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

KA'TORIA GRAY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO.:**
	)	**2:17-cv-0595-RAH-JTA**
KOCH FOODS, INC., et al.,	)	
	)	
Defendants.	)	

PLAINTIFF'S TRIAL BRIEF

I. FACTS IN SUPPORT OF GRAY'S CLAIMS[1]

A. KOCH FOODS POLICIES

"Koch Foods has established procedures and guidelines that when followed eliminates any perception that can be construed by the courts that discrimination may have occurred in the process." Deviating from those procedures and guidelines could permit a court or jury to construe discrimination may have occurred. Koch Foods harassment policy specifically prohibits conduct of a sexual nature and

[1] Plaintiff has created a timeline of relevant events included herewith as Exhibit 1.

includes: (1) suggesting, explicitly or implicitly, that an employee's or applicant's response to a sexual advance or request for sexual favors will or may affect the terms or conditions of his/her employment; (2) sexual flirtations, propositions, requests or demands for sexual favors; (3) unwelcome advances or touching; (4) graphic or suggestive comments about an individual's dress or body; the display in the workplace of sexually suggestive objects, pictures and photographs; and (5) other verbal, physical or visual conduct of a sexual nature or based on sex.

Defendant Birchfield, HR Complex Manager, was charged with the responsibility for ensuring his direct reports, the two HR Managers and their respective staff followed the law and Koch's policies. Defendant Birchfield and Bobby Elrod, VP of HR, plant HR Managers are held to a higher standard than other managers.

Koch maintains a two-step procedure for reporting sexual harassment: the employee may report harassment and discrimination to the shift manager, plant manager or complex HR manager or they may contact Elrod. Koch also has an open door policy regarding complaints.

Koch provides annual harassment training to its salaried managers. Managers are cautioned that a victim may be motivated to keep harassment secret out of fear of losing a job or reliving the trauma. Koch instructs manages that if an employee witnesses, experiences, and/or learns about harassment or discrimination, "the

employee must report it immediately" and that while there are persons designated to receive complaints an "employee at any point contact any manager with whom they feel comfortable."

Defendant McDickinson acknowledged receipt Koch's policy on August 4, 2014. Koch also has an anti-retaliation policy which prohibits taking any action against an employee asserting their rights under Koch's harassment and discrimination policy. Despite the policies and training by Koch, HR staff described a culture of fear and lack of trust and confidence with Elrod, Birchfield and/or McDickinson.

B. McDICKINSON AND BIRCHFIELD'S RELATIONSHIP IN VIOLATION OF KOCH POLICY

Soon after Birchfield hired his paramour in violation of Koch's anti-fraternization policy, it became evident to the plant HR staff that McDickinson lacked the education and job experience to be a plant HR Manager and that Birchfield and McDickinson were romantically involved. McDickinson had Birchfield's first name tattooed on her wrist; she openly shared intimate details about his life; they would drink out of the same water bottle in front of people; the two would leave for two hour long lunches and Birchfield would not require McDickinson to clock out; Birchfield would hang out in McDickinson's office talking several times a week when Birchfield had never before left the kill facility to come to the debone facility; McDickinson did her homework at work and asked staff

to assist her with writing papers; McDickinson disclosed details of Birchfield's financial information and she confided in Laura Cortes, HR Generalist, and Steven Jackson, Union Steward, intimate details of her relationship including that Birchfield bought her a Lexus car and leased a home that the two shared.

Likewise, Birchfield confided or engaged in locker room talk with Randy Sharpley, Chief Union Steward, that he was intimate with McDickinson, talking "hoochie coochie" talk with her while on speaker phone in Sharpley's presence where he discussed McDickinson's undergarments and tattoos. Birchfield would pick up McDickinson's personal items from her office when she was absent from work. Sharpley was also able to observe Birchfield and McDickinson arrive in the same vehicle at the plant on a Sunday, outside normal work hours. Sharpley stated it was not necessary to ask why McDickinson and Birchfield were together on a Sunday, because, "We already knew. Everybody knew [they were romantically involved]" and if he did not want to get fired, Sharpley knew he needed to keep his mouth shut around Birchfield. Sharpley also observed Birchfield arrive to pick up McDickinson for lunch and be gone for long periods or Birchfield would bring food and eat with McDickinson in her office. "God forbid if you said anything about David and he knew it. If you said anything about the relationship or all of the rumor mills and stuff and that you said it, and he knew you said it, then you would have a target…"

McDickinson openly discussed her sexual encounters and extramarital relations with HR generalist Laura Cortes. McDickinson was also involved with an hourly employee at the sister plant in Gadsden. McDickinson would put her cell phone on speaker and allow Cortes to listen to McDickinson's conversation discussing intimate details with the employee. The union steward, Steve Jackson, also an hourly employee, was invited by McDickinson and Birchfield to their home in Prattville and they would invite others to join them in sexual encounters. Birchfield would invite other Koch employees, including HR staff, to join in group sexual encounters. Birchfield photographed certain people and events in compromising sexual situations as an insurance policy for his later use if anyone complained; Jackson, hearing Birchfield's insurance comments while photographing HR employee Rebecca Milam in an unclothed state, did the same, photographing McDickinson and Birchfield in a nude and semi-nude state. McDickinson and Birchfield also solicited sexual relations with union steward/hourly employee Steve Jackson.

D. RANDY SHARPLEY COMPLAINTS

Koch had warning and notice of this conduct because on August 5, 2015, Union Steward Randy Sharpley complained to Birchfield that it was rumored in the plant that McDickinson was sleeping with both Jackson and male employee Irish Jenkins, and that she was selling excused attendance points for sex. Jackson admitted

to Chief Union Steward Sharpley he was having sex with McDickinson. Sharpley already knew of McDickinson's sexual encounters with a male employee because he talked about it to Sharpley and described McDickinson flashing her bare breasts.

E. RANDY DAVENPORT COMPLAINTS

Randy davenport, Plant Manager, wrote a complaint letter and on August 10, 2015, emailed a copy to Wally Lewis, VP Debone plant, and reported concerns that McDickinson was having sex with male employees asking that this be investigated. Lewis forwarded Davenport's complaint to Elrod and Elrod forwarded the complaint to Birchfield to investigate.

F. LAURA CORTES COMPLAINTS

Laura Cortes, HR Generalist, complained to Birchfield on August 14, 2015 about McDickinson having sex with employees. Birchfield recorded this conversation and he conveyed that McDickinson had been investigated for having sex with a union employee and taking an employee file out of the office "to have it doctored." Birchfield suspended McDickinson for 15 days as a result. Birchfield recorded his conversation with Cortes.

In the fall of 2015, Cortes was invited to McDickinson's home for a party. During the party, McDickinson cornered Cortes' husband while holding her skirt up to her crotch. McDickinson's body language and suggestive conversation with Cortes' husband made Cortes very uncomfortable. Cortes was also uncomfortable

with McDickinson's inappropriate and sexually suggestive conduct at a party McDickinson hosted.

Cortes complained to the HR Manager, Shawn Collins about McDickinson and Birchfield's inappropriate actions in the workplace. Cortes also complained to Randy Davenport, Plant Manager, who forwarded her complaints to his boss, Walley Lewis, writing that "there are many issues within the HR Dept. with HR Manager that made" Cortes and another HR employee (Kathie Denton) feel "very uncomfortable and threatened."

In 2016, Cortes submitted a 38-page hand-written statement to Bobby Elrod, Vice President Human Resources, listing numerous complaints about McDickinson and Birchfield dating back to 2014. Cortes told Elrod that shortly after McDickinson was hired, it was rumored McDickinson and Birchfield were romantically involved with one another and that McDickinson sexually harassed Fuller. After Cortes complained about Birchfield and McDickinson, Birchfield denied Cortes a promotion to the position of HR Manager, even though she was the most qualified, stating he did not trust her after she complained.

G. KATHIE DENTON COMPLAINTS

Kathy Denton, HR Generalist, reported her concerns in August 2015, at the same time as Cortes, to Randy Davenport, Plant Manager, about McDickinson and Birchfield being romantically involved and the unprofessionalism she observed in

the HR office by McDickinson. Davenport informed his supervisor Lewis that two HR clerks, Laura Cortez and Kathy Denton, told him "there are many issues within the HR Dept. with HR Manager that made" them feel "very uncomfortable and threatened." Davenport reported Denton's complaint that McDickinson sexually harassed male HR clerk Harvey Fuller, and that McDickinson had an "ongoing sexual relationship" with other hourly employees, "both Irish Jenkins and Steve Jackson." Denton told Davenport she was bringing the issues to him because she was "afraid [Birchfield would] not do anything."

After the complaints reached the desk of Elrod he asked Birchfield to investigate. Elrod never questioned Sharpley about McDickinson, Birchfield, Jackson or Jenkins or engaged in any investigation even though he knew other employees complained. Birchfield claims he conducted the investigation because it concerned the HR Manager and that person's reputation and standing inside the plant was at stake. Birchfield's response to these serious allegations was to discipline and suspend Denton for taking her concerns to Davenport, the Plant Manager. He considered Denton's complaints a breach of confidentiality even though per Koch policies, Denton was allowed to complain to Davenport.

However, despite the complaints by Sharpley, Denton, Simmons and Davenport, and being the subject of constant talk in the workplace involving allegations that she was romantically involved with Birchfield, on September 25-29,

2015, McDickinson and Birchfield went on vacation in Panama City Beach, Florida and stayed in the same condo with Jackson, paid for by Birchfield, and McDickinson and Birchfield stayed in the same bedroom. During this vacation McDickinson had Birchfield's first name, "David," tattooed on her inner wrist.

H. ALYCIA HUGHES COMPLAINT

On October 28, 2015, payroll clerk Alycia Hughes complained to her supervisor that "there has also been talk" that: Birchfield and McDickinson were living together; McDickinson was doing school work on company time; having an employee write a school paper for her; and McDickinson was arriving and leaving "at random hours," thereby delaying work that needs her approval. Robert Hughes also complained in writing to Elrod about Birchfield.

I. STEVE JACKSON

Jackson showed an hourly employee, Irish Jenkins, several pictures of Birchfield and McDickinson naked in bed. Jackson also showed Huey Marshall, III, Maintenance Supervisor, pictures of Jackson, McDickinson and Birchfield on vacation together in Florida. Birchfield and Jackson were in their underwear.

McDickinson and Birchfield tried to pressure Jackson into group sex with them. McDickinson also sought to indulge her and Birchfield's exhibitionist/voyeuristic desires by asking Jackson to have sex with her while Birchfield watched. McDickinson performed oral sex on Birchfield in front of

Jackson. Jackson showed Sharpley pictures on his phone of McDickinson and Birchfield for proof of what he was talking about. Jackson also took pictures of McDickinson and Birchfield engaging in sexual conduct with employees; Birchfield was naked and McDickinson was only partially clothed.

Birchfield told Jackson that he "owed" him and demanded he was to spend more time in McDickinson's and Birchfield's home. Because Birchfield told Jackson that he had the "power to hire, fire and promote" Jackson agreed to Birchfield's demands so he would not lose his job. On one occasion while Jackson was at McDickinson and Birchfield's home, McDickinson and Birchfield started having sex in front of him in the living room while he was seated on an adjacent chair, "They just started having sex. They were kissing, hugging; next thing I know, she's doing oral sex to him."

McDickinson would invite Jackson to their home and would remove her clothes and walk around naked in front of Jackson. Jackson also had sex with HR Generalist Brooke Smith in their home and in front of McDickinson and Birchfield.

