SUPREME COURT OF FLORIDA

NO. SC-06-1617

SPEEDWAY SUPERAMERICA,
Petitioner/Defendant,

vs.

ERMA DUPONT,
Respondent/Plaintiff.

Petition Seeking Discretionary Review
Of a Decision of the Fifth District Court of Appeal
Certifying a Question of Great Public Importance
(5th DCA Case No. 04-14)

PETITIONER'S INITIAL BRIEF

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I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, DISPOSITION IN THE LOWER TRIBUNAL AND CERTIFICATION OF A QUESTION OF GREAT PUBLIC IMPORTANCE

On March 9, 1999, Erma Dupont ("Dupont") filed her amended complaint in this case asserting that Speedway SuperAmerica LLC ("Speedway") violated the Florida Civil Rights Act, § 760.01 *et seq.*, Fla. Stat. (1997) ("FCRA"), as a consequence of being subjected to a sexually hostile working environment by co-worker Joel Coryell ("Coryell"). (Vol. I, pp. 39-45).

A jury trial was held on August 25-29, 2003, before the Honorable Judge John Dean Moxley. (Vols. XIII-XVII). Speedway moved for directed verdict as to Dupont's sexual harassment claim at the close of her case-in-chief and again prior to submission of the case to the jury, both of which were denied by the trial court.[1] (Vol. XVI, pp. 504-17). The jury found in Dupont's favor on her sexual harassment claim, awarding $88.80 in backpay, $40,000 in compensatory damages and $40,000 in punitive damages. (Vol. VIII, pp. 1067-69; Vol. XVI, pp. 812-15).

Speedway timely appealed the denial of its directed verdict motions to the Fifth District Court of Appeal. The District Court panel unanimously reversed the trial court, holding that the evidence, viewed in the light most favorable to Dupont,

[1] The trial court granted Speedway's directed verdict motion as to Dupont's retaliation claim. (Vol. XVI, pp. 515-16). Dupont has not challenged this ruling on appeal. The trial court also denied Speedway's post-trial motions renewing its directed verdict arguments. (Vol. VIII, pp. 1134-44, 1152-58, 1161-63).

did not establish that Coryell's conduct toward Dupont was sufficiently severe or pervasive to constitute actionable sexual harassment. *Speedway SuperAmerica LLC v. Dupont*, 30 Fla. L. Weekly D1641, 2005 WL 1537247 (July 1, 2005).

Thereafter, Dupont sought rehearing, rehearing *en banc* and certification of the issue. The full Fifth District Court of Appeal granted rehearing *en banc*,[2] withdrew the panel decision, affirmed the trial court's ruling and reinstated the jury verdict in its entirety. *Speedway SuperAmerica LLC v. Dupont*, 933 So. 2d 75 (2006) (as corrected). Dissenting, Judge Thompson authored a comprehensive 27-page decision supporting the propriety of the panel's initial decision.

In reaching its conclusion, the *en banc* court held that Dupont had introduced sufficient competent evidence to permit the jury to find that she had been subjected to severe and pervasive harassment on the basis of her sex. The court further held that Dupont satisfied the requirement that the harassment be "based on sex" by testifying that "she perceived Coryell's remarks, jokes, and physical touching as sexual and that his demeaning and intimidating actions were directed at her because she was female." *Speedway*, 933 So. 2d at 85. The Court also noted that "[h]is verbal abuse confirmed that he both lusted after females and

[2] As the Court is aware, rehearing *en banc* may only be ordered where the District Court determines the case is of exceptional importance or is necessary to maintain uniformity of the its decisions. Fla. R. App. P. 9.331(a). As the District did not grant rehearing to resolve a conflict in its decisions, it necessarily found that this case was of exceptional importance.

enjoyed demeaning them," notwithstanding the fact that the evidence introduced at trial indicated that Coryell was verbally indignant toward both males and females. *Speedway*, 933 So. 2d at 85.

Lastly, the *en banc* court also upheld the award of punitive damages against Speedway, but noted that "it is not clear what the standard is for punitive damages awarded under section 760.10." *Speedway*, 933 So. 2d at 90. The court stated that it might well be that *Mercury Motors Express, Inc. v. Smith*, 393 So. 2d 545 (Fla. 1981), controls. *Id*. However, since the standard in *Mercury Motors* would necessarily result in punitive damages being properly assessed in every harassment case, the court noted that a showing of "willful and wanton behavior" on the part of the employer might be required. *Speedway*, 933 So. 2d at 90. The court sustained the award but, characterizing it as a "close case," sought guidance from this Court by certifying the following question of great public importance:

> DOES THE RULE ANNOUNCED IN *MERCURY MOTORS EXPRESS, INC. v. SMITH*, 393 So.2d 545 (FLA. 1981), UNDER WHICH AN EMPLOYER CAN BE HELD VICARIOUSLY LIABLE FOR PUNITIVE DAMAGES BASED UPON THE WILLFUL AND WANTON CONDUCT OF ITS EMPLOYEE, APPLY TO PUNITIVE DAMAGE AWARDS UNDER SECTION 760.11(5), FLORIDA STATUTES?

Thereafter, Speedway requested that the District Court also certify the additional issues ruled upon by the *en banc* court, including the type of conduct that constitutes severe and pervasive harassment under the FCRA, whether non-

sexual conduct directed toward both males and females could constitute harassment based on sex for purposes of the FCRA and whether an hourly lead worker is properly considered a supervisor under the FCRA. The District Court declined to certify the additional issues as being of great public importance, notwithstanding that it had determined that the case was of exceptional importance in electing to rehear the matter *en banc.*

Although the District Court refused to certify these issues, Speedway respectfully requests that, in addition to addressing the certified question with regard to the punitive damages issue, this Court also review the issues mentioned above as the Court's interpretation is necessary not only to support any award of punitive damages in this case but are also necessary to provide guidance to employers confronted with the task of complying with both state and federal laws prohibiting sexual harassment.[3] Further, this Court has never had occasion to pass upon the substantive standards imposed by the FCRA in cases involving allegations of sexual harassment. The present case involves many of the issues common to claims of sexual harassment under the FCRA and, as such, provides an

[3] To the extent that this Court has jurisdiction to review the certified question, the Court may also exercise its discretion to review any issues raised and briefed during the appellate process, which it has done on a number of occasions. *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982); *State Farm Mutual Automobile Insurance Co. v. Nichols*, 932 So. 2d 1067, 1078 (Fla. 2006); *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 563 (Fla. 2005). The Court may elect to exercise its discretion even where the District Court declines to certify the additional issues. *See e.g., State v. Herny*, 781 So. 2d 1067, 1068 (Fla. 2001).

appropriate vehicle for this Court to provide definitive guidance concerning the application of the FCRA.

Importantly, the District Court in this case specifically agreed with Speedway that a number of federal cases (including the Eleventh Circuit's *en banc* decision in *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (*en banc*), *cert. denied*, 529 U.S. 1068, 120 S.Ct. 1624, 146 L.Ed.2d 483 (2000)) have rejected sexual harassment claims based upon greater evidence than was presented in this case. Notwithstanding this observation and despite the fact that Florida courts have repeatedly instructed that the FCRA should be construed in a manner consistent with Title VII and its interpretive federal case law,[4] the District Court found that Dupont had presented sufficient evidence to support the jury's verdict.

The practical effect of the Court's decision in this respect is that Florida employers are now held to differing legal standards when applying federal and state anti-harassment statutes, a result inconsistent with the well-settled principle that state and federal discrimination statutes be construed in a like manner. As conceded by Dupont's counsel before the District Court, the result in this case

[4]Since the FCRA was patterned after the federal anti-discrimination and anti-harassment statutes, Florida courts apply federal precedent in interpreting the FCRA insofar as the construction is not inharmonious with the FCRA's spirit and policy. *Natson v. Eckerd Corp., Inc.*, 885 So. 2d 945, 947 (Fla. 4th DCA 2004); *Russell v. KSL Hotel Corp.*, 887 So. 2d 372, 377 (Fla. 3d DCA 2004); *Castleberry v. Edward M. Chadbourne, Inc.*, 810 So. 2d 1028, 1030, n.3 (Fla. 2d DCA 2002) (*per curiam*).

would be that liability would not attach were the matter tried under Title VII while it would attach under the FCRA. (See Dupont's Motion for Rehearing, Rehearing *En Banc* and for Certification). Until the District Court's *en banc* decision in this case, Florida courts have never sanctioned different interpretations of state and federal discrimination statutes except in cases where, unlike here, the language or procedures of the statutes differ.

