SUPREME COURT OF FLORIDA

SPEEDWAY SUPERAMERICA, LLC,

Petitioner/Defendant,

vs. **CASE NO.: SC-06-1617**

Erma Dupont,

Respondent/Plaintiff.
_____/

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

In this brief, Erma Dupont, will be referred to as the Respondent, Plaintiff or Mrs. Dupont. Speedway Superamerica LLC. will be referred to as the Petitioner, Defendant, or Speedway.

Citations to the trial transcript will be made by the letter "T." and the appropriate page number.

STATEMENT OF THE CASE

This case is before the Court on a certified question from the Fifth District Court of Appeals as to whether the Florida or the Federal punitive damages instruction should be given in future cases. At the trial of this action, the Federal more restrictive jury instruction was used.

Petitioner in its Initial Brief has addressed all the major issues in dispute at the trial court level and which were resolved against it in the *en banc*, 9 to 1 decision by the Fifth District. Respondent will therefore address those issues as well as the certified question issue.

This case arose under the Florida Civil Rights Act, Chapter 760, Florida Statutes, and the action was filed in the Circuit Court for Brevard County. Petitioner appealed from a final judgment entered pursuant to a verdict following a jury trial awarding to Plaintiff, Erma Dupont her damages and costs. This is a hostile work environment sexual harassment case involving both acts of violent and substantial sexual harassing conduct to which Mrs. Dupont was subjected by her co-worker Joel Coryell. These acts occurred every time she went to work and worked with the perpetrator, over a period of 8 to 9 weeks, and during her entire 8 hour shifts.

STATEMENT OF THE FACTS

The Amended Complaint stated that this action was brought pursuant to section 760.10, Florida Statutes, the Florida Civil Rights Act. It alleged sexual harassment and a hostile work environment, as well as retaliation.

The facts in evidence at trial and in the record show that Erma Dupont was hired by Emro Marketing Co. to work in its Speedway convenience store in Titusville as a cashier/clerk in September 1996. She initially worked the third shift from 11 p.m. to 7 a.m. (T. 206). In January 1997, Speedway hired Joel Coryell to work as a cashier/clerk in the same store as Ms. Dupont. In March 1997, Ms. Dupont was moved to the second shift from 3 p.m. to 11 p.m. and worked a couple of times a week with Mr. Coryell (T. 216). Over the course of the 8 to 9 weeks she worked with Coryell, for 8 hour shifts, she was subjected to a sexually pervasive and hostile work environment. The incidents she was forced to endure included sexual touching, sexually derogatory comments about herself and other women, she was assaulted by being forcefully grabbed, she was physically touched in a sexual manner and was subjected to violent behavior by Coryell. There were many incidents of this nature established at the trial of this case which occurred throughout the eight hour shift when she worked shifts with Coryell and then during the overlap between shifts when Speedway moved

her to the night shift. This was months after she first reported the sexual harassment.

Speedway monitored its store with videotape cameras. It had 4-5 cameras in the store. (T. 259) It was the responsibility of the store management to monitor activities at the store through viewing the video tapes. It is clear Speedway management had actual knowledge both of the sexual harassment of Mrs. Dupont and another employee, but also of Coryell's violent behavior in the workplace. (T. 448, T. 577-8) It took no action until the women complained, and even then, it was month's later.

Mrs. Dupont is a petite grandmother, who is 5'1" in height, and who weighed 112 lbs. (T. 222) Her harasser was 6'2" and weighed approximately 230 to 240 lbs. (T. 217) His very physical presence, especially when coupled with his violent behavior was threatening to Mrs. Dupont. In her own words: "He was just the most violent person I ever saw in my life. He scared me to death." (T. 217) "He was like a raving bull." (T.219) Working with him was a nightmare. (T.218) Mrs. Dupont was subjected a barrage of harassment by her harasser for 8 to 9 weeks. She worked different shifts, but when assigned to work alone with her harasser, she was subjected to sexual harassment and threatening behavior for the entire 8 hour shift she had to work with him. (T. 220-221) During the time that she worked with Coryell, Ms. Dupont was

afraid of him because he exhibited violent behavior while at the store (T. 217). She was terrified of him and believed she would get hurt. (T. 318) When Coryell got angry his face would turn blood red. (T. 319) She was a nervous wreck. (T. 249) and would run to another part of the store to try and avoid his violent outbursts. (T. 285) As a result of the sexual harassment she endured she was both embarrassed and humiliated. (T. 317)

The evidence at trial established that the following incidents occurred, many of them on numerous occasions, which created the severe and pervasive hostile work environment to which Mrs. Dupont was subjected.

1. Coryell often cursed and yelled, and he would throw and slam things around. (T. 220,T. 222)

2. Coryell would call Mrs. Dupont "a stupid bitch". (T. 222)

3. Coryell would stand inappropriately close behind her while she was at the cash register. (T. 217)

4. Coryell would follow her around the store (T. 217).

5. When Mrs. Dupont tried to discourage Coryell or ignore him he would throw things in her direction that came close to hitting her and she would have to duck to avoid being hit or jump out of the way. (T. 218-220) (T. 318)

6. Coryell would stand over her when she counted the money in the safe, two to three inches away, for no reason. (T. 228, T. 229)

7. Coryell would sneak past her and pat her on the buttocks. (T. 218)

8. Coryell would tell her she would look good as a biker chick. (T. 223)

9. Coryell referred to women as dumb and stupid, and called Mrs. Dupont a "dumb blond". (T. 224-225)

10. Coryell grabbed Mrs. Dupont and pulled her towards him, into his front person. (T. 245)

11. Coryell grabbed and hurt her wrist. (T. 245)

12. Coryell often make sexually derogatory comments about female customers, including: "wasn't that nice, wish I could get some of that. (T. 223)

13. Coryell would say about female customers that he'd like to get some of that and simulate having sexual intercourse. (T. 224)

14. Coryell, while Mrs. Dupont was on her knees counting the safe would say she was dumb and couldn't count, and went off about dumb blondes. (T. 257)

15. Coryell would comment on her outfit and said she looked “hot”. (T. 223)

16. Coryell would sneak up behind Mrs. Dupont and commence to rub her. (T. 217, T. 218)

17. As a result of Coryell’s behavior Mrs. Dupont was constantly looking over her shoulder. (T. 218)

18. Coryell would talk about his sex life, that he couldn’t sleep and needed a girlfriend. (T. 218)

19. When Mrs. Dupont tried to ignore Coryell’s behavior he would get angry, and give her dirty looks. (T. 218)

20. He’d throw keys that would fly off the wall or floor, causing her to jump. (T. 219)

21. Coryell would throw cartons of cigarettes. (T. 220)

22. After reporting the sexual harassment and being told she wouldn’t have to work with Coryell, he was called in to work with her and they were left alone in the store. (T. 246, T. 247)

23. She was threatened with being fired after she said she was going to leave the store, because Coryell was called in to work with her. This was after she was told she wouldn’t have to work with him. (T. 247)

24. After reporting the sexual harassment and violent behavior, Mrs. Dupont, the victim, was moved to the undesirable night shift. (T. 242)

