No. 07-0531

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

EMMA COLE,
Plaintiff-Appellant,

v.

WHITE, JONES & KENT LLP,
Defendant-Appellee.

kate bohl 8/3/14 8:28 AM
Comment: Emma Cole brought suit, so she is "Plaintiff." She lost at the summary judgment stage, so she is now "Appellant." She has a right to appeal. If the decision to hear her case rested with the court, she would be referred to as "Petitioner," rather than "Appellant."

kate bohl 8/3/14 8:33 AM
Comment: This part of the cover sheet, listing the parties and including labels that reflect previous court actions is called the "style" of the case, and is treated like a sentence for purposes of punctuation. Hence the comma after "Appellant" and the period after "Appellee."

On Appeal from the United States District Court
For the Middle District of Florida, Tampa Division

Lower Tribunal Case No.: 06-0896-CIV-T-03X
Upton, J.

APPELLANT EMMA COLE'S BRIEF

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kate bohl 8/3/14 10:45 AM

Comment: In the Table of Contents, your point headings will be in a list, forming an outline of your argument

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kate bohl 8/3/14 10:42 AM

Comment: This main point heading "answers the second Issue Statement in this brief, so its structure is designed to match. Thus, it omits any reference to procedure and focuses immediately on the substance of the writer's point. The key aspect of this answer ("did not implement an effective remedy") precedes the damning - but legally insignificant - fact that the employer agreed with Cole's assessment of the situation. As a matter of law, if a reasonable person would have agreed with Cole it doesn't matter whether the employer did or not.

TABLE OF CITATIONS

kate bohl 8/3/14 10:48 AM

Comment: Make sure you do not include any pinpoint cites in your table of citations (also called a "table of authorities.") It is acceptable to remove all italics or underlining from case names in your table of citations.

kate bohl 8/3/14 10:50 AM

Comment: Make sure to check page numbers when you have finished your final edits. Words can shift, making your page references inaccurate. If any part of a citation appears on a page, include that page number here.

Cases **Page**

Page

Statutes and Rules

Miscellaneous Authorities

kate bohl 8/3/14 10:53 AM

Comment: You are free to include any subsections that make sense to you. For example, if you cited both state and federal laws you could create a separate subsection for each.

OPINION BELOW

The final judgment of the United States District Court for the Middle District of Florida is not published, but is located in the Transcript of Record at 24.

kate bohl 6/11/14 12:57 PM
Comment: On appeal, the documents in the record will be in a fixed sequence and the clerk's office will have given each page a number. The documents are presented in reverse chronological order. Therefore, in this specific example, there were 23 trial court documents. The order then appears on page 24.

STATEMENT OF JURISDICTION

On September 7, 2007, the United States District Court for the Middle District of Florida, Tampa Division, entered its order granting the Defendant's motion for summary judgment.

Plaintiff Emma Cole timely filed her notice of appeal on September 21, 2007. The district court properly exercised original jurisdiction over this case as a federal civil rights action under 42 U.S.C. §§ 1981a, 2000e-2000e-16 (2006), and subject matter jurisdiction under 28 U.S.C. § 1331 (2006).

kate bohl 6/11/14 12:53 PM
Comment: USE the United States Codes Annotated so that you have the benefits of the annotations. In your brief, CITE to the United States Code. It is the official publication of the code, even though the text of the Code itself is identical in either source.

The United States Court of Appeals for the Eleventh Circuit now has jurisdiction, pursuant to 28 U.S.C. § 1291 (2006), in that this appeal arises from a United States District Court's final judgment disposing of all parties' claims.

kate bohl 6/11/14 12:54 PM
Comment: The USC is published every six years, so your date will be 2012 if you are referencing the Code in 2014.

STATUTE INVOLVED

kate bohl 6/11/14 12:45 PM
Comment: Even if there is no controlling statute don't omit this section. Instead, indicate the legal concept, constitutional provision etc. For example, "This case involves interpretation of the Establishment Clause of the First Amendment to the United States Constitution."

This case involves interpretation of Title VII of the Civil Rights Act of 1964, as amended in 1991, 42 U.S.C. §§ 2000e-2000e-16 (2006). Title VII prohibits employment discrimination

based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1)(2000).

kate bohl 6/11/14 12:46 PM
Comment: Indicate in a single sentence or two what the statute, constitutional provision, etc. mandates, forbids, etc.

STATEMENT OF THE ISSUES

kate bohl 6/11/14 1:30 PM
Comment: Some circuits refer to this section as "Questions Presented" rather than "Statement of the Issues." Check out local court rules to figure out which heading is appropriate. You can get a basic overview by simply googling "local rules federal court." Here is one useful link: http://www.law.georgetown.edu/library/research/guides/federal_court_rules.cfm

I. Whether a reasonable jury could find that the sexual harassment suffered by Emma Cole was severe or pervasive in violation of Title VII when a co-worker harassed her for four months by making suggestive sexual comments by aggressively touching her in a sexual manner in the office and by e-mailing a threatening video photoshopped to depict Cole engaged in a sex act.

kate bohl 6/11/14 1:41 PM
Comment: Every issue statement includes these basic ingredients: 1. The core legal question. In this statement of the issues it is "Whether a reasonable jury could find that the sexual harassment suffered by Emma Cole was severe or persuasive" 2. The statute or controlling body of law. In this statement of the issues it is "in violation of Title VII." 3. Key, relevant facts. In this statement of the issues it is "a co-worker harassed her for four months by making suggestive sexual comments by aggressively touching her in a sexual manner in the office and by e-mailing a threatening video photoshopped to depict Cole engaged in a sex act." Typically you should include 2-3 relevant facts.

