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THE ELEVENTH CIRCUIT HELPS DEFINE WHAT SORT OF WORKPLACE CONDUCT MAY CONSTITUTE ACTIONABLE SEXUAL HARASSMENT

Today, no area of the law is as dynamic as the area of employment discrimination in general, and sexual harassment in particular. In a case entitled *Mendoza v. Borden, Inc.*, the United States Court of Appeals for the Eleventh Circuit, sitting *en banc*, rendered an opinion that helps to clarify what sort of conduct in the workplace may and may not constitute hostile environment sexual harassment.

Red Mendoza worked in Borden's Miami facility for sixteen months, first as a temporary employee in the accounting department and then as a permanent employee. During the last eleven months of her employment, her supervisor – the controller of the Miami facility – was Daniel Page. Mendoza worked in an office area with eight to twelve other accounting clerks; Page worked in a glass-enclosed office situated in a corner of that same office area.

Two years after Mendoza's employment ended, she filed a complaint in federal court in Miami alleging a variety of employment claims, including sexual harassment. At trial, Mendoza testified to the following alleged harassing conduct: (1) Page constantly watched her, followed her around, and looked her up and down – whether it was face to face or as she would get up from a lunch or picnic table to walk away and go back to the office; (2) Page seemed to be wherever she was in the plant, following her around the office and the plant's hallways – she could feel him watching her; (3) on two occasions, Page looked at her up and down, stopped in her groin area, and made a sniffing sound; (4) while she was at a fax machine in a hallway, Page passed by her and rubbed his right hip against her left hip while touching her shoulder and smiling, although he did not say anything to her at that point; and (5) at one point, Mendoza confronted Page by entering his office and saying, "I came in here to work, period," to which Page responded, "Yeah, I'm getting fired up, too." The trial court entered judgment in favor of Borden, finding that the incidents of harassment, in the minds of a reasonable person, were not physically threatening or humiliating and not of sufficient frequency or severity to suggest a hostile or abusive environment.

On appeal, the appellate court concluded that the trial court correctly entered judgment for Borden. The court first noted that the law that prohibits discrimination in the workplace is not a federal civility code, and that workplace harassment is not automatically actionable discrimination merely because the words used in the workplace have sexual content or connotations. Simple teasing, offhand comments, and isolated incidents generally will not amount to discrimination. The court next stated that there is both a subjective and an objective component to a plaintiff's proof of sexual harassment. The employee must subjectively perceive the harassment as sufficiently severe and pervasive to alter the terms or conditions of employment, and this subjective perception must be objectively reasonable. The court held that the conduct alleged by Mendoza fell well short of the level of either severe or pervasive conduct sufficient to alter the terms or conditions of her employment. It reasoned that the "following" and "staring" in the manner described by Mendoza, even with evidence that this conduct was constant and frequent and even considering this conduct in context with the sniffs, verbal

statement, and slight touching as Page walked by the fax machine, did not amount to actionable hostile environment sexual harassment given normal office interaction among employees.

In one of the concurring opinions in the case, Judge Carnes recognized that courts should be reluctant to permit plaintiffs who claim sexual harassment to rely upon their subjective interpretations of ambiguous conduct. As he put it, the baseline of objectively offensive conduct necessary for a plaintiff to demonstrate sexual harassment cannot be met with objectively ambiguous conduct that a “suspicious” employee subjectively perceives to be improper. Were the rule otherwise, supervisors and employers would be held to “a counsel of perfection” that the law does not require; supervisors would be unable observe and speak to employees without being hauled into court every time an employee finds the supervisor’s presence, tone of voice, the way he stands, or the way he walks to be offensive.

**U.S. DISTRICT COURT RELIES ON THE ELEVENTH CIRCUIT’S
MENDOZA OPINION TO GRANT SUMMARY JUDGMENT ON
TITLE VII AND FLORIDA CIVIL RIGHTS ACT CLAIMS**

In *Scott v. Pizza Hut of America, Inc.*, the United States District Court for the Middle District of Florida was required to decide whether it should enter a summary judgment in favor of the defendant on the plaintiff’s claims of hostile environment sexual harassment brought pursuant to Title VII and the Florida Civil Rights Act. The court held that summary judgment was appropriate.