J. HARVEY FULLER COMPLAINTS

HR Clerk Harvey Fuller reported to McDickinson from February 2015 to May 2015. During those three months, McDickinson sexually harassed him and asked him to have sex with her. McDickinson would also press her breasts into his shoulder while her other hand was massaging his other shoulder and she found excuses to

touch Fuller's chest, brush his shoulders, and fix his tie. McDickinson asked Fuller to sit on her lap and he refused saying "you're my boss . . . I'm not going to sit in your lap, Melissa." She slid sexual innuendoes into work conversations.

When McDickinson cleared her throat in the office, Fuller asked what was wrong and she replied that she would "like to have your big black cock in my throat." On another occasion away from the office, she suggested that she wanted Fuller to be her big black dick at work. McDickinson told Fuller he needed to leave his family to "get with someone who is going places" and implied that by having sex with her, Fuller would improve his employment situation. She called Fuller's cell phone to tell him, "I can have a plan for you; you just need to understand my ways," implying if he acceded to her sexual demands it would benefit him at work. Fuller understood McDickinson to be demanding he engage in a relationship with her to ensure the security of his job.

McDickinson showed up at a bar Fuller co-owned and while Fuller worked, McDickinson commented how much she wanted his "big black dick." McDickinson openly flirted with Fuller and unilaterally kissed him after asking him to leave his family for her.

McDickinson's conduct toward Fuller made him uncomfortable but he was afraid to complain to Birchfield because he understood they were in a sexual relationship. Not knowing where to turn, Fuller complained to the temporary service

that placed him at Koch that he was being harassed by his manager. Fuller also complained to HR Generalist Laura Cortes who had witnessed McDickinson pushing her body against Fuller at work. McDickinson and Birchfield terminated Fuller on May 21, 20o15, after he complained.

On October 9, 2015, five weeks before Ms. Gray was assaulted by McDickinson and Birchfield, Fuller filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alerting Koch that McDickinson sexually harassed him. Birchfield paid Charles Smith $200.00 to threaten Fuller to drop his claims after he filed his EEOC Charge.

K. BROOKE SMITH

After meeting and dancing with Brooke Smith at a Montgomery bar, McDickinson and Birchfield offered Smith a job as an HR Clerk in April 2016, despite the fact that she has no HR experience. McDickinson and Birchfield hired Smith because they were both sexually attracted to her. After hiring Smith, Birchfield and McDickinson invited her to their home along with Steve Jackson. Birchfield and McDickinson asked Smith to have sex with them, and McDickinson kissed Smith and touched her breast. Birchfield, while on Koch premises, would walk outside to smoke with Smith and put his arm around her, touch her buttocks and make comments to her like "you look so sexy today." On other occasions he called her into a vacant office and told her he just needed a hug from her and would

grope her buttocks. McDickinson told Smith that Birchfield was making her have sex with people while he watched, and Smith was sometimes present when this happened. McDickinson admitted to Smith that Birchfield liked to watch her do things with other people because it turned him on. He would videotape and take pictures of these events.

Smith and Jackson were with Birchfield and McDickinson one evening when they picked up two young boys at Wal-Mart and brought them back to their house. McDickinson and Birchfield took one boy in the bedroom to have sex with him. Smith could overhear McDickinson and Birchfield having sex with the boy and also saw flashes from a camera being taken while in the bedroom. Smith was later terminated for her repeated refusal to have sex with Birchfield and McDickinson. Birchfield told Smith "If you'd sleep with me, I'll get your job back." Birchfield showed Jackson three or four pictures of McDickinson and Brooke Smith, HR Clerk, naked standing next to each other and McDickinson was touching Smith's breasts.

Smith was present in McDickinson's and Birchfield's home during the A to Z investigation when Birchfield purchased new TracFones for himself, Jackson, and McDickinson and told them not to talk, or text on their personal phones but use the "burner phones" that could not be traced. McDickinson and Birchfield told Smith they bought "burner phones" to use because they were being investigated and were getting rid of their old phones.

L. REBECCA MILAM

In 2014, McDickinson hired her sister-in-law, Rebecca Milam, as a Quality Assurance Clerk and then promoted her to HR Clerk at the Debone plant. McDickinson encouraged a romantic relationship between Jackson and Milam. Jackson and Milam began a consensual sexual relationship. When Jackson and Milam spent the night together at her and Birchfield's home in 2015 and 2016, Birchfield and McDickinson would come into the room and get in the bed with Jackson and Milam and started engaging sexually with each other.

Later Birchfield photographed Milam with her clothes off and while she was unconscious. Jackson photographed Birchfield standing naked over Milam photographing her while she was passed out so he had evidence to protect himself from Birchfield retaliating against him.

M. IRISH JENKINS COMPLAINTS

Irish Jenkins, ("Jenkins"), started working at Koch around April 26, 2013. Jenkins was a good employee and in 2014, because of his good work ethic, his supervisor asked that he apply for the position of Inventory Clerk, which Jenkins was awarded. Jenkins volunteered to work extra hours after his regular shift under the supervision of Randy Sharpley in Waste Water for approximately two years and Sharpley contends Jenkins "was an excellent worker." Jenkins often would work seven days a week and never gave Sharpley any problems, Sharpley never

complained about Jenkins and Sharpley never knew any of Jenkins' other supervisors to complain about Jenkins.

McDickinson began stalking Jenkins on surveillance cameras to see when he was on break so she could approach him and spend time with him. While on break she would touch Jenkins and stroke his hair. McDickinson made sexual comments to Jenkins and referenced her sexual preferences, including telling Jenkins that black guys were different, better, and bigger, and taunted that she did not wear panties. McDickinson instructed Jackson to give Jenkins her phone number and to tell Jenkins that she liked him and wanted to "talk." Jenkins did not call McDickinson but she persisted in her pursuit of Jenkins. McDickinson forced herself on Jenkins sexually; "She started having sexual contact with me. She forced herself on me."

McDickinson's first sexual assault of Jenkins occurred in August 2015, when she called Jenkins' department and instructed Jenkins to assist her with returning human resource files from the "cage," an area enclosed by chain link fencing and a pad-locked gate. In August 2015, McDickinson called the receiving department and told Jenkins to meet her inside the cage. Once inside the cage, McDickinson kneeled down by a filing cabinet and began going through files but reached up to fondle Jenkins' genitals as he stood waiting to assist with the files. McDickinson then unzipped Jenkins' pants, exposed his penis, and began performing fellatio on Jenkins without his consent. Jenkins tried to step away, but McDickinson continued

performing oral sex on Jenkins. Jenkins was shocked by McDickinson's assault but stood still in the cage while she was assaulting him. When asked why he did not turn around and walk away from McDickinson Jenkins responded, "I didn't have anything. I needed my job, so I went through with it, man, to keep my job." On another occasion, McDickinson was waiting for Jenkins in his office in the receiving department when he reported to work at 4:30 am and had sexual intercourse with Jenkins in the receiving department.

Jenkins understood McDickinson was his boss just like everyone in authority over him. McDickinson made sure Jenkins knew she was in charge and could cause him to lose his job. Based on what McDickinson told Jenkins he understood McDickinson and Birchfield ran the plant. Birchfield described Jenkins as someone who is easily influenced by a stronger personality, a "go-along" type.

Between August and October 2015, after the incident in the cage, McDickinson called Jenkins to her office at Koch and performed fellatio on him in her office. Afterwards, gesturing to her computer monitor, she told Jenkins she could see everything and knew every time he was on break because it was all on camera. McDickinson even showed Jenkins on the camera surveillance footage how she was watching him while he was on break. When Jenkins would go on break McDickinson would come outside and sit beside him, and touch his hair, even after Jenkins refused her advances and told her no. McDickinson performed fellatio on Jenkins more than

three times in her office. McDickinson told Brooke Smith, HR Clerk, that she had sex with Jenkins in her office at Koch Foods.

In November 2015, McDickinson asked Jenkins to have sex with her and let Birchfield watch them several times and Jenkins refused each time. In December 2015, Birchfield suspended Jenkins for three (3) days for an alleged "points violation." In January 2016, McDickinson called Jenkins into her office, closed the door, and again asked him to watch her having sex with Birchfield. Jenkins again refused.

Jenkins was subsequently terminated from Koch by McDickinson and Birchfield. He filed an EEOC charge and lawsuit. *See Jenkins v. Koch Foods, Inc. et al*, Case No. 2:17-cv-0364-RAH-JTA. Before Jenkins was fired, he complained to Bobby Elrod that McDickinson and Birchfield sexually harassed him and played Elrod a recording of Jenkins' and Birchfield's meeting on December 17, 2015. Elrod shut Jenkins down from complaining. Elrod does not recall the date Jenkins called to complain.

N. KA'TORIA GRAY'S COMPLAINTS

In 2011, Koch Foods hired Gray to work as a nurse on the second shift at its Debone Plant. Birchfield did not discuss any of Gray's job duties with her in the interview and she has no memory of anyone at Koch reviewing the company's policies, including the harassment policy, with her.

Frank Sheley who was employed by a Koch Foods entity in Georgia, became Gray's supervisor. Sheley did not communicate any dissatisfaction with or criticism of Gray's performance.

Prior to November 14, 2015, Gray did not have any personal or social interaction with McDickinson or Birchfield and Gray did not discuss any aspects of her personal life with McDickinson. Birchfield and McDickinson expressed to at least two hourly employees, Jackson and Jenkins, that they were interested in having sex with Gray. McDickinson and Birchfield asked Jenkins to approach Gray about having sex with McDickinson and Birchfield. Jenkins refused McDickinson's and Birchfield's instruction to approach Gray about sex and they told Jenkins they would get Jackson to approach Gray on their behalf. Sometime in November 2015, McDickinson had a conversation with Jackson stating she wanted to have sex with Gray.

On November 14, 2015, McDickinson and Birchfield called Jackson to come to the home they shared. Jackson left immediately in route to their home. Jackson was then instructed by McDickinson to contact Gray and have her come to McDickinson's and Birchfield's home. On this same day, Birchfield and McDickinson instructed Jackson to send a text to plant Gray asking that she come to their house. McDickinson also instructed Jackson to call and text Gray that they were having a work cook out and she had permission to clock out and attend because

McDickinson and Birchfield wanted to discuss work with Gray. McDickinson also texted Gray to come to their home that evening.

Gray reluctantly went to McDickinson and Birchfield's house late in the evening after leaving her shift sometime after 11:00 p.m. McDickinson did not text Gray the address until 10:52 p.m. When she arrived, Birchfield, McDickinson and Jackson were the only people present. No other employees were there, and Gray asked where everyone else was. Koch has represented that William Summerville was present, but his sworn testimony disputes this as Summerville testified, he was at the house on this occasion from 12:00 p.m. until he left at 6:00 p.m. Summerville could not have been at the house the same time as Gray.

Gray did not want to go, but Gray believed McDickinson had the power to fire her because of her role as HR Manager. Gray went because McDickinson had said that she and Birchfield needed to talk to her about work and there were other people there.

When Gray arrived at McDickinson's home, the garage door was down but the house lights were on. Gray called either McDickinson or Jackson from her car to let them know she was there. The garage door opened, and Jackson instructed her to come in through the garage. When she got in the garage, there was a strobe light on and music playing. Gray saw two canvas type chairs with cup holders that were decorated with Auburn and Alabama logos; McDickinson was sitting in one of the

canvas chairs when Gray walked in. There was also a table with a speaker and Birchfield was playing music from his cell phone. The only people there were Birchfield, McDickinson, and Jackson. Gray asked where everybody else was because she had expected there to be other people from work. No one responded. Gray asked McDickinson and Birchfield what they needed to talk to her about. McDickinson and Birchfield told Gray they would have to be able to trust her and asked if they could trust her.

