IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2005

SPEEDWAY SUPERAMERICA, LLC,

Appellant,

v. Case No. 5D04-14

ERMA DUPONT,

Appellee.

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Opinion filed July 1, 2005.

Appeal from the Circuit Court
for Brevard County,
John Dean Moxley, Judge.

Mark L. Van Valkenburgh and
Susan Norton of Allen, Norton &
Blue, P.A., Winter Park, for Appellant.

Wayne L. Allen and Adrienne E. Trent
of Wayne L. Allen & Associates, P.A.,
Melbourne, for Appellee.

THOMPSON, J.

Speedway SuperAmerica, LLC ("Speedway") appeals from a judgment awarding Erma Dupont $80,740.54 following a jury verdict in this lawsuit for sexual harassment and hostile work environment.[1] We reverse the trial court's denial of Speedway's motion for judgment notwithstanding the verdict because Dupont's evidence was insufficient to demonstrate that the harassment was sufficiently severe or pervasive to

alter the terms and conditions of her employment and create a hostile work environment. See Gupta v. Fla. Bd. of Regents, 212 F.3d 571 (11th Cir. 2000); Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999).

Dupont alleged that sexual harassment by a male coworker led to a hostile work environment after her complaints to management brought no appropriate remedial action.[2] Specifically, she claimed that the coworker displayed violent behavior, made disparaging remarks regarding her gender and appearance, and engaged in unwanted, unsolicited, and offensive intimate touching. Further, she contended that as a result of management's lack of action a hostile work environment arose that subjected her to ridicule by the assistant store manager, denied her full-time employment with benefits when the offending coworker was granted same, and forced her to work alone with this individual.

Dupont testified at trial that she accepted employment with Speedway in September 1996 as a convenience store cashier/clerk. She worked the third shift for a few months before switching to the second shift that Joel Coryell also occasionally worked. Coryell said things to compliment her that she did not feel were complimentary. She tried to ignore him and thought that he was the most violent person she had ever met. Coryell became angry if she ignored him or gave him a dirty look; he would throw things that landed within a foot of her and take off through the store cussing. She ran away when he sneaked up behind her and put his hands on her. If she tried to work in another part of the store, Coryell would approach and begin discussing his sex life, his

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[1] Dupont brought this lawsuit under the Florida Civil Rights Act, section 760.01, et seq., Florida Statutes.

inability to sleep, and need for a girlfriend. He would walk past her and pat her on the buttocks or rub her. Once Coryell smacked her on the buttocks. Dupont was subjected to Coryell's misbehavior for eight or nine weeks.

She was humiliated by his comments that she looked "hot" in her uniform and would look good as a "biker chick." Female customers provoked comments that he wished he "could get some of that." He referred to most women, particularly blondes, as dumb and stupid. When Dupont counted the register, he stood over her and made her nervous. If she had to recount, he would call her a "dumb blonde."

Dupont complained to the store's assistant manager, Rosie Ruben, and also tried to inform another store manager, Larry Gilbert. Because Gilbert was in training in Ohio, she told the acting manager Barbara Bresner. She told Bresner what had occurred and that she was afraid of Coryell. Bresner indicated that Dupont did not have to tolerate his behavior and advised that the company did not tolerate such treatment.

Dupont had several conversations with Rosie Ruben about Coryell's behavior before speaking with Bresner, and finally, Gilbert. Gilbert responded that he did not know anything about her discussions with Ruben and Bresner, but deemed Coryell's behavior unacceptable and offered to change their work schedules so that Dupont would not have to work with him. Gilbert moved her, instead of Coryell, to the third shift, which she did not like. After the shift change, Coryell remained at the store past his scheduled shift in order to see her. That is when he began to hover over her as she counted the register.

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[2] Dupont also alleged a claim for retaliation for which the trial court granted Speedway a directed verdict.

Dupont continued to report Coryell's conduct to the managers. On one occasion, Coryell came around a corner, grabbed her by the wrists, and pulled her right into him. Dupont reported the incident to Gilbert. On one occasion, Ruben had to call Coryell in to work during her shift. She told Ruben that she was afraid of him and threatened to leave if he was called. Ruben replied that she would be fired if she left. That day Dupont worked a few hours with Coryell, but nothing occurred; consequently, the managers again began to schedule Dupont with Coryell. She complained to Gilbert, who advised that scheduling them together could not always be avoided. Dupont told Gilbert that she could not work at the store any longer. Asked to give notice, she refused and did not return.

Rosemary Ruben was in charge of arranging shifts when Dupont approached her about problems she was experiencing with Coryell. A few weeks later Gilbert told Ruben not to schedule Coryell and Dupont together. Dupont later told her the reason -- that Coryell was rubbing her shoulders. Ruben made a written report about the incident. One day, Ruben was busy and had to call Coryell in early to work with Dupont. Dupont commented that she was not scheduled to work with Coryell, and Ruben told her that she could cash out and go home early.

