IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

KA'TORIA GRAY,	)	
	)	
Plaintiff,	)	
	)	**No.: 2:17-cv-00595-RAH-JTA**
v.	)	
	)	
KOCH FOODS OF ALABAMA, *et al*,	)	
	)	
Defendants.	)	

DEFENDANTS KOCH FOODS OF ALABAMA, LLC and KOCH FOODS INC.'S TRIAL BRIEF

COME NOW Defendants Koch Foods of Alabama, LLC and Koch Foods, Inc. ("Koch Foods") and submit this trial brief to the Court.

I. INTRODUCTION

The art of distraction is nothing new. When robbers in Stockholm Sweden carried out a $30 million heist in the Stockholm National Museum in December 2000, they knew they needed a distraction and blew up two cars nearby to cover their getaway.[1] When the Pink Panthers stole more than $105 million from Harry Winston in Paris, they likewise needed a distraction to overwhelm security guards,

[1] "$30 Million Art Heist at Stockholm Museum", *available at* https://abcnews.go.com/International/story?id=81873&page=1 (Jan. 6, 2006).

which they did with eccentric costumes.[2] Gray will attempt to employ a similar distraction strategy at trial by parading third party witnesses (many of whom are significantly biased as they are represented by Gray's attorneys) on the stand to make unsubstantiated accusations against McDickinson and Birchfield. The evidence will show Gray did not observe any of the conduct alleged by these other witnesses and had no knowledge of it during her employment. Rather, she will rely upon this testimony to confuse the jury so it will be overwhelmed by the number of accusers and find in her favor despite the lack of evidence that Gray herself experienced unlawful sex discrimination.

If the evidence is properly limited to the substantive merits of Gray's claims, it will prove insufficient for her to prevail at trial. Gray worked at Koch Foods from 2011 through 2015 without incident. During those five years, she alleges only two instances of inappropriate conduct which purportedly occurred in November of 2015. Specifically, Gray alleges she voluntarily attended a house party after midnight at McDickinson's house on November 14, 2015 when McDickinson and Birchfield allegedly tried to dance with her and kiss her. The incident occurred off company property and after work hours. The second incident alleged by Gray occurred two week later when McDickinson allegedly brushed against Gray's body

[2] "The Heist at Harry's", Doreen Carvajal, *available at* https://www.nytimes.com/2008/12/14/fashion/14heist.html (Dec. 12, 2008).

while asking her to examine a sunburn. Gray will admit no further physical contact occurred.

McDickinson and Birchfield deny any of the alleged advances toward Gray occurred. Witness testimony will confirm Birchfield was not present that night. To the extent that Birchfield was present, the evidence will show Gray was not troubled by any encounter with him or McDickinson. Gray's co-workers will testify she laughed and made jokes about purportedly seeing Birchfield's genitalia. Although Gray knew very well how to report inappropriate conduct, the evidence will show she chose not to do so for several months. Rather, shortly before she resigned, she told a few select employees in passing that McDickinson and Birchfield had engaged in a sex act in her presence. The evidence will show these comments were not intended to be reports of discrimination or intended to stop any harassing behavior. Indeed, Gray will admit by the time she made these passing comments that the harassment had stopped. Simply, without the reliance on inappropriate character evidence in the form of unsubstantiated accusations against McDickinson and Birchfield, Gray's claims will prove weak and should be summarily dismissed on motion for judgment as a matter of law.

II. ANTICIPATED EVIDENCE AT TRIAL.

A. Koch Foods of Alabama.

Koch Foods of Alabama ("Koch Foods") is a chicken processing business in

Montgomery, Alabama. In 2012, the human resources ("HR") complex manager was David Birchfield ("Birchfield"). Birchfield reported to the corporate director of human resources, Bobby Elrod ("Elrod"), whose office was in Gadsden, Alabama. Elrod was designated under the Koch Foods anti-discrimination policy as a person to whom employees may bring concerns of discriminatory treatment. There were two HR managers – one over the processing, feed mill and hatchery and a second over the debone plant.

B. Gray Is Hired for Koch Foods Debone Plant.

Gray began working at Koch Foods in 2011 as a nurse in the safety department at the debone plant. At that time, Gray was a Licensed Practical Nurse. Shortly after Gray was hired, she began reporting to Frank Sheley ("Sheley") who was the debone plant complex safety manager. Sheley is employed by Koch Foods of Cumming, LLC in Cumming, Georgia. Sheley's office is in Georgia. He visited the Montgomery plant where Gray worked one to two times a month.

When she was hired, Gray acknowledged her receipt of Koch Foods' policy prohibiting unlawful harassment and providing its procedures for reporting concerns. Moreover, Gray was trained on these policies and procedures. Gray understood that Elrod, the corporate director of human resources, was someone to whom she could report harassment other than Birchfield or McDickinson. Gray also understood that Koch Foods' policies prohibited retaliation for making such

complaints. From January 24, 2011 through November 14, 2015, Gray and Birchfield work together at Koch Foods of Alabama without incident or complaint from Gray about Birchfield. In 2014, Melissa McDickinson was hired as Human Resources Supervisor at the debone plant to fill in for then-Human Resources Manager, Lindsey Johnson, who was on maternity leave. McDickinson was promoted to HR Manager in January of 2015. From August of 2014 through November 14, 2015, Gray and McDickinson worked down the hall from one another without incident.

