, its supervision and firing of Ms. Guerra while the investigation was pending, and other acts of the City were negligent.

In concluding that there is no liability in negligence, the district court ignored the basic elements of negligence. Where there is a legal duty, a breach of that duty, coupled with causation and harm equals negligence. The district court did not find that Ms. Guerra failed to prove any element of negligence, only that no cause of action in negligence exists. Therefore, they must have concluded that there is no legal duty to keep a workplace free of sexual harassment.

The legal duty arises from statutes and from court decisions recognizing a duty. The City of Miami Beach should be held liable

in negligence for its breach of legal duty. This Court should reverse the district court's decision and uphold the jury verdict and judgment in favor of Ms. Guerra.

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ARGUMENT

I. THE DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT AN EMPLOYER IS NOT LIABLE IN NEGLIGENCE FOR SEXUAL HARASSMENT UNDER FLORIDA LAW

A. THE DISTRICT COURT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN BYRD

The Florida Supreme Court in Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099 (Fla. 1989), stated that: "The clear public policy emanating from federal and Florida law holds that an employer is charged with maintaining a workplace free from sexual harassment." Byrd, 552 So. 2d at 1104. Byrd was a case for assault, battery, emotional distress, and negligent hiring and retention.

The Court went on to state:

> Public policy now requires that employers be held accountable in tort for the sexually harassing environments they permit to exist, whether a tort claim is premised on a remedial statute or on the common law.

Id.

The trial court, in denying the Renewed Motion for Summary Judgment, found:

> It could not be clearer that the Supreme Court is establishing a legal remedy for sexual harassment in the workplace. To hold otherwise, would be to take two steps backward, and would be totally out of step with today's society. It would further be a terrible injustice to the plaintiff herein, to deprive her of the opportunity to present her claim to a jury.

Order Denying Defendant's Renewed Motion for Summary Judgment p. 2.

The Third District Court of Appeal found that no common law negligence theory for sexual harassment exists. The Court expressly cited Byrd, and stated that this Court expressly declined to reach that issue at page 1105 of the opinion. However, that portion of the opinion states: "We express no opinion as to whether petitioners in this case have alleged sufficient facts to state a cause of action under the common law, an issue we do not reach." Byrd, 552 So. 2d at 1105 (emphasis added). This Court never questioned the existence of the common law cause of action, only whether the facts as alleged would be sufficient to plead such a cause.

This Court expressly found a common law tort claim to exist under public policy for sexually harassing environments an employer permits to exist. Byrd, 552 So. 2d at 1104. The Third District Court of Appeal's decision conflicts with this Court's decision in Byrd. This Court should reverse on this basis and uphold the jury verdict and judgment.

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B. THE DECISION OF THE DISTRICT COURT OF APPEAL CONFLICTS WITH A DECISION OF THE UNITED STATES SUPREME COURT ON THE SAME QUESTION OF LAW

Ms. Guerra sued for negligence of her former employer where the employer's negligence was a cause of sexual harassment and maintaining an unsafe workplace.

The United States Supreme Court has made clear that an employer is liable for its own negligence where its negligence is a cause of sexual harassment. Burlington Ind., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998). "[A]lthough a supervisor's sexual harassment is outside the scope of employment because the conduct was for personal motives, an employer can be liable, nonetheless, where its own negligence is a cause of the harassment. An employer is negligent with respect to sexual harassment if it knew or should have known about the conduct and failed to stop it." Burlington, 118 S. Ct. at 2267 (emphasis added). The Court went on to incorporate common law negligence standards and agency standards for employer liability under Title VII.

The Court has clearly recognized employer liability under negligence for sexual harassment in the workplace. In Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998), the Supreme Court found in dicta that an employer had a duty to prevent discrimination, and that there was possible negligence liability of the employer. However, the Court did not remand on

the issue of negligence because the reversal on the issue of supervisory harassment rendered such remand unnecessary. Id.

In Dees v. Johnson Controls, 168 F.3d 417 (11th Cir. 1999), the Eleventh Circuit used a negligence analysis under common law agency principles for an employer's liability for sexual harassment.