McDickinson directed Gray inside the house to the kitchen. Gray poured some cranberry juice to drink but did not eat. They walked back to the garage and the garage door had been lowered. Gray sat in one of the chairs and McDickinson sat in the other. Gray was concerned that no other employees were there as she had been told that other employees would be there, and no one would answer her when she asked where everybody was and still was not answered. Gray was also concerned that she could strongly smell of alcohol on McDickinson and Birchfield. McDickinson and Birchfield offered Gray an alcoholic beverage several times and Gray refused.

Gray asked McDickinson and Birchfield what they needed to talk to her about. McDickinson then cryptically stated that she and Birchfield needed to be able to trust Gray and then inquired if they could trust her. Gray was confused and asked McDickinson what exactly was she talking about. McDickinson stated that she and

Birchfield needed Gray's help to get rid of Betty Stabler. Gray asked for further clarification what she meant and McDickinson offered that Stabler was a troublemaker, that she and Birchfield knew that Gray wanted the medical manager position, and Birchfield was going to give Gray the position. As McDickinson was talking Gray saw a tattoo on her inner wrist that said "David" and Gray asked if that was Birchfield's name on McDickinson's wrist. McDickinson admitted that it was and disclosed she had gotten the tattoo when they had been out of town together. McDickinson emphasized again that they needed to trust Gray and moved the conversation to Gray writing a school paper for her, that they understood Gray was good at writing papers and she and Birchfield would pay Gray to write McDickinson's school papers. Gray was concerned that McDickinson was asking her to cheat for her and disclosed to McDickinson that she had overheard Stabler at work discussing that she had written a safety paper for a class McDickinson was taking and Gray not wanting to embarrass McDickinson in front of Birchfield, whispered that cheating was against school policy, it was not acceptable to have someone do your work and Gray would have to decline the invitation to write for her.

As the conversation continued on school cheating and Gray affirmatively informing McDickinson she would not engage in the scheme of writing papers for her, McDickinson reached and put her hand on Gray's knee and leaned in telling

Gray how good she smelled. Gray immediately removed McDickinson's hand and said thank you. McDickinson then asked what perfume Gray had on and leaned close to Gray telling her that she smelled so good. Gray said she could not recall. McDickinson then leaned even closer to Gray and this time said that she was attracted to Gray. Gray told McDickinson that she was making her uncomfortable. Birchfield was sitting close by when Gray made the comment.

McDickinson grabbed Gray's hand and told Gray that she wanted her to dance with her; Birchfield said he also wanted Gray and McDickinson to dance together. Gray nervously declined and said she was not a good dancer, but Birchfield and McDickinson again both insisted that Gray dance. Gray again declined and said she did not want to dance. Undeterred, McDickinson grabbed Gray's hand again and started pulling on her to get out of the chair telling Gray to stand up and dance with her. Gray again declined but at this point had stood from McDickinson pulling on her to dance.

McDickinson instructed Birchfield to fix Gray a drink even though Gray told them she did not want a drink. And at that moment, Birchfield came from around the table where he had been sitting and stood behind Gray while McDickinson stood in front as they "sandwiched" Gray between them. As McDickinson pressed the front of her body against Gray's she grabbed Gray's hand and put it on McDickinson's breasts while instructing Gray to "feel" and commenting that she

had recently had a boob job. Gray jerked her hand away. Gray was sandwiched between McDickinson and Birchfield ss McDickinson was pressing and grabbing on Gray, Birchfield was behind Gray trying to kiss her neck. Birchfield told Gray that he wanted to kiss her that he had never kissed anyone with braces on. At the time Gray wore braces. Gray tried to move away from between McDickinson and Birchfield. As Gray was backing away Birchfield positioned himself in front of Gray. Without asking or waiting on permission from Gray, Birchfield pulled on Gray and kissed her on the lips. Gray pushed Birchfield away from her and tried again to back away, but McDickinson had moved behind Gray. McDickinson was pressing her body against Gray.

Trying to remove herself from McDickinson and Birchfield's assaults, Gray said she had to use the restroom. McDickinson then dropped to her knees, pulled Birchfield's pants down and started performing fellatio on him in front of Gray. Gray moved to the door going into the house after McDickinson placed Birchfield's penis inside her mouth.

Jackson directed Gray to the bathroom location and Gray retreated into the room thinking that perhaps she could escape through a window. Gray turned the water on the faucet to survey her options as she did not need to use the restroom and noticed there were pills on the counter in the bathroom. When Gray exited the restroom the garage door had been opened again and Gray walked through the garage

and headed straight to her car. Birchfield came out the front door, but Jackson and McDickinson followed Gray to her car. McDickinson asked Gray to stay the night and Gray refused.

The next day, Birchfield texted Jackson to see if Gray had said anything to him about coming over. Jackson had not talked to Gray but responded that she said she would come over another time. Birchfield responded, "Cool. Birchfield instructed Jackson to lie if anyone questioned him about this incident and to specifically state that he (Birchfield) was not present.

In December 2015, Koch had "rumor" training for all employees at the Montgomery plant because of all the "rumors" that were going around in part related to McDickinson. McDickinson recalls that from the end of July 2015 forward there were persistent "rumors" about her being in relationships with various employees.

About one week after Gray had been summoned to McDickinson's home, McDickinson summoned Gray to her office in the Human Resource department at Koch Foods. Gray knocked on the door and after McDickinson told her to come in, Gray walked in and McDickinson was sitting at the desk with her shirt unbuttoned and without a bra on. McDickinson told Gray she had a sunburn and got up from her desk, walked over to Gray and put her breasts on Gray. McDickinson's breasts touched Gray's breasts. Gray backed up away from McDickinson. Gray told McDickinson that she was not interested in her, turned away and walked out the

door. McDickinson continued sending text messages to Gray asking her back to her house with Birchfield until late February 2016. Jackson, at McDickinson's request, also continued trying to get Gray to come back to the home. Gray refused to go back to McDickinson and Birchfield's home.

Gray does not recall the date, but at some point after the incident, told Sabrina Bell and LaTonya Lockley. Gray also reported the incident to Sheri Gonzalez in HR and Francisco Santos, Supervisor. Gray reported the incident to Santos because he was the Shift Manager. Gray did not know anybody else to tell. Gray believes she reported the incident to Kathy Denton, HR Generalist, as well.

On March 21, 2016, McDickinson suggested to Gray that they meet with Birchfield. Gray went to the meeting because she felt that they were going to discuss complaints she made about Bettye Stabler and they were Human Resources, so she "figured they would come up with a solution" to address her treatment from Sheley and Stabler. The meeting began in McDickinson's office, but neither McDickinson nor Birchfield discussed anything related to Gray's complaint. Birchfield suggested that the three have the meeting over lunch. At lunch, Birchfield asked Gray who she would like to report to. Gray responded that she did not have an answer to that. Birchfield then posed the choice to Gray of, "do you want to report to me or do you want to report to Melissa?" Gray responded she did not know how to answer that.

Birchfield then decided Gray would start reporting to McDickinson and changed her hours.

In April 2016, Jackson approached Gray and told her that McDickinson and Birchfield wanted to know if she would go to Florida with them. Prior to this invitation, Birchfield had asked Gray to go to Florida with he and McDickinson and he would fly them there in his plane. Jackson had previously shown Gray photographs from previous beach trips where McDickinson was topless and Birchfield was posing in his underwear.

On April 14, 2016, McDickinson issued a Memorandum of Understanding to Gray concerning call-in procedures for absences and tardiness. The Memorandum of Understanding alleged Gray failed to report an absence on April 8, 2016, failed to report an absence April 12, 2016, and was tardy April 11, 2016. Gray disputed the accuracy of the Memorandum of Understanding. She had reported her absences to Laura Cortes in the Human Resources office on those days because McDickinson was out of town.

On April 18, 2016, Gray filed an EEOC Charge. In it she alleges that she had been sexually harassed by McDickinson and Birchfield since November 14, 2015; had experienced retaliation for rejecting the harassment; and believed she would be subjected to future discipline if she continued to refuse their advances. Koch hired Robert and Deborah Callahan with A to Z Investigations in May 2016 to investigate

Gray's complaints of sexual harassment. They questioned several employees, including McDickinson and Birchfield, both of whom were questioned on June 7, 2016. Jackson was also questioned on June 7 and 14, 2016, and provided false information about the incident with Gray because he feared for his job and that Birchfield would retaliate against him. Birchfield, aware of the investigation, counseled Jackson on what to say when he was interviewed, instructing Jackson to say he was not there on November 14, 2015, that William Sommerville was there that evening, that Birchfield was not living with McDickinson, and that Jackson had only been to their house a few times.

Birchfield told Jackson about Gray's EEOC charge and asked Jackson to call Gray about her EEOC charge with McDickinson and Birchfield present. McDickinson decided to record the call between Jackson and Gray. Neither McDickinson nor Birchfield informed Gray they were recording the conversation. At the time Birchfield and McDickinson recorded Jackson's conversation with Gray, Birchfield was still the Complex HR Manager and McDickinson was still the HR Manager. It could be a breach of confidentiality for McDickinson or Birchfield to discuss anything related to Gray's EEOC charge with Jackson.

Gray complained to Sherrie Gonzalez, HR Generalist, on or about April 27, 2016, when Gray came in the HR office looking "as if she wanted to say something but didn't know how." Gonzalez says Gray expressed concern McDickinson was

looking for a scapegoat and "kept saying if you knew what Melissa did to me you would understand." Gonzalez asked Gray, "What did she do to you[? D]id she make a pass at you." In response, Gray "started to cry," which deepened into sobbing as she told Gonzalez that McDickinson made a pass at her. Gray proceeded to describe certain events that she said occurred at McDickinson's house. She stated that because "she didn't 'Fuck' Melissa she's getting paid back with write-ups and she's locked out of the bullpen." Gonzalez says that Gray told her: McDickinson "kissed her on the lips"; McDickinson lifted her own shirt and placed Gray's hand on McDickinson's breast and asked "doesn't it feel real – these are my new boobs"; McDickinson grabbed Gray and ground her pelvis against her; Birchfield, who was also there, came up behind Gray and started kissing her neck and back; Birchfield kept saying "we have to be able to trust you"; McDickinson said the same thing; and McDickinson performed oral sex on Birchfield in front of Gray. Per Gonzalez, the "entire conversation took place at the counter in H.R."

Gonzalez told McDickinson about Gray's comments the next day. Gonzalez did not believe what Gray had told her and Gray's statement did not affect Gonzalez's opinion of McDickinson's reputation. Gonzalez acknowledged that the statements Gray made to her were the type she would be required to report. Gonzales wrote two statements and gave them to McDickinson and McDickinson kept the statements and had them in her vehicle when she gave them to the A to Z

investigators in June 2016. McDickinson testified she did not ask Gonzales to write a statement. However, Gonzales testified that after reporting Gray's complaint to McDickinson, McDickinson instructed her to write a statement, which she did and gave both of her written statements to McDickinson as requested. Gonzalez had previously been trained during orientation at Koch on the steps to report harassment or discrimination which included reporting to your supervisor or the HR office. Gonzalez had also been trained to report everything to McDickinson.

