IN THE SUPREME COURT
OF FLORIDA

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

Alina Guerra,

Appellant,

v.

The City of Miami Beach,

Appellee

_____/

JURISDICTIONAL BRIEF OF ALINA GUERRA

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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. 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 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 District Court of Appeal that the conduct was not sexual harassment. 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.

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. The investigation arose when an anonymous letter was sent to Ms. Guerra's husband that contained graphic sexual language, sexual innuendo, and photos. The letter stated that Ms. Guerra had had sexual relations with an officer or officers of the City of Miami Police Department, and mentioned "Stan" (presumably Stanton Berlinsky). The letter also contained photos of Ms. Guerra's car in front of an apartment building.

Randy Mazer also claimed to have received a copy of this anonymous letter. 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. Each person testified that they told Mazer to take the letter to Internal Affairs. 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.

Although Internal Affairs was equipped with the ability to fingerprint the envelope, letter, and photos, this was not done. 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. The investigation took a year, during which time Ms. Guerra was fired. 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.

The Internal Affairs investigation concluded that a violation of the City of Miami Beach'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. 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. 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. 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. The county sent another investigator, to whom Berlinsky

also made disparaging remarks about Guerra. Guerra lost her job. Subsequent attempts to find jobs were unsuccessful where Guerra listed the City of Miami Beach as a past employer. The only jobs that she was offered were those where she left the city off her resume.

This action was filed as a negligence action. 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. The jury found in favor of Guerra and awarded $275,000.00. They found Guerra 25% negligent, and the award was reduced accordingly.

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.

SUMMARY OF ARGUMENT

This Court has jurisdiction over this matter because the decision of the district court of appeal directly and expressly 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.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THE SUPREME COURT OF FLORIDA ON THE SAME QUESTION OF LAW

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 directly and expressly conflicts with this Court's decision in Byrd. This Court should accept jurisdiction on this basis.

II. THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY 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.

CONCLUSION

This Court should accept jurisdiction. The district court of appeal's decision expressly and directly 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.

Respectfully submitted,

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By: _____
Donna M. Ballman

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon Mark Goldstein, City of Miami Beach, 1700 Convention Center Drive, Miami Beach, FL 33139 on this 17th day of December, 1999.

By: _____
Donna M. Ballman

CERTIFICATE OF FONT

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

By: _____
Donna M. Ballman

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S. Ct. Case No.
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APPENDIX OF APPELLEE ALINA GUERRA

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Order Appealed From

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NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 1999

CITY OF MIAMI BEACH,	**	
Appellant,	**	
vs.	**	CASE NO. 99-827
ALINA GUERRA,	**	LOWER TRIBUNAL NO. 94-18812
Appellee.	**	

Opinion filed November 24, 1999.

An appeal from the Circuit Court for Dade County, Murray Goldman, Judge.

Murray H. Dubbin and Mark Goldstein and Donald M. Papy, for appellant.

Donna M. Ballman, for appellee.

Before NESBITT, GODERICH, and SORONDO, JJ.

NESBITT, J.

Alina Guerra was a communications division employee of the Miami Beach Police Department. Her one-count complaint for negligence against the City alleged that she was subjected to a pattern of sexual harassment as a Miami Beach Police Department employee. The one count amended complaint alleged that, as Guerra

had informed her supervisor of the harassment, the City had a duty to ensure a safe work place and to protect her from a "hostile work environment." The City moved for summary judgment on the grounds that there is no recognition in Florida law for a negligence action based on alleged sexual harassment in the workplace. The motion was denied, and the trial court allowed the case to proceed under a common law negligence theory for sexual harassment. The jury found for Ms. Guerra. The City's post-judgment motions for a new trial and JNOV were denied. This appeal follows. Since we hold that Florida does not recognize a cause of action for sexual harassment under a common law negligence theory, we reverse.

Ms. Guerra argues that the Supreme Court of Florida's opinion in Byrd v. Richardson-Greenshields Securities, Inc., 552 So. 2d 1099 (Fla. 1989), permits a cause of action for common law negligence for sexual harassment. However, the court in Byrd specifically declined to reach this issue. Id. at 1105.

We agree with the holding in Vernon v. Medical Management Assocs. of Margate, Inc., 912 F. Supp. 1549 (S.D. Fla. 1996), in which Judge Marcus discussed the Byrd decision:

> Although the Court's opinion 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 seems 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 1564. Therefore, since the only count contained in Ms. Guerra's complaint is for a cause of action that does not exist, the final judgment is reversed.