Alina Guerra vs City of Miami Beach

GOOD MORNING. THE NEXT CASE ON THE COURT'S DOCKET, GUERRA VERSUS CITY OF MIAMI BEACH. MS. BALLMAN.

MAY IT PLEASE THE COURT. MY NAME IS DONNA BALLMAN, AND I REPRESENT THE PETITIONER ELENA GARRY. THE JURY, AFTER SHE CLAIMED SEXUAL HARASSMENT, AWARD HER $225.17.

WHAT WAS THE JURY INSTRUCTION, SPECIFICALLY ON THE ISSUE OF THEIR FINDINGS IN THE CITY? WHAT DID THE JURY INSTRUCTIONS SAY? ANOTHER JURY ACTUALLY REQUIRED THEM TO CONCLUDE THAT SEXUAL HARASSMENT HAD OCCURRED. WE HAD ARGUED FOR A NEGLIGENT RETENTION AND SUPERVISION INSTRUCTION, BUT THE COURT ACTUALLY WENT A STEP FURTHER AND REQUIRE THAT GUERRA PROVE THAT SEXUAL HARASSMENT HAD OCCURRED. THE COURT, ALSO, ASKED FOR AN INSTRUCTION --

DID THE COURT REQUEST AN INSTRUCTION ON NEGLIGENT SUPERVISION?

THE INSTRUCTIONS THE AT ISSUE ARE -- THE INSTRUCTIONS ARE NOT AT ISSUE HERE, AT THIS LEVEL. THEY WERE RAISED AT THE THIRD DISTRICT, BUT THEY HAVE NOT BEEN RAISED AT THIS LEVEL.

WAS THERE AN ACTUAL ISSUE RAISED, BEFORE THE THIRD DISTRICT, CONCERNING NEGLIGENT RETENTION OR HIRING OR -- AND/OR SUPERVISION?

YES, YOUR HONOR. WE DID ARGUE, BOTH SIDES HAD ARGUED, BASICALLY, THE SAME ARGUMENTS THAT ARE HERE BEFORE YOU, WHICH IS THAT, NUMBER ONE, A CAUSE OF ACTION DOES EXIST IN NEGLIGENCE, FOR SEXUAL HARASSMENT OR FOR ALLOWING SEXUAL HARASSMENT TO OCCUR, BUT, ALSO, WE ARGUED THAT THE COMPLAINT, ITSELF, HAD ALLEGED SUFFICIENT ALLEGATIONS TO DEAL WITH SUPERVISION AND RETENTION. THE COMPLAINT ALLEGED A BREACH OF THE EMPLOYER'S DUTY, NUMBER ONE, TO ASSURE A SAFE -- TO ENSURE A SAFE WORKPLACE, NUMBER TWO, TO PROTECT FROM A HOSTILE ENVIRONMENT, AND NUMBER THREE, TO PROVIDE SUPERVISION. AND WHILE THE WORD SUPERVISION WAS NOT SAID --

BUT THE TRIAL JUDGE DID NOT GIVE AN INSTRUCTION ON IT.

I THINK HE IMPOSED A STRICTER VERSION IN ASKING HER TO PROVE SEXUAL HARASSMENT. HE, ALSO, GAVE AN AT-WILL INSTRUCTION.

YOU HAVE TO PROVE SEXUAL HARASSMENT OCCURRED. THAT IS THE IMPORTANT THING, THAT SEXUAL HARASSMENT OCCURRED, AND THEN THE EMPLOYER'S LIABILITY, VICARIOUS OR OTHERWISE, IS THE ISSUE OF WHETHER THERE CAN BE NEGLIGENCE IN ALLOWING THE SEXUAL HARASSMENT TO HAVE CONTINUED, SO I AM NOT SURE WHAT YOU SAID, WHEN YOU SAID THAT THE INSTRUCTION WAS A STRICTER INSTRUCTION THAN NEGLIGENT SUPERVISION. FOR NEGLIGENT SUPERVISION, THERE, STILL, HAS TO HAVE BEEN SEXUAL HARASSMENT. CORRECT?

WELL, I THINK THAT THE COURT COULD HAVE JUST ALLOWED NEGLIGENT SUPERVISION ON THE BASIS OF FAILING TO ALLOW A SAFE WORKPLACE, WITHOUT APPLYING THE EXTRA OVERLAY OF REQUIRING INTENTIONAL DISCRIMINATION, BUT WHAT WE ARE HERE ON, REALLY, IS THE MORE NARROW ISSUE OF WHETHER AN EMPLOYER IS LIABLE IN NEGLIGENCE FOR SEXUAL

HARASSMENT, AND I THINK I CAN SIMPLIFY THAT ISSUE EVEN MORE, BECAUSE --

ARE YOU SAYING OUTSIDE OF NEGLIGENT HIRING, SUPERVISION, OR RETENTION, THAT THERE -- YOU ARE ARGUING THERE IS A SEPARATE TORT THAT IS FOR NEGLIGENT SEXUAL HARASSMENT?

NO, YOUR HONOR. WHAT I AM ARGUING IS, AND I THINK THE ISSUE HERE IS WHETHER THE -- THE ONLY ISSUE THAT THIS COURT NEEDS TO DECIDE IS WHETHER THE EMPLOYER HAS A LEGAL DUTY TO MAINTAIN A WORKPLACE FREE FROM SEXUAL HARASSMENT, AND THE REASON I THINK THAT THAT IS, REALLY, THE ONLY ISSUE THAT WE HAVE HERE, IS BECAUSE THIS COURT STATED, IN McCAIN VERSUS FLORIDA POWER CORPORATION, THAT ESTABLISHING THE DUTY ELEMENT AS THE MINIMUM FLESH HOLD LEGAL REQUIREMENT FOR NEGLIGENCE, AND HAD, IN FACT, NEGLIGENCE IS MOST BASICALLY DEFINED AS THE BREACH OF A LEGAL DUTY, WHERE THE BREACH CAUSES HARM, SO IF THE CITY OF MIAMI BEACH HAD A LEGAL DUTY TO KEEP THE WORKPLACE FREE FROM SEXUAL HARASSMENT, THEN IT IS BREACH OF THAT DUTY THAT WAS NEGLIGENCE.

WHERE DOES IT COME FROM? DOES IT COME, IN YOUR OPINION, FROM BERT, OR DID IT PREDATE BYRD?

I THINK THAT THERE ARE, REALLY, FOUR SOURCES THAT THE RESTATEMENT RECOGNIZES, OF A LEGAL DUTY, AND I BELIEVE THAT, TO SOME EXTENT, WE ARE DEALING WITH ALL OUR. FIRST, THE RESTATEMENT OF TORTS SET FORTH, THE SOURCE OF A LEGAL DUTY IS THE LEGISLATIVE ENACTMENT AND ADMINISTRATIVE REGULATION, AND WE CERTAINLY HAVE THAT HERE. WE HAVE TITLE VII. WE HAVE THE FLORIDA CIVIL RIGHTS ACT.

BUT IF YOU ARE PROCEEDING UNDER THOSE, YOU WOULD HAVE TO HAVE FILED YOUR ACTION WITH THE COMMISSION AND GONE THROUGH THAT KIND OF PROCEDURE. IF YOU WERE PROCEEDING UNDER THE FLORIDA CIVIL RIGHTS ACT, CORRECT?

IF WE WERE PROCEEDING UNDER THIS ACT. HOWEVER, IN FLORIDA, THERE ARE NUMEROUS CASES, ALL CITED IN OUR BRIEFS, WHICH SAY THAT A VIOLATION OF A STATUTE, ORDINANCE OR REGULATION IS EVIDENCE OF NEGLIGENCE, UNLESS THE LAW EXPRESSLY STATES OTHERWISE. AND I CAN GIVE YOU SOME EXAMPLES.

HAVE YOU MISSED YOUR STATUTORY TIME FRAME FOR CIVIL RIGHTS ACT, STATUTORY CIVIL RIGHTS ACT?