Beverly Scott worked for Pizza Hut as a part-time pizza delivery driver. She worked from a delivery store consisting of a single room in which several other employees worked. At most, she spent approximately twenty-five percent of her shifts in the store; the remainder of Scott’s time was spent delivering pizzas. Beginning a couple of months after she began working for Pizza Hut, several incidents occurred in the store, which formed the basis of Scott’s lawsuit. Scott claimed that she overheard a co-worker refer to a customer with profane phrases, overheard a shift manager and another co-worker engaging in five or six discussions concerning homosexual experiences and jokes implying Scott was a prostitute, witnessed a male co-worker pick up a female co-worker on several occasions and lay her on the floor and “put his hands on her body,” heard other employees use harsh language and utter profanities throughout her employment, and that a co-worker drew an obscene gesture in an air conditioner’s condensation.

Further, Scott alleged that two co-workers indicated to her that she did not get enough sex, and therefore she should “go out and get some sex.” Scott complained to the manager about these comments, and they were never made to her again.

Additionally, Scott complained to a shift manager that the lyrics to some rap music that was being played on a tape player in the store, which she heard for around three or four minutes, were vulgar, but the manager apparently made no effort to turn off the music. The next day, Scott complained to the district manager about the rap music. The district manager offered to transfer Scott to another store, but she refused. He asked her to prepare a letter describing the

incident, which she did and sent to him. The store manager also contacted Scott about the rap music incident, and after discussing it with her, he assured her that the problem had been solved. The next day when Scott returned to work, the tape player was gone. Scott believed, however, that her co-workers were upset with her because “a few of her co-workers would stare at her, making comments and continuing to use foul language.” Scott testified that she slowed down on her deliveries to avoid returning to the store.

The final incident took place when two co-workers made homosexual remarks about two other co-workers in Scott’s presence. She left work early that day, and that effectively marked the end of her employment with Pizza Hut. She officially resigned shortly thereafter.

In its motion for summary judgment, Pizza Hut argued that Scott could not prevail on her hostile environment sexual harassment claims because she was not subject to harassment based on her sex and because the level of harassment was not sufficiently severe and pervasive to affect a term or condition of her employment. Alternatively, Pizza Hut argued that it was not liable as a matter of law because it exercised reasonable care to deal with the harassment about which Scott complained, and she failed to take advantage of Pizza Hut’s policies and options it made available to her.

The court rejected Pizza Hut’s first position. It believed that the facts, interpreted in the light most favorable to Scott, showed that she was subjected to at least seven incidents that either implied she was a prostitute or that she needed “to go out and get some sex” so that “she wouldn’t be so bitchy.” The court further found that Scott was the target of these comments and male workers were not subject to these incidents.

The court agreed with Pizza Hut, however, that the harassment was not sufficiently severe and pervasive to constitute a hostile work environment under Title VII or the Florida Civil Rights Act. In this regard, the court noted first that for claims to be actionable under these statutes, the incidents in question must go beyond ordinary workplace tribulations such as the sporadic use of abusive language, gender related jokes, and periodic teasing. That is, simple teasing, offhand comments, and isolated incidents do not satisfy the severe and pervasive requirement for actionable hostile environment harassment. Ordinary workplace socializing and horseplay is insufficient. Next, the court noted that the correct inquiry is whether the alleged harassment is offensive on both subjective and objective levels. Harassment is subjectively offensive when the plaintiff perceived the harassment to be hostile or abusive. Harassment is objectively offensive when a reasonable person would have found the alleged harassment hostile and abusive. The factors to be considered in determining whether harassment is objectively hostile or abusive include the frequency of the conduct, the severity of the conduct, whether it is physically threatening or humiliating or simply an offensive utterance, and whether the conduct unreasonably interferes with the employee’s work performance. The court then discussed the Eleventh Circuit’s recent opinion in *Mendoza v. Borden, Inc.* and held that the acts about which Scott complained in this case, in light of *Mendoza*, were insufficiently severe and pervasive to constitute actionable hostile environment sexual harassment. The court believed that the conduct to which Scott was subjected, while “boorish, stupid, and inconsiderate,” did not rise to the level of conduct at issue in *Mendoza* and some other cases. It also found important that none of the acts about which Scott complained were physically threatening or humiliating. Finally, the court

determined that Scott had not shown that the conduct unreasonably interfered with her job performance.