II. Did Plaintiff Emma Cole's employer maintain a hostile work environment in violation of Title VII when, for seventeen days, the employer ignored her complaint about a co-worker's sexual harassment, it ignored her second complaint about additional harassment for twenty-seven days and when the employer waited until Cole notified the EEOC before suspending the harasser, seventy-three days after it was required to take effective corrective action.

kate bohl 7/11/14 3:22 PM
Comment: There are several variations on what language to use in your statement of the issues. The first issue statement included here begins with a reference to judicial procedure: "Whether a reasonable jury could find…" This second one omits the reference to judicial procedure and goes straight to the core legal question. The two formats are equally correct.

STATEMENT OF THE CASE

I. Course of Proceedings and Disposition in the Court Below

On November 10, 2006, Appellant EMMA COLE filed a complaint against Appellee WHITE, JONES & KENT LLP (the Employer) alleging

unlawful employment practices, specifically, that the Employer maintained a hostile work environment in violation of Title VII due to its failure to respond as required after receiving notice that a co-worker sexually harassed Cole. (R. 2, 5). Cole filed the complaint in the United States District Court for the Middle District of Florida, Tampa Division, after receiving her right to sue notice from the U.S. Equal Employment Opportunity Commission [hereinafter "the EEOC"]. (R. 2). The Employer answered the complaint on December 15, 2006, and denied the existence of a hostile work environment. (R. 8-9). On June 29, 2007, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Employer filed its motion for summary judgment, (R. 21), which the court granted on September 7, 2007. (R.24). The court's order stated that the harassment suffered by Cole may have been sufficiently severe or pervasive to be actionable, but the court concluded that it need not address this issue because the Employer's "prompt remedial" response precluded any finding of liability and thus warranted summary judgment. (R.24).

kate bohl 7/11/14 3:39 PM
Comment: In the course of proceedings section and the statement of facts section in an appellate brief, cite the record as R. 2 or R. at 2, following Bluebook rule B7.1.2. This rule appears to make the use of "at" discretionary.

kate bohl 7/11/14 3:37 PM
Comment: You can create a shortened form of long names. Include it in brackets after your first full reference. See Bluebook rule 4.2(b)

For the reasons cited herein, Cole respectfully submits that this Court should reverse the grant of summary judgment and remand this cause for further proceedings.

II. Statement of the Facts

Almost immediately after the Employer hired Cole as a paralegal on December 5, 2005, another paralegal at the firm, Philip Armani, began sexually harassing Cole. (R. 2-3). First, Armani asked Cole to date him. (R. 3). Cole declined and told Armani she does not date people from work. (R. 11:19). Armani nonetheless continued to ask Cole out every week for the next 14 or so weeks, or until mid-March 2006. (R. 11:11-13). Armani's persistence made Cole uncomfortable. (R.11:11).

kate bohl 7/11/14 3:43 PM
Comment: In addition to citing the page in the record, you may also cite the specific line on that page. Here this information is found on page 11 in lines 11-13

On Thursday, March 9, 2006, Armani touched Cole in an aggressive, sexual manner during work hours at the office. (R. 12:20). As Cole bent over a copy machine repairing a paper jam, Armani grabbed her hips and thrust his pelvis into her rear end. (R. 12:21). As he did this, he asked Cole, "Emma, don't you know this could be us?" (R. 12:22). Two other employees witnessed the incident, one of whom expressed disgust at Armani's actions. (R.12:26). The force of Armani's thrust caused Cole to bang her head on the printer. (R.12:22). The incident shocked Cole emotionally, causing her to cry and become overwrought and to miss a deadline on a document summary. (R. 13:14).

The Employer has a written "No Harassment" policy. (R.7). Pursuant to this policy, Cole went to see the firm's managing partner, Melvin Berg, on Monday morning, March 13, 2006, after regaining her composure over the weekend. (R. 13:16). Cole

kate bohl 7/11/14 3:45 PM
Comment: Express the facts of a case in the past tense except where, as here, the fact is not limited to the past.

told Berg about Armani's sexual harassment. (R. 14:1). Cole also requested that Armani be transferred off her floor. (R. 14:3). Berg replied that he would look into the matter. (R. 14:11). He later testified that he had no reason to doubt the credibility of Cole's complaint. (R. 18:22).