NO QUESTION THAT TIME FRAME WAS MISSED.

THAT IS WHY I THINK YOU ARE GOING UNDER TORTS, AND THAT IS WHY I AM BACK TO MY INITIAL QUESTION, THAT THIS DUTY THAT YOU SPEAK OF, IS IT A COMMON LAW DUTY THAT HAS BEEN THERE, OR DOES IT ARISE OUT OF THE BYRD OPINION? WHAT IS YOUR POSITION ON THAT?

I THINK THAT IT ARISES, FIRST, OUT OF THE STATUTES, SECOND OUT OF BYRD AND THE OTHER JUDICIAL INTERPRETATION OF ENACTMENTS OR REGULATION, WHICH IS THE SECOND THRESHOLD THAT THE RESTATEMENT SETS FORTH. SEXUAL HARASSMENT IS, REALLY, NOT SPECIFICALLY SET FORTH IN ANY STATUTE. IT IS THE PRODUCT OF A JUDICIAL INTERPRETATION OF THE MEANING OF SEX DISCRIMINATION, AND I BELIEVE THAT THIS COURT SETS FORTH THAT DUTY FAIRLY CLEARLY IN BYRD, SAYING THAT PUBLIC POLICY REQUIRES EMPLOYERS TO MAINTAIN A WORKPLACE FREE OF SEXUAL HARASSMENT. NOW, IF THAT OPINION WAS DEALING WITH A MORAL DUTY, THIS COURT, CERTAINLY, DIDN'T SAY THAT, AND SO THEREFORE IT MUST HAVE BEEN A LEGAL DUTY THAT THIS COURT WAS ADDRESSING.

LET'S SEE IF WE CAN BE A LITTLE MORE PRECISE, THOUGH, IN TERMS OF BYRD DEALT WITH THE ISSUE OF WHETHER OR NOT THERE IS THIS WORKERS COMPENSATION. THAT IS A FAIRLY NARROW

AND DISTINCT ISSUE, YOU KNOW, THAT WAS INVOLVED. WOULD YOU AGREE WITH THAT? I MEAN, IN TERMS OF THE ISSUE THAT NEEDED TO BE RESOLVED.

YES, YOUR HONOR, IT WAS.

WELL, LET'S JUST -- BECAUSE I AM -- I HAD THE SAME CONCERNS THAT JUSTICE SHAW HAS, BUT WE NEED A MORE DIRECT RESPONSE TO THOSE CONCERNS. ALL RIGHT. AND I AM -- IT IS A FRIENDLY EXCHANGE, IN TERMS OF DON'T BE FEARFUL. I JUST WANT TO TRY TO GET THIS ARTICULATED, IN A WAY THAT WE CAN UNDERSTAND IT. BYRD DID NOT DEAL WITH A CASE, FOR INSTANCE, WHERE SOMEBODY ATTEMPTED TO ALLEGE A NEGLIGENT BASIS FOR SEXUAL HARASSMENT AND THEN HAD SOME OUTCOME IN THE TRIAL COURT, SOME OUTCOME IN THE COURT OF APPEALS, AND THEN BROUGHT THE SAME EXACT ISSUE UP TO THIS COURT. THAT WAS NOT THE CONTEXT THAT BYRD WAS DECIDED. CORRECT?

THAT'S CORRECT.

OKAY. ARE YOU ASSERTING, HERE, THAT ALTHOUGH WE MAY NOT HAVE SEEN THIS CAUSE OF ACTION COME UP IN AN ACTUAL CASE, AND THEREFORE BE DISCUSSED IN AN APPELLATE OPINION OR WHATEVER, THAT, UNDER FLORIDA COMMON LAW, THAT A CAUSE OF ACTION, BASED ON A DUTY AND A BREACH THE DUTY AND WHATEVER, THE TYPICAL, HAS ALWAYS BEEN OUT THERE, JUST WAITING FOR THE RIGHT FACTS TO COME TO THE FORE, AND THEN FOR IT TO COME TO THE COURT TO RECOGNIZE SOMETHING THAT HAS, ALREADY, EXISTED THERE. IS THAT WHAT YOU ARE CONTEND SOMETHING.

YOUR HONOR, I DON'T BELIEVE IT HAS ALWAYS BEEN OUT THERE, BUT I BELIEVE THAT PUBLIC POLICY HAS CHANGED.

ONCE SEXUAL HARASSMENT, ITSELF, IS RECOGNIZED IN PUBLIC POLICY, BUT YOU ARE BASICALLY SAYING THAT YOU HAD A COMMON LAW CAUSE OF ACTION. IS THAT CORRECT?

YES, YOUR HONOR.

AND IT DIDN'T ARISE OUT OF BYRD. BYRD MAY HAVE DISCUSSED IT, IF I UNDERSTAND YOU. BUT LET ME COME BACK. I AM NOT SURE THAT I UNDERSTAND ABOUT WHAT HAPPENED AT THE TRIAL COURT LEVEL. JUST BEAR WITH ME A MINUTE, WHETHER IT IS IMPORTANT OR NOT IMPORTANT, BUT YOU SAID THE COURT REFUSED TO GIVE AN INSTRUCTION ON NEGLIGENT SUPERVISION. IS THAT CORRECT?

YES, YOUR HONOR.

AND THEN YOU SAY THAT THE COURT IMPOSED AN EVEN STRICTER STANDARD. NOW, ARE YOU SAYING THAT THE COURT INSTRUCTED THE JURY THAT THEY WOULD HAVE TO FIND THAT THE CITY, ITSELF, THROUGH THE ACTIONS OF ITS MANAGEMENT MANAGEMENT PERSONNEL, WERE GUILTY OF SEXUAL HARASSMENT?

THE COURT INSTRUCTED, AND I DON'T RECALL THE EXACT INSTRUCTION. I THINK IT MAY BE SET FORTH IN ONE OF THE BRIEFS IN THE THIRD DISTRICT, BUT THE COURT, CERTAINLY, SAID THAT THE JURY HAD TO CONCLUDE THAT SEXUAL HARASSMENT HAD OCCURRED, IN ORDER TO FIND LIABILITY, AND IT SPECIFICALLY INSTRUCTED WHAT SEXUAL HARASSMENT WAS.

OKAY. WELL, THERE IS A DIFFERENCE BETWEEN SEXUAL HARASSMENT THAT IS COEMPLOYEES OR WORKERS OR WHATEVER MAY COMMIT AND SEXUAL HARASSMENT THAT MANAGEMENT MAY BE RESPONSIBLE FOR. WOULD YOU AGREE?

YES, AND I BELIEVE THAT THE COURT DID DEAL WITH VICARIOUS LIABILITY OF -- FOR

SUPERVISORS VERSUS COEMPLOYEES. THANK THAT INSTRUCTION WAS GIVEN, ALTHOUGH YOU ARE TESTING MY MEMORY A LITTLE BIT, GOING BACK TO JURY INSTRUCTIONS, BUT I BELIEVE THAT THERE WERE VICARIOUS LIABILITY INSTRUCTIONS GIVEN, BUT I THINK THAT --

JUST FOLLOWING UP ON THIS, WE UNDERSTAND WHAT A NEGLIGENT RETENTION WOULD BE, BUT THEY -- THAT SEXUAL HARASSMENT WAS GOING ON, SOMEBODY, THAT THE EMPLOYER KNEW OR SHOULD HAVE KNOWN AND FAILED TO STOP IT, AND IT SEEMS TO ME THE CITY IS ACKNOWLEDGING THAT THAT KIND OF CAUSE OF ACTION COULD EXIST AT COMMON LAW. I AM HAVING TROUBLE, AND I WANT TO JUST MAKE SURE WE ARE CLEAR ABOUT THIS, THAT -- WAS THE CAUSE OF ACTION YOU ARE ASKING THIS COURT TO EITHER ACKNOWLEDGE EXISTED BEFORE OR AFTER BYRD OR BECAUSE OF BYRD, MEAN THAT ALL THAT HAS TO BE PROVEN IS THAT SEXUAL HARASSMENT OCCURRED IN THE WORKPLACE, AND THAT, BECAUSE -- THAT THERE WOULD BE SOME TYPE OF A STRICT LIABILITY IMPOSED ON THE EMPLOYER, THAT BECAUSE IT IS OCCURRING, THAT THEY HAVE BREACHED THEIR DUTY TO PROVIDE A SAFE WORKPLACE?