25. Even when she was transferred, she was still forced to work with Coryell, because their shifts overlapped and he would hover over her, intimidate her and make sexist remarks, about her being a dumb blond. (T.225)

Ms. Dupont initially complained of Coryell's behavior to Rosemary Ruben, the Assistant Manager (T. 225), in mid- March. Ruben often was her direct supervisor when she worked and would give Mrs. Dupont her job assignments. (T. 238) Nothing was done, so she then complained to Barbara Bressner, two weeks later in April. Bressner was the Acting Manager while the Store Manager, Larry Gelbert, was away at a training seminar (T. 230). She told Bressner what was happening and that she was "really terrified" of Coryell (T. 230). Bresssner told her she didn't have to take that kind of behavior and she would report it to Julie Rambo, the District Manager (T. 231). Barbara Bressner, while at that time Acting Manager of Mrs. Dupont's store, was its previous Manager, and was in a management position at that time as Manager of another store, but was filling in for the regular Store Manager. She in fact was the person who initially hired Mrs. Dupont. (T. 237)

Because Coryell's offensive conduct continued unabated, Ms. Dupont felt compelled in May 1997 to complain again for the third time and she went to Store Manager, Larry Gelbert, about the harassmentand told him everything. (T. 241) This was 30 days approximately after reporting Coryell to Store Manager Bressner and 45 days approximately after reporting Coryell's behavior to Assistant Manager Ruben. Also, Bressner had reported the incidents to District Manager (Rambo), and yet the sexual harassment and violent behavior continued from March until May. Gelbert said he didn't know anything about it but offered to change her schedule so she would not have to work with Coryell anymore (T. 242). Gelbert promised Dupont to stop scheduling her to work with Coryell and made it known to Ruben (T. 342) that she was not to be scheduled with Coryell. He changed Mrs. Dupont's schedule and put her back on the undesirable third shift from 11 p.m. to 7 a.m. (T. 242), where new employees start. Although Mrs. Dupont agreed to it, to get away from Coryell, the Store Manager Gelbert, instead of changing the harasser's schedule, he changed that of the victim. (T. 242) However, Dupont still had contact with Coryell at least once a week when the shifts changed. and he would drag out the overlap time between the shifts by at least 15-20 minutes (T. 243). He would hover over her during the shift changes (T. 244) in a threatening manner, while they were

locked in the store alone, and make derogatory remarks about her being a "dumb blonde", and make derogatory remarks about women in general. (T. 223 - T.225)

On one weekend when she was working the first shift (7 a.m.–3 p.m.), the store was short-handed and Assistant Manager Ruben told Ms. Dupont she was going to call in Coryell to work with Dupont while she, Ruben, went to the bank (T. 246-247). Dupont asked Ruben not to do that and that she would leave the store if Coryell was called in. She then was told by Ruben that if she left, she would be fired (T. 246-247). As a result, Mrs. Dupont who had been traumatized by Coryell's sexual harassment and violent behavior, and had reported the sexual harassment, despite the Store Manager's promise that she would not have to work with her harasser, was forced to do so, in order not to lose her job. Ruben not only called Coryell in, but she went to the bank and left them together in the store alone for about an hour (T. 247).

As a result of this incident, Mrs. Dupont called Gelbert to complain (T. 248). Her next schedule showed she had to work with Coryell during the second shift (3 p.m.-11 p.m.) (T. 248). She was told by Gelbert that they had to schedule it that way and that she would sometimes have to work with Coryell (T. 248). Because of this, Dupont told Gelbert he had broken his

promise and that she was quitting her job (T. 249). She resigned on May 29, 1997 (T. 255). Dupont testified she was terrified and a nervous wreck and it wasn't worth it anymore (T. 249). Dupont testified as to her nervous problems and trouble sleeping (T. 250-251). She went to a doctor and was prescribed Prozac (T. 252).

At trial, Rosemary Ruben admitted that Gelbert told her not to schedule Dupont and Coryell together (T. 342). On the day she called in Coryell to work with Dupont when she went to the bank, she could not remember telling Dupont she couldn't leave but denied threatening to fire her (T. 346, 358) Barbara Bressner recalled Dupont coming to her with complaints about Coryell (T. 362). Bressner said she reported the complaints to her supervisor, Julie Rambo, the District Supervisor that week (T. 364). Larry Gelbert, the Store Manager, said that after Dupont complained to him in May about Coryell's conduct, he discussed it with District Manager, Julie Rambo, and they decided to rearrange the schedules so Coryell and Dupont would never have to work together again (T. 388). This was approximately 38 days after Rambo had been told by Bressner about the sexual harassment, and she had taken no action to protect, Mrs. Dupont, and apparently never even discussed it with the Store Manager. (T. 241) Gelbert told Dupont about his proposed schedule change and also had a

talk with Coryell about his behavior (T. 389, 441). Gelbert said that Bressner and Ruben never told him about Dupont's complaints – the first time he knew about it was when Ms. Dupont herself came to him (T. 409). He was surprised to hear about the day Ruben called in Coryell to work with Dupont, but admitted he would probably have done the same thing (T. 425).

Linda Ford had been a co-worker of Dupont's at Speedway (T. 451). Ford had also worked with Coryell (T. 452). Dupont talked to her about Coryell's harassing behavior, touching her inappropriately, and her fear of working around him (T. 454). She had several conversations with Dupont about Coryell (T. 455). Ford testified that she herself had had problems with Coryell touching her inappropriately (T. 456-457). Ford complained to Gilbert about Coryell a few months before Dupont resigned (T. 457-458). Ford told Gelbert that because of Coryell's inappropriate touching and her fear of his temper, she did not want to work with him anymore (T. 459). When Ford requested that she not have to work with Coryell, she was told there was already another person (Dupont) who didn't want to work with him and was told what a good worker Coryell was (T. 460). Ford described Coryell's bad temper and said that working with him was like working "with a time bomb ready to go off" (T. 461). Ford was afraid of Coryell and considered his actions to be sexual harassment (T. 464).

Defendant Speedway moved for a directed verdict (T. 504). The trial court denied its motion for directed verdict as to Count 1 of the complaint (sexual harassment) and granted it as to Count 2 (retaliation) (T. 515).

Julie Rambo, District Manager, testified she was told by Bressner about Dupont's being uncomfortable working with Coryell but was not told it was sexual harassment (T. 528). Rambo talked to Gelbert about "personality conflicts", who by that time had been told everything, and they decided on a schedule change (T. 530). After complaining about the harassment of Mr. Coryell, Defendant's management initially took the step of separating them from working full shifts together by assigning Mrs. Dupont to the third shift, after she volunteered, "to avoid working with Coryell". (T. 242) This is the shift where beginning employees typically work from 11 p.m. to 7 a.m. It is undesirable because the employee is up all night, the employee works alone in a locked store, they don't have the interaction with customers as on a day shift and they are required to do housekeeping tasks, sweeping, mopping and cleaning the restrooms. (T.207 - 208) Then, the Defendant scheduled her to work the same shift again as her harasser and told her she would be scheduled to work with him in the future. (T.248-249) Upon learning this Mrs. Dupont felt she had no choice but to resign.

