OA 11-28-00

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

_____/

FILED
THOMAS D. HALL
JUL 21 2000
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BY _____

REPLY BRIEF ON THE MERITS OF ALINA 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

The case the City primarily relies upon, Vernon v. Medical Management Assoc., 912 F. Supp. 1549 (S.D. Fla. 1996), is one in which the employee did not allege any negligent hiring, retention, or supervision of an employee. 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, its failure to maintain a safe workplace, and other acts of the City were negligent.

The other cases, all Federal trial cases not binding upon this Court, involve attempts to allege a tort entitled "sexual harassment" or "common law sexual harassment." Ball v. Heilig-Meyers Furn. Co., 35 F. Supp. 1371 (M.D. Fla. 1999); Monteverde v. Baby Superstore, Inc., 1995 WL 38176 (M.D. Fla. 1995); Robertson v. Edison Bros. Stores, Inc., 1995 WL 356052 (M.D. Fla. 1995); Urquiola v. Linen Supermarket, Inc. 1995 WL 266582 (M.D. Fla. 1995); Maiorella v. Golf Academy, 1993 WL 463211 (M.D. Fla. 1993); Casey v. Wal-Mart Stores, Inc., 8 F. Supp. 1330 (N.D. Fla. 1998).

The only case the City cites that involves a negligence claim was one involving a claim entitled "negligence action based on

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common law sexual harassment." Yeary v. Florida Dept. of Corrections, 1995 WL 788066 (M.D. Fla. 1995). Here, Ms. Guerra's claim is not based upon "common law sexual harassment", but on the negligence of the employer in 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, its failure to maintain a safe workplace, free of sexual harassment, and other acts.

The City states that Ms. Guerra did not plead negligent hiring or retention. Answer Brief p. 9. The complaint is sufficient to allege both negligent supervision and retention. 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.

The City's other citations of Florida law are inapposite.

The City cites Ellis v. N.G.N. of Tampa, Inc., 586 So. 2d 1042 (Fla. 1991) as supporting its position. To the contrary, Ellis supports Ms. Guerra's claim. In Ellis, this Court allowed a

claim of negligence to proceed based upon a violation of a statute prohibiting the sale of alcohol to a habitual drunkard. The statute had a notice requirement, and the seller argued that the notice was a prerequisite to recovery. This Court held that notice was not a prerequisite to recovery under a negligence theory, but that it was a prerequisite to recovery under a theory of negligence per se. Here, Ms. Guerra is suing on a negligence theory, and is not required to comply with the notice provisions of Title VII or the Florida Civil Rights Act. She should be allowed to proceed on her negligence theory.

In Hullinger v. Ryder Truck Rental, Inc., 548 So. 2d 231 (Fla. 1989), this Court found that actions under Fla. Stat. § 760.10 were subject to a two-year statute of limitations. This is far from the City's claim that this Court found that there was no action in negligence for age discrimination. This Court mentioned in dicta that there was no common law cause of action for wrongful discharge because of age. There was no discussion of any claim in negligence.

In Scott v. Otis Elevator Co., 572 So. 2d 902 (Fla. 1990), this Court held that damages for emotional distress are available under Fla. Stat. § 440.205 in a case for wrongful discharge for making a worker's compensation claim. This Court recognized that a wrongful discharge in violation of public policy constitutes an intentional tort, justifying an award of emotional distress

damages. This Court discussed in dicta another case finding that there was no common law liability for retaliatory discharge. Again, there is no claim made in negligence.

In Smith v. Piezo Tech. and Prof. Adm'rs, 427 So. 2d 182 (Fla. 1983), this Court held that there was a statutory cause of action for wrongful discharge in retaliation for an employee's pursuit of a workers' compensation claim, even where no such liability existed under common law. There was no claim made in negligence.

In McElrath v. Burley, 707 So. 2d 836 (Fla. 1st DCA 1998), the First District held that Fla. Stat. § 760.11(7) is constitutional. There was no claim made in negligence. In DeMarco v. Publix Super Markets, Inc., 360 So. 2d 134 (Fla. 3d DCA 1978), aff'd, 1980.FL.2062 (http://www.versuslaw.com)(Fla. 1980), there was no action for breach of an at will employment contract under the access to the courts provision of the Florida Constitution, nor was there a private right of action for interference with the exercise of one's right to access the courts. No claim was made in negligence.

In Hartley v. Ocean Reef Club, Inc., 476 So. 2d 1327 (Fla. 3d DCA 1985), the Third District held that there is no cause of action for wrongful discharge under Florida common law for refusing to participate in illegal action. No claim was made in negligence.

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There is no case cited, nor can there be, for the proposition that the existence of a statute precludes liability in negligence for the same acts. In fact, the existence of such a statute supports a negligence claim, as discussed in Section II, infra.

