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.

CITY OF MIAMI BEACH,

Appellee.
_____/

APPELLEE'S JURISDICTIONAL ANSWER BRIEF

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SUMMARY OF ARGUMENT

This Court does not have jurisdiction over this matter because the Third District Court of Appeal's decision that Florida law does not recognize a common law negligence claim for a failure to provide an employee with a workplace free of sexual harassment does not conflict with any decisions of either the Supreme Court of Florida or the United States Supreme Court.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH ANY DECISION OF THE FLORIDA SUPREME COURT ON THE SAME QUESTION OF LAW

Appellant argues that the Third District Court of Appeal's decision in this matter directly conflicts with the Florida Supreme Court's decision in Byrd v. Richardson-Greenshields Securities, Inc., 552 So.2d 1099 (Fla. 1989). Specifically, Appellant argues that this Court in Byrd recognized a common law negligence claim for a failure to provide an employee with a workplace free of sexual harassment. Appellant misinterprets Byrd. The actual holding of Byrd was that the exclusivity provisions of Section 440.11, Florida Statutes, will not bar tort claims against an employer alleging assault, intentional infliction of emotional distress, or battery arising from sexual harassment. See id. at 1104 ("to the extent that the claim alleges assault, intentional infliction of emotional distress arising from sexual harassment or the specific type of battery involved in this case", the exclusivity rule of the workman's compensation statute will not bar them.); see also Vernon v. Medical Management Associates of Margate, Inc., 912 F. Supp. 1549, 1564 (S.D. Fla. 1996) (holding that "Byrd does not stand for the proposition that a common law claim for negligent failure to eliminate sexual harassment can be maintained under Florida law.")

In dismissing plaintiff's claim against her employer for failing to eliminate sexual harassment, the court in Vernon specifically addressed whether the Supreme Court in Byrd had created a common law claim for negligent failure to eliminate sexual harassment. The court 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.

Similarly, other courts have interpreted Byrd as not creating a common law or negligence cause of action for sexual harassment under Florida law. See Ball v. Heilig-Meyers Furniture Co., 35 F. Supp. 1371, 1375 (M.D. Fla. 1999)(reviewing other cases decided after Byrd, and dismissing a plaintiff's claim based on common law sexual harassment concluding that Byrd did not establish a new tort of sexual harassment).

Accordingly, because the Florida Supreme Court's decision in Byrd, 552 So. 2d 1099, did not recognize or create a claim for negligent failure to eliminate sexual harassment, the Third District Court of Appeal's decision does not conflict with any

Florida Supreme Court decision on the same question of law. This Court, therefore, should not accept jurisdiction on this basis.

II. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH A DECISION OF THE UNITED STATES SUPREME COURT ON THE SAME QUESTION OF LAW

Appellant next argues that the Third District Court of Appeal's decision conflicts with decisions of the United States Supreme Court because the decisions in Burlington Ind., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257 (1998), and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998) recognize a common law claim for negligence if the negligence is the cause for the sexual harassment. Appellant again misinterprets those decisions.

Those decisions arose out of statutory claims brought under Title VII, the Civil Rights Act of 1964, § 701 et seq., 42 U.S.C. A. § 2000e et seq.., and addressed the standards for employer liability under Title VII.[1] Neither case recognized or even contained a common law claim for negligent sexual harassment. Appellant's reliance on both cases is misplaced.

Therefore, because the United States Supreme Court decisions in Ellerth, 524 U.S. 742, and Faragher, 524 U.S. 775, did not recognize or even contain a claim for negligent failure to

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[1]Similarly, statutory claims for discrimination and sexual harassment may be brought pursuant to Florida law. Chapter 760, Florida Statutes.

eliminate sexual harassment, the Third District Court of Appeal's decision does not conflict with any United States Supreme Court decision on the same question of law. This Court, therefore, should not accept jurisdiction on this basis.

CONCLUSION

This Court should not accept jurisdiction because the Third District Court of Appeal's decision does not conflict with any decision of this Court or any decision of United States Supreme Court.

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 January 11, 2000.

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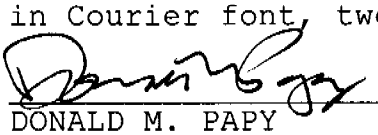
CERTIFICATE OF FONT

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

BY: 

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