The jury returned a verdict in favor of Plaintiff Dupont. On September 10, 2003, the Defendant filed a Motion to Set Aside Verdict Or, In The Alternative, For New Trial. Defendant also filed a Motion for Remittitur. Plaintiff filed a Memorandum of Law in opposition to each of these two motions. These motions were denied and the trial court entered a Final Judgment pursuant to the jury's verdict which was dated November 21, 2003, and filed on November 24, 2003. Defendant then appealed from the final judgment (and from the two orders denying its motion for summary judgment and renewed motion for summary judgment). This action in the Supreme Court then ensued after the Fifth District Court of Appeals entered its 9 to 1 *en banc* decision sustaining the trial judge's rulings and the jury verdict.

SUMMARY OF THE ARGUMENT

1. The Petitioner employer had actual knowledge through daily video surveillance and complaints from two or its female employees, including Plaintiff, that it had a male employee who committed violent acts in the workplace and who sexually harassed female employees, yet it failed to take prompt or effective remedial action to protect Plaintiff Irma Dupont, as the law requires. In fact, Petitioner intentionally created work assignments where Irma Dupont, who was already traumatized by the sexual harassment

and violent behavior to which she had been subjected, was required to work alone with the harasser in a locked store, at the change of shifts, and she was also told by a management employee that she would be fired if she left the store when that manager called in the harasser to work the same shift with her, and then the manager left her alone in the store with the harasser. Shortly after the ineffective attempted remedial action to have Mrs. Dupont and her harasser work different shifts, she was again scheduled to work with him and was told she would be so scheduled in the future. These latter work assignments occurred after Mrs. Dupont had reported the substantial harassment and workplace violence to which she had been subjected, and after she had been told she would no longer have to work with her harasser.

2. In enacting Chapter 760, Florida Statutes, the legislature was well aware of federal law, Title VII, and in fact it is referred to in several places in the Florida statute. Obviously, the Florida legislature felt the state should map its own course, and that federal law was not adequate to protect the citizens of Florida and to accomplish the purposes of the Florida act.

3. The law of summary judgment in the federal courts has taken a much different course than in Florida decisions. Federal judges do not hesitate to take out of the hands of the jury fundamental questions of weighing and evaluating evidence, responsibilities that have always been the

province of the jury under Florida law. A threshold question then becomes, when federal decisions are looked at for guidance, who is the proper trier of fact when there is evidence supporting a Plaintiff's case? Under the Florida Civil Rights Act and historic Florida precedent that is the role of the jury. Sexual harassment can be compared with defamation and pornography in that the best test we have are the community standards which a jury brings to a given set of facts in making that decision. Juries, not judges, are out in the general work force on a daily basis and they are in a much better position to know what is acceptable and reasonable conduct between their co-workers, and to decide what conduct on the job is so outrageous that no employee should be subjected to such conduct, and whether employers who have knowledge of such conduct by a co-worker have adequately protected that employee from future harassment, as the law requires. The record in this case shows that Speedway failed in its legal duty to Erma Dupont and that jury determination should not be disturbed by this court. The Fifth District Court of Appeals thoroughly reviewed the law and the facts in this case, and this Court should reaffirm their decision.

4. Petitioner argues that employers in Florida who have to meet the standards of Florida law in regard to sexual harassment would be unduly burdened. If this were true, Congress would pass a law pre-empting the field.

Florida employers are governed by a number of laws which are different or more stringent than federal law and yet commerce continues. The difference in the minimum wage is but one example.

5. The overriding factual issue in this case, which distinguishes it from many of the cases cited by Petitioner, is that this case involves workplace violence, as well as a constant barrage of sexual harassment to which Mrs. Dupont was subjected over a time span of 8 to 9 weeks, and throughout her 8 hour shift. If Petitioner's position were to be upheld, this Court in effect would be condoning a workplace environment where some level of sexual harassment coupled with violent acts would be acceptable, with the amount and severity of what is acceptable to be determined by a judge, and not a jury. Community standards, as determined by a jury, should be the standard under Florida law for determining whether unwelcome sexual conduct created such a severe and pervasive hostile work environment that the Florida Civil Rights Act was violated.

6. Sexual harassment takes place in the work environment, and we wouldn't be here today if we were talking about a couple of isolated minor examples of harassing behavior that were sex related, unaccompanied by violent behavior, spread over a long period of time . It is the totality of the work environment that must be viewed. Analyzing each individual act in

isolation from the totality of the work environment does not provide the protection clearly intended by the Florida legislature in enacting the Florida Civil Rights Act of 1992. The presence of acts of violence, coupled with numerous acts of sexual harassment occurring every time Mrs. Dupont reported to work, when she had to work with her harasser during an 8 hour shift, as a matter of law, imposed a burden on Petitioner to protect its employee, Irma Dupont, who was being victimized by such behavior. Its failure to do so did not meet the requirements of the Florida Civil Rights Act.

ARGUMENT

POINT I

STANDARD OF REVIEW

The correct standard of review under Florida law, is that if there are any genuine issues of material fact in dispute which a reasonable jury could resolve in favor of the plaintiff in a lawsuit, that is the exclusive province of the jury and a Motion for Summary Judgment, a Motion for Directed Verdict, and a Motion JNOV must be denied by the trial judge. As described in the Statement of Facts, there were numerous factual disputes which the jury under Florida law was required to resolve. There were no pure issues of

law as urged by the Petitioner and there couldn't be, because almost all sexual harassment claims, by their very nature, are fact intensive issues.

> When presented with a motion for directed verdict, a court must view all the evidence in a light most favorable to the non-movant, and in the face of evidence [*326] which is at odds or contradictory, all conflicts must be resolved in favor of the party against whom the motion has been made. *Ticor Title Guarantee Co. v. Harbin*, 674 So. 2d 781, 782 (Fla. 1st DCA 1996). It is only where there is no evidence upon which a jury could properly rely, in finding for the non-moving [**14] party, that a directed verdict should be granted. Id. The same standard applies when a court addresses a motion for judgment notwithstanding the verdict. *Easton-Babcock & Assocs., Inc. v. Fernandez*, 706 So. 2d 916, 919 (Fla. 3d DCA 1998). A judgment must be sustained if it is supported by competent, substantial evidence. Jones v. Rives, 680 So. 2d 450, 451 (Fla. 1st DCA 1996). This is the test used by the trial court as well as the standard of review on appeal. *Cecile Resort, Ltd. v. Hokanson*, 729 So. 2d 446, 447 (Fla. 5th DCA 1999).
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> *Jackson County Hospital v. Aldrich*, 835 So.2d 318, 326-327 (Fla. 1st DCA 2002) (emphasis added)

The above standard is the law of Florida, and has been followed by the courts in many cases, e.g. *Scott v. TPI Restaurants, Inc.* 798 so.2d 907; (Fla. 5th DCA 2001); *St. Johns River Water v. Fernberg Geological Services, Inc.*, 784 So.2d 500 (Fla. 5th DCA 2001) "A motion for directed verdict should not be granted when there is any reasonable evidence upon which a

jury could legally predicate a verdict in favor of the non-moving party." *American Motors Corporation v. Ellis*, 403 So.2d 459, 467 (Fla. 5th DCA 1981) citing *Hartnett v. Fowler*, 94 So.2d 724 (Fla. 1957).