Berg did not speak to or meet with Armani until March 30, 2006, seventeen days after receiving Cole's harassment complaint. (R. 18:25). When he did meet with Armani, Berg claims to have read him the firm's sexual harassment policy and to have told Armani to leave Cole alone. (R. 18-19:26-1). Berg did not, however, transfer Armani to another floor. (R.19:13). Nor did he place a record of Cole's complaint in Armani's file, as required by the firm's written policy. (R. 7, 19:18). Instead, he moved Cole two floors away from her practice group, thus necessitating constant travel up and down stairs throughout the work day. (R. 14:14).

kate bohl 7/11/14 3:48 PM
Comment: The fact statement can and should be persuasive in a persuasive document such as a brief to the court. Here, the word "claims" casts a little doubt on whether Berg actually read Armani the policy.

Four weeks after Berg told Armani to leave Cole alone, Armani sent Cole an e-mail message with an attached file. (R. 15:1-2). When she opened the attachment, Cole saw a video of two real-life celebrities having sex. (R. 15:3-6). However, their faces were digitally replaced with photographs of Cole and Armani taken from the Employer's website. (R. 15:4). Armani also inserted a message into the video stating, "This will be

us!" (R.15:6). Cole was not able to close the e-mail message before other employees saw it. (R. 15:11-12).

The next day, Cole again went to see Berg. (R.16:2). Berg agreed that the e-mailed video was "terrible" and he promised to take care of the matter and to let her know when it was resolved. (R. 16:6-8). However, twenty-seven days passed before Berg spoke to Armani or otherwise began an investigation of the incident, even though Berg and his entire personnel department were together at a retreat the week after he heard from Cole. (R. 16:10, 20:8).

On May 19, 2006, Cole, having still not heard back from Berg, filed a complaint with the EEOC. (R. 3). On May 28, 2006, Berg received notice of the EEOC complaint. (R. 20:13). On May 31, 2006, Berg launched an investigation of Armani's conduct and suspended him without pay. (R. 20:18). Armani resigned that afternoon. (R. 20:20). Berg testified that he did not have time to address the April 27, 2006 incident before May 31, 2006. (R.20:14-20).

III. Standard of Review

This Court reviews a district court's grant of summary judgment de novo applying the same legal standards as the trial court, albeit independently and without deference to the lower court's view of the law. *Salve Regina College v. Russell*, 499

kate bohl 7/14/14 4:10 PM

Comment: Questions that are purely legal are reviewed on appeal without deference to the lower court, called de novo. This standard is applicable where the facts are not in dispute, but the legal significance of those facts is contested. In this particular brief, what Armani did (the factual circumstance) is not in dispute. The significance is in dispute because Cole argues that the facts qualify as severe and pervasive harassment and Armani argues that they do not.

U.S. 225, 231 (1991); *Allen v. Tyson Foods, Inc.*, 121 F. 3d 642, 646 (11th Cir. 1997).

SUMMARY OF ARGUMENT

kate bohl 6/11/14 6:44 PM

Comment: This section often feels awkward to students who have been told over and over to CITE EVERYTHING. Typically there are NO cites in this section. Understanding the origins of this section help to explain this – the Summary of the Argument takes the place of a face to face conference between the judge or judges and counsel

At the summary judgment stage, the district court should have construed all of the evidence and inferences in the light most favorable to Cole. The record clearly demonstrates that she endured four months of escalating harassment, including overt sexual comments, aggressive touching, and an implied threat to commit sexual battery. A reasonable person in Cole's position could easily perceive such harassment to be severe or pervasive pursuant to Eleventh Circuit standards.

Moreover, despite receiving actual notice of her co-worker's harassment, Cole's employer repeatedly ignored her complaints and did not take effective remedial action until notified by the EEOC. Accordingly, it is respectfully submitted that Cole established a prima facie case of hostile work environment sexual harassment, and thus this Court should reverse the trial court's grant of summary judgment and remand the case for further proceedings.

kate bohl 7/14/14 4:12 PM

Comment: Keep the summary of the argument succinct. A paragraph per issue is usually sufficient. Save the nuances for the argument section itself.

ARGUMENT

In order to establish a prima facie case of hostile work environment sexual harassment, Cole must demonstrate (1) that she is a member of a protected class; (2) that she was subjected

kate bohl 7/11/14 4:15 PM

Comment: In the final editing process, look at the first three words in topic sentences to eliminate unnecessary words. Here the sentence could begin "To establish…" "in order" is wordy and unnecessary.

to unwelcome harassment; (3) that she suffered harassment due to a protected characteristic such as gender; (4) that the harassment was both objectively and subjectively severe or pervasive so as to alter the conditions of her employment and create a discriminatory work environment; and (5) that there is a basis for holding the Employer legally liable for the harassment. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). There is no dispute that Cole satisfied the first three elements in that Cole, a woman, is a member of a protected class who was harassed due to her gender. Moreover, the Employer does not dispute that Cole subjectively perceived Armani's harassment to be severe or pervasive. Accordingly, this argument focuses on why this Court should reverse the trial court's grant of summary judgment by holding that Armani's harassment was objectively severe or pervasive based on the reasonable person standard, and that there is a legal basis for imposing liability on the Employer.