I BELIEVE THE U.S. SUPREME COURT ACTUALLY SET FORTH THE NEGLIGENT STANDARD FOR SEXUAL HARASSMENT, AND WHAT THEY SAID IN BURLINGTON VERSUS ELLERS WAS THIS, IF AN EMPLOYER WAS NEGLIGENT WITH RESPECT TO SEXUAL HARASSMENT, IF IT KNEW OR SHOULD HAVE KNOWN ABOUT THE CONDUCT AND FAILED TO STOP IT, AND THEY ARE, ALSO, SAYING --

IS THAT WHAT YOU ARE SAYING THE CAUSE OF ACTION WOULD BE?

YES, YOUR HONOR.

AND HOW DOES THAT DIFFER FROM CAUSE OF ACTION FOR NEGLIGENT SUPERVISION?

I DON'T THINK IT DOES. I DON'T THINK WE ARE CREATING ANY NEW CAUSE OF ACTION AT ALL. I THINK WE ARE CONFIRMING THAT THAT CAUSE OF ACTION EXISTS, BASED ON A SEXUAL HARASSMENT FACT PATTERN.

IS THAT THE KIND OF PROOF THAT YOU SUBMITTED IN THE TRIAL COURT? THAT IS DID YOU ATTEMPT TO SUBMIT PROOF THAT YOUR CLIENT WAS BEING SEXUALLY HARASSED BY VARIOUS EMPLOYEES, AND THAT THE MANAGEMENT WAS AWARE OF THAT AND IGNORED IT AND LET IT GO ON OR WHATEVER, AND THAT?

THE TESTIMONY WAS THAT MS. GUERRA REPORTED NUMBER REDUCES INCIDENTS TO HER SUPERVISOR, MR. BOLINSKI, THE HEAD OF THE COMMUNICATIONS DEPARTMENT, AND --

DOES THE RECORD SHOW SOMEONE WAS SPECIFICALLY NAMED AND ALL THIS, BECAUSE THE COMPLAINT, REALLY, IS PRETTY VAGUE, ISN'T IT?

THE COMPLAINT WAS VERY BASIC, YOU KNOW, ULTIMATE FACTS, NO QUESTION ABOUT IT. IT WAS VERY BASIC, BUT WHAT SHE DID TESTIFY WAS THAT SHE HAD GONE TO MR. BOLINSKI ON SEVERAL OCCASIONS, NAMING THE PEOPLE WHO HAD DONE THINGS, AND THEN THE INTERNAL AFFAIRS INVESTIGATION RELATED TO THE LETTER THAT WAS SENT AND WHAT HAPPENED THERE WAS, THERE WAS ANONYMOUS LETTER THAT WAS SENT TO BOTH MS. GUERRA'S HUSBAND AND TO HER SUPERVISION -- AND TO HER SUPERVISOR, RANDY MASER, AND WHAT HAPPENED THERE WAS SHE TOOK IT TO FAMILY MEMBERS, SHE TOOK IT TO PEOPLE OUTSIDE THE COMMUNICATIONS DEPARTMENT. SHE TOOK IT TO LOWER-LEVEL EMPLOYEES INSIDE THE COMMUNICATIONS DEPARTMENT, AND FINALLY ALMOST EVERYBODY AT EVERY LEVEL TOLD HER TO TAKE IT TO INTERNAL AFFAIRS, WHICH, UNDER THEIR SEXUAL HARASSMENT POLICY, DOES INVESTIGATE. WHEN IT FINALLY GOT TO INTERNAL AFFAIRS, IT TOOK THEM A YEAR TO INVESTIGATE, BUT WHAT THEY HAD CONCLUDED WAS THAT A VIOLATION OF THE SEXUAL HARASSMENT POLICY HAD OCCURRED. WHAT SHE DID NOT DO WAS TO TAKE THE EXTRA STEP. THEY SAID, WELL, THEY HAD CONCLUDED THAT SOMEBODY INSIDE THE DEPARTMENT HAD DONE

IT. THEY DID NOT CONCLUDE OR, REALLY, MAKE ANY ATTEMPT TO CONCLUDE WHO HAD DONE IT, BUT THEY DID -- THEY DID NOT ATTEMPT TO ADDRESS OR CORRECT THE SITUATION, AND, INSTEAD, WHAT HAD HAPPENED WAS MS. GUERRA WAS FIRED, DURING THE COURSE OF THAT YEAR-LONG INVESTIGATION, AND SO IT JUST SEEMED TO GO ON WITHOUT HER, AND THEY DIDN'T SEEK HER INPUT ANY FURTHER.

LET ME COME BACK AND ASK YOU DIRECTLY THE QUESTION THAT JURISDICTION IN THIS COURT RESTS UPON A CONFLICT WITH BYRD. ISN'T THAT CORRECT?

YES.

AND WE WOULD HAVE TO FIND, DIRECTLY, THAT THE THIRD DISTRICT'S ANALYSIS WAS ERROR, WHERE IT FOUND THAT BYRD DID NOT DEAL, DETECTLY, WITH THIS ISSUE, ON THE BASIS THAT IT DID NOT ARRIVE AT A DECISION THAT THERE WAS A COMMON LAW CAUSE OF ACTION FOR SEXUAL HARASSMENT.

YES, YOUR HONOR, AND I BELIEVE THAT THE REASON THAT THERE IS A DIRECT CONFLICT WITH BIRD IS BECAUSE BIRD MAKES THE STATEMENT THE CLEAR PUBLIC POLICY EMANATING ROM FEDERAL AND FLORIDA LAW HOLDS THAT AN EMPLOYER IS CHARGED WITH MAINTAINING A WORKPLACE FREE FROM SEXUAL HARASSMENT, AND THE COURT, ALSO, SAID PUBLIC POLICY NOW REQUIRES THAT EMPLOYERS BE HELD ACCOUNTABLE IN TORT FOR THE SEXUALLY HARASSING ENVIRONMENTS THEY PERMIT TO EXIST, WHETHER A TORT CLAIM IS PREMISED ON A REMEDIAL STATUTE OR THE COMMON LAW, AND UNLESS THE COURT WAS SAYING THAT SOMETHING BESIDES A LEGAL DUTY, THAT COURT, THIS COURT HAS STATED A DUTY OF AN EMPLOYER, TO MAINTAIN A WORKPLACE FREE OF SEXUAL HARASSMENT. ONCE THERE IS A LEGAL DUTY, A BREACH OF A LEGAL DUTY IS NEGLIGENCE, WHEN IT CAUSES HARM, SO I BELIEVE THAT THIS COURT'S STATEMENT, IN ORDER FOR THE THIRD DISTRICT TO CONCLUDE THAT THERE IS NO ACTION IN NEGLIGENCE, THE THIRD DISTRICT HAD TO CONCLUDE THERE WAS NO LEGAL DUTY TO MAINTAIN A WORKPLACE FREE OF SEXUAL HARASSMENT, AND I BELIEVE THAT THIS COURT FOUND TO THE CONTRARY.

PUBLIC POLICY, AS OPPOSED TO A LEGAL DUTY, CAN YOU DRAW A DISTINCTION BETWEEN THE TWO?