The laws prohibiting sexual harassment are relatively new and therefore one can acknowledge that it is still in the development phase, where case law adds to the growing body of the law and our understanding of its parameters. This leads directly to the question of what is the definition of sexual harassment and a hostile and offensive work environment? These terms are not defined in any statute, but our understanding of the problem and the issues are increasing, while at the same time there has not developed a litmus test to be applied in every case. The question of course arises, when considering the possible range of human behavior, individual actions and reactions, individual psyches and the mores, and standards of the community, is it even possible or desirable to attempt such definitions? While we can probably all agree that certain isolated individual acts would in the normal case not rise to the level of sexual harassment, or a sexually hostile and offensive work environment, there comes a point when a line is crossed and most people would say "yes" this is sexual harassment. Applying community standards, as determined by a jury, is the only sensible and rational way to arrive at a decision as to the existence or not of

sexual harassment, when viewing a particular set of facts, such as those in this case.

The very term " a sexually hostile and offensive work environment" precludes consideration of many of the cases cited by Petitioner. Using the facts in those cases as guidance in this case would be simply taking the individual facts in this case out of the total context in which they occurred, for examination, without considering their cumulative effect, and the effect when considered with other incidents, in making a determination as to the existence, or non-existence, of a sufficiently severe and pervasive sexually hostile and offensive work environment. A jury, under the facts of this case is clearly best suited to make such determinations.

The *Mendoza* decision tells us that the analysis of sexual harassment must be from the viewpoint of a "reasonable person". The "reasonable person" standard is in reality a community standard test. The prevailing societal community standard is what a reasonable person would apply to a set of facts. The only real determinant of whether anti-social behavior directed at a woman rises to the level of a sexually hostile and offensive work environment, because it is severe or pervasive, is what a jury says it is, and that is a community standard. We simply have no better way of determining those standards than by submitting the facts to a jury. Under

Florida law only a jury can tell us what is the viewpoint of a “reasonable person”.

> In analyzing these issues, we adhere to the well-settled principle that an appellate court will not disturb a final judgment if there is competent, substantial evidence to support the verdict on which the judgment rests. Indeed, it is not the function of this Court to substitute its judgment for that of the trier of fact. See *Castillo v. E.I. Du Pont De Nemours & Co.*, 854 So. 2d 1264, 1277 (Fla. 2003) ("It is a basic tenet of appellate review that appellate courts do not reevaluate the evidence and substitute their judgment for that of the jury."); *Carter v. Brown & Williamson Tobacco Corp.*, 778 So. 2d 932, 939 (Fla. 2000) (quoting *Helman v. Seaboard Coast Line R.R. Co.*, 349 So. 2d 1187, 1189 (Fla. 1977)) ("It is not the function of an appellate court to reevaluate the evidence and substitute its judgment for that of the jury."); Grounds, 311 So. 2d at 168 (stating that an appellate court is not authorized to substitute its judgment for that of the trier of fact).
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> *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 675-676 (Fla., 2004)

The rule establishing the scope of appellate review is of long standing in Florida.

> But we have no authority to set aside a verdict which has been rendered by a jury and approved by the trial judge, solely on the ground that we would have found a different verdict had we been acting as jurors.
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> *Standard Oil Co. v. Nickerson*, 138 So. 55 (Fla. 1931)

The federal rule on appeal and Florida law are the same when reviewing a district court's denial of a motion for judgment as a matter of law. That denial will be upheld if the court determines that "reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions." *Walker v. NationsBank of Florida, N.A.*, 53 F.3D 1548, 1555 (11th Cir. 1995). " 'We will reverse that denial only if we conclude that 'the facts and inferences point overwhelmingly in favor of [the moving party], such that reasonable people could not arrive at a contrary verdict.' " *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997); *Miller v. Kenworth of Dothan Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). There is little room for argument that if this case were in federal court the decision of the jury would not have been reversed on appeal.

POINT II

THE PUNITIVE DAMAGES AWARD WAS NOT ERRONEOUS

Petitioner is urging this Court to reverse the punitive damages award because of the standard used at trial. Petitioner seems to be confused on this issue. Petitioner made no objection to the use of this jury instruction and in fact the Court actually gave Defendant's requested punitive damages instruction. (T. 651, T.652) It in fact is the Federal 11th Circuit Pattern Jury Instruction on Damages 2.1) (Appendix A is Petitoner's Proposed Jury

Instruction #20, which the Court gave as Instruction # 19. (T. 801) It is a more burdensome instruction for a Plaintiff than that customarily used in Florida cases. What is the appropriate punitive damages instruction for future cases, whether the instruction used in Dupont, or the Florida instruction under *Mercury Motors Express Inc. v. Smith*, 393 So.2d 545 (Fla. 1981) is the certified question presented to this Court by the Fifth District Court of Appeals. The Court has now accepted jurisdiction over this certified question. Since the more burdensome instruction for Plaintiffs was used in Dupont, there is no issue as to Dupont before this Court on the certified question as to punitive damages. What Petitioner seems to be complaining about is that it doesn't like the fact that even though it had the benefit of the instruction which favors a defendant, which it requested, the jury ruled in favor of Dupont, based upon the substantial evidence it had before it which supported the award of punitive damages.

Petitioner's *Kolstad* argument is disingenuous since what the trial court used as a punitive damages instruction is the Federal Eleventh Circuit Court of Appeals instruction. If we are going to apply federal law to the Florida Civil Rights Act, that is exactly what the trial court did in this case. The 11th Circuit punitive damages instruction is the law of this case. Petitioner's statement at the top of p.21 of its Initial Brief is simply untrue,

its false. What the 5th DCA did was to affirm a jury verdict on punitive damages where the jury was instructed using the very federal jury instruction Petitioner requested.

Petitioner's factual arguments are spurious as to the alleged "good faith" of Speedway in its efforts to remedy the sexual harassment to which Mrs. Dupont was subjected. First, let us not forget the daily videotapes which were regularly reviewed and from which its management had to have known about both the sexual harassment and the propensity for violent behavior of Coryell. Yet, they failed to take action, which should have been even before Mrs. Dupont made her complaints. Then, we have Mrs. Dupont making complaints to two levels of management, and then Bressler reported it to a third level of management, a District Manager, Rambo, and still no action. The testimony was that these 3 levels of management did not even report it to the Store Manager Gelbert. When Mrs. Dupont reported it to him, what did he do. He assigned her to the most undesirable shift, a shift where she overlapped with and was subjected to harassment by Coryell, then Assistant Manager Ruben ordered in Coryell to work with Mrs. Dupont and left her alone in the store with him, and finally Gelbert totally reneged on his promise, scheduled Mrs. Dupont to work again with Coryell and threatened to do it in the future. It's unbelievable that Speedway maintains that this

constitutes prompt, effective remedial action and that it acted in “good faith”. What these facts show are quite to the contrary, it acted in "bad faith" or as the Fifth District Court of Appeals noted, it was negligent in its actions.