Gray did, however, experience conflict with the safety manager, Betty Stabler. Even though their schedules barely overlapped, their on-going feud is well-documented and lasted over the entirety of Gray's employment. Gray felt her credentials and education were superior to Stabler. Gray was critical of Stabler's medical treatment. Gray also resented any notion that Stabler would give her instructions or tell her how to perform. Gray deeply resented being asked to perform hearing tests. She frequently complained to Sheley that she should not have to do them because she was a registered nurse and performing the hearing tests did not require any such training. Gray asked that the debone plant outsource the hearing tests like other Koch Foods' plants. When her request was denied, she cried "discrimination." She also falsely complained that she had to perform more hearing tests than other safety or medical employees, even though other employees assisted

Gray in completing the assigned hearing tests. Gray's hatred of Stabler culminated in Gray manipulating a production employee, Shirley McCall, into filing a complaint with the Nursing Board accusing Stabler of practicing medicine outside of the scope of Stabler's LPN license. Gray's effort failed as the Board found Stabler committed no wrong-doing.

C. The Alleged Sex Discrimination.

Gray claims she was subjected to one instance of misconduct during the five years she worked at Koch Foods, which occurred off company property late in the evening after work hours at McDickinson's home on November 14, 2015. Gray had no personal interaction with McDickinson prior to that night. However, Gray alleges that McDickinson and another Koch Foods employee, Steve Jackson, texted and called her late that evening inviting her to McDickinson's residence. Gray arrived after 11:00 p.m. At some point, Birchfield took a photo of Gray and McDickinson in close proximity with what appears to be Gray kissing McDickinson's cheek.

Gray alleges McDickinson touched her knee, attempted to put Gray's hand on her breast, and pressed against her, and that Birchfield quickly kissed her. No one asked Gray any personal questions or asked her to engage in any sexual activity. Thereafter, Gray alleges she saw McDickinson pull down Birchfield's pants and put his genitalia in her mouth, whereupon Gray immediately exited the room. She left the residence without incident shortly thereafter.

McDickinson and Birchfield both deny Birchfield was present that night. Birchfield will testify he was in Florence at the home of his friend, Kenneth Berry. Mr. Berry will substantiate Mr. Birchfield's alibi. William Summerville will testify he was present at McDickinson's house on November 14th, that Birchfield was not there, and that Gray only stayed shortly. The evidence will show that Steve Jackson gave a similar account in June of 2016 to the investigator retained by Koch Foods' legal counsel to investigate the allegations in Gray's EEOC Charge, *i.e.,* that Birchfield was not present and that McDickinson would never engage in such conduct. The evidence will show that, only after Birchfield was terminated, that Jackson sought out Gray's attorneys for his own self-interest because Birchfield was no longer around to protect his job at Koch Foods. The evidence will show that, while consulting with Gray's attorneys, Jackson materially changed his story to say that Birchfield was present at McDickinson's on November 14th. Jackson now contends that Birchfield and McDickinson engaged in oral sex in the corner of the garage while he and Gray carried on a conversation facing away from them and that Gray did not appear bothered by the conduct to the extent she saw it. Jackson will testify that he did not see either Birchfield or McDickinson touch Gray that night and did not hear them ask her for sex.

The only other purported inappropriate touching that occurred in the entirety of Gray's five (5) years of employment at Ala-Koch was about a week after the

November 14th incident when McDickinson allegedly brushed up against Gray while they were talking in McDickinson's office. Gray backed up and walked out. McDickinson denies this encounter ever occurred and Gray will not be able to point to any witnesses or other testimony to substantiate her accusations.

Gray worked at least another five months without any alleged inappropriate comments or touching from Birchfield or McDickinson. Rather, Gray sent text messages encouraging McDickinson's friendly overtures and invitations to dinner. The last time McDickinson and Gray had social contact was a text message exchange on February 22, 2016, which Gray initiated. On February 21, 2016, McDickinson texted Gray to ask how she was doing and asked Gray if she wanted to ride over after work. Gray responded "sure." When McDickinson failed to respond to Gray's text, Gray texted her the following day to ask, "what happened?"

Gray did not report any alleged sexual harassment during her employment at Koch Foods. Although Frank Sheley was Gray's immediate supervisor, she did not report any misconduct to him. Nor did Gray report the incident to Elrod, although she knew he was someone to whom she could complain. Gray made passing references to the alleged incident to employees who she considered to be her friends, although she has no idea as to when these discussions occurred. These current and former employees will testify that Gray was not making a complaint and only engaging in casual conversation.

D. Gray's Refusal To Perform Her Job and Her Resignation.

In March of 2016, Sheley questioned Gray about the status of the employee hearing tests that she had been assigned to complete. This prompted Gray to make a "formal" complaint to McDickinson and Birchfield that she was being discriminated against and humiliated. Around the same time, Gray sent a demeaning and offensive email to her co-worker Ashley Skinner, after Skinner questioned why Gray had refused to check an employee's blood pressure. Skinner complained to Sheley that Gray offended her. Sheley will testify he informed Birchfield that he did not feel he could supervisor Gray from a distance any longer and that it would be better if she could report to someone on site. Elrod suggested that the medical department be transferred under human resources. Following an in-person meeting on March 21st between McDickinson, Birchfield and Gray which Gray requested, the medical department was transferred to McDickinson's supervision. On April 14, 2016, McDickinson gave Gray a memorandum of understanding regarding Gray's tardiness and absences. That same day, Gray initiated an EEOC Charge. On April 29, 2016, Gray voluntarily resigned her employment.

Koch Foods retained legal counsel to respond to Gray's EEOC Charge who in turn retained a former FBI agent to conduct an independent investigation into Gray's allegations. Gray refused to participate in the investigation. None of the witnesses interviewed by the investigator alleged to have been present on the night

of November 14, 2015 could corroborate Gray's allegations. Rather, they all maintained Birchfield was not there and Gray visited very briefly and left without incident. Shortly after the investigation began, McDickinson voluntarily resigned. Birchfield was terminated approximately two (2) months later.