Gonzalez was confused as to how she reported Gray's complaint; initially claiming she called Burchfield and he asked her to write a statement. She then she changed her story to say Laura Cortez told her to go tell McDickinson after Gonzalez told Cortes that Gray quit the night before. However, Gonzalez was clear that McDickinson and Birchfield held a joint meeting and Birchfield and McDickinson told Gonzalez to write a statement. Gonzalez wrote two statements, claiming to have written them on the same day but admits that one was rewritten from a rough draft on April 27, 2016 and then she wrote the second statement on April 30, 2016 as requested by Birchfield and McDickinson. Gonzalez wrote another statement where she documented that Steve Jackson confessed to her that he was the one trying to get McDickinson and Gray together.

Gray also called Simmons asking advice about an attorney that could help her after being sexually harassed by McDickinson and Birchfield when Gray was lured

to their house to discuss a promotion over Betty Stabler. Gray said she was under a lot of stress due to Stabler's actions and that when she got to David and Melissa's house, Melissa made a pass at her, tried to kiss her and Birchfield smashed her in between and they were trying to have sex with her; Melissa had walked up to her to kiss he and David walked behind her and started rubbing on her neck and trying to kiss her on her neck and when she tried to leave to go to the bathroom, Melissa stated performing oral sex on David in Gray's presence.

Francisco Santos was Shift Manager in the Debone department for Koch for five years. Gray reported to Santos that McDickinson performed oral sex on Birchfield. Gray was still employed by Koch when she reported this to Santos. Santos did not tell anyone about Gray's complaints and did nothing in response. Santos, during his employment with Koch, was not aware of any change in McDickinson's professional reputation and is not aware of anything said by Gray affecting McDickinson's personal or professional reputation.

Gray talked with Tim Berry, Production Supervisor over 3rd shift, on one occasion about McDickinson and Birchfield in his office in the bullpen area, or the area where the supervisors' and shift manager's offices were located. Gray told Barry she received a text message from McDickinson asking her to come over to her house while she was on the clock and that McDickinson told her not to worry about her time she would take care of it. Gray also told Barry that when she arrived at

McDickinson's house Birchfield was there and while they were sitting there McDickinson began to practice oral sex on Birchfield in front of her and she was uncomfortable and had to leave. Barry believes what Gray shared with him about McDickinson and Birchfield would violate Koch's policies based on the training he received from Koch and it should be reported. As a supervisor, Barry was someone an employee could complain to if they felt they experienced harassment or discrimination. Gray's statement to Barry about McDickinson did not change his opinion of McDickinson.

Gray's last day worked for Koch Foods was April 29, 2016, and McDickinson designated her as ineligible for re-employment. On May 12, 2016, Gray's lawyer sent a letter to Koch Foods' counsel requesting that Koch Foods, Birchfield, and McDickinson preserve evidence relating to Gray's claims.

Gray testified being subjected to unwanted touch by Brichfield and McDickinson "was very, very stressful." Upon being able to leave McDickinson and Birchfield's home, she called two friends for emotional support. Chanda Hawkins and Gray met in nursing school and Gray called her the night of the events. Gray was upset when she called Hawkins at almost 2:00 am and told Hawkins she had gone by for what she thought was a BBQ but they had made sexual advances toward Gray. Hawkins recalled Gray was offended and could not understand why she would be treated in this way. Hawkins was aware that Gray sought psychiatric help.

Gray called and drove to Dakota Jones' home the night of the assaults. Jones described Gray as upset but shut down and would not talk about what had happened to her; she was sad and disturbed. Later, Gray opened up to Jones and told her that McDickinson and Birchfield had been drinking and both had come on to her and she had gone to the bathroom, but something happened there. She described Gray as crying, afraid, upset and scared and not knowing what to do because her job was in jeopardy. Gray told Jones she felt unsafe and threatened at work.

Gray also confided in other employees and managers at work and described that because of the retaliation by McDickinson and Birchfield she was being isolated by herself on the night shift in the basement area of the plant and not allowed around other managers and was being targeted for not providing medical care to team members that were not in the system in retaliation for refusing their advances.

II. PLAINTIFF'S CLAIMS

A. PLAINTIFF'S CLAIM TITLE VII HOSTILE WORK ENVIRONMENT BASED ON SEXUAL HARASSMENT AGAINST KOCH FOODS OF ALABAMA AND KOCH FOODS, INC.

1. KOCH FOODS IS LIABLE FOR THE HARASSMENT ENDURED BY GRAY

The test for employer liability depends on whether the harasser is a co-worker or a supervisor. See *Burlington v. Ellerth*, 524 U.S. 742, 754; *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998). If the harasser is a supervisor or a person empowered with authority by the employer, such as

McDickinson and Birchfield in their roles as the heads of HR, an employer is vicariously liable if: (1) the employee's refusal to comply with the supervisor's sexual demands, or (2) the harassment was sufficiently severe or pervasive to alter the conditions of her employment, which is known as a hostile environment claim. *Husley v. Pride Restaurants, LLC*, 367 F.3d 1238, 1245-46 (11th Cir. 2004).

To succeed on her claim Plaintiff must prove 1) McDickinson and Birchfield, her supervisors, harassed her because of her sex; 2) the harassment created a hostile work environment for Gray; and 3) Gray suffered damages because of the hostile work environment.

A "hostile work environment" created by harassment because of sex exists if:

(a) Gray was subjected to offensive acts or statements about sex – even if they were not specifically directed at [him/her];

(b) Gray did not welcome the offensive acts or statements, which means that [name of plaintiff] did not directly or indirectly invite or solicit them by [his/her] own acts or statements;

(c) the offensive acts or statements were so severe or pervasive that they materially altered the terms or conditions of [name of plaintiff]'s employment;

(d) a reasonable person – not someone who is overly sensitive – would have found that the offensive acts or statements materially altered the terms or conditions of the person's employment; and

(e) Gray believed that the offensive acts or statements materially altered the terms or conditions of [his/her] employment.

To determine whether the conduct in this case was "so severe or pervasive" that it materially altered the terms or conditions of [name of plaintiff]'s employment, you should consider all the circumstances, including:

(a) how often the discriminatory conduct occurred;

(b) its severity;

(c) whether it was physically or psychologically threatening or humiliating; and

(d) whether it unreasonably interfered with Gray's work performance.

A "material alteration" is a significant change in conditions. Conduct that amounts only to ordinary socializing in the workplace does not create a hostile work environment. A hostile work environment will not result from occasional horseplay, [sexual flirtation,] offhand comments, simple teasing, sporadic use of offensive language, or occasional jokes related to [race/religion/sex/national origin]. But discriminatory intimidation, ridicule, insults, or other verbal or physical conduct may be so extreme that it materially alters the terms or conditions of employment.

Koch Foods' harassment policy and training directed employees they could complain to supervisors. Gray reported what happened to her to numerous supervisors: Sabrina Bell, Francisco Santos, Tim Berry, and LaTonya Lockley. Koch Foods' training directs that they should have notified Human Resources after learning of harassing behavior, but they did nothing. Gray even told Sherry Gonzalez in Human Resources. Gonzalez forwarded the complaint to McDickinson, the

subject of the complaint, but there is no evidence McDickinson or Birchfield forwarded the complaint to anyone in authority over them to investigate.

When Gray reported what happened to her to Sabrina Bell and asked for Bobby Elrod's contact information, Bell told her he would not do anything.[2] This makes sense because "at least one time when an employee allegedly complained to the Corporate Director of Human Resources [he] then merely referred the complaint back to local HR to investigate." *Fuller v. Koch Foods, Inc.*, No. 2:17-cv-96-ALB, 2019 U.S. Dist. LEXIS 154241, at *5 (M.D. Ala. Sep. 10, 2019). The policy and system at Koch Foods was broken because of the broken Human Resources Department. The policy and reporting system were ineffective.

B. PLAINTIFF'S ASSAULT AND BATTERY CLAIMS AGAINST MCDICKINSON, BIRCHFIELD AND KOCH FOODS OF ALABAMA

The facts supporting most assault and battery claims pale in comparison to the facts of assault and battery that Ms. Gray alleges. Under Alabama law,

> an assault consists of 'an intentional, unlawful, offer to touch the person of another in a rude or angry manner under such circumstances as to create in the mind of the party alleging the assault a well-founded fear of an imminent battery, coupled with the apparent present ability to effectuate the attempt, if not prevented.' *Allen v. Walker*, 569 So.2d 350, 351 (Ala.1990) (citations omitted). A battery has been defined by the Alabama Supreme Court as follows: 'A successful assault becomes a battery. A battery consists in an injury actually done to the person of another in an angry or revengeful or rude or insolent manner ... to lay hands on another in a hostile manner is a battery, although no damage follows.' *Surrency v. Harbison*, 489 So.2d 1097, 1104

[2] Doc. 242-4, PX18, Gray Depo, depo pages 370:12-371:-4

> (1986). *Peterson v. BMI Refractories*, 132 F.3d 1405, 1412–13 (11th Cir.1998) (emphasis omitted); see also *O'Rear v. B.H.*, 69 So.3d 106, 117 (Ala.2011); *Walker v. City of Huntsville*, 62 So.3d 474, 494 (Ala.2010).

Battery also encompasses the rude or offensive touching of another person's clothing. *Hyde v. Cain*, 159 Ala. 364, 47 So. 1014, 1014 (1908); *Mills v. Wex–Tex Industries, Inc.*, 991 F.Supp. 1370, 1382 (M.D.Ala.1997). "The wrong [in committing a battery] consists, not in the touching so much as in the manner or spirit in which it is done, and the question of bodily pain is important only as affecting damages." *Harper v. Winston County*, 892 So.2d 346, 353 (Ala.2004) (quoting *Surrency v. Harbison*, 489 So.2d 1097, 1104 (Ala.1986), quoting *Singer Sewing Machine Co. v. Methvin*, 184 Ala. 554, 63 So. 997, 1000 (1913)).

After luring Gray from work under false pretenses to attend a work sanctioned event to discuss work related matters in the presence and comradery of other Koch employees, Gray instead found herself in a darkened garage alone with McDickinson and Birchfield. After offering Gray and alcoholic drink (which she refused) and refraining from answering Gray's question about the lack of other Koch employees, the awkwardness turned to the bizarre conversation centered on McDickinson's and Birchfield's need to be able to trust Gray implicitly and asking her repeatedly if they could trust her and demanding her answer that she could be trusted. Then the two attempted to solicit Gray's efforts to assist McDickinson by writing school papers

for her that would be submitted to enable McDickinson to cheat in order to pass college classes for a degree in human resources.

When Gray refused to assist McDickinson in her cheating efforts, the atmosphere and conversation in the garage shifted and became overtly sexual. While sitting in the chair next to Gray, McDickinson leaned in towards Gray and placed her hand on Gray's knee, and then said that Gray smelled "really good." Gray rebuffed McDickinson's advances and moved McDickinson's hand off her knee and said thank you. McDickinson then leaned in again and told Gray that she was attracted to her. McDickinson had apparently confided in Steven Jackson, the union steward, before this in order to have his help to lure Gray to McDickinson and Birchfield's home.

All the while, Birchfield was sitting nearby, watching McDickinson and observing Gray's growing discomfort. Gray told McDickinson that McDickinson was making her uncomfortable, especially with Birchfield there. McDickinson responded to Gray's rebuff by stating that she wore the pants in the relationship with Birchfield, and then asked Gray if she wanted to dance. Birchfield then responded by encouraging McDickinson and stated that he wanted to watch them dance. Gray refused and politely said she did not want to dance. Undeterred, McDickinson grabbed Gray's hand, pulled her up, and continued to encourage her to dance as did Birchfield. When Gray again refused, McDickinson instructed Birchfield to fix Gray a drink, though she had refused their offer previously to drink alcohol and forcing Gray to once again decline.