WELL, I THINK THAT THE COURT, WHAT THE COURT SAID WAS THAT THERE WAS A PUBLIC POLICY THAT CREATED A DUTY. THE COURT SAID THE EMPLOYER IS CHARGED WITH MAINTAINING A WORKPLACE FREE FROM SEXUAL HARASSMENT, BASED ON THE PUBLIC POLICY AND, ALSO, BASED ON THE STATUTORY PREMISE. THE LEGAL DUTY CAN ARISE FROM A LEGISLATIVE ENACTMENT, LEGISLATIVE REGULATION, JUDICIAL ENACTMENTS OR REGULATIONS, OTHER JUDICIAL PRECEDENT, WHICH, WE BELIEVE, DEALS WITH THE CASES THAT HOLD THAT A VIOLATION OF A STATUTE, ORDINANCE OR REGULATION IS EVIDENCE OF NEGLIGENCE, UNLESS THE LAW EXPRESSLY STATES OTHERWISE, AND, ALSO, A DUTY ARISING FROM THE GENERAL FACTS OF THE CASE, SO I THINK THE LEGAL DUTY AROSE FROM ALL FOUR OF THOSE THINGS AND THAT, FOR THE THEIRS DISTRICT TO CONCLUDE THAT NO NEGLIGENCE AND NO CAUSE OF ACTION NEGLIGENCE OCCURS, IT HAD TO CONCLUDE THAT THERE WAS NO LEGAL DUTY, AND I BELIEVE THAT THIS COURT EXPRESSED A LEGAL DUTY. I WOULD LIKE TO PRESERVE THE REMAINDER OF MY TIME.

THANK YOU VERY MUCH MR. PALP I.

THANK YOU. YOUR HONOR, MAY IT PLEASE THE COURT. MY NAME IS DONALD PAPY, CHIEF DEPUTY CITY ATTORNEY FROM MIAMI BEACH. THIS DEALS WITH THE ISSUE OF DISCRIMINATION, IN GENERAL. ONE CATEGORY OF THAT IS DISCRIMINATION AND ONE CATEGORY OF THAT IS SEXUAL HARASSMENT.

YOU ARE SAYING IT HAS BEEN PREEMPTED? LET ME TELL YOU WHERE I AM HAVING SOME

DIFFICULTY, AND I THINK THEY CAN OPERATE IN THE SAME REALM. WE KNOW THAT BYRD WAS DEALING WITH THE EXCLUSIVITY ASPECT OF WORKERS COMPENSATION. WAS THAT THE EXCLUSIVE REMEDY.

YES, YOUR HONOR.

AND THEN THIS COURT GOES ON TO TALK ABOUT THAT, IN LIGHT OF THE OVERWHELMING PUBLIC POLICY, WE CANNOT SAY THAT THE EXCLUSIVITY RULE OF THE WORKERS COMPENSATION STATUTE SHOULD EXIST TO SHIELD AN EMPLOYER FROM TORT LIABILITY, BASED ON INCIDENTS OF SEXUAL HARASSMENT, SO IT SEEMS THAT THE COURT IS TALKING ABOUT SOME TORT, AND WHAT IS THAT TORT, I GUESS, IS WHAT WE ARE TALKING ABOUT TODAY.

YOUR HONOR, THE TORTS IN BYRD, AND BYRD, AS YOU CORRECTLY POINTED OUT EARLIER, WAS A CASE DEALING WITH WHETHER WORKERS COMPENSATION WAS THE EXCLUSIVE REMEDY IN THE WORKPLACE.

BUT YOU WOULDN'T GET TO THAT, UNLESS YOU HAVE A TORT, SO WHAT IS THE TORT? A.

A TORT IS AN OFFENSE COMMITTED BY A COMMON LAW WORKER, WHICH IS TOTALLY LACKING IN THIS CASE. THERE IS NO EMPLOYEE ACTING INTENTIONALLY WITH A -- AGAINST A COMMON LAW TORT. THAT IS WHAT YOU HAD IN BYRD. YOU HAD INTENTIONAL DISTRESS AND THE ALLEGATION THAT THE EMPLOYER WAS NEGLIGENT IN HIRING OR RETENTION OF THOSE EMPLOYEES N THIS CASE, THERE WAS NO NEGLIGENT HIRING OR RETENTION.

YOU AGREE, THEN, THAT WHAT OF HIS PLANNED AND PROVEN -- WHAT WAS HAND AND PROVEN, AND THESE WERE THE ACTUAL INSTRUCTIONS, THESE VEREARTH ACTS OF SEXUAL HARASS -- OVERT ACTS OF SEXUAL HARASSMENT, AND THAT THE EMPLOYER KNEW ABOUT IT AND FAILED TO TAKE ANY ACTION, THAT WAS, THEREFORE, A COMMON LAW COURSE OF ACTION, FOR NEGLIGENT SUPERVISION AND RETENTION?

NO, YOUR HONOR, BECAUSE WHAT WE HAVE HERE IS THE ALLEGATIONS OF SEXUAL HARASSMENT ARE DETERMINED BY THE LEGISLATURE. IT IS IN DEROGATION AFTER COMMON LAW, HULLINGER AND OTHER CASES OF THIS COURT, HAVE EXPRESSLY DECLARED THAT WE ARE AT AN AT-WILL STATE, AND IT IS UP TO THE LEGISLATURE, FOR EXAMPLE, TO CREATE CAUSES OF ACTION FOR DISCRIMINATION FORM THE LEGISLATURE HASN'T, SO --

IN ANSWER TO YOUR PREVIOUS QUESTION, YOU ARE SAYING -- IN ANSWER TO THE PREVIOUS QUESTION, YOU ARE SAYING THAT THERE IS NO TORT ACTION FOR NEGLIGENT HIRING, SUPERVISION OR RETENTION?

NO, YOUR HONOR. THERE IS A CAUSE OF ACTION FOR NEGLIGENT HIRING OR RETENTION, BUT IT IS PREMISED UPON COMMON LAW INTENTIONAL TORTS, SUCH AS PHYSICAL BATTERY OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS. IT IS NOT PREMISED ON, QUOTE, SEXUAL HARASSMENT, WHICH IS A CREATURE OF STATUTE. THE LEGISLATURE HAS GIVEN RIGHTS, IN THIS STATE THAT, DID NOT EXIST AT COMMON LAW, TO COMPLAIN ABOUT DISCRIMINATION.

TALKING ABOUT BYRD.

YES, YOUR HONOR.

HAD THERE BEEN NO ALLEGATION OF ASSAULT AND BATTERY OR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, WE WOULD NOT GET TO THE NEGLIGENT HIRING AND RETENTION.

THAT'S CORRECT. NEGLIGENT HIRING AND RETENTION IS PREMISED ON A TORTFEASOR, WHO YOU EITHER KNEW BEFORE YOU HIRED THEM OR YOU LEARNED SQEBL HAD -- SUBSEQUENTLY HAD

COMMITTED OR HAD A PROPENSITY TO COMMIT TORTS, AND THAT IS NOT PLED HERE. IT WAS PLED, HOWEVER, IN THE BYRD CASE, AND THAT IS WHY BYRD WAS ALLOWED, AND THE COURT SAID, IN BYRD, IF THE FACTS --

SO THE NEGLIGENT HIRING IS NOT THE TORT, ITSELF?

THAT'S CORRECT. NEGLIGENT HIRING OR RETENTION REQUIRES AN INDEPENDENT TORT BY A COEMPLOYEE. TYPICALLY, IT COMES UP IN THE CONTEXT OF A THIRD PARTY, THE TALLAHASSEE FURNITURE CASE, WHERE A COMPANY'S DELIVERY MAN COMMITTED AN ASSAULT ON A CUSTOMER. THAT IS A TYPICAL NEGLIGENT HIRING OR RETENTION. BYRD WAS A LITTLE LESS TYPICAL, BUT IF YOU HAVE INTENTIONAL TORTS THAT ARE BEING COMMITTED IN THE WORKPLACE BY WORKERS, AND YOU KNEW ABOUT THAT, THEN YOU HAVE A CLAIM FOR NEGLIGENT HIRING OR RETENTION, WHICH BYRD CAN.