III. SUMMARY OF CLAIMS AND APPLICABLE LAW

A. Gray's Title VII Sex Discrimination Claim.

1. Gray was not subjected to an abusive working environment based upon her gender.

Gray pursues a hostile work environment theory of sex discrimination. To establish a hostile work environment claim pursuant to Title VII, Gray has the burden of proving "[her] workplace [was] permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of [her] employment and create[d] an abusive working environment." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir.2002). To meet this burden, Gray must show: (1) she belongs to a protected group; (2) she has been subject to unwelcome harassment; (3) the harassment was based on her gender; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatory abusive working environment; and (5) Koch Foods is responsible for such environment under a theory of vicarious or direct liability. *Id*. The requirement that the harassment be "severe or pervasive" contains

an objective and subjective component such that Gray objectively and subjectively perceived the conduct as sufficiently abusive to alter her working environment.

Gray will be unable to carry her burden of proof. The evidence will show the alleged encounter at McDickinson's house occurred off of company property and after working hours. The evidence will show Gray voluntarily attended. To the extent Birchfield was there that night, which the majority of witness testimony will refute, the evidence will show Gray was not bothered by whatever purportedly occurred and that she welcomed McDickinson's advances by kissing her. Gray left without incident and thereafter continued to encourage McDickinson's friendly overtures.

Gray also cannot establish that she was discriminated against **because of her sex**, when she has asserted repeatedly that McDickinson and Birchfield made sexual overtures toward both men and women employees. *Henson v. City of Dundee*, 682 F.2d 897, 903–04 (11th Cir. 1982) (explaining Title VII provided no remedy where a supervisor sexually harasses both men and women because the conduct is not based on the employee's gender). Contrary to Gray's assertions, *Bostock* does nothing to change this basic tenet of Title VII jurisprudence. For instance, in *Maner v. Dignity Health*, 9 F.4th 1114, 1122 (9th Cir. 2021), the Ninth Circuit Court of Appeals determined that *Bostock*'s holding could not save a plaintiff's claim that she was discriminated against because her supervisor favored another employee

romantically. The Court held that "[t]o determine whether an employer discriminated based on sex in violation of Title VII, we ask 'if changing the employee's sex would have yielded a different choice by the employer.'" *Id.* The same is true here whereby Gray's admissions to this Court, changing her sex would not have made a difference in Birchfield and McDickinson's alleged harassment. Had Gray been a man, she alleges she would have been subject to the same purported harassment.

With respect to Steve Jackson's presence that night, he will testify that the oral sex encounter between McDickinson and Birchfield occurred in his presence. Thus, to the extent Gray was purportedly "forced" to watch the encounter, so was Jackson, a male employee. As such, they were treated the same irrespective of gender. In addition, Koch Foods anticipates Gray will attempt to introduce evidence that McDickinson made sexual advances to a male employee under her supervision, Harvey Fuller. Under these alleged circumstances, Gray has no claim for Title VII sex discrimination.

2. Koch Foods cannot be held liable for supervisors acting outside of their authority.

Gray cannot demonstrate that Koch Foods is either directly or vicariously liable. This Court previously opined that Koch Foods could be held automatically liable for McDickinson and Birchfield's action merely because of their managerial positions. (Doc. 415, p. 29). However, the Eleventh Circuit has held "[s]trict liability

is illogical in a pure hostile environment setting. In a hostile environment case, no quid pro quo exists. The supervisor does not act as the company; the supervisor acts outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote." Corporate liability, therefore, exists only through *respondeat superior*; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the supervisor. *Steele v. Offshore Shipbuilding, Inc*., 867 F.2d 1311, 1316 (11th Cir. 1989)(citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986)(court of appeals erred by concluding that employer was automatically liable for hostile environment sexual harassment by supervisor)). Moreover, Plaintiff cannot rely upon Birchfield's alleged involvement in the encounter with Plaintiff on November 14, 2015 to establish notice to Koch Foods of discriminatory conduct. *See Willis v. Ray Sumlin Const. Co.*, No. 94-AR-0720-M, 1995 WL 597376, at *5 (N.D. Ala. June 8, 1995). In *Willis*, the district court rejected the notion that a notice to a supervisor who is also alleged to be a harasser establishes notice to the corporation of discriminatory conduct as doing so would create a strict liability standard. The district court explained as follows:

> Because Willis makes a hostile work environment claim, corporate liability must be predicated on respondeat superior. *See Steele v. Offshore Shipbuilding, Inc*., 867 F.2d 1311, 1316 [49 FEP Cases 522] (11th Cir. 1989) ("Corporate liability . . . exists only through respondeat superior; liability exists where the corporate defendant knew or should have known of the harassment and failed to take prompt remedial action against the

> supervisor."). Although an aggrieved employee need not complain to the corporate president, the harassment must be reported to someone sufficiently high in the corporate hierarchy. *See Henson v. City of Dundee*, 682 F.2d 897, 905 [29 FEP Cases 787] (11th Cir. 1982) (To establish respondeat superior liability, " [t]he employee can demonstrate . . . that she complained to higher management of the harassment."). In the instant case, the only formal reports of harassment were made by McDaniel to Carrico and McPeters. While Carrico and McPeters were above Willis in the corporate infrastructure, they also were alleged harassers. To permit an employee to establish respondeat superior by informing the harasser that his or her conduct was improper would essentially reintroduce strict liability in hostile work environment cases. Respondeat superior presupposes the objectivity of the corporate supervisor to whom the complaint is made. Accordingly, RSCC did not receive actual notice of the alleged conduct until "late January" when [an EEOC Charge] was filed.

Willis, 1995 WL 597376, at *5 (emphasis added).