Birchfield then moved and came up behind Gray and said close to her ear, "go on I want to see you all dance" while pressing his body into Gray's back. McDickinson also moved to mirror Birchfield's move but pressed her body into Gray's front. McDickinson and Birchfield "sandwiched" Gray and continued pressing their bodies into Gray's body. As they continued to press against her, Birchfield leaned in and told Gray that he wanted to kiss her and that he had never kissed someone with braces before. Alarmed, Gray immediately tried to turn around to remove herself from the unwanted sandwiching of McDickinson and Birchfield only to be pulled toward Birchfield who kissed Gray on the mouth.

Gray immediately refused Birchfield's forcible attempt to kiss her and pushed Birchfield back while trying to extract her body from between them. As Gray attempted to free herself, McDickinson grabbed Gray's hand and attempted to place it on McDickinson's own breasts while inviting Gray to feel her augmented breasts. Gray jerked her hand away and backed away from McDickinson.

McDickinson then asked Gray to have sex with her and Birchfield. Gray refused. Rebuffed, McDickinson suggested instead that just she and Gray could have sex while Birchfield watched. Again, Gray refused. In yet another assault on Gray, McDickinson pulled Birchfield's pants down, pulled out his penis, and began to perform oral sex on him in front of Gray and without asking Gray if she wanted to view them engaging in this private sexual act. Gray fled to the bathroom and

contemplated escaping from the house out through the bathroom window. Gray then exited the bathroom and fled from the house. Birchfield chased after Gray in his underwear.

There is sufficient evidence from which to infer that the touching of Gray by McDickinson and Birchfield was intentional, gratuitous, conducted with sexual overtones, and was unwelcomed by Gray. As such, there is sufficient evidence from which a jury could find that the Defendants committed a battery, the apprehension of which by Gray would give rise to an assault." *Livingston v. Marion Bank and Trust Co.*, 2:11 CV1369 LSC, 2014 WL 3347910, at *28 (N.D. Ala. July 8, 2014) (*Citing Ex Parte Atmore Community Hospital*, 719 So.2d 1190, 1194 (Ala. 1998) (finding sufficient evidence of a battery where plaintiff's supervisor "touched her waist, rubbed against her when passing her in the hall, poked her in the armpits near the breast area, and touched her leg," where there was evidence that the touching was intentional, conducted with sexual overtones, and unwelcome); *Bryars v. Kirby's Spectrum Collision, Inc*., 2009 WL 1286006, at *16 (S.D.Ala. May 7, 2009); *Edwards v. Hyundai Motor Mfg. Ala., LLC*, 603 F.Supp.2d 1336, 1356 (M.D.Ala.2009). Clearly, McDickinson and Birchfield's perverted sexual conduct, questions, vulgar comments and actions and unwelcomed invitations for sexual contact is hostile, rude and indicative of rudeness and lack of respect that McDickinson and Birchfield had for Gray. As the Alabama Supreme Court

explained, "[t]he wrong here consists, not in the touching, so much as in the manner or spirit in which it is done, and the question of bodily pain is important only as affecting damages." *Surrency* at 1104.

C. PLAINTIFF'S NEGLIGENT SUPERVISION AND RETENTION CLAIM AGAINST KOCH FOODS OF ALABAMA

The Alabama Supreme Court recognizes the torts of negligent/wanton hiring, negligent/wanton supervision, and negligent/wanton training. *See Southland Bank v. A & A Drywall Supply Co., Inc.*, 21 So. 3d 1196, 1214-1217, (Ala. 2008)(negligent training), *Armstrong Bus. Servs. v. AmSouth Bank*, 817 So. 2d 665, 682 (Ala. 2001) (negligent/wanton supervision)*; CP & B Enters., Inc. v. Mellert*, 762 So. 2d 356 (Ala. 2000)(negligent/wanton hiring).

The torts at issue have common elements. Namely, to prove a claim under Alabama law for any of [these torts], a plaintiff must demonstrate that the employer knew, or in the exercise of ordinary care should have known, that its employee was incompetent. See *Southland Bank*, 21 So. 3d at 1214-17; *Armstrong Bus. Servs*., 817 So. 2d at 682 (negligent/wanton supervision); and *Sanders v. Shoe Show, Inc*., 778 So. 2d 820, 824 (Ala. Civ. App. 2000) (negligent/wanton hiring). Wright v. McKenzie, 647 F. Supp. 2d 1293, 1297 (M.D. Ala. 2009).

In order to properly support a cause of action for negligent or wanton failure to train, supervise, retain, hire, and/or negligent or wanton entrustment, Gray must show that Birchfield and McDickinson caused her injuries because they were

incompetent, and that Koch knew or should have known of Birchfield and McDickinson's incompetency. *Southland Bank*, 21 So. 3d at 1215. "A mistake or single act of negligence on the part of an employee does not establish incompetency: 'Negligence is not synonymous with incompetency. The most competent may be negligent. But one who is habitually negligent may on that account be incompetent.' " *Id*. at 1216 (*quoting Pritchett v. ICN Med. Alliance, Inc*., 938 So. 2d 933, 941 (Ala. 2006))(emphasis in original; internal citations omitted).

> " 'In the master and servant relationship, the master is held responsible for his servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge. It is incumbent on the party charging negligence to show it by proper evidence. This may be done by showing specific acts of incompetency and bringing them home to the knowledge of the master, or by showing them to be of such nature, character, and frequency that the master, in the exercise of due care, must have had them brought to his notice. While such specific acts of alleged incompetency cannot be shown to prove that the servant was negligent in doing or omitting to do the act complained of, it is proper, when repeated acts of carelessness and incompetency of a certain character are shown on the part of the servant to leave it to the jury whether they would have come to his knowledge, had he exercised ordinary care."*Lane v. Central Bank of Alabama, N.A.,* 425 So.2d 1098, 1100 (Ala.1983), *quoting Thompson v. Havard*, 285 Ala. 718, 723, 235 So.2d 853 (1970); *See, also, Ledbetter v. United American Ins. Co.*, 624 So.2d 1371 (Ala.1993).

"Wantonness" is defined in § 6–11–20(b)(3) as "[c]onduct which is carried on with a reckless or conscious disregard of the rights or safety of others." In *Valley Building & Supply, Inc. v. Lombus*, 590 So.2d 142, 144 (Ala.1991), *citing Lynn*

Strickland Sales & Service, Inc. v. Aero–Lane Fabricators, Inc., 510 So.2d 142 (Ala.1987), explained the difference between negligence and wantonness:

"What constitutes wanton misconduct depends on the facts presented in each particular case. *South Central Bell Telephone Co. v. Branum*, 568 So.2d 795 (Ala.1990); *Central Alabama Electric Coop. v. Tapley*, 546 So.2d 371 (Ala.1989); *Brown v. Turner*, 497 So.2d 1119 (Ala.1986); *Trahan v. Cook*, 288 Ala. 704, 265 So.2d 125 (1972). A majority of the Court, in *Lynn Strickland Sales & Service, Inc. v. Aero–Lane Fabricators, Inc.*, 510 So.2d 142 (Ala.1987), emphasized that wantonness, which requires some degree of consciousness on the part of the defendant that injury is likely to result from his act or omission, is not to be confused with negligence (i.e., mere inadvertence):

"'Wantonness is not merely a higher degree of culpability than negligence. Negligence and wantonness, plainly and simply, are qualitatively different tort concepts of actionable culpability. Implicit in wanton, willful, or reckless misconduct is an acting, with knowledge of danger, or with consciousness, that the doing or not doing of some act will likely result in injury....'"510 So.2d at 145. *See also Central Alabama Electric Coop. v. Tapley, supra*, and *South Central Bell Telephone Co. v. Branum, supra."*

In *Big B, Inc. v. Cottingham*, 634 So.2d 999 (Ala. 1993), the defendant was held liable for negligently and wantonly supervising its store manager where there

was sufficient evidence that had the employer sufficiently investigated the complaints, the manager's attitude towards women and his fitness for employment would have been more seriously re-evaluated and he would not have been allowed to remain where he could mistreat female customers or employees. Once the company has reason to suspect an employee's unfitness, it is under a duty to thoroughly investigate and take such precautions so that the conduct will not occur again. *Id.*

The Alabama Supreme Court stated that "to prevent a directed verdict or a judgment notwithstanding the verdict from being entered for Big B on Cottingham's wanton training and supervision claim, Cottingham had to support her claim for compensatory damages with substantial evidence that Vaughn's supervisors made a conscious decision to downplay the sexual harassment complaint that had been made against Vaughn by the mother of the female employee, knowing that to do so would likely result in Vaughn's mistreating a female customer or employee. Cottingham had to support her claim for punitive damages with clear and convincing evidence. The court held that Cottingham made the necessary evidentiary showing to sustain her claim of wanton training and supervision. As previously noted, Vaughn's supervisors did not train Vaughn how to properly detain and handle an accused shoplifter, even though Vaughn detained shoplifters on numerous occasions. Furthermore, Vaughn's fitness for employment was called into question when the

mother of a 16–year–old female employee accused Vaughn of making an improper sexual advance toward her daughter. Although Stephens and Suco confronted Vaughn with the mother's accusation and Vaughn denied any wrongdoing, Stephens and Suco did not interview the female employee or file a thorough formal report with Big B's corporate headquarters. The jury could have reasonably inferred from the evidence that Stephens and Suco consciously chose to downplay the incident in order to retain Vaughn, knowing that to do so would likely give Vaughn another opportunity to demean or otherwise mistreat a female customer or employee."

Koch Foods had numerous complaints of Birchfield's and McDickinson's incompetencies as Human Resource managers. Koch contends it did not behave negligently or wantonly because it lacked any knowledge of tortious conduct by McDickinson and Birchfield. But the very nature of McDickinson's and Birchfield's positions, Human Resources managers at the plant and complex levels, imputes the knowledge directly to Koch. McDickinson and Birchfield hold the positions responsible for ensuring this type of conduct does not occur. Because of the nature of their conduct and their positions as well as the knowledge of their conduct by Elrod and other HR employees, Koch's failure to investigate or act in a way to deter or stop McDickinson's and Birchfield's behavior supports Gray's wantonness claims.

Koch's training on how to treat complaints is not to document them objectively or in the voice of a complaining employee; Koch's training directs supervisors to "document to defend." Further, the evidence shows that Koch did not want to supervise or delve into McDickinson's and Birchfield's conduct. The plant manager and numerous HR employees complained to Wally Lewis and Bobby Elrod shirked and ignored all of his responsibilities as VP of HR and asked Birchfield to investigate himself and McDickinson. Elrod testified he did not observe McDickinson and relied on Birchfield to report how she was doing her job. This type of institutional ignorance coupled with Koch's overt decision that any complaints should be treated as something to defend further supports Gray's wantonness claims.