Notably, in addition to case law and other authorities, the U.S. Supreme Court has held that federal courts should rely on guidance from the EEOC when considering sexual harassment cases. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

I. A JURY COULD REASONABLY FIND THAT ARMANI'S HARASSMENT, INCLUDING SUGGESTIVE SEXUAL COMMENTS, AGGRESSIVE AND UNWANTED PHYSICAL TOUCHING, A SEXUALLY EXPLICIT E-MAIL MESSAGE, AND AN IMPLIED THREAT TO COMMIT SEXUAL BATTERY, WAS OBJECTIVELY SEVERE OR PERVASIVE.

kate bohl 7/11/14 4:16 PM
Comment: Start your argument section with a broad statement to orient the reader. This first sentence would also be effective as a conclusion (what Cole can do) rather than a statement of what Cole must do.

kate bohl 7/14/14 9:24 AM
Comment: In addition to orienting the reader to the main argument, the thesis paragraph should note what is not at issue, and therefore what will NOT be discussed.

kate bohl 7/14/14 9:27 AM
Comment: If the writer wants to point out anything in particular that the reader needs to know about the authorities relied upon, the thesis paragraph is the place to do it.

kate bohl 7/14/14 9:21 AM
Comment: Main point headings answer the Questions Presented (or "Issue Statements" as they are called in some circuits). If you have two Questions Presented you should have two main point headings.

Cole's claim should have survived summary judgment because she endured severe or pervasive harassment based on governing precedent in the Eleventh Circuit. To be actionable under Title VII, a hostile work environment must be objectively offensive, one that a reasonable person in the plaintiff's position would find hostile and abusive. *Hulsey v. Pride Restaurants, LLC*, 367 F.3d 1238, 1247 (11th Cir. 2004). In determining whether harassment is objectively severe or pervasive, courts consider several factors, including but not limited to: (1) the frequency of the harassment; (2) its severity; (3) whether the harassment was physically threatening and humiliating or a mere utterance; and (4) whether the conduct unreasonably interferes with the victim's work performance. *Id.* at 1247-48. Plaintiffs need not offer proof of each factor, and there is no magic number of incidents that constitutes severe or pervasive harassment; rather, the totality of the circumstances is determinative. *Id.* at 1248; *Miller*, 277 F.3d at 1276.

kate bohl 7/14/14 9:32 AM

Comment: Normally, do not number the parts of your argument or the points you make in an argument. The exception is where the rule or statute contains a list of elements. In that circumstance, numbering makes it easier for the reader to follow your analysis.

A. The Once-Per-Week-Every-Week Frequency of Armani's Requests to Date Cole, Followed by His Two Instances of Severe Harassment, Add Up to Sixteen Individual Incidents of Harassment in Four Months.

kate bohl 7/14/14 9:36 AM

Comment: Subheadings do not correspond to you're your Questions Presented. You can have as many or as few as you need to organize your argument. Generally, you should add a subheading only where you have at least a page of "stuff to say."

kate bohl 7/14/14 9:39 AM

Comment: The subheading is not a substitute for a topic sentence. This is because it usually covers more than one paragraph of analysis. Some people like to think of it as a "super topic sentence."

Armani's actions toward Cole constitute frequent harassment because he asked her out on a weekly basis over a three-month period and because he harassed her twice again during a fourth month. Courts consider the frequency of sexual harassment as

one factor in determining its objective severity or pervasiveness. *Hulsey*, 367 F.3d at 1247. In *Johnson v. Booker T. Washington Broad. Serv., Inc.*, this Court held that fifteen incidents of unwelcome and inappropriate conduct over an identical four-month period of time, including sexually charged comments and unwanted physical contact, was sufficiently frequent to satisfy the objectively severe or pervasive standard. 234 F.3d 501, 509 (11th Cir. 2000). Here, Cole declined Armani's request to date the first time he asked her out in early December of 2005. (R. 11:19). Armani nonetheless continued to ask Cole to date him each and every week until mid-March of 2006, which adds up to approximately fourteen incidents of verbal harassment. (R.11:14-15, 12:11-13). In addition, Armani physically harassed Cole when he battered her at the office printer, (R. 12:12-20), and later engaged in cyber harassment when he e-mailed her the sex video. (R. 14:23). So, in all, Armani harassed Cole approximately sixteen times over a four-month period. Therefore, Armani harassed Cole frequently.

The Employer may argue that Armani's repeated requests to date Cole cannot be considered harassment because Title VII is not a civility code, but that argument fails because Armani's actions must be viewed in their totality. In sexual harassment cases, courts must view the alleged misconduct in context and cumulatively. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1242

kate bohl 7/14/14 4:27 PM
Comment: Cite the record throughout the analysis even though you previously cited it in the statement of facts. Your goal is to make your argument easy to understand and follow. You don't want to force the reader to have to flip back from your analysis to your statement of the facts to find where a particular fact is to be found.

kate bohl 7/14/14 10:16 AM
Comment: This paragraph shows typical and effective organization for legal analysis. It begins with a topic sentence that states the point of the paragraph. It is followed by the rule, in this case drawn from two different cases. It then applies the rule to the facts. Finally, it reconcludes. This can be described as Conclusion-Rule-Application-(re)Conclusion – "CRAC" or Conclusion-Rule-Explanation of rule-(re)Conclusion – CREAC. It is essentially the same as "IRAC." The only difference is that the "I" in IRAC is tweaked so that it expresses the writer's conclusion on the issue instead of simply describing the issue in purely neutral terms.

kate bohl 7/14/14 4:14 PM
Comment: Phrase counterarguments so that they express your conclusion. If you don't then you are essentially giving the opposing side space in YOUR brief. An easy way to do this is to write "but that argument fails because…" in the topic sentence.