In regard to the Certified Question before this Court, Respondent would urge the Court to clarify that the proper punitive damages jury instruction for the courts to use in future cases is the Florida punitive damages jury instruction found in *Mercury Motors Express*. Why single out sexual harassment cases to require a more stringent jury instruction than is used in all other civil cases in Florida? Despite the concerns raised by the Fifth District Court of Appeals, every sexual harassment case would not likely result in the award of punitive damages. There are clear standards in the Florida jury instruction which the jury is required to follow as in all other types of civil litigation. Based upon the facts in a particular case, the jury still would evaluate whether the actions of the employer, where the case was based upon *respondeat superior*, prove that the employer's management had knowledge of the sexual harassment and failed to take the appropriate and timely remedial action which the law requires. If they did not, the jury could award punitive damages. If they didn't have the requisite knowledge or took appropriate remedial action, then the jury would not award punitive damages. The law is clear that an employer who knowingly permits a

tangible job detriment to occur to a victim of sexual harassment is liable and no further analysis is required of the facts to establish liability of the employer. In this case, although it started as a co-worker sexually hostile work environment case, the Petitioner Speedway not only failed to take prompt remedial action to protect Mrs. Dupont, it ultimately re-created the opportunity for this traumatized employee to be subjected to further sexual harassment and violent acts by reassigning her to work with the perpetrator. It therefore constructively discharged her and took a tangible detrimental job action, which made it liable under that line of sexual harassment cases, as well as liable under the hostile and offensive work environment cases. See, *Hulsey v. Pride Restaurants, LLC*, 367 f.3D 1238, 1245-6 (11TH Cir. 2004)

POINT III

THE CIRCUIT COURT PROPERLY DENIED SPEEDWAY'S MOTION FOR DIRECTED VERDICT AS THERE WAS EVIDENCE ESTABLISHING A SEXUALLY HOSTILE AND OFFENSIVE WORK ENVIRONMENT

Petitioner's evaluation of the facts in this case lacks any sense of reality. What the facts show is that Respondent, Erma Dupont, was subjected to barrage of sexual harassment and violent behavior over a period of 8 to 9 weeks, continuously for her entire 8 hour shifts working with Coryell. Petitioner is simply wrong when it maintains that the District Court decision is at odds with Title VII. Its argument continues to ignore the totality of the

facts and that what really is at issue is the entire work environment, when considering all the facts, not individual facts in isolation. The record reflects numerous sexually hostile acts and violent behavior in the workplace, some of it directed specifically at Plaintiff, which the jury reviewed in determining that Mrs. Dupont was subjected to a severe and pervasive sexually hostile work environment. The actions included assault, battery, sexual touching, sexual comments, threats and intimidation, the resulting fear experienced by Mrs. Dupont and finally actions of the employer's management resulting in Plaintiff's constructive discharge.

> In evaluating the objective severity of the harassment, [*10] we look at the totality of the circumstances and consider, inter alia, "(1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (4) whether the conduct unreasonably interferes with the employee's job performance." Id. The plaintiff need not show that the harassment was so extreme that it produced tangible effects on his job performance in order to be actionable. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993). Isolated or sporadic incidents of harassment do not satisfy the "severe or pervasive" standard of a hostile work environment claim. (emphasis added)
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> *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88, 118 S. Ct. 2275, 2283, 141 L. Ed. 2d 662 (1998); see also *Gupta v. Fla. Bd. of Regents*, 212

F.3d 571, 583 (11th Cir. 2000).

Hulsey v. Pride Restaurants, LLC, 367 F.3d 1238,1247 (11th Cir. 2004). A number of Eleventh Circuit cases clearly support Plaintiff's position and the decision of the Fifth DCA. In *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002) the employee was called "Wetback," "Spic," and "Mexican Mother F_____" repeatedly over a month's time. The court used the "totality of circumstances" approach recommended in *Mendoza*, 195 F.3d at 1246, to underscore the point that one does not mechanically apply a list of factors and seek to disqualify a plaintiff for failing to meet one. The court followed the Seventh Circuit in noting that it is repeated incidents of harassment that establish a hostile work environment, not simply some "magic number". *Miller*, at 1276. It was enough for the court that the comments were frequent over a month's time, that the plaintiff could not avoid the comments, that the comments were severe, that the comments were directed at the plaintiff rather than just overheard, and that the comments were humiliating. In *Russell v. KSL Hotel Corp.*, 887 So.2d 372, 378 (Fla. 3d DCA 2004), a judgment notwithstanding the verdict was reversed and the court noted that the trial court improperly utilized a divide-and-conquer approach to separate the alleged instances of misconduct, a term which describes the analysis used in this case. One of the tests used by

courts for concluding that sexual harassment is sufficiently severe or pervasive is: “whether the conduct is physically threatening or humiliating”. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17,21, 114 S.Ct. 367, 370, 126 L.Ed. 2d 295 (1993); *Mendoza*, 195 F.3d at 1245. There is no question that is what occurred in this case.

Petitioner raises, as it did before the Circuit Court and District Court the language in *Faragher and Oncale*, that the law prohibiting sexual harassment is not a "civility code" for the workplace. The Supreme Court was saying the law wasn’t designed to require employees to be polite to each other. However, laws are designed to control human behavior. Civilization wouldn't function as it does without the legislature and the courts saying this behavior is acceptable and this behavior is not. These are fact intensive cases and it is the totality of the facts which a jury must assess, based upon contemporary standards in our society. Despite Petitioner's efforts to trivialize what happened to Mrs. Dupont, no employee, male or female should have to put up with such conduct in the workplace, and the law clearly prohibits it. The law imposes a duty on employers to protect their employees in these situations and that did not occur in this case, as the jury found. Juries are the proper entity to decide whether sexual misconduct,

coupled with violent behavior, was so severe or pervasive as to constitute a sexually hostile and offensive work environment.

A. The Evidence at Trial Established that Dupont was Subjected to Harassment that was Sufficiently Severe or Pervasive to be Actionable Under the FCRA

1. The Conduct in Dupont was Inextricably Intertwined such that All of the Conduct Formed a Basis for Dupont's Sexual Harassment Claim

Mendoza and *Gupta* relied upon by Petitioner did not involve the same level of violent behavior and the fear generated in the victim as happened with Mrs. Dupont. When an employee is subjected to sexual misconduct, coupled with violent behavior, many courts have found actionable sexual harassment. *Smith v. Sheahan*, 189 F.3d 529, 533 (7th Cir. 1999). The 11th Circuit in a case with facts similar to this case, but not as severe, found in *Johnson v. Booker T. Washington Broadcasting Service, Inc.*, 234 F.3d 501 (11th Cir. 2000) that the conduct was objectively severe or pervasive. It is important to note that *Johnson* was decided after *Mendoza* and *Gupta*.