IF I UNDERSTAND MS. BALLMAN'S ARGUMENT, YOU HAVE A TORT, AND THE DUTY OF THAT TORT CAN BE BASED ON, EITHER, A STATUTORY OR COMMON LAW ISSUE, AND SO WHY, IF THAT IS TRUE, WELL, TELL ME WHAT YOU SEE AS THE FALLACY IN THAT ARGUMENT.

THE FALLACY IN THAT ARGUMENT IS THAT DISCRIMINATION IS A CREATURE OF STATUTE IN THIS STATE. IT DOES NOT EXIST AT COMMON LAW. IT IS WRONG, WE ALL AGREE WITH THAT, BUT IN THE STATE OF FLORIDA, IT ONLY BECAME A CAUSE OF ACTION WHEN THE LEGISLATURE SAID SO. THEY HAVE CREATED A FRAMEWORK THAT REQUIRES TIMELY FILING OF A CHARGE, INVESTIGATION BY A STATE AGENCY, A DETERMINATION OF CAUSE OR NO CAUSE. A WAITING PERIOD, BEFORE YOU CAN FILE SUIT, AND THEN ULTIMATELY, A LAWSUIT BEING FILED, IF YOU ARE NOT SATISFIED, AFTER MEDIATION IS ATTEMPTED, TO ALLOW A CLAIM FOR NEGLIGENT HIRING OR RETENTION, IN THE ABSENCE OF AN INTENTIONAL TORT, COMMON LAW TORT, WOULD BE TO FRUSTRATE THE POLICY OF THE LEGISLATURE, TO NOT ALLOW PEOPLE TO RUN INTO COURT ON DISCRIMINATION CLAIMS BUT, RATHER, TO REQUIRE TIMELY FILING, FOLLOWING UP WITH MEDIATION, AND THEN ULTIMATELY, PERHAPS, FILE AGO LAWSUIT.

LET ME SEE IF I UNDERSTAND, BECAUSE ULTIMATELY I AM A LITTLE BIT CONFUSED, BY THE WAY YOU HAVE ARTICULATED THIS, AND IT ALMOST APPEARS YOU ARE AYNG TWO THING THAT IS DON'T FIT TOGETHER.

YES.

SO LET ME ASK, GOING BACK TO BYRD AND THE NEGLIGENT HIRING AND RETENTION.

YES.

OKAY. IF I UNDERSTAND IT CORRECTLY, YOU ARE SAYING THAT THERE CAN'T BE A COMMON LAW NEGLIGENT HIRING AND RETENTION CLAIM, BASED ON INTENTIONAL SEXUAL HARASSMENT, OR ARE YOU SAYING THAT THAT CAN'T EXIST? LET'S JUST, YOU KNOW, CAN THAT EXIST OR NOT?

IT WILL REQUIRE COMMON LAW TORTS, WHICH, AS IN BYRD, WERE A NATURE OF SEXUAL HARASSMENT.

IF, IN BYRD OR HYPOTHETICALLY, THERE WAS A CASE WHERE THERE WAS A PARTICULAR PERSON, AND THE PERSON, AT ONE JOB THAT WILL MAKE IT A MALE, JUST FOR PURPOSES OF A HYPOTHETICAL, WORKED AT THE JOB FOR A LONG TIME, AND WAS JUST CLASSIC SEXUAL HARASSER. I MEAN INTENTIONALLY WENT AROUND, SEXUALLY HARASSING, IN THAT INSTANCE, WOMEN, AND IN THE SAME WORKPLACE, AND WAS FIRED, AND, LATER, ANOTHER EMPLOYER NEEDED SOMEBODY TO WORK AT WHAT THIS PERSON DID, AND CALLED THE FORMER EMPLOYER AND SAID I AM THINKING ABOUT HIRING MR. SMITH, TO DO WHAT HE DID FOR YOU, AND THE FORMER EMPLOYER SAYS, WELL, HE IS GOOD AT WHAT HE DOES, BUT HE IS A SEXUAL HARASSER,

AND WE FINALLY HAD TO FIRE HIM FOR THAT, BECAUSE HE JUST DID IT SO MANY TIMES AND WOULDN'T LISTEN AND ALL OF THAT. AND THIS NEW EMPLOYER WENT AHEAD AND HIRED HIM, ANYWAY, AND THEN HE DID JUST WHAT HE DID ON THE OTHER JOBS, AND SEVERAL WOMEN QUIT, AS A RESULT OF WHAT HAPPENED. WOULD THEY HAVE CAUSES OF ACTION AGAINST THE NEW EMPLOYER, FOR THE NEGLIGENT HIRING AND RETENTION OF THAT PERSON THAT I DESCRIBED?

NO, YOUR HONOR.

NO? THE ANSWER TO THAT IS NO.

CORRECT, YOUR HONOR.

AND WHY IS THAT?

BECAUSE NEGLIGENT HIRING OR RETENTION, WHICH, AGAIN, I MUST ADD, WAS NOT PLED HERE NOR PROVEN.

WELL, BUT WORKING THROUGH THAT HYPOTHETICAL.

RIGHT. IS BECAUSE NEGLIGENT HIRING AND RETENTION REQUIRES A TORT FEES OR, SOMEONE WHO -- A TORTFEASOR, SOMEONE WHO COMMITS A TORT RECOGNIZED UNDER THE COMMON LAW OF THE STATE OF FLORIDA. THE INDIVIDUAL DOES HAVE A CLAIM, HOWEVER, UNDER THE FLORIDA CIVIL RIGHTS ACT, UNDER TITLE SEVEN.

SO YOU ARE SAYING, I THINK JUSTICE LEWIS ASKED YOU INITIALLY, AND IN ESSENCE WHAT YOU ARE CLAIMING HERE IS THAT IS THERE A STATUTORY PREEMPTION, AND THAT IS THAT THE LEGISLATURE HAS PROVIDED A MECHANISM TO ADDRESS THIS, AND THAT IS AN EXCLUSIVE MECHANISM FOR THIS PARTICULAR KIND OF INJURY.

FOR DISCRIMINATION, YES.

FOR THIS KIND OF INJURY.

PHYSICAL BATTERY OR INTENTIONAL INFLICTION, NO, THAT IS NOT PREEMPTED.

BUT SEXUAL HARASSMENT BEING AT THE CORE OF IT, YES.

IF IT IS ONLY SEXUAL HARASSMENT IN THE ABSENCE OF A COMMON LAW TORT, THEN YES.

OKAY.

AND THERE WAS, IN THIS CASE, NO -- UNLIKE THE OHIO CASE, IT WAS ACTUAL SEXUAL MOLESTATION ALLEGED. THERE IS NOTHING LIKE THAT IN THIS RECORD OF ANY UNWANTED TOUCHING?

YOUR HONOR, THE ONLY PLACE IN THE RECORD, AND I BELIEVE THIS IS -- THAT IS A PAGE, I THINK, 191 OF THE TRANSCRIPT, THERE IS AN ALLEGATION, AND BY THE WAY, I MUST SAY THAT, IN READING THROUGH THE WHOLE RECORD, AND I HOPE THE COURT WILL DO THAT, CHECK THE WHOLE TRANSCRIPT, THIS IS NOT A SEXUAL HARASSMENT CASE. THE ALLEGATIONS ARE THAT SHE HAD PROBLEMS IN THE WORKPLACE. SHE DIDN'T GET ALONG. THIS IS NOT A CLASSIC. NOW, THE THIRD DISTRICT DIDN'T RULE ON THAT, OF COURSE, BUT WE DID ALLEGE THAT BELOW, AND THEY SIMPLY RULED THAT THERE WAS NO COMMON LAW CAUSE OF ACTION, BUT IN TERMS OF THE ONLY ALLEGATION OF ANYTHING PHYSICAL WAS THAT ALLEGEDLY ONE OF THE SUPERVISORS TOUCHED A JACKET OR A COAT THAT SOMEONE WAS WEARING, WHILE THEY WERE WEARING IT. THAT IS IT. THERE WAS ABSOLUTELY NOTHING ELSE. THERE WERE NO SEXUAL

ADVANCES OF ANY SORT. THERE WAS NO PHYSICAL ASSAULTS OF ANY SORT. THIS WAS PROBLEMS IN THE WORKPLACE. THE ONLY THING OF A SEXUAL NATURE AT ALL WAS THIS ANONYMOUS LETTER THAT THE CITY TRIED TO INVESTIGATE, BUT EVEN THAT, WE SUGGEST, AND, AGAIN, THAT IS THE THIRD DISTRICT DIDN'T RULE ON THIS, DOESN'T RISE TO THE LEVEL OF BEING SO SEVERE OR PERVASIVE, AND THE JURY INSTRUCTIONS WERE DEFICIENT, WE BELIEVE, IN THAT REGARD. ALSO THE JURY INSTRUCTION HAD NOTHING GOING NEGLIGENT HIRING OR RETENTION. YES, YOUR HONOR.