II. VIOLATION OF TITLE VII, THE FLORIDA CIVIL RIGHTS ACT, AND THE DADE COUNTY HUMAN RIGHTS ORDINANCE CONSTITUTE EVIDENCE OF NEGLIGENCE OR NEGLIGENCE PER SE

The City takes the position that the existence of statutes barring the behavior that is the basis for the negligence claim somehow prohibits Ms. Guerra from bringing a negligence claim. Florida courts have long recognized that violation of a governmental statute, ordinance, or regulation constitutes evidence of negligence, unless the law expressly states that a violation will not constitute evidence of negligence. See Gabriel v. Tripp, 576 So.2d 404 (Fla. 2d DCA 1991) (statutory violation making it unlawful to knowingly transmit a sexually transmissible disease); Bennett M. Lifter, Inc. v. Varnado, 480 So.2d 1336 (Fla 3d DCA 1985) (violation of residential Landlord Tenant Act, § 83.51, Fla. Stat. (1983); Walt Disney World Co. v. Merritt, 404 So.2d 1077 (Fla. 5th DCA 1981) (violation of State Fire Marshal's Rules and Regulations); Hines v. Reichhold Chemicals, Inc., 383 So.2d 948 (Fla. 1st DCA 1980) (statutory violation of emission of gases and noxious odors); Jones v. Florida East Coast R.R. Co., 220 So.2d 922 (Fla. 4th DCA 1969) (violation of municipal ordinance requiring railroad crossing signals); Conroy v. Briley, 191 So.2d 601 (Fla. 1st DCA 1966) (violation of city ordinance regarding handrail on stairways); Florida East Coast Railway Co. v. Pollack, 154 So.2d 346 (Fla. 3d DCA 1963) (city ordinance regulating speed of trains within municipal limits).

Statutes and ordinances are categorized in three groups to determine the standards to apply when there is a violation of the statute. These categories come under the general headings of strict liability, negligence per se, and evidence of negligence. See deJesus v. Seaboard Coast Line R.R., 281 So. 2d 198 (Fla. 1973); Eckelbarger v. Frank, 732 So.2d 433 (Fla.2d DCA 1999). Because Title VII, the Florida Civil Rights Act, and the Dade County Human Rights Ordinance protect a particular class or classes of people from a particular type of harm, violation might even be negligence per se, which encompasses statutes or ordinances which protect a particular class of people from a particular injury or type of injury. See deJesus v. Seaboard Coast Line R.R., 281 So. 2d 198, 201 (Fla. 1973)(holding that violation of statute was negligence per se where statute protected motorists from danger of train collision). In Newsome v. Haffner, 710 So. 2d 184, 186 (Fla. 1st DCA), review denied, 722 So. 2d 193 (Fla. 1998), the First District held that "a cause of action in negligence per se is created when a penal statute is designed to protect a class of persons, of which the plaintiff is a member, against a particular type of harm." The court explained that the statute at issue, the "open house party" statute, "is clearly designed to protect minors from the harm that could result from the consumption of alcohol or drugs by those who are too immature to appreciate the potential consequences." Id. at 185. See

Eckelbarger v. Frank, 732 So.2d 433 (Fla. 2d DCA 1999)(violation of ordinance requiring protective barrier around pool was negligence per se); Beverly Enterprises-Florida, Inc. v. Knowles, No. 98-0765 (Fla. 4th DCA 08/25/1999) (violation of Patient's Bill of Rights was negligence per se.

Contrary to the City's assertion that the existence of these statutes precludes liability in negligence, the law in Florida is that the violation of a statute or ordinance constitutes either negligence per se or evidence of negligence.

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

The City ignores the clear language of the United States Supreme Court regarding an employer's duty. "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 Ind., Inc. v. Ellerth, 524 U.S. 742, 118 S. Ct. 2257, 2267 (1998).

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.

This Court has also expressly recognized an employer's duty to keep a workplace free of sexual harassment in Byrd v. Richardson-Greenshields, 552 So. 2d 1099 (Fla. 1989). The City utterly failed to rebut Ms. Guerra's argument that the basic elements of negligence (duty, breach, causation and harm) require liability in negligence if there is a breach of a legal duty. This Court and the United States Supreme Court have recognized that legal duty. The jury found that there was a breach of that duty, coupled with causation and harm. The City should not escape liability in negligence.

A holding that no liability in negligence exists where an employer knowingly allows sexual harassment in the workplace would necessarily be a holding that there is no legal duty on the employer's part. Such a holding would expressly and directly conflict with this Court's clear ruling in Byrd, as well as with the United States Supreme Court's rulings in both Faragher and Burlington.

CONCLUSION

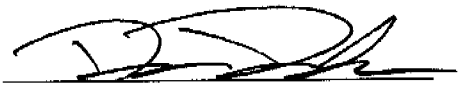
This Court should reverse the Third District Court of Appeal Decision. The district court of appeal's decision conflicts with this Court's decision in Byrd v. Richardson-Greenshields, 552 So. 2d 1099 (Fla. 1989). The decision also conflicts with decisions of the United States Supreme Court and other 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. Those statutes are either evidence of negligence or provide liability in negligence per se. 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 19th day of July, 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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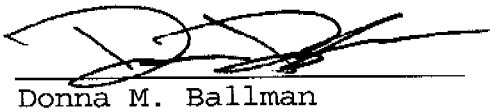
By: 
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