Barbara Bresner, the store manager, remembered that Dupont approached her in April 1997 with complaints about Coryell. Dupont described her fear of Coryell, and Bresner reported this fact to her supervisor, district manager Julie Rambo. Rambo stated she was going to take action, but Bresner did not follow up. Bresner had taken sexual harassment classes during manager training and noted that employees were aware of the 800 telephone number to report sexual harassment.

Former store manager Larry Gilbert knew that Dupont was afraid of Coryell. When he first became aware of her report that Coryell once placed his cold hands on her shoulder, told a blonde joke, and acted on one occasion in an overbearing manner, he immediately called Rambo. Rambo and Gilbert discussed their options. They ruled out Coryell's transfer to another store and ultimately decided to arrange their schedules so that Coryell and Dupont did not have to work together. Gilbert also explained to Coryell that he should not behave in an intimidating manner and that harassment was against company policy. Neither Bresner nor Rambo had told him about Dupont's problems, and he could not recall whether Ruben told him about the complaints. He never reviewed the store's video tapes in response to the complaints about Coryell.

Gilbert informed Ruben of the scheduling decision. He was aware of the incident when Ruben called Coryell in to work with Dupont, but related that he would have done the same on that particular day because Coryell was good about coming to work on short notice.

Linda Ford, a coworker, knew Dupont had complained about Coryell's harassment and inappropriate touching, but she had never witnessed this behavior. Ford, however, had had similar problems with Coryell. He had "accidentally" brushed against Ford's breasts about a dozen times, touched her shoulders and neck area, and attempted to give her a massage. She reported Coryell's conduct to Gilbert about six months before Dupont's termination, but she did not go into detail because she was embarrassed. Ford told Gilbert that she did not want to work with Coryell due to his numerous inappropriate touchings and his temper. She believed that Coryell's actions demonstrated sexual harassment.

Based upon this evidence, the trial court denied Speedway's motion for a directed verdict for the sexual harassment, but granted a directed verdict for retaliation.

Not all of Dupont's complaints reached upper management through Bresner, and, therefore, the situation was for the most part deemed a personality conflict between Dupont and Coryell. When Rambo visited the store, Dupont did not make any further complaints to her. Following her complaints, however, the scheduling records reflect that their schedules overlapped on three occasions.

The jury returned a verdict in Dupont's favor and, following Speedway's unsuccessful post-trial motions, the trial court entered a final judgment awarding Dupont $80,740.54.

Speedway's position is that none of the alleged misconduct was sufficiently severe or pervasive as to permeate the workplace and no evidence supported a finding that Speedway intentionally or with callous indifference violated Dupont's rights under the Florida Civil Rights Act.

We review an order denying a motion for judgment notwithstanding the verdict to determine if, in viewing the evidence most favorably to the nonmovant, there is substantial, competent evidence to support the verdict. See Jackson County Hosp. Corp. v. Aldrich, 835 So. 2d 318, 326-327 (Fla. 1st DCA 2002).

Dupont's counsel admitted that some facts in the case did not rise to the standard that the federal courts have applied when determining sexual harassment,[3] but urged the trial court to ignore federal case law in ruling on Speedway's renewed motion

[3] Dupont did not allege that Coryell sexually propositioned her. He never talked about her sex life, tried to kiss her, asked her out on a date, or engaged in any explicitly sexual conduct toward her.

because he personally believed that the federal courts have gone far astray of understanding the nature of sexual harassment. Because section 760.01, et sequitur, mirrors Title VII of the Civil Rights Act of 1964,[4] we look to federal law to construe complaints under the Florida Civil Rights Act. See McCabe v. Excel Hospitality, Inc., 294 F. Supp. 2d 1311, 1313 n.1 (M.D.Fla. 2003).

Speedway argues that Dupont's allegations did not demonstrate sexual harassment, a form of sex discrimination, sufficient to create a hostile work environment. See Burlington Indus. v. Ellerth, 524 U.S. 742 (1998). To establish a hostile work environment in a sexual harassment case, the plaintiff must prove that: (1) he or she belongs to a protected group; (2) that the employee was subjected to unwelcome sexual harassment; (3) that the harassment was based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable exists. Mendoza, 195 F.3d at 1245; Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Although it may appear counter-intuitive, Dupont has not demonstrated that the alleged harassment was sufficiently severe or pervasive to alter or affect the terms or conditions of employment or create a hostile working environment. Coryell's compliments delivered in a flirtatious manner that she looked "hot" and that she would look good as a biker chick do not rise to the level of discriminatory "conditions of employment." As the Eleventh Circuit commented in a Title VII case concerning a professor's compliments to the plaintiff associate professor, in Gupta, 212 F.3d at 584,

[4] 42 U.S.C. § 2000e ("Title VII").