The District Court's decision lowers the bar of actionable conduct to now encompass merely uncomfortable or bothersome conduct, conduct far below that recognized by federal precedent binding upon Florida employers. *See e.g.*, *Mendoza*, 195 F.3d at 1251 ("Were we to conclude that the conduct established by Mendoza was sufficiently severe or pervasive to alter her terms or conditions of employment, we would establish a baseline of actionable conduct that is far below that established by other circuits"). Lastly, as any award of punitive damages necessarily depends upon the proper imposition of liability in the first place, this Court's review of the underlying liability issue could also impact the Court's determination as to the propriety of the punitive damages award. Since the punitive damages issue has been certified by the District Court, this Court should review not only that issue but also the underlying finding of liability necessary to support any punitive damages award. For these reasons, Speedway requests that

the Court review both the certified punitive damages question and the underlying imposition of liability in this case.

II. STATEMENT OF FACTS

A. Background

Dupont began working for Speedway as a cashier on approximately September 8, 1996. (Vol. XIV, pp. 210, 232). Until the end of February 1997, Dupont worked the third shift between 11:00 p.m. and 7:00 a.m. (Vol. XIV, pp. 206-207, 215). While working the third shift, Dupont did not work alongside any other co-workers. (Vol. XIV, p. 215). In late February, Dupont was reassigned to the second shift and scheduled to work between 3:00 p.m. and 11:00 p.m. (Vol. XIV, pp. 207, 215).

In March 1997, she began working with Coryell on a couple of occasions per week. (Vol. XIV, p. 216). The store manager during this period of time was Larry Gelbert. (Vol. XV, pp. 339, 381). Rosie Reuben was the assistant manager at the time. (Vol. XIV, p. 232; Vol. XV, pp. 337, 339).

Although she testified that she did not read it, Dupont did confirm that she understood that Speedway had a policy prohibiting sexual harassment and that she must report improper conduct to a supervisor. (Vol. XIV, pp. 254, 270, 304, 313). In actuality, Speedway did indeed maintain an anti-harassment policy, which was posted on the store bulletin board located alongside the beverage machines which

Dupont cleaned on a daily basis. (Vol. XIV, p. 272; Vol. XVI, p. 525). In addition to maintaining a policy prohibiting harassment, Speedway's normal practice is to apprise newly hired employees of its anti-harassment policy and 1-800 reporting hotline. (Vol. XV, pp. 365-366; Vol. XVI, p. 525). Speedway also provided equal employment opportunity and anti-harassment training for all of its managers. (Vol. XV, pp. 365-366, 382-383, 409).

At any given point, the Speedway store at issue in this case employed approximately nine employees, most of them part time, to operate three shifts per day, seven days per week. (Vol. XV, pp. 426-427; Vol. XVI, pp. 524, 544, 583).

B. Plaintiff's Interactions With Coryell

Upon being transferred to work on the second shift, Dupont testified that she experienced issues with Coryell over the course of eight to nine weeks which made her uncomfortable. (Vol. XIV, pp. 217, 221).

Initially, Dupont testified that Coryell tried to complement her but that it made her feel uncomfortable. (Vol. XIV, pp. 216-217). On one occasion, he told her that she would "look good as a biker chick" and that she "looked hot" in her Speedway uniform vest. (Vol. XIV, p. 223). Her response at that time was to simply ignore him. (Vol. XIV, pp. 217, 230). On one other occasion he commented about his sex life and that he needed a girlfriend. (Vol. XIV, pp. 218,

301). On other occasions, he made crude comments about female customers, such as "wasn't that nice, wish I could get some of that." (Vol. XIV, p. 223).

Dupont testified that Coryell often also exhibited an angry temper and routinely used profanity. (Vol. XIV, pp. 218-219, 221-222). In this respect, he often used the phrase "god damn" and also "liked to call people stupid bitch or simple son of a bitch, dumb bastard," phrases which Dupont admitted were not derogatory terms toward women. (Vol. XIV, pp. 221-222, 285). On occasion, he called her a "stupid bitch" or "dumb blonde"[5] when she was slow counting the safe or her count did not match his. (Vol. XIV, pp. 222, 224-225, 230).

Coryell also regularly threw or slammed objects such as pens, pencils, clothes pins, cigarettes and keys. (Vol. XIV, pp. 218-220). Although Dupont admits that Coryell did not target her when he indiscriminately threw objects, at times they would land in her vicinity. (Vol. XIV, pp. 219-220, 279, 286-287, 318). Referring to his behavior and temper in this respect, Dupont testified that she subjectively believed that "[h]e was just the most violent person I ever saw in my life" and that "[h]e scared me to death." (Vol. XIV, pp. 217, 319).

Dupont also testified that Coryell often stood over her as she knelt down to count the floor safe "like he was trying to watch me count it." (Vol. XIV, pp. 218, 228).

[5] At trial, Dupont conceded that she was not naturally blonde. (Vol. XIV, p. 295).

On two occasions as Dupont stood at the register, Coryell came up behind her and touched her. (Vol. XIV, pp. 217-218). On one such occasion, he massaged her neck and shoulders. (Vol. XIV, pp. 298, 322). On the other occasion (which occurred in late April), as Coryell walked by her, he patted her on the buttocks and kept walking. (Vol. XIV, pp. 218, 222, 255, 299). Lastly, on one occasion in late April, as Coryell came around a corner he grabbed Dupont's wrist and pulled her toward him, although their bodies did not touch. (Vol. XIV, pp. 245, 300).

C. Plaintiff's Complaints Concerning Coryell's Conduct

Dupont asserts that the first time she mentioned Coryell's conduct to anyone at Speedway was the Sunday between the third and fourth weeks of March, 1997 (which was about two weeks after the conduct started) when she told Reuben about the "dumb blonde" comment Coryell made while she was counting the safe. (Vol. XIV, pp. 225, 240-241; Vol. XV, pp. 340-341). Between March 20, 1997 and April 9, 1997, Dupont and Coryell only worked one shift together. (Vol. XVII, Def. Ex. 1, pp. 75, 81-82, 92-93).

Shortly thereafter, during the week of April 4-11, 1997 and following the incident where Coryell massaged her neck and shoulders and brushed against her while walking by, Dupont decided to discuss Coryell's conduct with the store manager. (Vol. XIV, pp. 230-231, 241, 254-255). As Gelbert was in Ohio during

that week for training, Dupont discussed it with acting manager Barbara Bresner. (Vol. XIV, p. 230; Vol. XV, pp. 361, 381, 409). At that time, she informed Bresner what was occurring and that she was fearful of Coryell. (Vol. XIV, p. 230; Vol. XV, p. 362). In response, Bresner notified district manager Julie Rambo. (Vol. XIV, p. 231; Vol. XV, p. 363-364; Vol. XVI, pp. 520, 527-528).

Toward the end of April to beginning of May and approximately two weeks after she discussed it with Bresner, Dupont also discussed Coryell's conduct with Gelbert. (Vol XIV, pp. 241, 255; Vol. XV, p. 387). When she discussed the matter with Gelbert, she told him everything that had occurred between her and Coryell and that she was afraid of him. (Vol. XIV, pp. 241-242, 245, 258-259, 296, 319-320; Vol. XV, pp. 387, 410, 421). Notably, at trial Dupont readily admitted that she had not told Reuben or Bresner about the physical conduct, which she only reported Gelbert. (Vol. XIV, p. 258; Vol. XVI, p. 528). Additionally, when she discussed her concerns with Reuben, Bresner and Gelbert, Dupont did not mention the term "sexual harassment." (Vol. XIV, p. 257; Vol. XV, pp. 373, 377).

D. Speedway's Response to Dupont's Concerns and Subsequent Minor Interaction Between Dupont and Coryell

Following her discussion with Bresner, Dupont indicated that Coryell continued to "talk down to [her]," hover over her while she counted the safe and made comments such as "stupid can't count the safe" and "dumb blonde." (Vol.

XIV, pp. 255-257). Dupont admitted, however, that Coryell did not exhibit any anger in these instances. (Vol. XIV, p. 257).