Koch contends that a tort claim recognized by Alabama law must underlie this claim. As a general rule, under Alabama law, an independent cause of action for sexual harassment does not exist and, thus, the alleged sexual harassment alone cannot be the underlying tort necessary for plaintiff's negligent hiring, training, supervision and retention claim. *Stevenson v. Precision Standard, Inc.*, 762 So.2d 820, 824-25 (Ala.1999). However, the Alabama Supreme Court has recognized a sexual harassment exception to the requirement that a common law tort must underlie a negligent hiring, training, supervision, and retention claim. The exception provides that "the manner in which a sexual-harassment complaint is handled when sexual harassment has, in fact, occurred can form the basis for a claim

for negligent or wanton supervision" when the handling of the complaint did not cause the harassment to cease or caused it to only temporarily cease. *Stevenson v. Precision Standard, Inc.*, 762 So.2d 820, 825 (Ala.1999); *see also Patterson v. Augat Wiring Sys., Inc.*, 944 F.Supp. 1509 (M.D.Ala.1996); *Machen v. Childersburg Bancorporation, Inc.*, 761 So. 2d 981, 81 FEP Cases 815 (Ala.1999); *Mardis v. Robbins Tire & Rubber Co.*, 669 So.2d 885 (Ala.1995); *Big B, Inc. v. Cottingham*, 634 So.2d 999, 1003—04 (Ala.1993); *see also Folsom v. McAbee Const., Inc.*, No. 7:09-CV-01486-HGD, 2012 U.S. Dist. LEXIS 114441, 2012 WL 3527876, at *15 (N.D. Ala. June 6, 2012) report and recommendation adopted, No. 7:09-CV-01486-KOB, 2012 U.S. Dist. LEXIS 114412, 2012 WL 3508587 (N.D. Ala. Aug. 14, 2012).

Despite Gray's and other complaints of sexual harassment there were no investigations into reports of sexual harassment, therefore it did not cease. Gray falls within the exception recognized by the Supreme Court.

D. PLAINTIFF'S INVASION OF PRIVACY CLAIM AGAINST MCDICKINSON, BIRCHFIELD AND KOCH FOODS OF ALABAMA

In *Phillips v Smalley Maintenance Servies, Inc.*, 435 So.2d 705 (Ala. 1983), the Alabama Supreme Court adopted the *Restatement (second) of Torts* definition of the wrongful-intrusion branch of the invasion-of -privacy tort:

> One who intentionally intrudes physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly

> offensive to a reasonable person." (internal cites omitted).

The commentary to the *Restatement* definition of this tort adds:

> The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability for the examination of a public record concerning the plaintiff, or of documents that the plaintiff is required to keep and make available for public inspection. Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye. Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters. *Restatement (Second) of Torts* § 652B (1977) cmt. c.

To support an intrusion claim, Gray must show that the defendants "intruded" or "pried" into a private matter in a way that would be objectionable to a reasonable person. *Hogin v. Cottingham*, 533 So.2d 525, 531 (Ala. 1988). "Two primary factors are to be considered in determining whether or not an intrusion which effects access to private information is actionable. The first is the means used. The second is the defendant's purpose for obtaining the information." *Id.* (internal citations omitted). "[E]xtensive egregious inquiries into one's sex life, coupled with intrusive and coercive sexual demands," is an example of intrusion that is sufficient "'to outrage or cause mental suffering, shame or humiliation to a person of ordinary

sensibilities.'" *Stevenson v. Precision Standard, Inc.*, 762 So.2d 820, 826 (Ala.1999) (quoting *Phillips v. Smalley Maint. Servs., Inc.*, 435 So.2d 705, 711 (Ala. 1983)); see also *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1300 (11th Cir. 2007).[3]

McDickinson, the HR Manager for the Debone Plant, and David Birchfield, the Complex HR Manager, subjected a subordinate, Gray to unwanted touching, forced her to touch McDickinson's intimate body parts, kissed her, propositioned her for group sex, and repeatedly pursued her using their positions of power to pressure her into capitulation. When she resisted, they moved her under their supervision making it that much harder for her to escape them.

McDickinson's and Birchfield's actions, sexual demands, touching, kissing, and comments as an intrusion into Gray's private matters in a way that could induce humiliation or shame in a person of ordinary sensibilities. McDickinson and Birchfield, as agents for Koch-Ala had no legitimate purpose for their conduct or intrusion.

E. PLAINTIFF'S OUTRAGE CLAIM AGAINST MCDICKINSON, BIRCHFIELD AND KOCH FOODS OF ALABAMA

[3] It is not necessary that information about the victim's private concerns be communicated to a third party. *Phillips*, 435 So.2d at 709. Further, it is not necessary that the wrongdoer invade the victim's physical privacy. *Id.* at 711.

In order to prevail on tort-of-outrage or intentional infliction of emotional distress claim, Gray is required to present substantial evidence indicating that Birchfield's, McDickinson's and Koch Food's conduct (1) was intentional or reckless; (2) was extreme and outrageous; and (3) caused emotional distress so severe that no reasonable person could be expected to endure it. *Thomas v. BSE Indus. Contractors, Inc*. 624 So. 2d 1041, 1043 (Ala. 1993); see also *American Road Service Co. v. Inmon*, 394 So. 2d 361 (Ala. 1981).

Courts have recognized the tort of outrage in egregious sexual harassment cases. *Stabler v. City of Mobile*, 844 So.2d 555, 560 (Ala. 2002). McDickinson and Birchfield knew they had power over Gray's professional and financial future and made overt references to that power in propositioning her for sex. Recognizing their power over Gray and her inability to escape, McDickinson and Birchfield touched Gray inappropriately, forced themselves on Gray sandwiching her between them, kissed Gray, forced Gray's hand to touch and fondle McDickinson's breast and when McDickinson brushed up against Gray pressing her breasts on Gray and McDickinson performing fellatio on Birchfield in front of Gray exposing Birchfield's genitals to Gray.

1. KOCH IS LIABLE FOR MCDICKINSON'S AND BIRCHFIELD'S TORTIOUS ACTS

For Koch to be deemed liable for the intentional torts of its HR Complex Manager and HR Manager, McDickinson, Gray must demonstrate that (1) the

tortious acts were committed "in the line and scope of the employment," (2) they were committed "in furtherance of the business of the employer," or (3) the employer "participated in, authorized, or ratified the wrongful acts." *Potts v. BE & K Const. Co*., 604 So. 2d 398, 400 (Ala. 1992); *see also Joyner v. AAA Cooper Transp*., 477 So.2d 364, 365 (Ala. 1985).

Here, McDickinson used her position at Koch Foods to touch, call, text, kiss, force her to touch her breast, request sex acts from Gray, and perform sex acts in Gray's presence. Their conduct was couched as being in the line and scope of their job. McDickinson and Birchfield committed these acts in the course of performing work for Koch, so these facts satisfy the first way of showing liability.

> To show ratification, in addition to proving that the offending employee committed a tort, "a complaining employee must show that the employer (1) had actual knowledge of the tortious conduct of the offending employee ...; (2) that based upon this knowledge, the employer knew, or should have known, that such conduct constituted sexual harassment and/or a continuing tort; and (3) that the employer failed to take 'adequate' steps to remedy the situation." *Potts*, 604 So. 2d at 400. "If the steps taken to remedy the situation are not reasonably calculated to halt the harassment, the steps taken by the employer are not 'adequate.'" *Id* Elrod had notice from numerous complaints and failed to act to protect Gray.

III. COUNTER CLAIMS FILED AGAINST GRAY

A. SLANDER *PER SE*

To establish defamation, McDickinson and Birchfield must present sufficient evidence from which the jury could find: 1) a false and defamatory statement

concerning each of them; 2) an unprivileged communication of that statement to a third party; 3) fault amounting to at least negligence on the part of Gray; and 4) actionability. *Warren v. Birmingham Bd. Of Educ.*, 739 So.2d 1125, 1132 (Ala. Civ. App. 1999); *Restatement (Second) of Torts* § 558.

There are two forms of actionability: actionability of the statement irrespective of special harm (slander *per se*) or the existence of special harm caused by the publication of the statement (slander *per quod*). *McCaig v. Talladega Publ. Co.*, 544 So.2d 875, 977 (Ala. 1989). The plaintiff must prove special damages as an element of a claim of slander *per quod*. *Butler v. Town of Argo*, 871 So.2d 1, 17 (Ala. 2003) (citing *Ceravolo v. Brown*, 364 So.2d at 1157). McDickinson and Birchfield have withdrawn their argument for slander *per quod*. Therefore, in order to prevail they must prove slander *per se.*

Spoken words that impute to the person of whom they are spoken the commission of an indictable criminal offense involving infamy or moral turpitude constitute slander actionable *per se*. *Warren*, 739 So.2d at 1132-33 (citing *Caravolo v. Brown*, 364 So.2d 1155 (Ala. 1978), quoting *Marion v. Davis*, 217 Ala. 16; *Tonsmeire v. Tonsmeire*, 281 Ala. 102 (1967). Spoken words that fall short of imputing the commission of an indictable offense involving infamy or moral turpitude, but which are defamatory only when coupled with some other extrinsic

fact, are actionable *per quod* only. *Cf. F.A.A. v. Cooper*, 566 U.s. 284, 295 n. 5 (2012).

While slander *per se* carries a presumption of damage as a matter of law, *Anderson v. Gentry*, 577 So.2d 1261, 1263 (Ala. 1991), this presumption is based on the value of a good reputation. "The foundation of an action for libel or slander is a malicious injury to reputation, and any false and malicious imputation of crime or moral delinquency by one published of and concerning another, which subjects the person to disgrace, odium, or contempt in the estimation of his friends and acquaintances, or the public, with resulting damage to his reputation, is actionable either *per se* or *per quod*." *Tidmore v. Mills*, 33 Ala. App. 243, 32 So.2d 769, 779-90 (1947) (quoting Justice Brown in *Marion v. Davis*, 217 Ala. 16, 114 So.357, 358 (1927).

When measured against these basic principles, McDickinson and Birchfield cannot establish their slander *per se* claims.

1. Gray's Words Did Not Meet The Standard For Slander *Per Se*.

Defendants' slander *per se* claims are based upon Gray's statements, made to multiple people: that Birchfield was at McDickinson's house on November 14, 2015; that McDickinson and Birchfield lived together; and that Birchfield exposed his genitalia as McDickinson performed oral sex on him in front of Gray. (Doc. 267-1, p. 3.) Defendants claim that these statements are slander *per se* because

McDickinson was still married to Mark McDickinson in November 2015 and Gray's comments imputed the crime of adultery to her as well as indecent exposure to Birchfield. *Id.* at 28. Defendants also claim that the comments "impugned or prejudiced their competency in their jobs" or "cast[] doubt upon their effectiveness in their jobs." *Id.* at 3, 28. Defendants also allege that Gray's comments imputed the "crime of assault." *Id.* at 28. The evidence as presented does not meet the standard for establishing slander *per se*.

2. Gray's Statements Were Not False.

Truth is an absolute defense to defamation. *Liberty Loan Corp. of Gadsden v. Mizell*, 410 So.2d 45 (Ala. 1982). McDickinson and Birchfield must first show that the defamatory statements are untrue before Gray is obligated to vindicate the defense of truth. *Crutcher v. Wendy's of North Alabama, Inc.*, 857 So.2d 82, 95 (Ala. 2003).

3. The Statements Do Not Contain An Imputation Of An Indictable Crime Of Moral Turpitude.

When examining the allegedly defamatory statements, a court must give the language used "that meaning that would be ascribed to the language by a … listener of 'average or ordinary intelligence, or by a common mind.'" *Camp v. Yeager*, 601 So.2d 924, 927 (Ala. 1992). Only if the words are reasonably capable of a defamatory meaning can they be actionable *per se*. *Blevins v. W.F. Barnes Corp.*, 768 So.3d 386, 390 (Ala. 1999). The oral statement must, itself, impute an indictable

offense. *Id.* at 391. Consequently, words and their meanings matter. *Id.* (the word "extort" does not have the same meaning as the word "extortion").