> A man can compliment a woman's looks (or a woman compliment a man's looks) on one or several occasions, by telling her that she is looking "very beautiful," or words to that effect, without fear of being found guilty of sexual harassment for having done so. Words complimenting appearance may merely state the obvious, or they may be hopelessly hyperbolic. Not uncommonly such words show a flirtatious purpose, but flirtation is not sexual harassment.

Aside from commenting on Dupont's looks, Coryell did not make any other comments about her.

Dupont also complained that Coryell touched her buttocks and rubbed her shoulders in a sexual manner and made inappropriate comments about female customers. These types of physical threats or conduct must be extensive, longlasting, unredressed, uninhibited, and permeate the plaintiff's work environment to be actionable. See, e.g., Indest v. Freeman Decorating, Inc., 164 F.3d 258, 263 (5th Cir. 1999). For example, in Mendoza, 195 F.3d at 1247-1248, the court concluded that the alleged conduct fell well short of the level of either severe or pervasive conduct sufficient to alter the plaintiff's terms or conditions of employment when the offending employee rubbed his hip against the plaintiff's hip while rubbing her shoulders, smiling, and telling her that he was getting "fired up," made sniffing sounds while looking at the plaintiff's groin and constantly followed her, staring in a "very obvious fashion."

The offending conduct must be extreme. Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998). The conduct must be hostile enough to create an objectively hostile or abusive environment that a reasonable person would find hostile or abusive. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Mendoza is instructive:

> 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. 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 environment must be one that "a reasonable person would find hostile or abusive" and that "the victim . . . subjectively perceive[s] . . . to be abusive." Furthermore, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances." Mendoza, 195 F.3d at 1246 (citations omitted).

The objective component of this analysis is somewhat fact intensive. Nevertheless, the courts have identified four factors to consider in determining whether the harassment objectively altered an employee's terms or conditions of employment. They are: (1) frequency of conduct; (2) severity of conduct; (3) whether the conduct is physically threatening or humiliating or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. Id.

There are no minimum number of incidents to establish a hostile work environment. Worth v. Tyer, 276 F.3d 249, 268 (7th Cir. 2001). Dupont testified that the incidents occurred over eight or nine weeks. She alleged that Coryell smacked her buttocks once, rubbed against her a few times, grabbed her once as she stepped around a corner and met him, and made numerous inappropriate comments. Comparing these allegations to conduct deemed nondiscriminatory by other courts persuades us that the conduct is not sufficiently severe. See, e.g., Gupta, 212 F.3d at 584-585 (supervisor touched employee's jewelry and asked her to lunch on several occasions, touched her knee and raised her dress hem while asking about the material; stated that she looked "very beautiful" and stared at her in way that made her feel uncomfortable, called her home two or three times per week at night and on weekends

asking about her boyfriend, and suggested that he would like to come over and spend the night); Minor v. Ivy Tech State College, 174 F.3d 855, 857 (7th Cir. 1999) (supervisor on one occasion put his arms around plaintiff, kissed and squeezed her and stated, "Now, is this sexual harassment?"); Weiss v. Coca Cola Bottling Co., 990 F.2d 333, 334-335 (7th Cir. 1993) (supervisor asked about plaintiff's personal life, complimented her on her looks, asked her for dates, called her a dumb blonde, repeatedly put hands on her shoulders, placed "I love you" signs in her work area, and attempted to kiss her on three occasions); Willets v. Interstate Hotels, LLC, 204 F. Supp. 2d 1334, 1337 (M.D. Fla. 2002) (supervisor hugged plaintiff three times a year, rubbed her head and shoulders, frequently indicated love for her, grabbed her buttocks, kissed her, and placed hand on her inner thigh); Fromm-Vane v. Lawnwood Med. Ctr., Inc., 995 F. Supp. 1471, 1474 (S.D. Fla. 1997) (supervisor's reference to size of employee's husband's penis, women's breasts and sexual exploits with his girlfriend and discussions regarding his visits to "whorehouses"). But see Russell v. KSL Hotel Corp., 887 So. 2d 372, 378 (Fla. 3d DCA 2004) (holding evidence supported jury's verdict for sexual harassment where coworker told new hire he expected a male to be hired and expressed dissatisfaction that female was hired, kissed plaintiff upon introduction, constantly made kissing noises, pushed her ear, rammed his erect penis into plaintiff's buttocks and whispered, "F*ck you, Kitty, F*ck you," cursed at her, tapped her on her back and laughed, told another male employee in plaintiff's presence, "[H]ow many times should we f*ck her? Should we call her husband? How many times can we "f*ck her?," and punched the plaintiff in the back and refused to allow her to leave work because she was in pain).

Viewing Dupont's allegations in the most favorable light, we conclude that they were insufficient to prove that Coryell's conduct was sufficiently severe or pervasive to create a hostile working environment. Because we reach this conclusion, we do not discuss Speedway's remedial response to Dupont's complaints. Accordingly, we reverse and remand to the trial court with directions that it enter judgment in favor of Speedway.

REVERSED.

PETERSON and ORFINGER, J.J., concur.