When Dupont discussed the matter with Gelbert, he replied that Coryell's conduct was "unacceptable" and they discussed how the matter could be resolved. (Vol. XIV, p. 242). Specifically, as Dupont readily admits, he accepted her word and "offered that he change the schedule so we wouldn't have to work together and I told him that would be fine." (Vol. XIV, pp. 242, 246, 307-308; Vol. XV, p. 389). Dupont stressed that Gelbert "made every effort" to ensure that they did not have to work the same shift. (Vol. XIV, p. 242).

Indeed, following his discussion with Dupont, Gelbert considered several options to alleviate Dupont's concerns. (Vol. XV, p. 388). To this end, Gelbert testified, "basically, what we did was we put a mitigation plan so that neither one would never [sic] work together on the same shift."[6] (Vol. XV, p. 388). Thereafter, Gelbert adjusted the Dupont's and Coryell's schedules accordingly. (Vol. XV, pp. 388, 395, 422).

Gelbert also instructed Dupont to immediately report any future improper conduct to him. (Vol. XV, p. 390). It is also undisputed that Gelbert counseled Coryell. (Vol. XV, pp. 389, 397, 441).

[6] Similarly, Rambo testified that the "goal was to satisfy Erma [Dupont] and keep them apart as much as possible." (Vol. XVI, p. 552).

Significantly, the evidence is undisputed that, following Dupont's complaint to Bresner which was relayed to Rambo, Speedway took steps at that time to separate the shifts of Dupont and Coryell, effective with the preparation of the next two-week schedule on April 24, 1997. (Vol. XVI, pp. 530, 541, 570-571). Save for the one occasion in late May which precipitated her resignation, Dupont and Coryell were never scheduled to work the same shift after April 24, 1997. (Vol. XVI, pp. 541-542). Furthermore, between April 10, 1997 and April 24, 1997, Dupont and Coryell were only scheduled and worked on the same shift on April 12, 1997. (Vol. XVII, Def. Ex. 1, pp. 95-96, 110, 115, 120, 125).

Following the adjustment to the schedules, Dupont and Coryell only had contact with each other approximately once per week (four times). (Vol. XIV, pp. 243; Vol. XVI, pp. 541-549, 584-585). This typically occurred only when there was a changeover between the shift that Dupont worked to one where Coryell worked. (Vol. XIV, p. 243). The payroll records indicated that the combined amount of time that Dupont and Coryell overlapped after April 24 (and through her resignation in May) amounted to only a few several hours. (Vol. XVI, p. 584).

The first occasion that the payroll records indicate an overlap was for a forty-five minute store meeting attended by all nine store employees. (Vol. XVI, pp. 542-544, 584).

The second occasion occurred on May 3, 1997 where Dupont stayed beyond the end of scheduled 7:00 a.m. to 3:00 p.m. shift by twenty minutes while Coryell began work at 3:00 p.m., resulting in an overlap of twenty minutes. (Vol. XVI, pp. 545-546, 585). Notably, the payroll records also indicated that Reuben, co-worker Jerry Schneider and a Mash Hoagies[7] employee were working in the store at that time as well. (Vol. XVI, pp. 545-546).

On the third occasion, on May 18, Reuben called Coryell in early for his shift because she had to leave to make a deposit at the bank. (Vol. XIV, pp. 246, 308; Vol. XV, p. 345; Vol. XVI, pp. 547, 585). Coryell came in to work forty-five minutes early on that date and Dupont stayed fifty minutes beyond her scheduled quitting time that day, resulting in an overlap of their schedules of one hour and thirty-five minutes. (Vol. XIV, pp. 246; Vol. XVI, pp. 547-548, 553). Notwithstanding the fact that they had to work together for this one hour and thirty-five minutes, Dupont specifically admits that "nothing happened" with Coryell that day. (Vol. XIV, pp. 246, 309). To the contrary, Coryell spent the entire time working in the walk-in cooler and they did not even speak to each other or touch each other. (Vol. XIV, pp. 247, 308; Vol. XV, p. 345).

Lastly, on May 25 the payroll records revealed that Dupont stayed twenty minutes beyond her shift and Coryell clocked in fifteen minutes prior to the start of

[7] Mash Hoagie is a separately-owned and staffed sandwich shop located within the Speedway store.

the third shift he was scheduled to work, resulting in an overlap of thirty-five minutes. (Vol. XVI, pp. 549, 585). Schneider was also working at that time. (Vol. XVI, p. 549).[8]

During these few occasions, Dupont indicated that Coryell still made comments that she was not counting the safe correctly and would also hover behind her while she was counting. (Vol. XIV, p.p. 243-244).

In late May, Dupont became aware that she was scheduled to work one afternoon shift with Coryell. (Vol. XIV, p. 248). When she discussed her desire not to work with Coryell on this shift because of her fear of him, Gelbert told her that "sometimes he couldn't help it" and that she would only have to work that one shift with him. (Vol. XIV, pp. 248-249, 296). In response, Dupont elected to voluntarily resign her employment with Speedway on May 29, 1997. (Vol. XIV, pp. 249, 255, 313; Vol. XV, p. 430). Two days after her resignation, Dupont was hired by another convenience store closer to her residence. (Vol. XIV, p. 260).

After she resigned, she called Speedway's 1-800 hotline for reporting improper harassment and left a message. (Vol. XIV, pp. 311-312). When she was called back, she refused to discuss the matter. (Vol. XIV, p. 311-312).

[8]Despite these four occasions of minor overlap in their shifts, the undisputed evidence indicated that, on several occasions (May 7, 14, 21), Gelbert took steps to shorten Coryell's scheduled shift to avoid even this minor interaction between the two. (Vol. XVI, pp. 550-551).

E. Reuben's Non-Supervisory Status

Even though she held the title of assistant manager, Reuben was an hourly-paid employee who possessed no input into hirings, firings, promotions, demotions, transfers, discipline or schedule preparation. (Vol. XV, pp. 337-338, 384-85). Rather, Reuben's position called for her to merely relay directives from Gelbert. (Vol. XV, pp. 338-339). Essentially, Reuben acted as a lead worker responsible for maintaining the store operation during her shift and while Gelbert was absent. (Vol. XV, pp. 384-385, 403, 408; Vol. XVI, pp. 579-580). While Dupont reported to Gelbert (Vol. XV, p. 339), she was instructed to go to Reuben "with any questions about the store or what was going on." (Vol. XIV, p. 237). For example, Dupont testified that when she worked with Reuben in Gelbert's absence, Reuben directed her to bag ice and stock the cooler and would "just give [her] general instructions on what needed to be done." (Vo. XIV, p. 238).

While Reuben did have the responsibility to receive complaints on behalf of Gelbert when he was not in the store, her responsibility with respect to complaints was to relay them to Gelbert for handling. (Vol. XV, pp. 352, 414).

When Dupont wanted time off, she went to Gelbert. (Vol. XIV, p. 305). When Dupont was given a raise, it was Gelbert that gave it to her. (Vol. XIV, pp. 305-306). Gelbert was also the person that evaluated her work performance. (Vol. XIV, p. 306). As noted above, after she raised concerns about working with

Coryell, it was Gelbert that decided to alter shifts for her and Coryell so that she did not have to work with Coryell on the same shift. (Vol. XIV, p. 306).

SUMMARY OF THE ARGUMENT

In the present case, the District Court's decision upholding Dupont's award of punitive damages is erroneous because the Court failed to apply the correct standard. Neither the Court's standard in *Mercury Motors* (which does not require willful or wanton conduct on the part of the employer), nor the higher standard requiring willful or malicious conduct by the employer, is appropriate for claims based upon the FCRA. Rather, the standard enunciated by the United States Supreme Court in *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (construing Title VII), should be applied to cases arising under the FCRA. The application of the *Kolstad* standard furthers the goals of the FCRA in interpreting federal and state anti-discrimination laws consistently and also recognizes the unique concerns at issue with respect to such claims. Most importantly, the *Kolstad* standard provides a workable standard that balances the remedial purposes of the anti-discrimination laws with the goal of fostering preventive measures taken by employers such as the promulgation of anti-harassment policies and complaint mechanisms. As is patently evident from the facts of this case as applied by the *en banc* District Court, a strict application of either *Mercury Motors* or the more heightened willful or malicious standard would

automatically result in liability for punitive damages in harassment cases since plaintiffs are required to prove that the employer failed to take prompt remedial action in response to harassment as an element of his or her case.