B. No Basis Exists for Holding Koch Liable for Gray's State Law Claims.

Gray asserts state law tort claims against Koch Foods based on McDickinson and Birchfield's alleged misconduct. Even if Gray could present substantial evidence of the *prima facie* elements of these torts, which she cannot, Koch Foods cannot be held liable. The Eleventh Circuit has held that "[u]nder Alabama law, an employer is liable for the intentional torts of its agents if (1) the wrongful acts were committed in the scope of his employment; (2) the acts were in furtherance of the employer's interests; and (3) the employer participated in, authorized, or ratified the wrongful acts." *Stancombe v. New Process Steel LP*, 652 Fed. Appx. 740, 741 (11th Cir. 2016) (affirming district court's judgment that employer could not be held

vicariously liable for employee's state law torts) (citing *Potts v. BE & K Const. Co*., 604 So.2d 398, 400 (Ala. 1992).

1. The alleged conduct was outside of the scope of McDickinson and Birchfield's employment with Koch Foods.

"An employer may not be held vicariously liable, however, for sexual harassment by an employee when the employee acts only to 'satisf[y] his own lustful desires,'" *Barlow v. Piggly Wiggly Alabama Distrib. Co*., No. 2:14-CV-971-WMA, 2015 WL 5770625, at *6 (N. D. Ala. Oct. 2, 2015) (citing Ex *parte Atmore Cmty. Hosp*., 719 So. 2d 1190, 1194-95 (Ala. 1998)). No evidence exists McDickinson or Birchfield were acting within the scope and line of their employment when they allegedly harassed Gray. It is undisputed that any inappropriate touching or sexual misconduct had nothing to do with McDickinson or Birchfield's job duties. In addition, the alleged conduct occurred outside of the workplace and after work hours.

2. Koch Foods did not ratify the alleged conduct.

In addition to proving the underlying tortious conduct of McDickinson and Birchfield, to show ratification Gray must present substantial evidence that Koch Foods "(1) had actual knowledge of [their] tortious conduct and that the tortious conduct was directed at and visited upon [Gray]; (2) that based upon this knowledge, [Koch Foods] knew, or should have known, that such conduct constituted ... a tort; and (3) that [Koch Foods] failed to take "adequate steps" to remedy the situation."

Mills, 991 F. Supp. at 1383 (citing *Mardis v. Robbins Tire & Rubber Co*., 669 So. 2d 885, 889 (Ala.1995); *Potts*, 604 So .2d at 400)(emphasis added)).

Koch Foods' first notice of the alleged conduct was Gray's EEOC Charge, which she filed shortly before her resignation. By that time, however, Gray admits that Birchfield or McDickinson were no longer harassing her. Koch Foods could not take any further steps to remedy the situation as Gray resigned and the purported harassment had admittedly ceased. Nevertheless, Koch Foods investigated the allegations. McDickinson resigned shortly after the investigation began. Birchfield was later terminated.

This Court previously opined that Koch Foods potentially ratified the alleged conduct because Birchfield was purportedly present on the night of November 14th and failed to stop McDickinson's advances toward Gray. This theory ignores that Gray contends Birchfield and McDickinson were co-harassers and, instead, puts Birchfield in the position of an independent observer and absolves Gray of any responsibility for making a complaint. *See Willis*, No. 94-AR-0720-M, 1995 WL 597376, at *5 ("Respondeat superior presupposes the objectivity of the corporate supervisor to whom the complaint is made."). Nevertheless, if Birchfield's presence ratified McDickinson's conduct because Birchfield was her supervisor, it is impossible for Koch Foods to have ratified Birchfield's alleged tortious conduct. If Birchfield could ratify his own conduct, a strict liability standard would exist.

Alabama law does not countenance strict liability for intention tortious conduct by managers simply by virtue of their position. As noted *supra*, the evidence will show Gray never reported any alleged misconduct by Birchfield and that, after the evening of November 14th, Birchfield never touched her again.

3. Gray's Negligence Claim Fails.

> For the master to be held liable for the servant's incompetency, it must be affirmatively shown that had the master exercised due and proper diligence, the master would have learned of the incompetency. This may be done by showing specific acts of incompetency and showing that they were brought to the knowledge of the master, or by showing them to be of such a nature, character, and frequency that the master, in the exercise of due care, must have had notice of them.

Kelley v. Worley, 29 F. Supp. 2d 1304, 1313 (M.D. Ala. 1998).

Gray's negligence claims are premised upon the alleged encounter on November 14th and the underlying torts flowing from those alleged events of assault, battery, invasion of privacy, and outrage. She has failed to show that Koch Foods knew or should have known that, prior to November 14th, Melissa McDickinson would assault, batter, or invade the privacy of Gray. Gray points only to an unsubstantiated accusation made against McDickinson in August of 2015 that McDickinson was sexually involved with two (2) male employees: Irish Jenkins and Steve Jackson. Although Gray questions the integrity of the investigation, it is undisputed that McDickinson and Jackson never had a sexual relationship. To date, Gray failed to put forth any evidence to refute the sworn testimony of Jackson and

McDickinson that no such relationship occurred, and she will be unable to do so at trial. As for Jenkins, this Court has held that, to the extent any such relationship existed between McDickinson and Jenkins, it was consensual as a matter of law. (See Doc. 222 in *Irish Jenkins v. Koch Foods, Inc. et al*, Case No. 2:17-cv-364-RAH). Thus, as a matter of law, the 2015 accusations were false and cannot be relied upon to show notice of incompetency to Koch Foods.

Moreover, Gray will be unable to point to any evidence to show that Koch Foods knew or should have known Birchfield would commit any intentional torts. The August 2015 accusations against McDickinson did not implicate Birchfield in any wrongdoing. Gray has failed to point to any prior complaints against Birchfield for any inappropriate sexual overtures. Thus, Koch Foods cannot be held liable on a negligence training or retention theory for any alleged conduct by Birchfield.