FROM THE CITY'S POINT OF VIEW, DOES THE TOUCHING MAKE A DIFFERENCE? LITS SAY -- LET'S SAY HE TOUCHED THE WOMAN'S BLESS. WOULD IT HAVE -- THE WOMAN'S BREAST. WOULD IT HAVE MADE ANY DIFFERENCE?

CERTAINLY IN THE BYRD CASE, WHERE THERE WAS AN INTENTIONAL TORT. THAT IS NOT THE POINT IN THE PLEADING AND THAT IS NOT THE POINT OF THE CASE. IF SOMEONE BRUSHES UP AND SAYS, HEY, THAT IS A NICE JACKET, THAT IS NOT A BATTERY. NO ONE WOULD ARGUE THAT THAT IS A BATTERY, AND THERE IS NO ALLEGATION OF A SEXUAL CLAIM.

THE TOUCHING OF THE BREAST, IT IS NOT AN ASSAULT OR ANYTHING, AND, PROBABLY, WOULD JUST BE A BRUSHING, OTHER THAN THAT, BUT, WOULD THE INTENT, HERE,, DOES THAT MAKE IT SOMETHING ELSE?

THERE IS, REALLY, NO ALLEGATION THAT THERE WAS AN INTENT TO BATTER THIS WOMAN. THAT IS NOT THE IN THE COMPLAINT. I AM SIMPLY RESPONDING TO WAS THERE EVER ANY ALLEGATION --

THE ATTEMPT WAS, AS MOST SEXUAL HARASSMENT, TO GET SOME KIND OF PLEASURE FROM HARASSING SOMEBODY OF THE OPPOSITE SEX.

FIRST OF ALL, IT WASN'T THE OPPOSITE SEX HERE. IT WAS TOUCHING OF A JACKET. THAT IS ALL SHE SAID IN THE COMPLAINT. I MEAN THAT IS ALL SHE SAID AT TRIAL.

WOULD IT HAVE MADE ANY DIFFERENCE, IF THAT WAS HIS MOTIVE, AND HE HAD PHYSICALLY TOUCHED THE WOMAN?

IT WAS A SHE, AND I SHE HAD PHYSICALLY ATTACKED THIS PERSON, THE PLAINTIFF, THAT WOULD HAVE BEEN A POSSIBLE BATTERY, WHICH IS AN INTENTIONAL TORT. IF WE HAD KNOWN ABOUT THE PROPENSITY BEFORE, OF THE PERSON BATTERING PEOPLE, OR SUBSEQUENTLY LEARNED OF THIS PROPENSITY AND RETAINED THEM, IF THAT HAD BEEN PLED, WHICH IT WAS NOT, YOU SEE, WHAT WE HAVE, HERE, REALLY, IS A FAILURE TO COMPLY WITH THE STATUTE.

BUT YOU CAN -- WHAT I AM TRYING TO SET UP IS SOMETHING LESS THAN WOULD NORMALLY, YOU WOULD NORMALLY CONSIDER A BATTERY. THIS PERSON COMES BY THIS WOMAN'S DESK EVERYDAY, AND EVERYDAY, WHEN HE COMES BY, HE REACHES OVER AND TOUCHES HER BREAST. HE DOESN'T BRUCE HER. HE DOESN'T HIT HER OR -- HE DOESN'T BREWS HER. HE DOESN'T -- HE DOESN'T BRUISE. HE DOESN'T HIT HER OR ANYTHING ELSE. WOULD THAT BE AN ACTION OF COMMON LAW?

THAT WOULD POSSIBLY CONSTITUTE SEXUAL HARASSMENT, YES, IF HE DOES THAT. THAT IS NOT WHAT WE HAVE, HERE, THOUGH.

CAN YOU EXPLAIN WHAT THE UNITED STATES SUPREME COURT SAID IN BURLINGTON, THE STATEMENT WHERE IT APPEARS THAT THEY ARE SPEAKING ABOUT A NEGLIGENT CAUSE OF ACTION AND SPECIFICALLY THE THE SUPERVISOR, OUTSIDE THE SCOPE OF EXPLOIT -- EMPLOYMENT, THAT AN EMPLOYER CAN BE NEGLIGENT OUTSIDE OF HARASSMENT, IF IT KNEW OR SHOULD HAVE KNOWN ABOUT THE CONDUCT AND FAILED TO STOP IT. THEY DON'T SEEM TO BE

DISTINGUISHING BETWEEN CONDUCT THAT HAD CONSTITUTED AN INDEPENDENT TORT, SUCH AS SEXUAL BATTERY, AND JUST ATMOSPHERE IN A WORKPLACE THAT CREATES A HOSTILE WORK ENVIRONMENT.

YOUR HONOR, THE ANSWER TO THAT IS THAT, IN THAT CASE, THE PLAINTIFF COMPLIED ITH THE ADMINISTRATIVE PREREQUISITE TO TITLE VII. THAT CASE IS A TITLE VII CASE. THEY WERE NOT ADDRESSING NEGLIGENT HIRING OR RETENTION, A SEPARATE -- THERE IS NO COMMON LAW FEDERAL TORT OF SEXUAL HARASSMENT.

ARE YOU SAYING THAT, UNDER TITLE VII, IN ORDER FOR THE EMPLOYER TO BE LIABLE --

YES.

-- THERE HAS TO BE SOMETHING OTHER THAN JUST THAT SEXUAL HARASSMENT EXISTED. EVEN UNDER TITLE VII, THERE HAS TO BE SOMETHING, EITHER THE EMPLOYER HAS TO HAVE FAILED TO ADOPT THE POLICY OR HAS SOME CONDUCT CONTRIBUTED TO CAUSE THE SEXUAL HARASSMENT.

YES, YOUR HONOR, BUT MOST IMPORTANTLY, THE PERSON, SEE, EVERY TIME SOMEONE IN THIS STATE FILES A FLORIDA CIVIL RIGHTS ACT COMPLAINT AND IT DOESN'T COMPLY WITH THE REQUIREMENTS, THEY ARE DISMISSED, EVEN IF IT IS THE MOST EGREGIOUS CASE OF DISCRIMINATION, BECAUSE THE LEGISLATURE BALANCED THE RIGHTS OF EMPLOYEES AND EMPLOYERS. THEY DIDN'T WANT EVERY CASE TO GO TO COURT. THIS CASE, AS IT STANDS NOW, FIRST OF ALL THE AMENDED COMPLAINT DOESN'T MENTION SEXUAL HARASSMENT. IT SAYS HARASSMENT. IF YOU ARE ALLOWED IN FLORIDA, NOW, AFTER THIS CASE, TO SUE FOR HARASSMENT, YOU DON'T HAVE TO GO THROUGH AN ADMINISTRATIVE PROCEDURE, YOU CAN SEE ANYTIME FROM DAY ONE TO FOUR YEARS LATER, YOU ARE GOING TO HAVE FLOOD GATES IN THIS STATE THAT WAS SPECIFICALLY REJECTED BY THE LEGISLATURE. THAT IS IMPORTANT.