(11th Cir. 1999). Individual acts should not be considered in isolation. *Id.* at 1259 (Tjoflat, J., concurring in part and dissenting in part). Repeated requests for an intimate outing may seem merely annoying in isolation, but they should be considered "pretextual" when followed by more serious acts of harassment. *Id.* at 1262, 1268. Here, Armani's fourteen requests to date Cole, (R.12:11-13), were unquestionably followed by two far more serious incidents. (R. 12:21, 15:3-7). The Employer misses the proverbial forest for the trees by failing to consider the cumulative context of Armani's actions. *Id.* at 1263. Therefore, Armani's requests to date cannot be viewed separately or excluded from the calculation of the frequency of his harassment.

kate bohl 7/14/14 10:27 AM
Comment: A carefully used colloquial expression can be effective – just use very sparingly. Humor is not appropriate.

B. Armani's Unwelcome, Aggressive Physical Contact at the Office Printer and His E-mailed Video Purporting to Depict Cole Engaged in a Sex Act Constituted Severe Harassment.

Both of Armani's last acts of harassment were severe because they involved overt sexual conduct. To be considered actionable sexual harassment under Title VII, the harassing conduct necessarily must include sexual or other gender-related connotations. *Mendoza*, 195 F.3d at 1247. Indeed, the conduct must be obviously sexual in nature or sex-specific. *Id.* at 1254 (Edmondson, J., concurring). Direct or indirect propositions to have sex can constitute objectively severe harassment. *Hulsey*,

367 F.3d at 1248. When Armani grabbed Cole's hips from behind while she was bent over and violently shoved his pelvis into her rear end, he asked her, "Emma, don't you know that this could be us?" (R. 12:20-23). A reasonable person could perceive Armani's physical act as well as his question to her to be a request or suggestion to have sex. However, if there were any doubt about the sexual nature of Armani's request during the printer incident, Armani removed it when he e-mailed Cole the pornographic video, with its doctored images of Armani and Cole having sex, and his vow, "This will be us!" (R.15:1-7). Because these incidents involved conduct obviously sexual in nature as well as direct or indirect propositions to have sex, they constituted an objectively severe form of harassment, or so a reasonable person could conclude.

C. Armani's Battery of Cole and His Pornographic E-mail, Both of Which Were Seen by Other Employees, Were Physically Threatening and Humiliating.

A reasonable person in Cole's position could find that Armani's harassment was both physically threatening and humiliating because the first incident involved an actual battery in front of other employees and because the second incident included an implied physical threat that also was viewed by other employees. Courts consider whether the alleged misconduct was humiliating and physically threatening in assessing whether the conduct at issue constitutes objectively

severe or pervasive harassment. *Hulsey*, 367 F.3d at 1247-48. Offhand or uncivil comments are insufficient to establish severe harassment, but harassment does not need to rise to the conscience-shocking level to be actionable. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1988); *Mendoza*, 195 F.3d at 1268 (Tjoflat, J., concurring in part and dissenting in part).

Furthermore, in *Mendoza*, this Court cited with approval the Eighth Circuit's finding of actionable harassment when a male employee physically threatened and humiliated a co-worker by thrusting his hips into her from behind. 195 F.3d at 1252 (citing *Howard v. Burns Bros., Inc.*, 149 F.3d 835, 839 (8th Cir. 1998)). This Court also has found actionable harassment that included the playing of pornographic videotapes in the office, *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996), and the sending of inappropriate e-mail messages. *Mendoza*, 195 F.3d at 1250 (citing *Yamaguchi v. U.S. Dept. of the Air Force*, 109 F.3d 1475, 1478 (9th Cir. 1997)). Here, Armani indisputably battered Cole from behind in an aggressive, sexual manner, causing her to fall and bang her head. (R. 12:22-23). Two of Cole's co-workers witnessed the incident, one of whom expressed disgust at Armani's actions. (R.12:24). Cole immediately ran to her office crying, (R.13:14-15), an obvious symptom of humiliation. Armani next sent Cole the explicit video with its

implied threat of more severe battery, "This *will* be us!" (emphasis added)(R.15:3-7). Some of Cole's co-workers heard, saw, and laughed at the video depicting Cole having sex with Armani. (R. 15:11-12). Cole, however, did not find it amusing; a reasonable person could infer that she found it humiliating because she tried to turn it off so quickly. (R. 15:11-12). Berg himself agreed that Cole's final act of harassment was terrible. (R. 20:6). Accordingly, a reasonable person in Cole's position could find Armani's harassment both physically threatening and humiliating.

kate bohl 7/14/14 4:40 PM
Comment: The preceding two paragraphs could be described as "extended CRAC" or "extended CREAC." They illustrate how to handle a point in the analysis that is too long for a single paragraph. The writer has broken the point into two paragraphs but has connected them by using the word "furthermore." Here, the rules governing the point would take more than a page if not broken into two paragraphs. The two paragraphs together, however, are still structured as CRAC or CREAC.