Application of the *Kolstad* standard to the facts of the present case reveal that Dupont's punitive damages award cannot withstand scrutiny. The undisputed facts established that Speedway undertook good faith efforts to prevent and remedy sexual harassment. Speedway enacted a comprehensive anti-harassment policy, it provided training to managerial employees regarding harassment, it promulgated a 1-800 hotline for complaints and it responded to complaints with efforts designed to minimize any future harassment. The District Court's decision wrongly focuses on the outcome of Speedway's remedial measures rather than on the reasonableness of Speedway's decisions. Under the District Court's view of the FCRA, the only means of ensuring that Speedway would not be liable for harassment would be to immediately dismiss the alleged perpetrator, an approach which has not been sanctioned by state or federal precedent. When viewed under the proper standard, Speedway's efforts to limit interaction between Coryell and Dupont were certainly reasonable given Dupont's complaints and the minor interactions between the two following her complaint is insufficient to support liability for sexual harassment in general, let alone an award of punitive damages.

Alternatively, in the event that a willful or maliciousness standard is applicable, the District Court wrongly applied the standard to the facts of this case in a manner which would necessarily result in automatic liability for punitive damages in all sexual harassment cases. If such a standard applies, Dupont should have to demonstrate willful or malicious conduct by the employer over and above that necessary to establish sexual harassment liability generally.

Finally, Speedway also requests that this Court review the District Court's refusal to reverse the Circuit Court's directed verdict denial on Dupont's sexual harassment claim. Speedway contends that the evidence viewed in the light most favorable to Dupont fails to rise to a sufficiently severe or pervasive level to establish actionable harassment.

In seeking to establish actionable harassment, Dupont attempts to bootstrap a few isolated instances involving arguably sexual remarks and a couple of occasions of relatively benign touching to more routine displays of non-sexual, non-gender based anger and profanity. Dupont's attempts in this regard are improper and not in accord with the prevailing case law. Lastly, the evidence also establishes that, once a supervisor became award of Dupont's complaints, prompt remedial measures specifically drawn to address the complained-of conduct were implemented by Speedway. While there was evidence that Coryell and Dupont interacted sparingly after Speedway's implementation of a schedule change, these

occurrences were few and the problems between Coryell and Dupont subsided save for a few verbal comments and an incident where Coryell pulled Dupont's wrist. Viewed under the proper standard for assessing an employer's prompt remedial measures, a directed verdict should have been entered in Speedway's favor.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review for pure questions of law is *de novo*. *D'Angelo v. Fitzmaurice*, 863 So. 2d 311, 314 (Fla. 2003). Further, "[i]f the trial judge, in granting a motion for a directed verdict, fails to apply the correct legal rule, the judge's action is erroneous as a matter of law." *Files v. State*, 613 So. 2d 1301, 1304 (Fla. 1992).

With respect to the denial of a directed verdict, review of the trial court's ruling employs the same test used by the trial court. *Sims v. Cristinzio*, 898 So. 2d 1004, 1006 (Fla. 2d DCA 2005). The facts, and all reasonable inferences drawn from the facts, must be viewed in the light most favorable to the non-moving party. *Goldberg v. Florida Power & Light Co.*, 899 So. 2d 1105, 1110 (Fla. 2005). However, a "motion for directed verdict should be granted when there is no evidence or reasonable inferences upon which a jury could legally predicate a verdict in favor of the nonmoving party." *Wallent v. Florida Power Corp.*, 852 So. 2d 339, 342 (Fla. 2d DCA 2003).

II. THE PUNITIVE DAMAGES AWARD WAS ERRONEOUS

The District Court's affirmance of the punitive damages award in this case was erroneous as the Court applied an incorrect legal standard which would make an award of punitive damages automatic in cases of sexual harassment. Neither the *Mercury Motors* standard or a "willful or wanton behavior by the employer" standard (*Schropp v. Crown Eurocars, Inc.*, 654 So. 2d 1158, 1159-60 (Fla. 1995)) is applicable to cases under the FCRA. Rather, as detailed below, since the FCRA is patterned after Title VII, the FCRA should be interpreted consistent with the federal standard enunciated by the United States Supreme Court in *Kolstad*. Application of that standard to the present case clearly demonstrates that the award of punitive damages in favor of Dupont was unwarranted.

A. The Standard Articulated in *Kolstad*, Rather than the Standard Articulated in *Mercury Motors* Applies to Punitive Awards Under the FCRA

With respect to punitive damages, the provisions of the FCRA simply provide that "[t]he court may also award . . . punitive damages." § 760.11(5), Fla. Stat. Although silent as to the appropriate standard, this provision does incorporate permissive language, an indication that the Florida Legislature did not view punitive damages as mandatory whenever an FCRA violation has been established. *Granados Quinones v. Swiss Bank Corp.*, 509 So. 2d 273, 275 (Fla. 1987); *Kinder v. State*, 779 So. 2d 512, 514 (Fla. 2d DCA 2000) (*per curiam*), *decision approved*

by, 830 So. 2d 832 (Fla. 2002) (citing *Belcher Oil Co. v. Dade County*, 271 So. 2d 118 (Fla. 1972) (Term "shall" is normally used to denote mandatory)).

In *Mercury Motors*, this Court held, in the context of a wrongful death action against an employer for the willful and wanton conduct of its employee, that punitive damages could only be assessed against an employer pursuant to the doctrine of *respondeat superior* upon proof that the employer itself is at fault. 393 So. 2d at 547-48. The Court further held that negligent conduct on the part of the employer, as opposed to willful and wanton conduct, was sufficient to hold the employer punitively liable for its employee's willful and wanton conduct. *Mercury Motors*, 393 So. 2d at 548-49. In so holding, however, the Court specifically rejected the plaintiff's argument that an employer should always be vicariously liable for the willful and wanton conduct of its employees. *Mercury Motors*, 393 So. 2d at 547. The Court further noted that the objective of compensatory damages "is to make the injured party whole" while punitive damages serve as "punishment of the defendant and as a deterrent to others." *Mercury Motors*, 393 So. 2d at 547.

In addition to the standard enunciated in *Mercury Motors*, this Court has alternatively held that punitive damages may also be imposed upon an employer for its own independent willful and malicious actions of its managing agents. *Schropp*, 654 So. 2d at 1159.

With respect to co-worker sexual harassment claims brought under the FCRA, neither of these standards should apply. As is aptly demonstrated by the District Court's *en banc* decision in this case, under either of these common law standards, an employer would automatically be held liable for punitive damages. As detailed below, a prerequisite to establishing liability for compensatory damages on a claim for co-worker sexual harassment is proof that the employer knew or should have known of the harassment and failed to take prompt remedial measures. Such a standard essentially mirrors the employer negligence standard articulated in *Mercury Motors* and would result in imposition of punitive damages in every case where entitlement to compensatory damages has been established. *Kolstad*, 527 U.S. at 540-41 (Discussing cases noting agency principles' limitations on vicarious liability for punitive damages awards).[9]

Further, to the extent that the courts viewed the failure to completely remedy any complaint of harassment as willful conduct, as the District Court did in this case, the direct liability punitive damage standard would also be established in every case where entitlement to compensatory damages has been established.

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[9] The Court in *Castleberry* noted that it would be erroneous to apply Florida common law principles to the FCRA where federal and state precedent provide different standards. *Castleberry*, 810 So. 2d at 1029 (rejecting application of common law *respondeat superior* principles). Similarly, the United States Supreme Court has likewise cautioned against strict application of common law principles to Title VII. *Faragher v. City of Boca Raton*, 524 U.S. 775, 792, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986).

Recognizing this result and the unique circumstances in which discrimination and harassment claims arise, the United States Supreme Court articulated the proper standard for imposing punitive damages under Title VII. *Kolstad*, 527 U.S. 526. In *Kolstad*, the Court held, *inter alia*, that employers may only be held vicariously liable for the discriminatory actions of its managing agents where the employer has not undertaken good faith efforts to comply with Title VII.[10] 527 U.S. at 539-40. Addressing employer liability for punitive damages, the *Kolstad* Court stated:

> Holding employers liable for punitive damages when they engage in good faith efforts to comply with Title VII, however, is in some tension with the very principles underlying common law limitations on vicarious liability for punitive damages—that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously." Where an employer has undertaken such good faith efforts at Title VII compliance, it "demonstrates that it never acted in reckless disregard of federally protected rights."
>
> * * *
>
> [W]e are compelled to modify these principles to avoid undermining the objectives underlying Title VII. Recognizing Title VII as an effort

[10] Punitive damages under Title VII, as amended by the Civil Rights Act of 1991, may only be awarded where the plaintiff "demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(a)(1). The Court noted that this standard focuses on the employer's "state of mind." *Kolstad*, 527 U.S. at 535. To the extent that the analogous "willful or malicious" direct punitive liability theory mentioned in *Schropp* is held to be applicable in this case, that standard should be interpreted consistently with the holding in *Kolstad* for purposes of FCRA claims. As noted by *Kolstad*, the "inquiry does not end with a showing of the requisite 'malice or reckless indifference.'" 527 U.S. at 539.