BUT WHAT YOU ARE SAYING, THE BURLINGTON STATEMENTS, REALLY, HAVE TO BE UNDERSTOOD IN THE CONTEXT THAT THEY WERE SPEAKING ABOUT THE STATUTORY CAUSE OF ACTION.

YES, YOUR HONOR.

AND YOU ARE SAYING THAT, TO RECOGNIZE JUST THIS GENERALIZED DUTY, IN NEGLIGENCE, THERE WOULD BE NO REASON FOR A PERSON WHO WAS INJURED, THROUGH SEXUAL HARASSMENT, TO AVAIL HERSELF OR HIMSELF OF THE STATUTORY REMEDIES THAT WOULD ESSENTIALLY UNDERMINE THE STATUTORY SCHEME?

IT CERTAINLY WOULD, YOUR HONOR, AND WHAT --

ISN'T THERE --

DON'T YOU GET ATTORNEYS FEES, IF YOU FILE UNDER THE STATUTE?

YES, YES, YOU DO.

THERE ARE OTHER ADVANTAGES.

YOU DO, BUT, IN FLORIDA, AT COMMON LAW, THERE IS NO CAUSE OF ACTION FOR DISCRIMINATION, SEX DISCRIMINATION OR SEXUAL HARASSMENT, AND THAT IS WHY, IN BYRD, WE HAD COMMON LAW, INDEPENDENT COMMON LAW TORTS COMMITTED BY TORTFEASORS, AND THE COURT SAID THAT, IF THOSE FACTS, THE COURT REMANDED BYRD, AND SAID IF THOSE FACTS SUPPORT A COMMON LAW CAUSE OF ACTION, THEN THE CASE GOES FORWARD. THAT IS ALL THAT BYRD SAID, AND BYRD SAID THAT WORKERS COMP IS NOT GOING TO BE THE EXINCLUSIVE REMEDY THAT, IT IS NOT A BAR, THAN IS AN EXTREMELY SIGNIFICANT DIFFERENCE WITH THIS

CASE. IN THIS CASE, WE HAVE A PLAINTIFF WHO DID NOT COMPLY WITH THE ADMINISTRATIVE PREREQUISITES FOR A STATUTORY CAUSE OF ACTION. SHE DID NOT PLEAD NEGLIGENT HIRING OR RETENTION. THE COMPLAINT SAYS SHE WAS SUBJECTED TO A PATTERN OF HARASSMENT. SHE ADVISED HER SUPERVISOR ABOUT IT, AND THE CITY WAS NEGLIGENT IN FAILING TO CORRECT THE SITUATION. THAT IS THE STATE OF THIS COMPLAINT. IT WAS NOT AMENDED. THERE WERE NO JURY INSTRUCTIONS ON NEGLIGENT HIRING OR RETENTION, AND IF YOU LOOK AT WHAT WAS GIVEN, YOU HAVE, BASICALLY, A COMMON LAW SEXUAL HARASSMENT COMPLAINT, AND THIS COURT DID NOT FIND THAT IN BYRD. THAT IS NOT THE IMPORT OF BYRD, AND TO ALLOW SUCH A CAUSE OF ACTION THAT DID NOT EXIST AT COMMON LAW WOULD FLOUT THE LEGISLATURE'S VERY CAREFULLY CAREFULLY-CRAFTED, AND I MIGHT SAY, QUITE GENEROUS STATUTE, IT IS A LONGER STATUTE THAN CHAPTER 11. THERE ARE MORE DAMAGES AND LONGER TIME LIMITS. THE LEGISLATURE DECIDED TO BALANCE THE RIGHTS OF THE EMPLOYERS AND THE EMPLOYEES. FOR US TO HAVE AN OPPORTUNITY, IN A CONFIDENTIAL SETTING, WITH COMPLYING WITH APPROPRIATE TIME LIMITS, WITH INVESTIGATION BY THE AGENCY CHARGED BY THE STATE OF FLORIDA TO INVESTIGATE, IF, FOR EXAMPLE, THE AGENCY HAD DETERMINED THAT THERE WAS NO REASONABLE CAUSE TO PURSUE -- TO BELIEVE THERE WAS DISCRIMINATION, WHICH WE BELIEVE THEY WOULD HAVE CONCLUDED, SHE WOULD NOT HAVE BEEN ALLOWED TO GO INTO COURT. SHE WOULD HAVE HAD AN ADMINISTRATIVE REMEDY. SHE WOULD HAVE BEEN ALLOWED TO FILE FOR ADMINISTRATIVE RELIEF. IF SHE DIDN'T DO THAT, SHE WOULD HAVE BEEN BARRED, AND IF SHE DID, AND IT WAS CONCLUDED THERE WAS NO DISCRIMINATION, THAT WOULD HAVE BEEN THE END OF IT. SHE WOULD NEVER HAVE GONE TO COURT, IF THEY HAD FOUND REASONABLE CAUSE OR IF THEY HADN'T ACTED WITHIN 180 DAYS, SHE, THEN, COULD HAVE PURSUED A CLAIM AGAINST US IN COURT, BUT THE LEGISLATURE, NORMALLY THE ARGUMENT ABOUT FLOOD GATES IS THAT, WHATEVER HAPPENS, YOU ARE GOING TO HAVE A LOT OF CLAIMS. THE REASON IT IS SO SIGNIFICANT HERE IS, FIRST OF ALL, IT WOULD APPLY TO ANY TYPE OF DISCRIMINATION, NOT JUST SEXUAL HARASSMENT. THERE IS NO REASON THAT THERE WOULD BE A DIFFERENCE FOR THAT. THAT IS NOT WHAT THE LEGISLATURE INTENDED. THEY HAVE DEVELOPED --

COULD I JUST GET TO YOU CLARIFY ONE THING. I MEAN, YOU SEEM TO BE ASSERTING THAT IT IS TOTALLY PREEMPTIVE. LET'S LOOK AT A SITUATION. IF WE HAVE AN INTENTIONAL TORT, EVERYTHING THAT IS IN BYRD, BUT WE CALL THAT, BECAUSE IT INVOLVES, MAYBE, A MALE AND FEMALE, SEXUAL HARASSMENT, ARE YOU SUGGESTING THAT THE ONLY RELIEF THAT THIS LADY WOULD HAVE HAD IS THROUGH THE ADMINISTRATIVE CHANNEL?

NO, YOUR HONOR.

OKAY. SO YOU ARE RECOGNIZING THAT, IF IT IS AN INTENTIONAL TORT.

YES.

AND IT HAPPENS TO, WE CAN PUT A LABEL ON IT, OF HARS ASMENT OR SEXUAL -- -- OF HARASSMENT OR SEXUAL OR WHATEVER THAT OTHER PHRASE IS, THERE IS CAUSE FOR THAT.

YES, YOUR HONOR.

YOU ARE TRYING, THROUGH LEGISLATIVE CHANNELS, THOSE THING IN HIS THE NATURE OF DISCRIMINATION AND HARASSMENT THAT DO NOT AMOUNT TO AN INDEPENDENT TORT. IS THAT A FAIR --.

CORRECT. THAT IS EXACTLY RIGHT, YOUR HONOR. WE ARE NOT, IN ANY WAY, SAYING THAT THE COMMON LAW IS BEING AMEDED BY THIS STATUTE. WHAT I AM AMENDED BY THIS STATUTE. WHAT I AM SAYING IS THAT IT DID NOT EXIST, AND THIS COURT HAS CONSISTENTLY HELD THAT. FOR EXAMPLE IN WHISTLE BLOWING, A VERY EGREGIOUS CASE, SOMEONE FILED ABOUT POLLUTION, AT THAT TIME THERE WAS NO WHISTLE BLOWERS STATUTE, NO CAUSE OF ACTION.

NOW THERE IS. WE THANK YOU AND URGE YOU TO CONCLUDE THAT THERE IS NO CAUSE OF ACTION HERE AND AFFIRM THE THIRD DISTRICT OR, IN THE ALTERNATIVE, IF THE COURT WERE TO CONCLUDE THERE WAS A CAUSE OF ACTION, THAT THE THIRD DISTRICT BE ALLOWED TO DETERMINE WHETHER IT WAS SEXUAL HARASSMENT. THANK YOU.