C. Gray Is Not Entitled To Punitive Damages from Koch Foods.

1. McDickinson or Birchfield were not acting within the scope of their employment for purposes of Title VII liability.

Punitive damages are "an extraordinary remedy" in employment cases and "[n]ot every unlawful discriminatory act will support an award of punitive damages against an employer." *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999). A "plaintiff seeking punitive damages against an employer for job discrimination faces daunting obstacles under the law established by decisions of the Supreme Court and this Court. 'Punitive damages are disfavored by the law and are

awarded solely to punish defendants and deter future wrongdoing.'" *Ash v. Tyson Foods, Inc.*, 664 F.3d 883, 900 (11th Cir. 2011) (internal citations omitted). In *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 536–37 (1999), the Supreme Court outlined the standard for punitive damages in cases of alleged employment discrimination. In order to support such an award, the "plaintiff must come forward with substantial evidence that the employer acted with actual malice or reckless indifference to his federally protected rights." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1280 (11th Cir. 2002) (emphasis added); *Kolstad,* 527 U.S. at 539 (identifying the standard for punitive damages as "plaintiff's burden"). To do so, Gray must establish two elements. First, she must show the alleged wrongdoers "discriminate[d] in the face of a perceived risk that [their] actions will violate" the [discrimination statute]. *Id.* at 536. Second, Gray must show that the "malfeasing agent[s] [McDickinson and Birchfield] served in a 'managerial capacity' and committed the wrong while 'acting in the scope of employment.'" *Rubinstein v. Adm'rs of the Tulane Educ. Fund*, 218 F.3d 392, 405 (5th Cir. 2000) (emphasis added) (citing *Kolstad*, 527 U.S. at 541); *Equal Emp't Opportunity Comm'n. v. Fed. Express Corp*., 513 F.3d 360, 372 (4th Cir. 2008) (observing that the jury must also find "[t]hat the decision maker acted within the scope of his employment in making the challenged decision"); *E.E.O.C. v. New Breed Logistics*, 783 F.3d 1057, 1072 (6th Cir. 2015) ("Second, the plaintiff demonstrates that the employer is liable by

establishing that the discriminatory actor worked in a managerial capacity and acted within the scope of his employment"). For example, in *Ogden v. Wax Works, Inc*., the Eighth Circuit explained that a plaintiff must show that "an employee serving in a 'managerial capacity' committed the wrong while 'acting in the scope of employment.'" *Ogden*, 214 F.3d at 1008–09 (quoting Kolstad, 527 U.S. at 543, 119 S.Ct. 2118, in turn citing Restatement (Second) of Agency § 217C). In that case, the Eighth Circuit held the employer could be held liable for manager's discriminatory actions because they involved the duties that "were the kind he was employed to perform; his abusive conduct occurred for the most part during working hours on [the employer's] premises; and his conduct was 'actuated in part to serve [the employer].'" *Ogden*, 214 F.3d at 1010; *Gorbett v. OS Rest. Servs., Inc.*, No. 1:07 CV 2448, 2009 WL 10717142, at *15 (N.D. Ohio July 10, 2009) (citing *Kolstad,* 527 U.S. at 543-44) (holding "the scope of the employment requirement [was] satisfied here because all of the harassment [plaintiff] alleges occurred at the workplace, during work hours"). To impute liability for punitive damages to the employer,

Here, Gray cannot show that Birchfield or McDickinson were acting within the scope of their employment. It is undisputed the alleged events of November 14th upon which Gray primarily bases her sex discrimination claim occurred at a private social gathering that was off company property and outside of working hours. Gray cannot show any alleged action taken by McDickinson or Birchfield that night was

actuated in whole or in part to serve Koch Foods. Indeed, this Court has already held as a matter of law that McDickinson and Birchfield were acting outside the scope of their employment if such conduct occurred. Simply, Koch Foods may not be punished for a private gathering that occurred off its property and over which it had no control.

2. Koch Foods acted in good faith.

Even if Gray presented substantial evidence to establish a claim for punitive damages (which she has not), she still should not recover punitive damages because Koch Foods will establish that the alleged discrimination was contrary to its good faith efforts to comply with Title VII or Section 1981. *Kolstad* establishes this defense, '"[g]iving punitive damages protection to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes' Title VII's objective of 'motivating employers to detect and deter Title VII violations.'" 527 U.S. at 545-46 (internal citations omitted). Federal courts have found "good faith" efforts to exist where the employer "had a well-publicized policy forbidding sexual harassment, gave training on sexual harassment to new employees, established a grievance procedure for sexual harassment complaints, and initiated an investigation of the plaintiffs' complaints." *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002).

The factual basis for Koch Foods' *Kolstad* good faith defense is unassailable, just as it was in the Eleventh Circuit's decision applying it in *Ash*. Koch Foods has written policies prohibiting discrimination on the basis of race, gender, national origin, and other protected categories. Koch Foods disseminates and conducts training on that policy. The evidence at trial shows that Koch Foods not only promulgated effective EEO policies, but enforced them at the Montgomery complex. Gray, Birchfield, and McDickinson all will testify that they received and were familiar with the EEO policies. In addition, the evidence at trial will be undisputed that (1) Koch Foods' investigated Gray's EEOC Charge, (2) that Gray not only failed to report any alleged harassment, but also refused to participate in the investigation; and (3) that all witnesses to the events of November 14th were questioned and none substantiated Gray's allegations.