In Watson v. Bally Mfg. Corp., 844 F. Supp. 1533 (S.D. Fla. 1993), aff'd 84 F.3d 438 (11th Cir. 1996), Judge King recognized a case virtually identical to the one at bar. The Court declined to dismiss counts for negligent hiring and retention based upon the employer's breach of "duty to provide a safe working environment, free from harassment, verbal threats, and physical assaults." Id. at 1537.

In Gomez v. Metro Dade County, 801 F. Supp. 674 (S.D. Fla. 1992), Judge Highsmith declined to grant summary judgment on a case for negligent hiring and retention relating to sexual harassment. See also, Liberti v. Walt Disney World Co., 912 F. Supp. 1494, 1501 (M.D. Fla. 1995)(allowing state law claims for negligent retention and negligent supervision relating to sexual harassment involving videotaping and peeping of employees in a dressing room).

Because the United States Supreme Court has recognized employer liability in negligence for sexual harassment in the workplace, the Third District Court of Appeal decision should be

reversed, and the jury verdict and judgment upheld.

C. THE DISTRICT COURT'S DECISION FAILS TO RECOGNIZE THE ELEMENTS OF COMMON LAW NEGLIGENCE

> The four elements of negligence are (1) a legal duty owed by defendant to plaintiff, (2) breach of that duty by defendant, (3) injury to plaintiff legally caused by defendant's breach, and (4) damages as a result of the injury. Paterson v. Deeb, 472 So. 2d 1210, 1214 (Fla. 1st DCA 1985).

Meyers v. City of Jacksonville, No. 1D99-1537, 2000.FL.0044559 <http://www.versuslaw.com> (Fla.App. 04/17/2000). Where Appellants alleged that at the time of an injury, a City had a statutory,non-discretionary duty to provide a wheelchair ramp or other means of safe accessibility for persons using wheelchairs and trying to use the building in question, relying on section 553.501, Florida Statutes, et seq. and the Americans With Disabilities Act, the First District Court of Appeal recognized a claim for negligence based upon that duty. Id. Here, there is a statutory duty under Title VII and the Florida Civil Rights Act, as well as under Dade County ordinance. There is also a legal duty that this Court has recognized.

Establishing the duty element is the "minimal threshold legal requirement" for asserting a cause of action in negligence. McCain v. Florida Power Corp., 593 So. 2d 500, 502 (Fla. 1992)(footnote omitted).

The Restatement (Second) of Torts recognizes four sources of duty: legislative enactment and administrative regulation; judicial interpretation of the enactments or regulations; other

judicial precedent; and, a duty arising from the general facts of the case. Restatement (Second) of Torts, Section(s) 285(1965).

Here, the Third District did not conclude that Ms. Guerra had not proven her case, only that Florida law did not recognize her cause of action. However, where this Court in Byrd has already ruled that there is a legal duty to keep a workplace free of sexual harassment, the Third District had to ignore the basic elements of negligence to reach its conclusion that no such cause of action exists. If there is a legal duty, a breach of that legal duty, coupled with causation and damages should create liability in negligence.

CONCLUSION

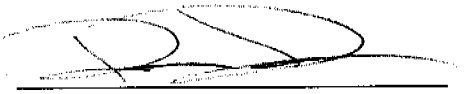
This Court should reverse the Third District Court of Appeal Decision. The district court of appeal's decision conflicts with this Court's decision in Byrd v. Richardson-Greenshields, 552 So. 2d 1099 (Fla. 1989). The decision also conflicts with decisions of the United States Supreme Court and other Federal Courts.

In concluding that there is no liability in negligence, the district court ignored the basic elements of negligence. Where there is a legal duty, a breach of that duty, coupled with causation and harm equals negligence. The district court did not find that Ms. Guerra failed to prove any element of negligence, only that no cause of action in negligence exists. Therefore, they must have concluded that there is no legal duty to keep a workplace free of sexual harassment.

The legal duty arises from statutes and from court decisions recognizing a duty. The City of Miami Beach should be held liable in negligence for its breach of legal duty. This Court should reverse the district court's decision and uphold the jury verdict and judgment in favor of Ms. Guerra.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon Donald Papy, City of Miami Beach, 1700 Convention Center Drive, Miami Beach, FL 33139 on this 2nd day of June, 2000.

By: 
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CERTIFICATE OF FONT

This brief is typed in Courier font, nonproportional, twelve point type.

Respectfully submitted,

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