THANK YOU.

IN THE ONLY CASE IN FLORIDA, OTHER THAN THE ONE BEFORE YOU NOW, IN WHICH A FLORIDA COURT ADDRESSED THE ISSUE OF COMMON LAW NEGLIGENCE, BASED ON THE DISCRIMINATION LAW, THE FIRST DCA RECOGNIZED THAT THE CLAIM FOR NEGLIGENCE, BASED UPON THE DUTY TO PROVIDE A WHEELCHAIR RAMP SET FORTH IN THE AMERICANS WITH DISABILITIES ACT AND FLORIDA STATUTE SECTIONS 553.501, THAT CASE WAS MEYERS VERSUS CITY OF JACKSONVILLE, DECIDED --

WOULD YOU AGREE, MS. BALMAN, THAT THE HOLDING IN THE THIRD DISTRICT CASE IS THAT FLORIDA DOES NOT RECOGNIZE A CAUSE OF ACTION FOR SEXUAL HARASSMENT, UNDER A COMMON LAW NEGLIGENCE THEREY? THAT IS THE HOLDING IN THE THIRD DISTRICT CASE, CORRECT?

YES. I THINK THAT'S CORRECT.

WOULD YOU, ALSO, AGREE THAT BYRD DOES NOT DISCUSS COMMON LAW NEGLIGENCE AT ALL?

THAT'S CORRECT. BYRD -- WELL, ACTUALLY BYRD DOES, BECAUSE NEGLIGENCE WAS PLED. AND WHAT BYRD DIDN'T ADDRESS THE ISSUE OF NEGLIGENCE, BUT IT DID SAY THAT IT WAS PLED, AND IT DIDN'T EXCLUDE NEGLIGENCE FROM ITS RULINGS, WHICH IT COULD HAVE.

RIGHT. BUT BYRD, REALLY, HOLDS THAT THERE COULD BE A TORT ACTION, IF YOU GO INTO THAT LANGUAGE IN BYRD. IT DOESN'T SAY THERE COULD BE A COMMON LAW NEGLIGENCE ACTION.

WELL, WHAT THE COURT SAID IS THERE CAN BE A COMMON LAW TORT ACTION, AND WHAT IT DIDN'T SAY IS, WELL, THAT WOULDN'T INCLUDE NEGLIGENCE. IT WOULD HAVE TO BE AN INTENTIONAL TORT, WHICH IT COULD HAVE. I THINK THERE WERE SOME INDEPENDENT TORTS THAT -- OF THE EMPLOYEES INVOLVED, BY THE WAY. THERE WAS DEFAMATION, WHICH THEY WERE STATING THAT SHE WAS HAVING AFFAIRS WITH OFFICERS AND STAN BURLINSKI, THE DEPARTMENT HEAD. THERE WAS BATTERY, IN THAT THE SUPERVISOR WAS TOUCHING HER CLOTHING AND IT WAS UNWANTED TOUCHING.

ARE THOSE PLEDZ, THOSE INCIDENTS?

IT WAS NOT IN THE PLEADING, BUT IT WAS CERTAINLY PROVEN, AND I DON'T THINK THERE IS ANYTHING THAT REQUIRES THAT IT BE PLED IN A NEGLIGENCE CAUSE OF ACTION, BUT IT WAS CERTAINLY PROVEN, AND BY THE WAY, THE ISSUE EVER INDEPENDENT FORCE BECAUSE NOT RAISED BELOW. -- OF INDEPENDENT TORTS WAS NOT RAISED BELOW.

LET ME ASK YOU THIS. THE EMPLOYER HAS TO HAVE A NEGLIGENT SUPERVISION CAUSE OF ACTION, BUT THERE HAS TO BE SOME ADDITIONAL TORT BY THE PERSON THAT YOU NEGATIVE HIRED, SO IF THAT IS THE CASE, WOULDN'T YOU HAVE TO HAVE SOMETHING IN YOUR PLEADING WHICH WOULD GO TO THAT ELEMENT OF YOUR NEGLIGENCE ACTION, AND WHAT DO YOU HAVE IN YOUR PLEADING THAT WOULD --

I DON'T THINK THAT IS THE CASE, BECAUSE I THINK NEGLIGENCE, VERY SIMPLY, HAS TO BE PLED AS A LEGAL DUTY, A BREACH, CAUSE OF ACTION, AND DAMAGES, AND THERE IS NOTHING THAT SAYS --

YOU ARE SAYING THAT THIS NEGLIGENCE ACTION IS THE TORT, ITSELF, AND THAT YOU DON'T HAVE TO PLEAD ANY OTHER TORT.

CORRECT. RIGHT. THE LAW, THE CASE LAW THAT THIS COURT HAS SET FORTH IS DUTY, LEGAL DUTY, BREACH, CAUSE OF ACTION AND HARM IS WHAT HAS TO BE PLED IN A NEGLIGENCE ACTION. I DON'T THINK --

BUT YOU WOULD AGREE THAT, IF THIS WAS ANOTHER TYPE -- NOT A SEXUAL HARASSMENT CASE, A NEGLIGENT RETENTION OF SOMEBODY WHO WAS A -- HAD ASSAULTED PEOPLE, THAT ALL THESE CASES, TRADITIONALLY, DO REQUIRE AN UNDERLYING TORT TO HAVE BEEN COMMITTED BY THE EMPLOYEE?

WELL, CERTAINLY THE EMPLOYEE HAS TO HAVE DONE SOMETHING WRONG, IN ORDER FOR IT TO BE NEGLIGENT, BUT I THINK THAT --

THAT SOMETHING WRONG HAS TO BE A TORT.

RIGHT. BUT I DON'T THINK THAT THAT NECESSARILY HAS TO BE PLED IN A NEGLIGENCE ACTION. I THINK THAT THE COURT --

YOU ARE SAYING IT IS PROVEN, IF WE READ THE RECORD, THAT EVEN THOUGH YOU DIDN'T PLEAD IT, THAT THE ACTUAL PROOF WOULD ESTABLISH THERE WERE INDEPENDENT TORTS HERE?

YES. THEY WOULD INCLUDE DEFAMATION, BATTERY, TRESPASS, VANDALISM, PROPERTY DAMAGE, AND KIND OF LUMP THIS TOGETHER, WHICH IS A VANDALISM OF HER CAR. PERSONAL PROPERTY AND EAVESDROPPING, WHERE SHE WAS ACTUALLY FOLLOWED AROUND OUTSIDE THE WORKPLACE AND PHOTOGRAPHS WERE TAKEN OF HER.

TRIAL BY AMBUSH, IF YOU DON'T HAVE TO PLEAD IT BUT THEN YOU CAN COME TO TRIAL AND PROVE IT, AREN'T YOU AMBUSHING THE DEFENSE, BECAUSE THEY HAVEN'T PREPARED FOR WHAT, NOW, YOU ARE PUTTING ON. IT IS NOT IN YOUR COMPLAINT. IS THAT --

THEY CERTAINLY GOT IT IN DISCOVERY, YOUR HONOR, AND THE FACT IS THAT WHAT WE ARE REQUIRED TO PROVE OR WHAT WE ARE REQUIRED TO PLEAD ARE JUST BARE ELEMENTS. A DUTY, A LEGAL DUTY, A BREACH, CAUSE OF ACTION, AND HARM, AND FOR THIS -- CAUSATION AND HARM, AND FOR THIS COURT TO FIND AGAINST US, YOU WOULD HAVE TO INCLUDE THAT THERE IS NO LEGAL DUTY, IN FLORIDA, TO KEEP A WORKPLACE FREE FROM SEXUAL HARASSMENT.

YOUR TIME IS UP. THANK YOU, MS. BALLMAN. THANK YOU, COUNSEL.