D. Armani's Harassment Caused Unreasonable Interference with Cole's Job Performance Because She Not Only Missed an Important Deadline but Was Transferred Away from Her Practice Group.

A reasonable person could perceive that Armani's actions and the Employer's initial response to them interfered unreasonably with Cole's job performance. In determining whether conduct rises to the level of objectively severe or pervasive harassment, courts consider whether the harassment unreasonably interferes with the victim's job performance. *Hulsey*, 367 F.3d at 1248. An employer's decision to transfer the complainant may be seen as punitive and may trigger liability if the transfer leaves the complainant worse off in terms of employment opportunities. Emma T. Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* 246 (BNA Books

1992)(citing *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463 (7th Cir. 1990)). Indeed, courts generally require employers to remedy harassment through actions targeted at the harasser, not the victim. Emma T. Lindemann & David D. Kadue, *Sexual Harassment in Employment Law* 79 (Cum. S., BNA Books 1999) (citing *Intlekofer v. Turnage*, 973 F.2d 773, 780 (9th Cir. 1992)). Here, Armani's first instance of severe harassment caused Cole to miss a deadline on a document summary. (R. 13:14). More significantly, the harassment prompted the Employer to relocate Cole two floors away from her practice group. (R. 14:14-15). As a result, she must constantly go up and down the elevator or stairs throughout the workday in order to perform her duties. (R. 14:14-16). Thus, a reasonable person in Cole's position could view the effects of Armani's harassment as unreasonably interfering with her job performance.

kate bohl 7/14/14 4:45 PM
Comment: It is perfectly permissible to cite a secondary source as authority if the precise rule you want to use is not clearly expressed in a primary authority. When you cite a secondary source, it is helpful to add the cite relied upon by your secondary source in a parenthetical.

kate bohl 7/14/14 4:47 PM
Comment: You can use the same fact several times in your analysis when it is useful to illustrate more than one point in your analysis.

Further, although the Employer may argue that Cole received pay raises after filing her complaint, (R.10:16-23), this factor still weighs in Cole's favor because the office relocation unquestionably made her job performance more difficult than before she complained about the harassment. The Supreme Court has cautioned that tangible effects on job performance need not be extreme in order for harassment to be actionable. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993). Moreover, plaintiffs do not need to offer proof of every factor under the

Harris test in order for harassment to be objectively severe or pervasive; indeed, no single factor is required. *Id.* at 23. As Justice O'Connor explained, only the totality of the circumstances is determinative. *Id.* Here, the Employer admits that the harassment caused Cole to be transferred two floors away from the attorneys and staff she must work with throughout the day. (R. 14:14-15). Therefore, a reasonable person could perceive that the harassment interfered with her job performance. Moreover, even if a reasonable person could view the pay raises as evidence that the harassment did not unduly compromise Cole's job performance or work opportunities, such a belief would not be fatal to her discrimination claim, given the "no single factor" rule of *Harris* and the clear frequency, severity, and physically threatening and humiliating nature of Armani's conduct.

kate bohl 7/15/14 11:02 AM

Comment: Give the name of the judge or justice who wrote the opinion only if it is a US Supreme Court Justice or has some other specific significance.

kate bohl 7/14/14 4:53 PM

Comment: Address arguments that the opposing counsel might use head on. Better to dismiss these arguments rather than leave the impression that the argument is so strong you have to avoid it. Address such counterarguments at the end of the section in which you have made your own arguments.

II. REPRESENTATIVES OF COLE'S EMPLOYER ESSENTIALLY IGNORED BOTH OF COLE'S COMPLAINTS AND DID NOT IMPLEMENT AN EFFECTIVE REMEDY UNTIL CONTACTED BY THE EEOC, DESPITE AGREEING THAT ARMANI'S ACTIONS WERE "TERRIBLE" AND THE EMPLOYER.

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Comment: This main point heading "answers the second Issue Statement in this brief, so its structure is designed to match. Thus, it omits any reference to procedure and focuses immediately on the substance of the writer's point. The key aspect of this answer ("did not implement an effective remedy") precedes the damning - but legally insignificant - fact that the employer agreed with Cole's assessment of the situation. As a matter of law, if a reasonable person would have agreed with Cole it doesn't matter whether the employer did or not.

Cole's employer was liable as soon as Cole reported the harassment and chose to do nothing. Employer liability involving sexual harassment by a co-worker exists when the employer receives actual or constructive notice of the harassment but fails to take immediate and appropriate corrective action. *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1257 (11th Cir.

2003); 29 C.F.R. § 1604.11(d)(Westlaw current through Oct. 11, 2007). Some Eleventh Circuit cases, and indeed the trial court in this action, (R.24), use the terms "prompt" and "remedial" to define the employer's duty, but the duty is the same. *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 (11th Cir. 2000); *Fleming v. Boeing Co.*, 120 F.3d 242, 246 (11th Cir. 1997). Thus, the slight variation in terminology is irrelevant.

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Comment: This is an example of a string cite: more than one case, each supporting the same point. Although courts sometimes include entire paragraphs of case cites, two cases are usually sufficient in a legal brief to be filed with the court. More than two cases can distract the reader from the argument you are making.