Petitioner recites to this Court factual evidence in other cases which were used by Plaintiffs to buttress their sexual harassment claims. It matters not, because these are not the facts before the jury in this case, and certainly not all the facts. For example, Petitioner maintains that Coryell hovering

over Mrs. Dupont while she is on the floor counting money during the change in shifts is not sexual harassment. What Petitioner fails to acknowledge however is that at the same time Coryell was calling Mrs. Dupont a "dumb blonde". (T. 257) How can one in applying any reason or common sense say that those two actions are not so related, when they occurred at the same time, that they do not form part of her total work environment and do not together support her claim. Using demeaning sexual comments, such as calling a woman a "dumb blonde" is well recognized by the courts as an act of sexual harassment. The comments by Coryell to Mrs. Dupont that she was a dumb blonde, calling her a stupid bitch and the comments about women customers are demeaning and derogatory. Clearly such statements are based upon sex and would be offensive to any woman. Such comments must be viewed in the totality of the facts in the case. The 11th Circuit in *Hulsey v. Pride Restaurants, LLC*, at 1248, makes it clear that the totality of the circumstances approach is applicable in these cases and a Plaintiff does not have to prove individually that the conduct making up every factor is objectively severe and pervasive.

A recent 11th Circuit decision substantially reaffirms the analysis of the Fifth District Court of Appeals in this case. In *Parker v. Atlanta Newspapers Name Holding Corporation, Cox Enterprises, Inc.*, 2006 U.S.

App. LEXIS 14323, the 11th Circuit once again addressed the factors a plaintiff must prove to establish a severe and pervasive work environment, and also clarified when a jury question is presented in these cases.

> In order to establish a hostile work environment sexual harassment claim under Title VII an employee must show: "(1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable." Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999).
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> *Parker v. Atlanta Newspapers Name Holding Corp.*, 2006 U.S. App. LEXIS 14323, 4-5 (11th Cir. 2006)

The decision addressed the fourth element as to whether the conduct was so severe or pervasive, as to alter the terms and conditions of Parker's employment and stated:

> The fourth element, which the district court did address, requires that harassing conduct be severe or pervasive enough to alter the terms and conditions of employment. This element has both a subjective and objective component. Id. at 1246. The employee must "subjectively perceive" the harassing conduct as severe and pervasive and this perception must be objectively reasonable. Id. This

> Court has identified four factors to aid courts in evaluating the objective reasonableness of an employee's perception that conduct is severe and pervasive enough to alter the terms and conditions of employment: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Id.
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> Parker has established a genuine issue of material fact about whether she subjectively perceived the harassment as severe and pervasive enough to create a hostile work environment. Parker stated that Cannon's "comments and actions made me fear coming to work. I was sick and in shock by Cannon's conduct and the [*7] lack of management concerns." Because that statement creates a genuine issue of material fact about her subjective perception, the next question we must answer is whether her belief was objectively reasonable. See *Mendoza*, 195 F.3d at 1246.
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> *Parker*, 6-7

The evidence in this case presents even stronger testimony of the fear created in Mrs. Dupont by her harasser.

> Under the second factor, the offensive and demeaning nature of many of Cannon's comments indicates that the verbal harassment which Parker had to endure was severe. The comments were undeniably sexually explicit and repeatedly referred to Parker's anatomy and Cannon's desire to have sex with her. It is also significant that Parker was a production worker on the insert machine that Cannon operated. Parker had to work

> in close proximity to Cannon at whatever hopper he determined [*9] that she should run. Parker had nowhere to go where she could escape Cannon's unwelcome attention.
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> *Parker*, 8-9

We have almost the same set of facts in this case where Mrs. Dupont worked in a small store space with her harasser and was in close proximity to him, no matter what she did. She could not escape Coryell's unwanted attention. His sexual comments were directed both at Mrs. Dupont and other females.

Strikingly similar to the facts in this case is that it involved the perpetrator standing over his victim and touching her. The observation of the Eleventh Circuit is instructive. We must keep in mind also that in this case we have violent acts by Coryell which were not present in Parker.

> Parker apparently concedes that the touching and standing too close incidents occurred while Cannon was training her. However, in conjunction with Cannon's comments, we cannot rule out the possibility that these physical incidents were objectively threatening or humiliating. Even if this factor does not ultimately support Parker's claim, we, unlike the district court, do not believe that its absence necessarily indicates that the harassment was not severe and pervasive.

The Eleventh Circuit also found that the question of interference with Plaintiff's job performance was a jury question. Mrs. Dupont testified that

she was terrified of Coryell, was afraid of him and worked looking over her shoulder.

> We also disagree with the district court's conclusion that Cannon did not interfere with Parker's job performance. Although Cannon was not Parker's supervisor, he was the operator of the insert machine that Parker was assigned to and had the authority to determine the hopper where Parker would work. Parker has alleged that Cannon would take her out of the normal rotation and force her to work extra hours at the most difficult position. On at least one occasion he instructed another employee not to assist Parker at one of the hoppers. Parker's job duties did require her to be able to operate a hopper without assistance, but that does not mean that Cannon did not interfere with Parker's job performance. Parker alleges that she was treated unfairly because Cannon treated her more harshly than other employees on his machine. The fact that the assignments Cannon gave Parker were technically within the duties of her position does not alone decide the question. If Cannon singled Parker out for harsher treatment than other employees on his machine, that may have affected her job performance. That is an issue that a jury needs to decide.
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> *Parker*, 9-10

The Court distinguished the Parker case from those relied upon by Petitioner on facts not that different than this case, and in reversing the summary judgment stated:

> We think that Parker has presented evidence from which a jury might find that she was subject to a "continuous barrage of sexual harassment" such as

> we found actionable [*12] in Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 509 (11th Cir. 2000). Like the Court in Johnson, we distinguish Parker's case from other cases where we have determined that the harassment was not severe and pervasive because a plaintiff was subject to "fewer instances of less objectionable conduct over longer periods of time." See id. (citing *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1242-43 (11th Cir. 1999), and *Gupta v. Fl. Bd. of Regents*, 212 F.3d 571, 585 (11th Cir. 2000)). Parker stated that she was subject to Cannon's unwelcome comments on a daily basis, every time she was at work, for a period of several months. Cannon's statements were offensive and demeaning and were of an overtly sexual nature. Cf. *Gupta*, 212 F.3d at 583 (noting that much of alleged harassment was conduct "that no reasonable person would consider to be of a gender-related or sexual nature"). There is no possibility that Cannon's statements were misinterpreted by Parker.
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> *Parker*, 11-12
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> Parker has presented enough evidence to create a genuine issue of material fact as to whether the harassment she faced was sufficiently [*13] severe and pervasive to create a hostile working environment. The district court erred in granting summary judgment to the defendants on that element of Parker's claim.
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> *Parker v. Atlanta Newspapers Name Holding Corp.*, 2006 U.S. App. LEXIS 14323, 12-13 (11th Cir. 2006)

The testimony by Mrs. Dupont was even stronger and clearly the 9

judges of the Fifth District Court of Appeals were correct in their decision.