Gray may argue that Birchfield or McDickinson intentionally ignored the EEO policies that she admits existed and applied to her employment decisions. However, management's disregard of rules is the exact conduct for which employers are insulated by the *Kolstad* defense. *See Harsco Corp. v. Renner*, 475 F.3d 1179, 1189-1190 (10th Cir. 2007) ("If failure of supervisors to comply with company policy were sufficient evidence to prove the lack of a good-faith effort to train, the *Kolstad* defense would be effectively eliminated.") Birchfield and McDickinson will testify that they knew it was a violation of the EEO policy to make an

employment decision based on gender, race, or any purported protected conduct. The evidence that Koch Foods made a good faith effort to comply with the law is overwhelming. The Eleventh Circuit flatly rejected such argument as a basis to avoid the *Kolstad* good faith defense:

> The district court did not err [in vacating the punitive damages award]. The theory that [plaintiff's counsel] pitched to the jury, and pitches to us, is that an employer's good faith efforts to prevent discrimination in employment decisions do not matter so long as someone in a position to make a hiring or promotion decision violated that policy even once. If accepted, that theory would butcher precedent and eviscerate the good faith defense. . . . If, as [plaintiff's counsel] insists, a single misuse of managerial authority resulting in discrimination establishes that the employer did not make good faith efforts to prevent that discrimination, then the good faith defense does not exist. Under her theory the only time that the good faith defense to vicarious liability for punitive damages could come into play would be when there was no violation of the job discrimination laws to begin with, and therefore no basis for compensatory or punitive damages. Counsel has not explained to us the utility of a defense that exists only when there is no need for it. . . . Supreme Court precedent is not like the ash on a cigarette, to be flicked off whenever convenient. The district court followed the *Kolstad* decision in setting aside the punitive damages award, and we follow that decision in affirming the district court's judgment.

Ash, 664 at 906–07. Because Koch Foods will establish the *Kolstad* good faith defense, Gray is not entitled to punitive damages.

3. Punitive damages are not recoverable for negligence.

A claim for negligent hiring, supervision and retention does "not warrant an award of punitive damages." *CP & B Enterprises, Inc. v. Mellert*, 762 So. 2d 356, 362 (Ala. 2000); (citing *Tuscaloosa County v. Barnett*, 562 So.2d 166, 169

(Ala.1990); *Bradley v. Walker*, 207 Ala. 701, 703, 93 So. 634, 635 (1922) (" 'Punitive damages are not recoverable for simple negligence, but the recovery in such case is for compensatory damages.' ")); *Stallworth v. Imani Env't Grp., Inc.*, No. 2:12-CV-814-WKW, 2013 WL 5930499, at *4 (M.D. Ala. Nov. 5, 2013). As such, Gray may only seek compensatory damages for her negligence claims which is limited to recovery for purported mental anguish.

D. Gray Improperly Seeks Double Damages on Duplicative Claims For A Single Injury Caused By The Same Purported Wrong.

"Alabama law generally bars double recoveries, and, although '"a party is entitled to full compensation for his injuries," ' *Ex parte Barnett*, 978 So.2d 729, 732 (Ala.2007) (quoting in turn *Wilbourn v. Ray*, 603 So.2d 969, 972 (Ala.1992) (quoting *McClendon v. City of Boaz*, 395 So.2d 21, 26 (Ala.1981)), he ' "can gain but one satisfaction." ' *Lee L. Saad Constr. Co. v. DPF Architects, P.C.*, 851 So.2d 507, 521 (Ala.2002) (quoting *Mobile Ins., Inc. v. Smith*, 441 So.2d 894, 896 (Ala.1983)); *see also Turquoise Props. Gulf, Inc. v. Overmyer*, 81 So. 3d 1250, 1255 n.3 (Ala. 2011) (holding "Alabama law ... does not countenance double recoveries"). "'It is a universal rule that a plaintiff, although entitled to full compensation for an injury, is entitled to only one recovery for a single injury caused by two or more tortfeasors.' *Crews v. McLing*, 38 So. 3d 688, 693 (Ala. 2009) (quoting *Shepherd v. Maritime Overseas Corp.*, 614 So.2d 1048, 1051 (Ala.1993) and *Ex parte Rudolph*, 515 So.2d 704 (Ala.1987)). For example, "[a]lthough a plaintiff may recover both

in 'contract and tort for the same events, a plaintiff may not get a "double recovery" for compensatory damages.'" *Sharritt v. Liberty Mut. Ins. Co*., No. CIV.A. 05-0164-CG-B, 2005 WL 1505994, at *2 (S.D. Ala. June 24, 2005) (quoting *Hill v. United Ins. Co. of America*, 998 F. Supp. 1333, 1337 (M.D.Ala.1998) (citations omitted); *see also Avery v. City of Talladega, Ala*., 24 F.3d 1337, 1348 (11th Cir.1994) ("Of course, the plaintiffs may not recover twice for the same violation; the breach of contract claim survives merely as an alternative legal theory to redress any wrong that may have been done them."); *Barrow v. Bristol-Myers Squibb*, 1998 WL 812318, *46 (M.D.Fla.1998) ("Although Plaintiff has met the elements for recovery of damages under theories of strict liability, negligence, and fraud/negligent misrepresentation, no double recovery for the same injury shall be allowed.").

Federal courts are instructed to guard against double recovery and dismiss claims that are duplicative in nature. *See Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980) (explaining that "the courts can and should preclude double recovery by an individual"); *White v. United States*, 507 F.2d 1101, 1103 (5th Cir. 1975) (explaining that "no duplicating recovery of damages for the same injury may be had"); *see also F.T.C. v. Leshin*, 719 F.3d 1227, 1232 (11th Cir. 2013) (quoting *MCA Television Ltd. v. Pub. Interest Corp*., 171 F.3d 1265, 1274 (11th Cir.1999)) ("Remedies are inconsistent if they provide 'double recovery for the same injury'"). Accordingly, federal courts routinely dismiss state law tort claims which are premised upon the