FLORIDA'S SUPREME COURT INTERPRETS NOTICE PROVISIONS IN THE STATE WHISTLE-BLOWER ACT

Sections 448.101-105, Florida Statutes, are commonly known as the Whistle-Blower Act and are designed to protect private employees who report or refuse to assist employers who violate the laws that protect the public. The Whistle-Blower Act provides employees with a cause of action against their employers who take certain kinds of retaliatory personnel action. Under the Act, an employer may not take a retaliatory personnel action against an employee because the employee has: (i) disclosed or threatened to disclose to any appropriate governmental agency, under oath and in writing, an activity, policy, or practice of the employer that is in violation of a law, rule, or regulation; (ii) provided information to or testified before any appropriate governmental agency, person, or entity conducting an investigation, hearing, or inquiry into an alleged violation of a law, rule, or regulation by the employer; and (iii) objected to or refused to participate in any activity, policy, or practice of the employer that is in violation of a law, rule, or regulation. The Act further provides the procedural requirements for an employee to obtain relief and includes as part of those requirements the condition that the for certain alleged violations, the employee must notify the employer of the illegal activity, policy, or practice prior to bringing the action.

In *The Golf Channel v. Jenkins*, the Florida Supreme Court was required to reconcile conflicting opinions among the state's district courts of appeal as to whether the Act's pre-suit notice requirement applied to employer retaliation based on all three forms of employee whistle-blowing conduct, or only to claims based on an employee's disclosure or threatened disclosure of employer activity. There, the plaintiff alleged he was fired for objecting to other employees' unlawful acts and reporting them to his supervisors. Specifically, Jenkins claimed that he objected and reported that a certain officer of his employer masturbated in front of two female clerical employees, employees committed fraud on vendors, an employee wrote scripts that were plagiarized, and employees falsified budget reports. The trial court dismissed Jenkins' case because he did not first provide his employer with written notice of his objection to the activities.

The Fifth District Court of Appeal reversed, holding that the pre-suit notice requirement only applied to claims based on an employer's retaliation for an employee's public disclosure of unlawful activity. In so holding, the Fifth District's opinion conflicted with an opinion on the same issue by the Second District Court of Appeal in *Potomac Systems Engineering, Inc. v. Deering*.

The Supreme Court held that the notice provisions in the Whistle-Blower Act were ambiguous, and thus it was required to engage in statutory construction as to whether the written notice requirement applied to all whistle-blower claims. The court determined that it did not. Interpreting the Act to require notice only with respect to disclosure claims was consistent with the actual language employed by the Act, the remedial purpose of the Act, and the purpose of the

written notice requirement of giving the employer a reasonable opportunity to cure the unlawful activity.

TEMPORARY INJUNCTION ENTERED FOR DIRECT SOLICITATION OF FORMER EMPLOYER'S CUSTOMERS

In *Globe Data Systems d/b/a Globe Ticket & Label Co. v. Johnson*, the defendant/appellee was a sales person for plaintiff/appellant in 1991 when he entered into a covenant not to compete, which provided that defendant/appellee would not compete with plaintiff/appellant for a one-year period after terminating his employment in any geographical area in which he had conducted sales for one year prior to his termination. The evidence was undisputed that defendant/appellee directly solicited plaintiff/appellant's customers a few days after terminating his employment, but the trial court declined to enter a temporary injunction on the grounds that it found no irreparable harm as a result of such solicitations. The Fifth District Court of Appeal disagreed, reasoning that the 1991 version of Section 542.33(2)(a) of the Florida Statutes, which governs covenants not to compete, presumes irreparable harm upon evidence of direct solicitation. Moreover, the appellate court found as a matter of law that the one-year duration of the covenant not to compete was reasonable, and that defendant/appellee's new employer was a national company, so barring him from operating in territories covering most of Florida, which he had previously serviced for plaintiff/appellant, was reasonable. The appellate court also noted that the temporary injunction should run from one year after its entry so that plaintiff/appellant would receive the full benefit of its contract. Upon rehearing, the appellate court clarified that only a temporary injunction should be entered pending a full hearing on whether a permanent injunction was appropriate.