2. Assuming *Arguendo* that Non-Sexual Conduct That is Not Based Upon Gender is Properly Considered, Dupont Nonetheless Did Establish Severe and Pervasive Harassment

Petitioner asks this Court to invade the province of the jury and to reweigh the evidence upon which they made their decision. Comparing the facts in this case to the facts in *Mendoza* and *Gupta* is error because those cases involved minimal physical contacts and threats. When the facts in this case are analyzed in light of the cases which include physical violence, threatening behavior and intimidation, it is clear that the legal standard of proof is met and a reasonable jury could conclude, as they did, that Erma Dupont was the victim of sexual harassment based upon a sufficiently severe or pervasive hostile and offensive work environment.

Consider for a moment what we have, if we ignore *arguendo*, the derogatory statements made because Mrs. Dupont was a female, that she was a dumb blonde, the sexual comments about other women and the simulation of sexual intercourse by the harasser. The facts still remain that Mrs. Dupont was patted on her buttocks, she was physically grabbed and pulled against the harasser, and was threatened and intimidated by the actions of her harasser because of his throwing objects on numerous occasions throughout an 8 to 9 week period, which she had to duck to avoid. What we have is a

clear case of assault and battery. Justice Grimes in his concurring opinion in *Byrd v. Richardson-Greenshields Securities*, 552 So.2d 1099,1105 (Fla. 1989) reminds us: "… as every law student should know by his third week, the tort of assault does not require physical injury or even touching. Its minimal essence is putting the victim in fear of bodily harm." Our common law heritage derived from England is that victims of assault and battery have been protected for over 300 years. The record in this case is undisputed that Mrs. Dupont was subjected to both. Protection under the Florida Civil Rights Act against sexual harassment and a hostile and offensive work environment offers little if it is not viewed as including an extension of the common law protection against assault and battery. In our more modern era, the law without question imposes liability upon an employer who learns of such behavior and fails to take appropriate remedial action to cause it to stop, as happened in this case. Under Florida's Civil Rights Act an employer has a duty to protect women employees against such behavior. When the elements of common law assault and battery are present, how can it be said that such conduct does not rise to the level of a prohibited hostile and offensive work environment under the statute, when it is coupled with sexual misconduct. It would seem beyond reasonable debate to deny that such facts establish sexual harassment per se. There is no question that a woman should

be protected against such outrageous behavior, and is protected, if the Florida Civil Rights Act is correctly applied.

A recent Florida decision, *Maldonado v. Publix Supermarkets*, 2006 Fla. App. LEXIS 17271 (Fla. 4th DCA 2006) analyzed the facts of that case in light of the 5th DCA *Dupont v. Speedway* decision currently before this court, and distinguished the facts before it from this case. The decision illustrates that the 5th DCA was correct in its opinion. The Court in *Maldonado* applied the same federal case law as the 5th DCA applied in this case, and came to the opposite conclusion based upon a weaker set of facts. As the 4th DCA noted, at p.4: " This case contrasts with *Speedway v. SuperAmerica*, where a female employee was subjected to repeated, countless acts of verbal and physical harassment over a nine-week period; the employee was subjected to offensive conduct 'every time she worked [with the offender] on a typical eight-hour shift.' *933 So.2d at 81*." Clearly the *Maldonado* court recognized that the 5th DCA in this case accurately analyzed the current state of the law, and the facts in this case. This Court should affirm the Fifth District Court of Appeals decision as well. Unlike the facts in this case, in *Maldonado* it is clear that the employer had taken prompt effective remedial action, instead of creating for the victim a continuing harassment scenario, as Petitioner did in regard to Mrs. Dupont.

B. The Evidence Introduced at Trial Established that Speedway Failed to Take Prompt Remedial Action To Remedy The Harassment

The failure of the employer to take effective remedial action as the law requires substantially contributed to the severity or pervasiveness of the harassing behavior to which Mrs. Dupont was subjected and by itself established liability of the employer. Petitioner misconstrues and fails to acknowledge what the evidence showed in this case. Despite Mrs. Dupont complaining initially to 2 levels of management, Ruben in March and Bressler in April, the facts of the sexual harassment to which she was being subjected, and despite that harassment being reported to a third level, District Manager Rambo, no action was taken until some 48 to 63 days later, when Mrs. Dupont again complained to management, to Gelbert, her Store Manager, in May, when he had returned to the store. If Speedway had an effective policy against sexual harassment, why didn't Bressler or Rambo report Mrs. Dupont's complaints to Gelbert, and why didn't they take prompt remedial action, or Ruben for that matter? The answer in all likelihood is what is so typical in these types of cases, an anti-harassment policy is window dressing and management employees are either not trained at all as to the policy; or it is the wink, wink training of "don't take it seriously". The transfer of Mrs. Dupont to the undesirable midnight shift is pretty good

evidence of how seriously Speedway treated sexual harassment complaints, even if she did acquiesce to this shift change to get away from Coryell, her harasser. The message to other employees is clear, go ahead and complain, you'll suffer adverse consequences for doing so.

The evidence in this case is that Rosemary Ruben had all the trappings and apparent authority of a manager, and that she in fact exercised management authority over Mrs. Dupont. The list is long. 1) She had the title Assistant Manager. 2) She could and did call in employees to work. 3) She assigned employees to duties when she was in charge of a shift. 4) She acted for the Store Manger when he was absent. 5) She helped establish schedules for employees. 6) She made bank deposits. 7) She had the keys to the store and to the Manager's Office within the store. 8) She told Mrs. Dupont she would fire her if she left when she called Coryell into work. 9) She took inventory. 10) In her position she had responsibility to report sexual harassment. It is clear Ms. Ruben was the representative of the employer in the absence of the Store Manager, and she was much more than a lead worker as Petitioner maintains.

A number of courts have looked at the issue. In *Swinon v. Potomac Corporation*, 270 F.3d 794, 804 (9th Cir. 2001), a race discrimination case under Title VII, the court stated the applicable standard :

> First, an employee is a member of management if a "supervisor possessing substantial authority and discretion to make decisions concerning the terms of the harasser's or harassee's employment, such as authority to counsel, investigate, suspend, or fire the accused harasser, or to change the conditions of the harassee's employment. Second, a supervisor who lacks such authority is nonetheless classified as "management" if he "has an official or strong de facto duty to act as a conduit to management for complaints about work conditions.
> ….
> "An official's knowledge will be imputed to an employer when: "…(B) the official is charged with a duty to act on the knowledge [of harassment] and stop the harassment; or (C) the official is charged with a duty to inform the company of the harassment." (quoting *Torres v. Pisano,* 116 F.3d 625, 636-37 (2d Cir. 1997)

The evidence in this case shows that even when the Store Manager took action, it was totally ineffectual, because Mrs. Dupont was harassed on the change of shifts, and then he shortly rescinded his own alleged remedial action. Mrs. Dupont was left to endure harassment at the change of shifts with her harasser, then the harasser was ordered into work while she was working, she was left alone in the store with him and was told she'd be fired if she left work, and finally she was rescheduled to work with the harasser. It's simply a mockery to consider this set of facts as prompt, effective remedial action to protect a victim of sexual harassment in the workplace.