The words spoken by Ms. Gray do not include any imputation of any crime, let alone an indictable offense involving moral turpitude. Stating that Birchfield was at McDickinson's house on November 14, 2015, is certainly not an imputation of an indictable offense. Nor is the statement that McDickinson and Birchfield lived together.

The statement that McDickinson performed oral sex on Birchfield does not impute an indictable offense. Sodomy between consenting adults is not a crime in Alabama. §13A-6-60(5); §13A-6-63; §13A-6-65(a)(2). In *Doe v. Pryor*, 344 F.3d 1282, 1288 (11th Cir. 2003) the Alabama Attorney General conceded that §13A-6-65, Ala. Code 1975, was unconstitutional to the extent that it applied to private, consensual anal and oral sex between unmarried persons. The Eleventh Circuit noted, in *Doe*, that the Supreme Court decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), held that statutory prohibitions on consensual sodomy are unconstitutional. *Doe*, 344 F.3d at 1287). The Supreme Court of Alabama, in *Williams v. State*, acknowledged the holding in *Lawrence* and held that subsection of §13A-6-65(a)(3) (dealing with sexual contact with another person) was unconstitutional as applied to the defendant in that case.

Further, while Ms. Gray's comments may have carried an imputation of indecent exposure, as discussed below indecent exposure is not an indictable crime of moral turpitude.

Consequently, the words, as spoken by Ms. Gray and without any extrinsic evidence or interpretation placed upon them, do no impute[4] an indictable offense to either McDickinson or Birchfield. In order for the words to be understood to references any indictable offense, the words themselves must be supplemented by innuendo and testimony as to the potential injurious tendencies of the words. That analysis is not appropriate when examining a claim of slander *per se*. *Marion v. Davis*, 217 Ala. 16, 19 (Ala. 1927).

4. Slander *Per Se* May Not Be Based Upon Statements That Prejudice A Person In Their Occupation.

McDickinson and Birchfield claim that slander *per se* is proved if the subject statements prejudice a person in their occupation. That is not the law in Alabama. To constitute slander actionable *per se*, the alleged slander must impute an indictable offense involving infamy or moral turpitude. *Cotrell v. Nat'l Collegiate Athlet. Ass'n*, 975 So. 2d 306, 245 (Ala. 2007); *Marion v. Davis*, 271 Ala. 16, 114, So.357 (1927). Admittedly, in the case of libel – defamation through a written publication --, the rule is different, as noted in *Ceravolo v. Brown*, 364 So.2d 1155, 1157 (1978):

[4] Defendants use the word "impute" as if it is equivalent to "implies" or "suggests," That is incorrect. "To impute" is "to attribute to," or "to charge." Ms. Gray in her words did not attribute any particular crime to McDickinson or Birchfield; she merely described what she saw and experienced.

> In cases of libel, if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody any accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se. While to constitute slander actionable per se, there must be an imputation of an indictable offense involving infamy or moral turpitude.

The cases where words only are found to be actionable *per se* because they prejudice a person in his office, profession, trade, or business all involve either accusations of a crime or are cases of libel. *Gary v. Crouch*, 867 So.2d 310, 316 (Ala. 2003) (written comments damaged plaintiff's reputation); *Liberty Nat. Life Ins. Co. v. Daugherty*, 840 F.2d 152, 158 (Ala. 2002) (statements accused plaintiff of larceny, an indictable criminal offense involving infamy or moral turpitude).

While *Ledbetter v. United Ins. Co. of America*, 845 F.Supp. 844, 846 (M.D. Ala. 1994) appears to establish a different rule – slander *per se* is committed when a defendant ascribes conduct to the plaintiff which is incompatible with the proper conduct of his lawful business, trade or profession – that statement does not accurately reflect the facts that were befoe the court in *Ledbetter*.[5] As an earlier opinion in that case establishes, United Insurance agents told customers that "Ledbetter was fired for stealing money or for 'faking' a robbery or to the effect that Ledbetter would not be selling insurance anymore … The alleged statements are clearly defamatory as they insinuate that Ledbetter had committed larceny."

[5] *Ledbetter* is not so much a decision about the elements of slander *per se* as it is about the evidence that can support an award of punitive damages in a case of slander *per se*. *See Zedan v. Bailey*, 522 F.Supp.3d 1363, 1380 (M.D. Ga. 2021)

Ledbetter v. United Ins. Co. of America, 837 F.Supp. 381, 388 (M.D. Ala. 1993), *aff'd*, 59 F.3d 1247 (11th Cir. 1995).

Contrary to Defendants' arguments, *Daugherty* did not accept the "*Ledbetter* Test" as articulated by Defendants – that slander *per se* can be based solely upon comments that a person's conduct is incompatible with his business, trade or profession. Rather, the Court in *Daugherty* recognized that, in *Ledbetter*, the trial court concluded that the defendants had accused the plaintiff of stealing. *Daugherty*, 840 So.2d at 157. So, as in *Ledbetter*, the Court in *Daugherty* affirmed the trial court's judgment because the defendants had accused the plaintiff of larceny. *Daugherty*, 840 So.2d at 158-160.

The only other Alabama court to acknowledge the existence of the "*Ledbetter* Test" questioned the authority of that test. *ABC Advertising Agency, Inc. v. Lake*, 2008 WL 11422052, *12 (N.D. Ala. March 10, 2008) (*Ledbetter* is questionable authority for assertion that statements about conduct being incompatible with the proper conduct of lawful business are slander *per se*).[6]

Even if Ms. Gray's comments included the statement that either McDickinson or Birchfield were unfit to perform their jobs (which her words did not), they would

[6] The statement in *Blevins v. W.F.Barnes Corp.*, 768 So.2d 386, 390 (Ala. 1999), that "words … which directly tend to prejudice anyone in his office, profession, trade or business, or in any lawful employment by which he may gain his livelihood" do not alter this outcome, as that comment was in reference to libelous publications and not slander *per se*. *Id.*

not constitute slander *per se* under Alabama law. *Hughes v. Wal-Mart Stores East, LP*, 846 Fed. Appx. 854 (11th Cir. 2021) (statement that employee was "unfit" to continue working as a pharmacist would not constitute slander *per se* under Alabama law); *Mills v. Wex-Tex Industries, Inc.*, 991 F.Supp.1370, 1387 (M.D. Ala. 1997) (statements that an employee was "mentally disturbed" neither slander *per se* or *per quod*).[7]

Consequently, any claim that Ms. Gray's comments harmed McDickinson or Birchfield in their business or profession are necessarily slander *per quod* claims, which claims have been dismissed by the Defendants.

5. Assault Is Not A Crime Of Moral Turpitude

To the extent Ms. Gray's statements imply either McDickinson or Birchfield, or both, committed the crime of assault, assault is not an indictable crime of moral turpitude in Alabama. *Dudley v. Horn*, 21 Ala. 379 (Ala. 1852) (charge that plaintiff had committed an assault and battery on his wife not actionable as slander); *Gillman v. State*, 165 Ala. 135 (1910) (mere assault and battery does not involve moral turpitude); *Ex parte McIntosh*, 443 So.2d 1283, 1286 (Ala. 1983) (among those crimes not involving moral turpitude are assault and battery)[8]; *Cottrell v. Nat'l*

[7] *Mills* was issued by Judge De Ment, the same person who authored the decision in *Ledbetter*. *Ledbetter* is not cited in *Mills*.

[8] *McIntosh* is not a slander case. Rather, like many other cases discussing crimes of moral turpitude, it arose in the context of the admissibility of evidence to impeach a defendant with evidence of prior convictions for crimes involving moral turpitude. *See*, §12-21-162(b), superseded and

Collegiate Athletic Ass'n, 975 So.2d 306, 345 (Ala. 2007) (reaffirming validity of *Dudley* and *Gillman*).

Consequently, Defendants' claim of slander *per se* cannot be supported by comments, if made, that the Defendants committed an assault on Ms. Gray.

6. Ms. Gray's Comments Did Not Impute Adultery.

McDickinson and Birchfield claim that Ms. Gray's words accused them of the crime of adultery. However, an examination of her actual words, and the law relating to "adultery" demonstrates that Ms. Gray did not accuse them of the crime of adultery.

"Adultery" has two meanings in the law. As a civil matter, *i.e.* divorce proceedings, "adultery" means voluntary sexual intercourse of a married man or woman with a person other than the offender's wife or husband. *Ex parte Grimmett*, __So.3d__, 2022 WL 129086, at *4 (Ala. 2022); §30-2-1(a)(2), Ala. Code 1975. Only a single act is necessary.

"Adultery" as a crime, however, is a different story. "Adultery consists of at least one act of illicit intercourse between persons of different sexes, where either is married, and an agreement, either expressed or implied, to continue the relation as opportunity offers and the parties desire. *Brown v. State*, 24 Ala. App. 385, 385

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narrowed Rule 609, Ala. R. Evid. *Adams v. State* 955 So.2d 1037, 1082 (Ala. Crim. Ap. 2003), *rev'd in part*, *Ex parte Adams*, 955 So.2d 1106 (2005).

(Ala. App. 1931). Occasional acts of adultery between parties do not make out the offense of adultery within the meaning of the law. *Bodifield v. State*, 86 Ala. 67, 67 (Ala. 1889); *Boice v. State*, 10 Ala. App. 100 (1914); *Stewart v. State*, 35 Ala. App.288 (1950); *Fuller v. State*, 38 Ala. App. 244, 244 (1955). Fornication, itself, is not included in the Alabama Criminal Code.

This understanding of adultery is now codified at §13A-13-2, which provides that a person commits adultery when he engages in sexual intercourse with another person who is not his spouse and lives in cohabitation with that other person when he or that other person is married. The statute does not cover transitory adulterous acts, but requires the offender to be "living in adultery," which has been interpreted by the courts to mean that the conduct must be open and notorious. Comments to §13A-12-2.

Ms. Gray's comments do not include any reference to the marital status of either McDickinson or Birchfield; they mention only a single sexual interaction; and there is no mention or suggestion that they intend to continue the conduct as the opportunities arise or are living in adultery. Indeed, Ms. Gray had no knowledge as to the marital status of either McDickinson or Birchfield and it is neither mentioned nor implied in anything that Ms. Gray said. Nothing that Ms. Gray said would impute the crime of adultery to either McDickinson or Birchfield.

McDickinson, by conceding that she was married to someone other than Birchfield on November 15, 2015, is the only person who has made any comment that would suggest that she engaged in adultery on that date.

7. Indecent Exposure Is Not A Crime Of Moral Turpitude.

In *Adams v. State*, 955 So.2d 1037, 1082 (Ala.Crim. App. 2003), the court held:

> Alabama has never held that the crimes of indecent exposure and contributing to the delinquency of a minor are crimes that fit within the definition of Rule 609, Ala. R. Evid. Indeed, neither crime involves dishonesty or false statements and have no bearing on a person's ability to testify truthfully. Compare, *Alfa Mutual General Insurance Company v. Oglesby*, 711 So.2d 938 (Ala. 1997) ("[t]he courts of this state have not determined whether indecent exposure is a crime involving moral turpitude"), with *Duckett v. State*, 61 Md. App. 151, 157, 485 A.2d 691, 695 (1985), aff'd, 206 Md. 503, 510 A.2d 253 (1986) ("we hold, therefore, that, for purposes of impeachment, indecent exposure is not an infamous crime, a crime of moral turpitude, a felony, nor a crime involving dishonesty or deceit.").