THE FLORIDA SUPREME COURT CONSTRUES KEY PROVISION OF THE FLORIDA AUTOMOTIVE DEALERS ACT

The Florida Supreme Court recently construed a key provision of the Florida Automotive Dealers Act in *Hawkins v. Ford Motor Co.* The court held that Section 320.643(2)(a) of the Florida Statutes, which is a part of the Florida Automotive Dealers Act, is not the exclusive basis for objection by a motor vehicle manufacturer to a proposed transfer of all the equity interest in a corporate motor vehicle dealership if a change in the dealership's executive management is also contemplated by the transaction. The court reasoned that the entire transaction must be analyzed, and the multiple statutory provisions of Chapter 320 considered together depending on the structure and nature of the entire transaction. Section 320.643(2)(a) only provides that a motor vehicle manufacturer may challenge the transfer of stock of a dealership on the basis of the transferee's lack of good moral character. However, Section 320.643(1) provides that a manufacturer may object to the transfer of the franchise agreement on either the transferee's lack of good moral character, or lack of business experience. Section 320.644 permits a manufacturer to oppose a change in the dealer's executive management on the grounds of either lack of good moral character, or lack of sufficient business experience as well. Here, the dealer notified Ford

that it intended to sell all of its stock and that the executive management of the dealership would change. Ford initiated administrative proceedings to oppose the transfer of stock and the transfer of executive control of the dealership on the basis of the transferees' purported lack of business experience, but made no allegation as to the transferees' lack of good moral character.

After the stock transfer failed to go through and the administrative proceedings were accordingly dismissed, the dealership's owners sued Ford in federal court for wrongfully objecting to the stock transfer on the grounds that Ford had made no allegation about the transferees' moral character in the administrative proceedings. Relying on the plain language of the three statutory provisions at issue, the Florida Supreme Court first found that in most cases, a transfer of stock of a dealer under Section 320.643(2)(a) is distinguishable from a transfer of that dealer's motor vehicle franchise agreement under Section 320.643(1). In one instance, the corporation's stock is being transferred; in the other, an asset of the corporation is being transferred. The court noted that although a transfer of stock can in effect constitute a transfer of the franchise agreement, they must be treated separately because the Legislature intended that they be treated differently because it enacted separate statutory provisions with different grounds for objection. However, the court also found that when a stock transfer also involves a transfer of executive management under Section 320.644, a motor vehicle dealer can object to the transfer of stock on grounds of lack of business experience, and are not bound by Section 320.643(2)(a)'s provisions involving lack of good moral character only. The court reasoned that a transaction such as this one cannot be viewed in a vacuum, but as a unified whole. Had the transaction involved simply a sterile transfer of stock without any change in executive management, then the lack of good moral character objection under Section 320.643(2)(a) would have been the sole viable grounds of any manufacturer's objection. In sum, the case holds that if a stock transfer is contemplated along with a change in executive control, a manufacturer can object to the stock transfer itself on grounds of lack of business experience, not just on the transferee's lack of good moral character. The case appears somewhat inconsistent in that it holds that the statutory provisions of a proposed stock transfer and transfer of executive management can in effect be merged by considering the entire transaction together, but unless the dealer expressly states that the franchise agreement will be assigned, the basis for objecting in that case cannot be merged with those involving a stock transfer regardless of the circumstances of the transaction.

**COURT HOLDS THAT PLACING AN ADVERTISEMENT IN A NEWSPAPER
DOES NOT CONSTITUTE A DIRECT SOLICITATION IN
VIOLATION OF A COVENANT NOT TO COMPETE**

In *Lotenfoe v. Pahk*, the Second District Court of Appeal reversed the entry of a temporary injunction based on a covenant not to compete on the grounds that placing an advertisement in a newspaper does not constitute direct solicitation, adopting *King v. Jessup*, 698 So.2d 339 (Fla. 5th DCA 1997). The appellate court also found that the employer failed to demonstrate a likelihood of success on the merits because the employee set forth defenses during the hearing such as the agreement had expired, and the employer had breached the agreement by failing to negotiate a partnership with the employee in good faith, both of which the appellate

court found to be strong. The appellate court also expressed doubt that a party could demonstrate a likelihood of success on the merits during an evidentiary hearing lasting less than thirty minutes. Finally, the appellate court held that because the trial court did not hold a hearing on the amount of the injunction bond, which was set at \$20,000.00, the employee's damages for being wrongfully enjoined would not be limited to the bond amount, even if bad faith could not be demonstrated.