A. The Employer Ignored Cole's First Sexual Harassment Complaint for Seventeen Days, Ignored Her Second Complaint for Twenty-Seven Days, and Waited Seventy-Three Days to Begin a Serious Investigation.

The Employer failed to respond as required to Cole's sexual harassment complaints because it waited weeks even to talk with the harasser and ultimately did not take any effective remedial action until receiving notice of Cole's EEOC filing. To avoid liability under Title VII for maintaining a hostile work environment, employers must thoroughly investigate sexual harassment complaints and must implement corrective measures without delay. *Walton v. Johnson & Johnson Serv., Inc.*, 347 F.3d 1272, 1288 (11th Cir. 2003); EEOC, *Policy Guidance on Current Issues of Sexual Harassment*, N-915-05, http://www.eeoc.gov/policy/docs (accessed Oct. 31, 2007) (EEOC Notice, *Guidance*). Here, the Employer's managing partner waited nearly three weeks to initiate action after receiving notice that one of his employees had been harassing a co-worker on an on-going,

weekly basis for more than three months and had actually battered her in an aggressive, sexual manner during office hours. (R. 18:14-18). In fact, Berg waited seventeen days after Cole first complained to meet with Armani, but his deposition does not explain the delay. (R. 18:25). His deposition, which the Employer relied upon in support of its motion for summary judgment, (R. 21), also does not explain why Berg, who believed Cole's complaint to be credible, (R.18:22), failed to pick up the telephone to tell Armani to stay away from Cole until Berg could meet with him.

Although faced with a similar situation, the employer in *Nurse "BE" v. Columbia Palms West Hosp. Ltd. Partn.* launched an investigation within one day of receiving a complaint about a co-worker's harassing phone calls and inappropriate touching. 490 F.3d 1302, 1312 (11th Cir. 2007). The harasser in that case received a disciplinary action the next day and was warned that further unprofessional conduct would result in his immediate termination. *Id.* As a result, this Court held that the employer met its duty under the law by taking prompt action. *Id.* Similarly, in *Coates v. Sundor Brands, Inc.*, the employer, upon receiving a harassment complaint, immediately suspended the accused co-worker without pay pending an investigation. 164 F.3d 1361, 1366 (11th Cir. 1999). This Court later found no basis for employer liability. *Id.* In *Fleming*, the employer

went to an alleged victim of harassment to inquire about a co-worker's rumored harassment. 120 F.3d at 246. Upon hearing the employee confirm the co-worker's misconduct, the employer immediately took steps to discipline the harasser. *Id.* at 247. This is the type of temporal response that Cole's Employer should have taken to avoid liability. *Id.* It did not do so.

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Comment: Although "the Employer" actually consists of multiple people, since "the Employer" is singular, the correct pronoun reference is "it" rather than "they." This is also true of a reference to a court that consists of a panel of justices: "the court" would be "it."

The Employer in this case, not only failed to take prompt or immediate action after receiving Cole's first complaint, but also waited even longer to act after receiving notice of the e-mailed video depicting Cole having sex with Armani. (R. 20:2-20). In fact, although Berg agreed that Armani's harassment was terrible, he did not speak to Armani or otherwise deal with the matter until May 24, 2006, twenty-seven days later. (R.20:18-20). The Employer argues that Berg did not have time to address the matter the week after hearing from Cole because he attended an office retreat with his human resources department. (R. 20:9-10). The purpose of the retreat was to address firm *personnel* issues. (R. 20:10-15). A reasonable jury could believe that the retreat afforded Berg a perfect opportunity to address the Armani personnel matter. Moreover, Berg inexplicably did not act right away after receiving official notice from the government that Cole had complained to the EEOC. (R. 20:19). Instead, he waited another forty-eight hours before starting an investigation. (R. 20:18).

In sum, this Employer took absolutely no action in the face of what could be considered severe and pervasive sexual harassment that could be considered either immediate or prompt as a matter of law. The trial court's grant of summary judgment thus requires reversal.

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Comment: A brief, one to two sentence summary of the argument made in a given section is an appropriate way to end a section. If word count limitations arise, it can be omitted.

B. The Employer's Conversation with Armani after Cole's First Complaint and the Transfer of Cole to a Different Floor Was Insufficient Because It Failed to Deter Armani from Escalating His Harassment.

The Employer not only failed to act promptly, but its response to Cole's initial complaint did not stop the harassment or deter Armani because his subsequent actions included more severe misconduct. An employer's remedial or corrective action upon receipt of a sexual harassment complaint must be reasonably designed and likely to end the harassment. *Walton*, 347 F.3d at 1288; *Kilgore v. Thompson & Brock Mgt., Inc.*, 93 F.3d 752, 754 (11th Cir. 1996). Disciplinary action in proportion to the severity of the harassment, including reprimands placed in personnel files, suspensions, or terminations, may be necessary. EEOC Notice, *Guidance*. Merely meeting with an alleged harasser to remind him of office policy against offensive conduct is not a sufficient initial response if the harassment does not end. *Id.* Moreover, employers have an affirmative duty to make follow-up inquiries to ensure that the harassment has not