A finding of sexual harassment includes determining that it altered the terms and conditions of employment. All the acts to which she was subjected satisfy this element, and as the record reflects she was placed in fear of bodily harm from her harasser. Defendant relies heavily on cases in which the Eleventh Circuit found insufficient severity or pervasiveness. But those cases rest upon facts not comparable to the egregiousness of the events in the present case. *See e.g., Mendoza v. Borden*, 195 F.3d 1238 (11th Cir. 1999); *Gutpa v. Florida Board of Regents*, 212 F.3d 571 (11th Cir. 2000). The facts in those cases involved only one isolated instance of minor and ambiguous touching, and were not done in conjunction with other violent acts in a continuous barrage of sexual statements and behavior as the facts in this case indicate occurred. Despite what Defendant has asserted to this Court, the law in the Federal Eleventh Circuit does not require an outrageous sequence of events before enough severity or pervasiveness will be found to qualify for a Title VII violation. It is simply in error to cite to Mendoza and Gupta for such a proposition. The Eleventh Circuit cautioned against reading those two cases in that way. See, *Johnson v. Booker T. Washington Broadcast Service, Inc.*, 234 F.3d 501, 509 (11th Cir. 2000) (unwanted massages, standing close enough to touch plaintiff, offender pulling pants tight enough to show imprint of his private parts, roughly fifteen incidents over four

months meets the test). The *Johnson* court called attention to *Dees v. Johnson Controls World Services, Inc.*, 168 F.3d 417, 418 (11th Cir. 1999) ("continuous barrage of sexual harassment"), as a more accurate example of the circuit's treatment of cases involving more than the comparatively minor transgressions of *Mendoza* or *Gupta*. The *Johnson* court cautioned defendants not to compare real sexual harassment cases with *Mendoza* and *Gupta* where there were "fewer instances of less objectionable conduct over longer periods of time." *Johnson* 234 F.3d at 509. The controlling U.S. Supreme Court authority on which all of the foregoing cases are founded (and by which they are controlled) defines the issue in terms especially apt for this case:

> Title VII comes into play **before the harassing conduct leads to a nervous breakdown.** A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. **Moreover, even without regard to these tangible effects**, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's rule of workplace equality.

Harris v. Forklift Systems, Inc., 510 U.S. 17, 22 (1993) (emphasis added).

A survey of sexual harassment cases is instructive in how various courts have analyzed the facts which have come before them.

"… to constitute impermissible discrimination, the offensive conduct is not necessarily required to include sexual overtones in every instance or that each incident be sufficiently severe to detrimentally affect a female employee." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3rd Cir. 1990). "Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988); "A realistic picture of the work environment is not obtained by viewing each incident in isolation." *Dey v. Colt Construction & Development Co.*, 28 F.3d 1446, 1456 (7th Cir. 1994). "A holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes." *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1524 (M.D. Fla. 1991) and *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) ("harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex"). *Russell v. KSL Hotel Corp*., 887 So. 2d

372, 378 (3rd DCA 2004) "when analyzing the sexual harassment issue, the trial court should have guided itself with the rule that sexual harassment conduct includes conduct that is not clearly sexual in nature."

Finally, Mrs. Dupont suffered the ultimate alteration of the terms and conditions of her employment when she was constructively discharged as a result of the Defendant assigning her again to work the same shift as her harasser, and in telling her she would be assigned to work with him in the future. The law is clear that an employer who knowingly permits a tangible job detriment to occur to a victim of sexual harassment is liable and no further analysis is required of the facts to establish liability of the employer. While typically applied in a case of supervisor harassment, there is no reason the same rationale should not apply when the employer instead of taking prompt effective remedial action when it learns of non-supervisor sexual harassment causes an adverse tangible employment action to be taken against the employee, such as in this case. Federal case law has recognized that an employer creates a tangible adverse employment action when it furthers the proximity of the harasser to his victim, or threatens the employee with continued exposure to harassment, as in this case, resulting in the constructive discharge of the employee. *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 753-54, 118 S. Ct. 2257, 2265, 141 L.Ed. 2d 633 (1988);

Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 512 (11th Cir. 2000). A decision from the Middle District of Florida is instructive.

> Defendant City continues in its analysis of Faragher by explaining that to insure that Title VII does not become a "general civility code," the Supreme Court held that the Act does not prohibit simple teasing offhand comments, isolated benign incidents or innocuous differences in the ways men and women interact with the same or opposite sex. Id.
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> However, Defendant City neglects to mention that in the continuation of the Supreme Court's opinion in Faragher, the Court further explains "that while indicating the substantive contours of the hostile [*1123] work environment forbidden by Title VII, our cases have established few definite rules [**11] for determining when an employer will be liable for a discriminatory action otherwise actionably abusive." 118 S. Ct. at 2284. There have been a myriad of cases in which the District Courts and Courts of Appeal have held employers liable on account of actual knowledge by the employer of sufficiently harassing knowledge by subordinates, which employers have done nothing to stop. Id. In such instances, the combined knowledge and inaction may be seen as demonstrable negligence, or as the employer's adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy. Faragher at 2284, quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201 (1998).
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> *Mortenson v. City of Oldsmar*, 54 F. Supp. 2d 1118, 1122-1123 (D. Fla., 1999).

CONCLUSION

Respondent respectfully requests that this Court affirm the jury's verdict and the *en banc* decision of the Fifth District Court of Appeals. The Fifth District opinion is a well reasoned opinion which correctly analyzes the area of sexual harassment under federal law and correctly applies it to the Florida Civil Rights Act. The Florida Civil Rights Act, Section 760.01 (3), contains the legislative mandate that it "… shall be liberally construed to further the general purposes stated in this section…." Those general purposes include in Section 2, "… to secure for all individuals within the state freedom from discrimination because of … sex ... and thereby to protect their interest in personal dignity…." This Court has recognized that:

> Like Title VII, chapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature.
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> *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000); *Woodham v. Blue Cross & Blue Shield of Fla. Inc.*, 829 So.2d 891 (Fla. 2202); *Maggio v. Fla. DOL & Empl. Sec.*, 899 So.2d 1074 (Fla. 2005)

Looking to federal decisions for guidance on what is or is not considered sexual harassment does not mean changing long standing Florida law that juries decide questions of fact. It is critical to a proper analysis of

these cases to recognize that the federal summary judgment standard has not been adopted by the Florida Supreme Court. *Green v. CSX Transportation, Inc.*, 626 So.2d 974 (Fla. 1st DCA 1993). Florida still believes that a jury is best qualified to resolve factual issues.

Respectfully submitted,

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By:_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 7 copies of the foregoing have been filed with the Clerk of Court, and an electronic version has been provided, and a copy been furnished by Express Mail to Petitioner/Defendant, c/o Susan Potter Norton, Esq., Allen, Norton & Blue, P.A., 121 Majorca Ave., Suite 300, Coral Gables, FL 33134 on this ___2nd____ day of November, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements as set forth in Fla. R. App. P. 9.210(a)(2).

(s) Wayne L. Allen
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