> to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's "good-faith efforts to comply with Title VII."

Kolstad, 527 U.S. at 544-45 (internal citations omitted); *see also Wilbur v. Correctional Services Corp.*, 393 F.3d 1192, 1205 (11th Cir. 2004), *reh'g en banc denied*, 129 Fed. Appx. 604 (2005) (applying *Kolstad* to sexual harassment claim).

Viewed under this standard, the undisputed evidence established that Speedway had implemented a broad anti-harassment policy, trained its store managers with respect to harassment, posted its policy and complaint procedure on the store bulletin board and initiated a 1-800 hotline for complaints of discrimination. Further, as more fully discussed below, following Dupont's complaint in this matter, Speedway took affirmative steps to remedy her concerns by separating Coryell and Dupont as much as possible on future shifts. Speedway also counseled Coryell regarding the mandates of its anti-harassment policy.

Given this undisputed evidence, even if Dupont establishes that the evidence submitted to the jury was sufficient to sustain her award of back pay and compensatory damages, it is nonetheless insufficient to establish that Speedway did not make good faith efforts to prevent and remedy unlawful harassment. To the contrary, all that Dupont could possibly show is that the reasonable measures

taken by Speedway to remedy her specific complaints did not completely alleviate her concerns as the shifts that she and Coryell worked after her complaint overlapped on a few occasions and she continued to feel uncomfortable because he hovered over her while she counted the safe on these occasions. Even assuming *arguendo* she can establish liability on the part of Speedway from such conduct, this conduct would be insufficient to establish liability for punitive damages.

B. Even Assuming *Arguendo* that Willful or Malicious Conduct by Speedway is the Proper Standard, the Evidence Introduced at Trial Failed to Establish Liability for Punitive Damages

The District Court in this case held that, while a "close case," even if all that is required is willful and wanton behavior on the part of Speedway to sustain a punitive damages award, Dupont nonetheless met this burden by showing that Speedway delayed in taking remedial action, failed to formally investigate Dupont's allegations and elected not to counsel Coryell. A review of this evidence demonstrates that Speedway did not act willfully or wantonly with respect to Dupont's claims of harassment.

First, as noted above, the evidence indicated that Gelbert did verbally counsel Coryell regarding Speedway's harassment policy in response to Dupont's complaint. Second, a formalized investigation of Dupont's claims were unnecessary under the circumstances of this case as the undisputed evidence from both Rambo and Gelbert established that, following Dupont's complaint, they

elected to credit her version of the facts and take remedial action by separating the two employees. Lastly, as detailed more extensively below, Dupont did not unnecessarily delay taking remedial measures in this case, even if viewed from her first discussion with Reuben in late March. From that point forward, Dupont and Coryell were only scheduled to work together for two shifts prior to the date that Gelbert formally decided to separate their schedules. Given the fact that the complaint to Reuben (or the complaint to Bresner and Rambo) did not involve any physical conduct, the short delay in effecting the scheduling change cannot form the basis for the imposition of punitive damages where, as here, Coryell and Dupont were only scheduled to work the same shift on two occasions during that month. As a consequence, Speedway's directed verdict motion as to the punitive damages award should have been granted under any of the above standards.

III. THE CIRCUIT COURT ERRED BY NOT GRANTING SPEEDWAY'S MOTION FOR DIRECTED VERDICT AS THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH ACTIONABLE SEXUAL HARASSMENT

As the punitive damages award cannot stand to the extent that the evidence does not support liability for sexual harassment in the first instance, the Court should review the denial of its directed verdict as to liability generally. *See e.g.*, *Wilbur*, 393 F.3d at 1204-05 (punitive damages award cannot stand where there is no basis for liability). As discussed above, this Court has yet to address the substantive standards imposed by the FCRA in cases of sexual harassment and,

given that the District Court's decision is at odds with federal Title VII precedent binding upon Florida employers, guidance from this Court is especially warranted.

To establish a claim of sexual harassment based upon harassment by a co-worker, a plaintiff must prove: (1) that she is a member of a protected group; (2) that she was subjected to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment was based on her gender; (4) that the harassment was sufficiently severe or pervasive to alter the terms or conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer knew or should have known of the harassment and failed to take prompt remedial action. *Natson*, 885 So. 2d at 947; *Russell*, 887 So. 2d at 377-78; *Castleberry*, 810 So. 2d 1029-30; *Mendoza*, 195 F.3d at 1245; *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889, n.3 (11th Cir. 2000).

Importantly, as the United States Supreme Court has repeatedly made clear, the anti-harassment laws should not be construed as creating a general "civility code" for the workplace. *Faragher*, 524 U.S. at 788 ("A recurring point in these opinions is that 'simple teasing,' offhand comments or other isolated incidents (unless extremely serious) will not amount to discriminatory changes in 'terms or conditions of employment'"); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) ("We have never held that

workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations"); *Meritor*, 477 U.S. at 67 ("[N]ot all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII"); *Mendoza*, 195 F.3d at 1245.

To this end, the *Faragher* Court further noted, "ordinary tribulations of the workplace, such as sporadic use of abusive language, gender-related jokes, and occasional teasing" cannot form the basis of a claim for actionable harassment. *Faragher*, 524 U.S. at 788. Rather, "conduct must be *extreme* to amount to a change in terms and conditions of employment[.]" *Faragher*, 524 U.S. at 788 (emphasis supplied). The *Oncale* Court instructs that the goal of preventing Title VII from becoming a "general civility code for the American workplace" is properly achieved by "careful attention to the requirements of the statute." *Oncale*, 523 U.S. at 80.

In the present case, a review of the evidence in the light most favorable to Dupont reveals that she was not subjected to actionable sexual harassment as the evidence fails to establish that the complained-of conduct was severe or pervasive or that Speedway failed to promptly remedy the harassment.

A. The Evidence Introduced at Trial Did Not Establish that Dupont was Subjected to Harassment that was Sufficiently Severe or Pervasive to be Actionable Under the FCRA

"Establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component."[11] *Mendoza*, 195 F.3d at 1246 (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)); *Faragher*, 524 U.S. at 787. In assessing this element, the courts look to the totality of the circumstances and review the frequency of the conduct, the severity of the conduct, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether it interferes with work performance. *Faragher*, 524 U.S. at 787-88; *Harris*, 510 U.S. at 23; *Mendoza*, 195 F.3d at 1246.

1. Non-Sexual Conduct Which is Not Based Upon Gender Cannot Form the Basis for of a Claim for Sexual Harassment

In assessing whether the harassment is sufficiently severe and pervasive, courts have been careful to delineate between actionable harassment and harassment unconnected to a protected category. In the present case, Dupont attempts to bootstrap her meager evidence of arguably sexual conduct, consisting only of a couple of comments and an ambiguous episode where Coryell brushes against her or pats her behind while walking passed, by introducing evidence of

[11] In this case, Speedway does not contest that Dupont subjectively believed the harassment was severe and pervasive.

more frequent outbursts by Coryell where he uses profanity and throws objects indiscriminately about the store. While such behavior may be boorish, it cannot properly be relied upon to establish actionable sexual harassment.

The Eleventh Circuit has held that Title VII "is not a shield against harsh treatment in the workplace." *Succar v. Dade County School Bd.*, 229 F.3d 1343, 1345 (11th Cir. 2000) (quoting *McCollum v. Bolger*, 794 F.2d 602, 610 (11th Cir. 1986), *cert. denied*, 479 U.S. 1034, 107 S.Ct. 883, 93 L.Ed.2d 836 (1987)). "Personal animosity is not the equivalent of sex discrimination." *Succar*, 229 F.3d at 1345 (quoting *McCollum*, 794 F.2d at 610).