resumed and the victim has not suffered any type of retaliation. *Id.*

Here, Berg simply met with Armani after hearing Cole's complaint in order to read him the firm's sexual harassment policy. (R. 18:26-19:1). Berg's deposition does not actually claim that he reprimanded Armani for persistently asking Cole to date and for thrusting his pelvis into her posterior. (R. 17). A reasonable person could infer, in fact, that he did not reprimand Armani, because despite reading Armani the firm's harassment policy in full, (R. 19:1), he did not put a record of Cole's complaint in Armani's personnel file as the policy required him to do. (R. 7, 19:18). A reasonable person also could infer that Armani interpreted Berg's failure to follow the policy he had just read out loud as a sign that Berg did not take Cole's complaint seriously. Armani may also have interpreted Berg's decision to move Cole's office as a sign that Berg wished to punish the complainer. (R. 19:4-5). Further, Berg does not assert that he ever followed up with Cole. At the summary judgment stage, the district court should have drawn these and other such reasonable inferences in favor of Cole. *Miller*, 277 F.3d at 1275. No inference is required, however, to know that just four weeks after Berg supposedly told Armani in no uncertain terms to leave Cole alone, (R. 19:1), Armani e-mailed Cole the sex video with its implied threat: "This will be

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Comment: This would NOT be an appropriate spot to insert a record cite. This sentence is actually a minor legal conclusion posited by the writer.

us!" (R. 15:3-7). In *Coates*, the employer not only spoke with the harassing co-worker immediately after being put on notice that he made sexual overtures to a co-worker, but the employer also followed up with the victim several times to check on whether the harassment had stopped. 164 F.3d at 1363. Upon learning during one of these follow-up sessions that the harassment had resumed, the employer immediately suspended the offending employee. *Id.* This Court held that the employer's actions constituted a timely and effective remedy, thus relieving it of liability. *Id.* at 1366.

Similarly, in *Nurse "BE"*, this Court reversed a denial of summary judgment for the employer because the employer's prompt disciplinary measures effectively ended the sexual harassment. 490 F.3d at 1312. In *Walton*, this Court held that since the employer's remedial measures stopped the harassment and ensured that it did not recur, the employer had fulfilled its duty and thus had no liability. 347 F.3d at 1288-89. Although the Employer will argue that it eventually suspended Armani, (R. 20:18-19), this Court in *Walton* cited with approval the Eighth Circuit's view that a material issue of fact existed when the employer waited *less* than two months before removing the harasser. 347 F.3d at 1289 (citing *Dhyne v. Meiners Thriftway*, 184 F.3d 983, 988 (8th Cir. 1999)). In sharp contrast, the Employer here waited more than two months, from March 13 to May

24, 2006 – a total of seventy-three days – to suspend Armani. (R.18:10, 20:18-19). Accordingly, a reasonable jury could find that the Employer failed to take prompt and effective remedial action, thus mandating reversal of the trial court's grant of summary judgment.

It should also be noted that the imposition of employer liability in Title VII cases such as this one is necessary because Cole and others in similar situations suffer even greater harm when employers know about the harassment and fail to abate it. When an employer receives notice of a co-worker's sexual harassment and does nothing to remedy the problem, the employer's inaction is discriminatory in itself. *Coates*, 164 F.3d at 1366. Such an employer exacerbates the harassment and leaves the victim even more compromised in her ability to perform the tasks for which she was hired. *Id.* at 1368 (Barkett, J., concurring). Meanwhile, the perpetrator gains a freer hand to harass because of the employer's implicit approval of the harassment. *Id.* This is exactly what happened here. Cole suffered harassment. (R.24). She complained. (R.18:8). The Employer did not undertake a prompt remedial response. (R.18:25-26). Armani clearly felt emboldened and escalated his misconduct. (R.20:6). The Employer still failed to take immediate corrective action. (R.20:14). Cole's co-workers knew of the harassment; some of them witnessed it. (R.12:23, 15:11).

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Comment: The preceding two paragraphs are an example of "extended CRAC" or "extended CREAC."

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Comment: Although not wrong, the first six words of this sentence are not necessary, and could be removed to shift the significant point in the sentence to the beginning of that sentence OR simply to remove words in order to comply with word count requirements.

Yet they saw Cole, the victim, being moved upstairs whereas the harasser received no apparent discipline. (R.14:14). Therefore, a reasonable person could easily conclude that the Employer's inaction intensified Cole's injury and exacerbated the overall discriminatory workplace environment.

CONCLUSION

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Comment: The conclusion should clearly state the relief you seek. It should not include any new information or any citations. It can be reduced to a single sentence if necessary. This conclusion is somewhat repetitive, but repetition ensures that even a busy reader who does not focus on every word gets the point.

The lower court's grant of summary judgment should be reversed as a matter of law. Not only did the Employer fail to institute immediate and effective corrective measures upon learning of Armani's actions, but a rational jury could find that the harassment itself rose to the severe or pervasive level. It is respectfully submitted that summary judgment was improper in this instance. Accordingly, Cole respectfully requests an order from this Court reversing the trial court's decision.

Respectfully submitted,

Your signature, typewritten name