same conduct as a companion Title VII discrimination claim as Title VII permits recovery of compensatory damages for mental anguish. *Rodriguez v. Express World Wide, LLC*, No. 12 CV 4572 RJD RML, 2014 WL 1347369, at *8 (E.D.N.Y. Jan. 16, 2014), report and recommendation adopted, No. 12 CV 4572 RJD RML, 2014 WL 1350350 (E.D.N.Y. Mar. 31, 2014) ("However, because the emotional distress and embarrassment suffered by plaintiff under this claim are the same as those serving as the basis for the award of emotional damages under Title VII and the NYCHRL, I conclude that an award of damages for battery would be duplicative."); *Pac. Int'l Grout Co. v. Zinkova*, No. 2:12-CV-00778-MJP, 2012 WL 3051771, at *8 (W.D. Wash. July 25, 2012) ("Washington courts have dismissed outrage claims as duplicative of discrimination claims because Title VII already allows for damages for emotional injuries on the same facts."); *Johnson v. Blue Cross/Blue Shield*, 375 F. Supp. 2d 545, 549-50 (N.D. Tex. 2005) (dismissing state law claim alleging intentional infliction of emotional distress where claim incorporates and realleges same facts that support race and age discrimination claims); *Martinez v. Bohls Bearing Equip. Co.*, 361 F. Supp. 2d 608, 633 (W.D. Tex. 2005) (rejecting claim for intentional infliction of emotional distress where same facts formed basis for both intentional infliction of emotional distress claim and for plaintiff's Title VII harassment claim). *Hicks v. City of Tuscaloosa*, 2016 WL 1180119 (N.D. Ala. March 28, 2016)(reducing damages because jury award on pregnancy discrimination and

FMLA retaliation with respect to wrongful transfer claim "involve[d] a double recovery").

There is no claim for lost wages as Gray's constructive discharge claims was dismissed. Gray's only recoverable damages are for alleged mental anguish. It is undisputed Gray's surviving claims, *i.e.*, her Title VII hostile work environment claim and tort claims, are all entirely premised upon Birchfield and McDickinson's alleged advances toward her in November of 2015. (Third Amended Complaint, Doc. 6). Gray cannot recover damages for mental anguish on her Title VII claim, assault and battery claims, invasion of privacy claim, outrage claim, and negligence claim as they are all based upon the purported mental suffering caused by Birchfield and McDickinson's conduct in November of 2015. This would constitute an unlawful duplicate recovery, *i.e.*, Gray would be recovering for the same injury on six (6) different claims. As such, the Court should dismiss Gray's duplicative tort claims, or require Gray to elect which remedy she intends to pursue at trial.

IV. EVIDENTIARY ISSUES.

Gray intends to throw whatever allegations against McDickinson, Birchfield, and Koch Foods (whether relevant, verifiable, or not) against the proverbial wall to see what sticks. This Court should not permit Gray to succeed in this effort because the allegations involving other Koch Foods employees are not relevant to Gray's claims and introducing them during the liability phase of the trial will be irrevocably

damaging to Koch Foods. A detailed timeline concerning the origination and timing of the accusations is attached hereto as Exhibit "**A**."

A. Harvey Fuller

Fuller was hired in March 2015 to work as an HR Clerk. Fuller was terminated in May 2015, when he left work early during a new employee orientation, requiring co-workers, Laura Cortes and Rebecca Milam to finish his job duties. Fuller was instructed to contact David Birchfield about returning to work but failed to do so for over a week. In October, 2015, more than five months after his termination, Fuller made the first reference to any alleged harassment by McDickinson in an EEOC Charge. In the Charge, Fuller asserted numerous claims against Koch Foods of Alabama, the large majority of which did not involve McDickinson. Fuller alleged McDickinson "approached [him] on several occasions with requests for sex and sexual favors. She requested I leave my family to 'get with someone who is going places' and implied that complying with the requests would improve my employment situation." Fuller did not make any allegations that McDickinson touched him inappropriately; nor did he allege any sexual misconduct by Birchfield.

To the extent Gray contends Fuller's accusations are pertinent to the issue of notice, the argument fails. Gray cannot rely Fuller's accusation for notice as to her Title VII sex discrimination claim, because McDickinson's purported advances to Fuller would not put Koch Foods on notice that McDickinson would discriminate

against a Gray, a female employee. In addition, Fuller made no such accusations against Birchfield.

To the extent she relies upon Fuller's accusation as notice to Koch Foods of tortious conduct for purposes of her negligence claim, the argument also fails. "[N]ot just any 'incompetency' suffices to give rise to a cause of action for so-called negligent hiring, training, and supervision liability. Rather, Plaintiffs must prove that an allegedly incompetent employee committed a state law tort." *Buckentin v. SunTrust Mortg. Corp.*, 928 F. Supp. 2d 1273, 1288 (N.D. Ala. 2013). "The 'incompetency' of the offending employee in a negligent training and supervision claim [of which the employer purportedly had notice], ..., must be based on an injury resulting from a tort which is recognized under Alabama common law." *Sears v. PHP of Alabama, Inc.*, 2006 WL 932044, *19, n. 13 (M.D. Ala. 2006). As of November of 2015, Fuller had made no accusations of assault, battery, outrage, or invasion of privacy. The only accusation consisted of hearsay from Kathie Denton that McDickinson sent inappropriate text messages to Fuller (text messages which Denton admittedly never saw). As a matter of law, this hearsay accusation cannot have put Koch Foods on notice that McDickinson or Birchfield had engaged or would engage in intentional tortious conduct. *Livingston v. Marion Bank & Tr. Co.*, 30 F. Supp. 3d 1285, 1319 (N.D. Ala. 2014) (holding evidence that bank president made inappropriate and suggestive remarks to a former employee fell "far short of