The Court in *Oncale* noted that non-sexual conduct may constitute sexual harassment where the plaintiff proves that she "is harassed in such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace" or by proving that women are subjected to harassing conduct while men are not. *Oncale*, 523 U.S. at 80-81. However, "[w]hatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of . . . sex.'" *Oncale*, 523 U.S. at 81.

In this case, no interpretation of the evidence can establish that Coryell's conduct in throwing objects around the store, cursing at customers and fellow

employees, standing over her watching her count the safe and making rude and demeaning comments when he felt she failed to count it properly constituted evidence of sexual harassment. Dupont specifically admitted that Coryell did not direct his anger solely at her or even at females generally. Rather, she admitted that he regularly used profanity which was not derogatory toward women. None of this evidence falls within the ambit of "sex-specific and derogatory terms as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace."

The Eleventh Circuit's decision in *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 584-85, *reh'g and suggestion for reh'g en banc denied*, 229 F.3d 1171 (11th Cir. 2000), *cert. denied*, 531 U.S. 1076, 121 S.Ct. 772, 148 L.Ed.2d 671 (2001), presents the identical issue. In that case, the Court overturned a verdict in favor of the plaintiff as to her sexual harassment claim. Notably, the plaintiff in *Gupta* sought to buttress her evidence of sexual conduct with evidence of non-sexual, non-gender related conduct in an attempt to establish that the harassment was more severe and pervasive than it actually was. Responding directly to the plaintiff's argument, the Court held:

> Although we examine the statements and conduct complained of collectively to determine whether they were sufficiently pervasive or severe to constitute sexual harassment, the statements and conduct must be of a sexual or gender-related nature-"sexual advances, requests for sexual favors, [or] conduct of a sexual nature," before they are considered in determining whether the severe or pervasive

> requirement is met. Innocuous statements or conduct, or boorish ones that do not relate to the sex of the actor or of the offended party (the plaintiff), are not counted. Title VII, as it has been aptly observed, is not a "general civility code."
>
> Gupta complains of several things that no reasonable person would consider to be of a gender-related or sexual nature. For example, she complains that Rhodd told her to steer clear of certain faculty members because they were evil and racist. Those statements merit no mention in a discussion of sexual harassment, except perhaps to serve as a clear example of what it is not.
>
> Gupta also complains that Rhodd assisted her with the move to Fort Lauderdale by helping her find a place to live and to find inexpensive furniture. She also criticizes him for telling her to come and see him if there was anything he could do for her. Mere solicitude, even if repetitive, is not sexually harassing behavior.
>
> Another matter Gupta complains about that is either not sexual in nature, or insufficiently so to be due any real weight, is that Rhodd suggested he, Gupta, and Neela Manage go to lunch at a Hooters restaurant a few hours after she arrived for her interview with the University. Gupta may have been offended by that suggestion, and apparently was, but we do not think that a reasonable person would have thought that such an invitation, unaccompanied by any sexual remark and not pressed when it was declined, was necessarily based on the sex of the invitees or was a sexual comment or suggestion of any kind. The same is true of Rhodd and Sarah Ransdell taking Gupta to dinner at Mango's [and] Shooter's, places which Gupta described as bars. *Gupta*, 212 F.3d at 583-84.

The Eleventh Circuit recently reiterated the principle that non-sexual harassment not taken against a plaintiff because of his or her gender cannot be considered when assessing whether the harassment is actionable. *Menefee v. Montgomery County Bd. of Educ.*, 137 Fed. Appx. 232, 233, 2005 WL 1444211 (11th Cir. 2005). In *Menefee*, the plaintiff alleged that a female co-worker sexually

harassed him by hiding in his classroom and "throwing her forearm" into him as he passed, by standing in the doorway of his classroom to prevent him from leaving, and by stopping him, laughing and telling him that "the school was hers." Rejecting this evidence, the Court held:

> [H]e failed to show that the acts that occurred in April 2002 could be considered to have a sexual or gender-related nature. On their face, they do not appear to be sexual in nature, and he provided no evidence, other than conclusory allegations, to support the proposition that the April 2002 conduct was based on his gender. *Menefee*, 137 Fed. Appx. at 233-34.

Similarly, the decision in *Brill v. Lante Corp.*, 119 F.3d 1266, 1274 (7th Cir. 1997), cited approvingly by *Mendoza*, is instructive. In that case, the plaintiff sought to buttress her sexual harassment claim by relying upon evidence that a supervisor shared his religious view opposing premarital sex (the plaintiff was pregnant and unmarried) and evidence that another manager "towered" over her. Rejecting this evidence as being indicative of sexual harassment, the Court held that "Brill's attempts to buttress her claim with additional incidents—one manager telling her he disapproved of premarital sex and another yelling at her while 'towering' over her—do not appear to have anything to do with her sex, and for that matter are not particularly sexual in nature, either." *Brill*, 119 F.3d at 1274; *see also Mendoza*, 195 F.3d at 1247-48 (expressing doubt that conduct such as innocuous comments and following or staring could properly be considered sexual harassment); *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 976 (7th Cir.

2004) (rejecting as evidence of sexual harassment vulgar and crude conduct where offenders treated both genders poorly and other evidence of workplace difficulties were not based upon sex); *Racicot v. Wal-Mart Stores, Inc.*, 414 F.3d 675, 676-77 (7th Cir. 2005) (rejecting sexual harassment claim based upon conduct such as plaintiff being called a "son of a bitch," being subjected to profanity in her presence, interference with her work performance); *Dunlap v. Kansas Dept. of Health and Environment*, 127 Fed. Appx. 433, 436, 2005 WL 737585, **4 (10th Cir. 2005) (disregarding harassment not based upon protected category in deciding severity or pervasiveness element); *Nievaard v. City of Ann Arbor*, 124 Fed. Appx. 948, 954, 2005 WL 517294, **5-**6 (6th Cir. 2005) (harassment not based upon a protected category "can not be figured 'into the hostile working environment equation,' because such incidents are not alleged to have occurred 'because of sex.' Therefore they cannot be considered[.]"); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 464 (6th Cir. 2000) ("[W]hile Bowman recites a litany of perceived slights and abuses, many of the alleged harassing acts cannot be considered in the hostile environment analysis because Bowman has not shown that the alleged harassment was based upon his status as a male").

In this case, when viewed under the standards articulated above, Dupont's allegations concerning Coryell's conduct do not rise to the level of severe and pervasive harassment. In particular, Dupont indicated that she observed Coryell

become very angry at times and slam or throw things and use profanity toward customers and toward her. Dupont also contends that on one occasion Coryell commented that she looked hot in her vest and would look good as a biker chick. He commented about his sex life on one occasion and stated he needed a girlfriend, while on other occasions he made comments about female customers such as "wasn't that nice, wish I could get some of that." Lastly, on three occasions Coryell touched her—once by grabbing her wrist, once by massaging her neck and shoulders and once by patting her buttocks as he walked past her while she was standing at the counter.

As Coryell's conduct in exhibiting non-sexual, non-gender based anger and hovering over her as she counted the safe are properly excluded from the severe or pervasive inquiry, it is clear that even the few arguably gender-related comments and isolated instance of brushing against her buttocks while passing by are insufficient to support a jury verdict. These actions certainly did not constitute extreme conduct necessary to support a claim under Title VII or the FCRA as they were neither frequent nor severe and did not involve threatening conduct.

The Eleventh Circuit's *en banc* decision in *Mendoza* is perhaps most instructive. In that case, the full Eleventh Circuit rejected a claim of sexual harassment with more egregious facts than those presented here. In particular, in *Mendoza*, the plaintiff introduced evidence that her supervisor constantly watched

her and followed her around, constantly looked her up and down in a "very obvious fashion," on two occasions looked her up and down and stopped in her groin area and made a "sniffing" motion, commented that he was "getting fired up," made a sniffing motion on an additional occasion while not looking at her groin and, on one occasion, rubbed his hip against her while touching her shoulder and smiling. *Mendoza*, 195 F.3d at 1242-43. After a thorough discussion of precedent from around the country, the Court found that these facts were not sufficiently severe or pervasive so as to alter the terms or conditions of the plaintiff's employment and, as such, the Court affirmed the trial court's grant of judgment as a matter of law to the employer. *Id*.[12]

As in *Mendoza*, Dupont attempts to establish a claim of harassment based upon isolated incidents of arguably sexual compliments and isolated instances of relatively innocuous physical contact. While inexcusable, Coryell's conduct is insufficient to establish liability for harassment on Speedway's part.

In finding that there was sufficient evidence to support the verdict, the District Court in this case heavily relied upon the fact that Dupont "perceived" Coryell's conduct as sexual and as being directed at her because she was a female.

[12]Indeed, Judge Edmondson, in his concurring opinion, further stressed that Mendoza never presented any evidence of other employees at the workplace who were treated considerably different or better than she was. *Mendoza*, 195 F.3d at 1253. In his opinion, such evidence is "the heart of the case" and courts should not allow "fudging on the proof." *Mendoza*, 195 F.3d at 1254.

The Court's reliance upon Dupont's subjective perceptions in this respect is contrary to the authority cited above and is not probative of whether Coryell's conduct was in fact sexual in nature or gender-based, particular where, as here, the context indicates that much of the conduct was not.[13] Indeed, as noted above, Dupont admitted that the Coryell's profanity was directed at males and females and his angry outbursts were directed at no one in particular. Were Dupont's subjective beliefs enough to establish that the complained of conduct was sexual or gender-based, there would be no need for an objective component to this inquiry and the anti-harassment laws would certainly become nothing more than a general civility code subject to the peculiarities of each complainant.

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

Furthermore, even if the incidents of non-sexual, non-gender based conduct are considered in assessing severity or pervasiveness, it is nonetheless clear that the evidence introduced at trial falls far short of actionable conduct to support a jury verdict.

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[13] The trial evidence indicated that Dupont was only about five feet tall, while Dupont was over six feet tall. (Vol. XIV, pp. 217, 222). Additionally, prior to working for Speedway, Dupont worked for seventeen years in an office with primarily the same employees and shared a space with only another female employee. (Vol. XIV, pp. 301-302). While these facts presumably contributed to her subjective belief, they should not be controlling as to whether liability for harassment should attach.

Along with *Mendoza*, a comparison of the alleged harassment in this case vis-à-vis the alleged harassment in *Gupta*, where the Court overturned a verdict for the plaintiff, demonstrates that Dupont has not satisfied her burden of establishing severe and pervasive harassment. In *Gupta*, the plaintiff, an associate professor, alleged that a co-worker, Dr. Rhodd, over a period of six or seven months, said or did the following: (1) looked her up and down in a way that made her feel uncomfortable; (2) called her 2-3 times per week late at night and asked questions like whether she was in bed or where her boyfriend was; (3) frequently asked her to lunch; (4) put his hand on her inner thigh while the two were sitting next to each other; (5) touched the jewelry she was wearing; (6) lifted the hem of her dress ostensibly to feel its material; (7) unbuckled his belt, pulled down his zipper and tucked in his shirt in front of her; (8) told her that Caribbean and Western people were promiscuous but that he could look at her and tell that she was innocent and did not have much experience; (9) told her that she should have called him and that he would have "come and spent the night with you" after an overnight thunderstorm; and, (10) commented that women were like meat and that men needed variety in women. *Gupta*, 212 F.3d at 583-85

Although Dr. Rhodd's conduct was clearly more extreme and offensive than Coryell's conduct towards Dupont, the Eleventh Circuit reached the opposite conclusion in *Gupta*, finding that the behavior failed to meet the severe or

pervasive standard. *Gupta*, 212 F.3d at 585. In so holding, the court noted that "'All of the sexual hostile work environment cases decided by the Supreme Court have involved patterns or allegations of extensive, long lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiff's work environment.' This is not such a case." *Gupta*, 212 F.3d at 586.

As in *Mendoza* and *Gupta*, the decision in *Miller v. Lectra USA, Inc.*, 145 Fed. Appx. 315, 317, 2005 WL 1901821, **2 (11th Cir. 2005), likewise reveals that the conduct described by Dupont fails to rise to an actionable level. In that case, the plaintiff's allegations of harassment included incidents where the supervisor "(1) at a hotel bar and in front of Miller and other co-workers, loosened the tie of a married, male co-worker and rubbed her hands all over his chest and head, (2) took Miller with her to purchase condoms and told Miller that the condoms were for her "love-fest weekend with [her] new boyfriend," and (3) talked about her sex life with male and female co-workers[;] . . . [4] made comments to her about her being a good-looking female and her marriage not being that serious as she had been only recently married, [5] told her that she looked good in short skirts, and [6] asked her out for drinks and dinner on a number of occasions." *Miller*, 145 Fed. Appx. at 317. The Court held that this conduct could not establish the severe or pervasiveness element.

In reaching a contrary conclusion in the present case, the District Court relied upon several cases which are clearly distinguishable. In particular, the District Court cited *Russell*, *Natons*, and *Harris*, as well as *Swenson v. Potter*, 271 F.3d 1184 (9th Cir. 2001) and *Knabe v. Boury Corp.*, 114 F.3d 407 (3d Cir. 1997).

However, a review of the facts of these cases reveals that they are inapposite. In *Russell*, on the plaintiff's first day of work, her co-worker expressed his disgust to her over the fact that they hired a female and then tried to forcibly kiss her. *Russell*, 887 So. 2d at 374-75, 378. Thereafter, the co-worker continuously came up behind her and made kissing noises, tapped on her back and laughed at her. The co-worker also remarked to another employee, in the plaintiff's presence, "How many times should we fuck her? Should we call her husband? How many times can we fuck her?" *Russell*, 887 So. 2d at 375. Finally and perhaps most significantly, on another occasion, the co-worker "approached her from the rear, rammed his erect penis into her buttocks and whispered in her ear, 'Fuck you, Kitty. Fuck you.'" *Russell*, 887 So. 2d at 375.

Similarly, in *Natson*, the plaintiff introduced evidence that her supervisor regularly touched her inappropriately. Following the plaintiff's complaint, the inappropriate touching continued and worsened and the supervisor verbally harassed her. The plaintiff even testified that the supervisor rubbed her nipples. *Natson*, 885 So.2d 946-47.

Likewise, in *Harris*, the Court found that the plaintiff was continuously verbally harassed with explicit sexual remarks and innuendos by the company President. In particular, the Court noted that:

> Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumb ass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris'] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing.

Harris, 510 U.S. at 19. Contrary to the District Court's decision in this case, the facts in the present case are anything but a "similar record of harassment" as compared to the facts in *Russell*, *Natson* or *Harris*.

Similarly, as the dissent by Judge Thompson in this case highlights, *Knabe, and Swenson* are also distinguishable. In *Knabe*, the Court specifically noted that it was not deciding the severe or pervasiveness issue as summary judgment in favor of the employer was affirmed on other grounds. *Knabe*, 114 F.3d at 411, n.6. In *Swenson*, the Ninth Circuit overturned a jury verdict based upon the employer's prompt remedial measures and, in so doing, did not discuss the severe or pervasiveness element at all. *Swenson*, 271 F.3d 1196-97.

Evaluated under the settled legal standards set forth above, the facts of this case, taken in the light most favorable to Dupont, nonetheless demonstrate that the

complained of conduct falls beneath the level of actionable harassment and, as such, Speedway's directed verdict motion should have been granted.

B. The Evidence Introduced at Trial Did Not Establish that Speedway Failed to Take Prompt Remedial Action To Remedy Any Harassment

Assuming *arguendo* that Dupont could establish that the harassment was sufficiently severe or pervasive to support the jury's verdict, Speedway's directed verdict motion nonetheless should have been granted by the Circuit Court as the evidence was insufficient to establish that Speedway failed to take prompt remedial action after Dupont brought Coryell's conduct to its attention. In this respect, both the Circuit Court and the District Court improperly focused on whether the remedial measures taken by Speedway were completely effective rather than focusing on whether they were reasonably calculated to end the problem.

As mentioned above, in the context of co-worker harassment, an employer may only be held liable when it knew or should have known of the harassment and failed to take prompt remedial action. *Castleberry,* 810 So.2d at 1029-30. Employer knowledge of the harassment can be established by proving that the employee complained to "higher management." *Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 753-54 (11th Cir. 1996), *reh'g and suggestion for reh'g en banc denied*, 105 F.3d 673 (1997).