creating an issue of fact with regard to whether the Bank had prior notice of [the president's] alleged propensity to sexually harass female employees so as to be deemed incompetent for purposes of negligent retention claim as it was "highly doubtful that, as described, it would support any tort cause of action under Alabama law."); *Rogers v. Hartford Life & Acc. Ins. Co*., 2012 WL 887482, at *5 (S.D. Ala. Mar. 15, 2012) (holding that for purposes of negligent training and retention claim the plaintiff must show employer was on "notice of propensities of its employees to engage in tortious behavior"); *see also Southland Bank v. A & A Drywall Supply Co.*, 21 So. 3d 1196, 1216 (Ala. 2008) ("A mistake or single act of negligence on the part of an employee does not establish incompetency."). Even assuming Gray could prove Koch Foods received Fuller's EEOC Charge before November 14, 2015, Fuller's allegation that McDickinson merely said he should get with someone who is going places is hardly notice of intentional tortious conduct, much less incompetency. Simply, there is no acceptable basis under the Federal Rules of Evidence for Gray to present the highly prejudicial evidence of Fuller's unsubstantiated accusations.

B. Irish Jenkins

Jenkins is a former Koch Foods employee who is represented by Gray's counsel in litigation filed against Koch Foods, McDickinson and David Birchfield. (*Jenkins v. Koch Foods, Inc., et al*., No. 2:17-cv-00364-ALB-SMD). Jenkins alleges

he had a consensual sexual relationship with McDickinson. Unlike Gray, Jenkins claims that Birchfield was jealous of his relationship with McDickinson and coerced him to deny any relationship with McDickinson. The Court held that, as a matter of law, Jenkins failed to establish he was discriminated on the basis of his gender as any purported relationship between he and McDickinson was consensual and welcomed by Jenkins. In light of this judicial determination, any evidence pertaining to Jenkins' allegations is not probative of any issue in this case. *Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668, 677 (7th Cir. 2011)(internal citations omitted)("Although the Hospital's discrimination against other employees who raised similar complaints would be circumstantial evidence to support Leitgen's retaliation claim, [plaintiff's] reliance on [discrimination against other employee] is unavailing because the record contains no evidence that the Hospital did in fact discriminate against [the other employee]."); *Candelore v. Clark Cty. Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) (holding evidence that involved conduct away from the workplace or outside business hours was not probative on the issue of hostile work environment as "[a] co-worker's romantic involvement with a supervisor does not by itself create a hostile work environment"); *Davis v. Dunn Const. Co.*, 872 F. Supp. 2d 1291, 1312–13 (N.D. Ala. 2012)(holding evidence of unsubstantiated accusations of racism in prior EEOC Charges made by other employees, some of which were dismissed at summary judgment, failed to prove

plaintiff's race discrimination claim); *Jackson v. Cintas Corp.*, 391 F. Supp. 2d 1075, 1101 (M.D. Ala. 2005) ("The court is not persuaded that the "rumors" of [supervisor's] alleged consensual affair with another subordinate employee is sufficient to place Cintas on constructive notice of [supervisor's] alleged propensity to engage in *unwelcome* sexually harassing conduct.")

C. Brooke Smith

Smith was terminated from Koch Foods in July, 2016, a month after McDickinson resigned. Pursuant to Smith's sworn testimony, any sexual conduct she experienced with McDickinson occurred after she and McDickinson were no longer employed with Koch Foods. Likewise, Smith swore under oath that Birchfield had never approached her for sex. Later, she recanted this testimony given just a few weeks earlier, to claim that Birchfield had asked for sex and she refused. Nevertheless, Plaintiff has no evidence Smith was terminated for refusing Birchfield's advances. Smith testified it was her unsubstantiated belief this was the case, but she was forced to admit that she did not know who made the decision to terminate her employment. Smith has never filed an EEOC Charge, lawsuit or otherwise made a claim of sexual harassment against Koch Foods or McDickinson or Birchfield.

Smith's constantly evolving allegations, which did not even began to surface until after McDickinson and Plaintiff's resignation, could not put Koch Foods on

notice of any purported misconduct. *See Warren v. Prejean*, 301 F.3d 893, 905 (8th Cir. 2002) (affirming the exclusion of testimony about information that was not previously available to the employer and was therefore "irrelevant as to the information known to [the employer] at the time of the termination"); *Wills v. Brown Univ.*, 184 F.3d 20, 28 (1st Cir. 1999) (affirming exclusion of testimony from students who claimed to have been sexually harassed by same harasser as it was undisputed the students did not report the incidents to the harasser's supervisor prior to the incident that formed the basis of the complaint and thus the me too testimony did not increase the likelihood that the supervisor was more culpable for failing to remove the harasser). Indeed, a Koch Foods' investigator had to track Smith down to her house on multiple occasions to obtain Smith's account of her relationship with McDickinson and Birchfield. Interestingly, Smith continued to voluntarily socialize with McDickinson and Birchfield despite the alleged ill-treatment from them.

Second, as to punitive damages, there is no evidence that Koch Foods had actual or constructive knowledge of McDickinson or Birchfield's alleged harassment of Smith in 2016 when Plaintiff was employed with Koch Foods. *See Dudley v. Wal-Mart Stores, Inc.*, 166 F. 3d 1317, 1323 (11th Cir. 1999). Because there is no evidence of knowledge or approval of the conduct toward Smith, Koch Foods cannot be held vicariously liable for punitive damages, and any testimony that goes to the issue of punitive damages is improper and inadmissible. *Miller*, 277 F.3d

at 1280 (reversing district court's submission of punitive damages issue to jury and subsequent punitive damage award where plaintiff failed to prove defendant employer had actual notice of the alleged harassment sufficient to find malice or reckless indifference).

Respectfully submitted February 23, 2022.

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CERTIFICATE OF SERVICE

I certify that the foregoing has been served upon the following counsel of record by e-filing with the Court through the CM/ECF system, this February 23, 2022:

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