The proper standard to measure the employer's response to a complaint of harassment is whether the remedial action is "reasonably likely to prevent the

misconduct from recurring." *Kilgore*, 93 F.3d at 754; *Jackson v. Hennessy Auto*, 2006 WL 1882690, *2 (11th Cir. July 10, 2006) (*per curiam*) (slip opinion) (employers response to harassment "was appropriate and reasonable despite having failed to prevent future harassment"); *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 811 (7th Cir. 2001) ("We are not to focus solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed"); *Skidmore v. Precision Printing and Packaging, Inc.*, 188 F.3d 606, 615 (7th Cir. 1999); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 676 (10th Cir. 1998). An employer need not take all possible actions or the most extreme actions in response to a complaint. *Kilgore*, 93 F.3d at 754. Rather, courts should consider "whether the response was proportional to the seriousness and frequency of the harassment." *Adler*, *supra*.

In this case, Dupont first mentioned Coryell's conduct to Reuben. At the outset, it should be noted that the undisputed facts of this case establish that Reuben was not a member of "higher management" sufficient to put Speedway on notice of alleged sexual harassment. In this respect, the record evidence indicated that Reuben was an hourly-paid employee who was not involved in hirings, firings, promotions, demotions, transfers, evaluations, granting wage increases and disciplining employees. Rather, Reuben was akin to a foreman or lead worker who was responsible for providing directions to other employees in the absence of

Gelbert, such as assigning tasks to stock the cooler for example. As such, Reuben cannot properly be considered a member of "higher management." *Kilgore*, 93 F.3d at 754 (Manager of Pizza Hut, while having some managerial responsibilities over Pizza Hut facility, was not a member of the management company's higher management such that complaint triggered knowledge); *Rosales v. City of San Antonio, Texas*, 2001 WL 1168797 (W.D. Tex. July 13, 2001) (Foreman not considered a supervisor); *Trigg v. New York City Transit Authority*, 2001 WL 868336 (E.D. N.Y. July 26, 2001), *aff'd*, 50 Fed. Appx. 458 (2d Cir. 2002) (Court held that a foreman who oversaw the daily work assignments of employees and dealt with operational issues but did not have the authority to change or alter the terms of the employees' employment was not a supervisor); *Feliciano v. Alpha Sector, Inc.*, 2002 WL 1492139 (S.D. N.Y. July 12, 2002) (Noting that there is a "difference between a 'supervisor' in the colloquial sense and a 'supervisor' under the rubric of Title VII" and holding that co-worker was not a supervisor since, although co-worker "may have had oversight responsibility" over the plaintiff, he did not possess the typical trappings of supervisors (authority to hire, fire, set schedules, etc.)); *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002) ("It is manifest that the essence of supervisory status is the authority to affect the terms and conditions of the victim's employment. This authority primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee. Absent an

entrustment of at least some of this authority, an employee does not qualify as a supervisor for purposes [of] imputing liability to the employer"). [14]

Additionally, even if Dupont's discussion with Reuben is considered, it is clear that Speedway took reasonable steps to alleviate any sexual harassment. Notably, at the time that Dupont discussed the matter with Reuben in late March, the only conduct which she complained of were the verbal comments made by Coryell, such as "dumb blonde." Between March 20, 1997 and April 9, 1997, Dupont and Coryell only worked one shift together. (Vol. XVII, Def. Ex. 1, pp. 75, 81-82, 92-93). Given the nature of her complaint and the fact that they were only scheduled to work one shift together, it certainly cannot be considered an unreasonable delay by Speedway to take action in early April as it did.

In early April, when Dupont complained for the first time of more serious (but excluding the physical incidents) comments to Bresner (and relayed to Rambo), Speedway took immediate steps to ensure that any harassment ceased. Rambo discussed the matter with Rambo and the next schedule was prepared to ensure that Dupont and Coryell were separated to the greatest extent possible in the small convenience store environment. Indeed, for the pay period beginning April 10, 1997, Dupont and Coryell were only scheduled and worked on the same shift

[14] The Court's holding as to Ruben's managerial status is also at odds with other employment laws. *See e.g.*, 29 U.S.C. § 152(12) (National Labor Relations Act definition of "supervisor").

on April 12, 1997. (Vol. XVII, Def. Ex. 1, pp. 95-96, 110, 115, 120, 125). Additionally, as discussed above, there were only a few minor instances of overlap between their shifts after April 10, 1997, but other employees were always working and Dupont admitted that nothing further occurred on these occasions save for Coryell standing over her watching her count the safe and making crass remarks as she counted. Gelbert also counseled Coryell regarding Speedway's harassment policy.

The separation of Dupont and Coryell was not only effective, but it was also reasonable given the complaints raised at the time. To this end, the separation of the employees involved has consistently been held to be a reasonable response to a complaint of harassment. *United States Gypsum* v. *Jones*, 126 F.Supp.2d 1172, 1178 (N.D. Iowa 2000) (rearranging work schedules so that complaining party and alleged harasser no longer worked together); *Carmon v. Lubrizol*, 17 F.3d 791, 794-95 (5th Cir. 1994) (transfer to another shift in response to complaint of vulgar comments); *Hubbard v. UPS*, 200 F.3d 556, 557-58 (8th Cir. 2000).

Similarly, the fact that the shifts of Dupont and Coryell overlapped on four occasions likewise does not make Speedway's response to her complaint inappropriate or unreasonable. In *Skidmore*, following the employee's complaint of harassment, the employer took steps to separate the two employees involved by assigning them different shifts. However, on several days their shifts overlapped

and the employee complained that the harassment continued because the harasser continued to leer at her. *Skidmore*, 188 F.3d at 611-612. Notwithstanding, the court held that the employer's actions in separating the employees and telling the alleged harasser to "leave [the plaintiff] alone" was sufficient as a matter of law as it was reasonably calculated to abate the harassment. *Skidmore*, 188 F.3d at 615-16; *see also Harvill v. Westward Communications, L.L.C.*, 433 F.3d 428, 437 (5th Cir. 2005) (Finding prompt remedial measure when supervisor investigated but could not substantiate the allegation and, upon further complaint to higher management months later, the employees where then separated).

The facts of the present case clearly established that Speedway's response to Dupont's complaint was reasonable and effective. Following her discussion with Reuben, Dupont only worked one shift with Coryell prior to her complaint to Bresner in early April. At that time, Speedway sought to minimize the contact between the two employees beginning with the next prepared schedule on April 24. Even prior to April 24, the two employees only worked together one other shift. While there was some overlap between the employees due to shift changeover, the interaction was minimal and no further problems occurred as is evidenced by the fact that Dupont did not complain further to Gelbert as he asked her to do if any problems persisted. Considered in this context, the Circuit Court's denial of Speedway's motion for directed verdict was erroneous.

CONCLUSION

Based upon the facts of this case, Dupont's punitive damages award cannot withstand scrutiny under any standard. This Court should recognize the consistent purposes of Title VII and the FCRA and adopt the federal standard articulated by the *Kolstad* Court. Such a standard, which focuses on the employer's good faith efforts to comply with the anti-harassment laws, is uniquely suited to cases such as the present case. Even so, to the extent that a lesser standard applies, the award should still be overturned as the facts of this case demonstrate that Speedway did not act willfully or maliciously to subject Dupont to unlawful harassment.

The punitive damages award (and the verdict generally) is also due to be overturned as Dupont cannot establish liability under the FCRA in the first place. The evidence demonstrates that she was not subjective to severe or pervasive harassment sufficient to alter the terms or conditions of her employment and, upon receiving notice, Speedway acted reasonably in attempting to stop any harassment.

Finally, as eloquently articulated by Judge Thompson's dissent, a review of the evidence to ensure that Dupont can establish the minimum threshold of conduct necessary to support an award for unlawful harassment is not tantamount to sanctioning violence against women as Dupont vehemently argued before the *en banc* District Court. Rather, as this Court is well aware, Florida courts have a duty to ensure that sufficient evidence exists to sustain jury verdicts.

WHEREFORE, Speedway respectfully requests that this Court exercise its discretionary jurisdiction to review both the certified question and the denial of its directed verdict motion and reverse the District Court's *en banc* decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, this 24th day of August, 2006 to: Wayne Allen and Adrienne E. Trent, 700 N. Wickham Road, Suite 107, Melbourne, Florida 32935.

/s/ Brian Koji
Attorney

CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this Brief has been prepared in Times New Roman, fourteen (14) point, and complies with all applicable rules of Florida Appellate Procedure and other rules associated therewith.

/s/ Brian Koji
Attorney

APPENDIX