In *Blake v. City of Montgomery*, 386 So.2d 503, 504-05 (Ala. Crim. App. 1980), the Court held that asking a witness whether he had ever been arrested or convicted of indecent exposure was improper impeachment. Significantly, this decision was handed down before the adoption of the Alabama Rules of Evidence in 1996, and expresses the Court's view under the previous standard, which restricted impeachment evidence to crimes involving moral turpitude. Consequently, any comment which Ms. Gray may have made suggesting that Birchfield committed the

offense of indecent exposure would not qualify as a crime of infamy or moral turpitude.

8. Gray's Comments Were Privileged.

Even if Ms. Gray's comments could be construed as to impute an indictable criminal offense of moral turpitude to McDickinson or Birchfield, her comments are privileged. Each of the individuals identified in Defendants' Counterclaims[9] (Docs. 49 and 50) were employees of Koch Foods of Alabama or Koch Foods, Inc., authorized and designated under the anti-harassment policy to receive internal complaints of discrimination in the workplace. Further, the evidence will establish that Ms. Gray's communications were made in good faith and free of malice and that she was motivated only by a desire to secure a workplace free of sexual harassment and intimidation and not to advance her own personal goals or out of malice. The evidence will establish that each of Ms. Gray's statements were made pursuant to a qualified privilege. In such a case, Ms. Gray need not prove her good faith; rather in order to prevail the Defendants must prove actual malice. *Crutcher v. Wendy's of North Alabama, Inc.*, 857 So.2d 82, 95 (Ala. 2003).

[9] Defendants identify five individuals in the Complaints: Sherri Gonzalez, Sabrina Bell, La Tonya Lockley, Tim Berry, and Steve Jackson. While Defendants identified numerous other individuals in their opposition to summary judgment to whom communications were allegedly made, this Court ruled that none of those additional communications may be considered as part of Defendants' invasion of privacy claims because they were not included in the pleadings and a party may not amend their complaints through argument in a brief opposing summary judgment. Doc. 415, p. 70, fn. 27. The same ruling should apply with regard to the defamation claims.

The claims, as set out in the Answers, of both Birchfield and McDickinson are based upon damages to personal and professional reputation and forced resignation. Didn't Marian concede that they are not seeking reputational damages and not claiming they were fired because of Ka'Toria's statements? While they make a general claim for compensatory, punitive and exemplary damages, is that enough? Hasn't she conceded the claims out of existence?

Also, while she identifies 15 people Ka'Toria told in her response to summary judgment, only Gonzalez, Bell, Lockley, Berry and Jackson are specifically identified in the counterclaim, along with the statement that, on information and belief Ka'Toria told others. The Court ruled (Doc. 415, p. 70 fn 27 that they could not rely on communications to those not named in the counterclaim because you may not amend your complaint through argument. While this was in the context of the privacy claim, the same argument should apply to the defamation claims and we should try to keep any statements other than those made to people named in the complaint.

IV. EVIDENTIARY ISSUES

A. SPOILIATION OF EVIDENCE AND ADVERSE INFERENCE JURY INSTRUCTION

After Plaintiff had propounded discovery to Defendants and sought to have their phones imaged, the cell phones of the Defendants lost all data that had been stored on the phones during the time they were harassing the plaintiff. Plaintiff had

previously forwarded a litigation hold letter in May 2016, prior to the A to Z investigation and while McDickinson and Birchfield were still employed with Koch Foods.

In January 2018, counsel for defendant Birchfield and McDickinson advised Plaintiff's counsel that Ms. McDickinson's phone experienced an unexplained factory reset on January 5, 2018, and that Mr. Birchfield, had the same problem arise and his phone experienced an unexplained factory reset on January 8, 2018.

The cell phones of McDickinson and Birchfield had been examined by the investigator hired by Koch Foods and an expert retained by McDickinson and Birchfield. Plaintiff was refused the same discovery prior to the destruction of the evidence.

Spoliation refers to the destruction of evidence or the significant and meaningful alteration of a document or instrument. *Green Leaf Nursery v. E.I. DuPont de Nemours & Co., 341 F.3d 1292, 1308 (11th Cir. 2003). But it is sometimes also defined as the "intentional destruction, mutilation, alteration or concealment of evidence, usually a document."* United States EEOC v. GMRI, Inc., No. 15-20561-CIV, 2017 U.S. Dist. LEXIS 181011, at *60-61 (S.D. Fla. Nov. 1, 2017). Federal Rule of Civil Procedure 37(e) governs the issuance of sanctions for failure to preserve electronically stored information ("ESI") and provides guidance

as to what the Court should consider in evaluating whether sanctions are appropriate. As amended in December 2015, Rule 37(e) requires three threshold showings:

1) that a party has lost ESI that should have been preserved;

2) that the party failed to take reasonable steps to preserve the ESI; and

3) that the lost ESI cannot be restored or replaced.

See Fed. R. Civ. P. 37(e); *see also, e.g., DVComm, LLC v. Hotwire Communications, LLC*, No. 14-5543, 2016 WL 6246824, at *5 (E.D. Pa. Feb. 2, 2013) (issuing an adverse inference where witness destroyed electronic communications right after his deposition); *GN Netcom, Inc. v. Plantronics, Inc.*, No. 12-1318, 2016 WL 3792833, at *5 (D. Del. July 12, 2016) (imposing punitive monetary sanctions and an adverse inference, and granting fees and costs, where witnesses destroyed electronic communications during discovery).

Once these threshold conditions are met, the Court may issue both "curative measures" and more-serious "specific sanctions". *DVComm*, 2016 WL 6246824 at *6-*7. Curative measures, which range from factual presumptions, the striking of defenses and pleadings, default judgment, and the submission of spoliation jury charges and evidence to the jury, require a showing of prejudice. *Id.* at *6. The more-serious specific sanctions, which include adverse-inference instructions, a presumption that the lost information was unfavorable, do not require a showing of prejudice; instead, they require a finding of "intent to deprive another party of the

information's use in litigation." *Id*. (comparing Rule 37(e) sub-parts (1) and (2) and noting that "[a] showing of prejudice is not required before imposing sanctions under Rule 37(e)(2)"); *see also*, 2015 Advisory Committee Notes to Rule 37 ("2015 Notes"), explaining that a finding of intent to deprive supports "not only an inference that the lost information was unfavorable … but also an inference that the opposing party was prejudiced … ." Lastly, the facts warranting any Rule 37(e) findings must be established merely by a preponderance of the evidence. *DVComm*, 2016 WL 6246824 at *6.

Defendants had a duty to preserve this evidence the moment they reasonably anticipated litigation and litigating claims against Plaintiff. "The duty to preserve exists as of the time the party knows or reasonably should know litigation is foreseeable." *Mosaid Technologies v. Samsung Electronics*, 348 F. Supp. 2d 332, 336 (D.N.J. 2004) (affirming spoliation instruction and monetary sanctions where, despite notice, a party failed to preserve ESI central to their claims). Thus "[a]s a general rule, '[a] party which reasonably anticipates litigation has an affirmative duty to preserve relevant evidence.'" *Kvitka v. Puffin Co.*, No. 06-cv-0858, 2009 WL 385582, at *3 (M.D. Pa. Feb. 13, 2009) (dismissing all claims because Plaintiffs failed to retain computer containing relevant electronic communications). Plaintiffs' duty to preserve, thus, was triggered all the way back in 2015, when they first anticipated and acted on these allegations.

See, e.g., *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (explaining that "the obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation"). Indeed, Defendants should have at least collected and produced this information in response to Plaintiff's Interrogatories and Requests for Production specific to this content. And yet, Defendants did nothing to preserve this key evidence.

B. DEFENDANTS FAILED TO TAKE ADEQUATE TIMELY MEASURES TO ENSURE THE PRESERVATION OF THIS KEY EVIDENCE

"A party's discovery obligations do not end with the implementation of a 'litigation hold'—to the contrary, that's only the beginning." *Zubulake v. UBS Warburg, LLC*, 229 F.R.D. 422, 432 (S.D.N.Y. 2004). Accordingly, "counsel must oversee compliance with the litigation hold, monitoring the party's efforts to retain and produce relevant documents." *Culler v. Shinseki*, No. 09-0305, 2011 WL 3795009, at *3 (M.D. Pa. Aug. 26, 2011) (citing *Zubulake*, *supra*).

C. PLAINTIFFS HAVE BEEN DEPRIVED OF EVIDENCE THAT CANNOT BE RESTORED OR REPLACED – AND THAT IS HARMFUL TO PLAINTIFFS' CLAIMS

As the Rules recognize, "[d]etermining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair." Destruction of evidence

during pendency of litigation may suffice to support an inference the party destroyed responsive evidence because it was harmful. The more central to the case the spoliated evidence is, the more prejudicial its loss may be deemed to be. *DVComm*, 2016 WL 6246824 at *7; *see also*, 2015 Notes, explaining that proof of intent to deprive implies that unfavorable information was destroyed, and the opposing party was thereby prejudiced. Destruction of evidence during the pendency of litigation is precisely what Plaintiffs have done, and precisely why Defendants have been prejudiced.

Spoliation sanctions should serve three functions: a remedial function by leveling the playing field or restoring the prejudiced party to the position it would have been without spoliation; a punitive function, by punishing the spoliator for its actions; and a deterrent function, by sending a clear message to other potential litigants that this type of behavior will not be tolerated and will be dealt with appropriately if need be. *CentiMark Corp. v. Pegnato & Pegnato Roof Mgmt.*, No. 05-708, 2008 WL 1995305, at *9 (W.D. Pa. May 6, 2008) (granting spoliation sanctions where party failed to take steps to preserve relevant evidence before losing possession during the pendency of the lawsuit).

To be sure, the Court has numerous options for sanctioning Defendants' strategic and egregious conduct. As in *DVComm*, the Court might determine that even where the spoliated ESI is limited to a single issue of fact and may be

recoverable, "[s]ignificant potential for abuse exists if we do not … instruct the jury as to an adverse inference" so as to "deter this conduct." *DVComm*, 2016 WL 6246824 at *8. As in *GN Netcom*, where a party was found to have "failed to take reasonable steps to preserve ESI … in bad faith with intent to deprive," the Court may find that monetary sanctions of fees and costs for 18 months of discovery, "although unable to fully redress the prejudice … are warranted," as are "punitive monetary sanctions" in the amount of triple the damages claimed by Plaintiffs. *GN Netcom*, 2016 WL 3792833, at *13. The Court might next conclude that McLachlan's "inability to substantiate its claims with evidence it was entitled to receive may not be fully remediated by an order precluding [Plaintiffs] from using particular evidence to defend [themselves]." *Id.* Finding, thus, that "lesser sanctions" will be "inadequate to fully redress the prejudice," the Court may decide that in addition to any such "evidentiary sanctions," an adverse-inference jury instruction is also warranted. *Id.*

Judge Rambo's analysis in *Kvitka* is instructive. There, the "facts giving rise to [Plaintiff's] claims" had "a lot to do with some emails." *Kvitka*, 2009 WL 385582, at *5. Accordingly, the Court noted that "defendants would need access to Kvitka's old laptop to inspect and investigate her email program and hard-drive." *Id.* Therein, of course, lay the rub: Plaintiff Kvitka had "discarded her old laptop … in direct defiance of instructions" from counsel. *Id.* at *4. Despite filing and litigating the suit

vigorously, counsel, of course, failed to inform the Court or Defendants of this loss. *Id.* at *2. When the destruction finally came to light, Plaintiffs tried to characterize the loss as "innocent and routine" – but the Court was not as sympathetic. *Id.* at * 4. Finding Plaintiffs to have been "manipulative and evasive throughout the litigation," and thereby to have "severely prejudiced Defendants by stripping them on information necessary to defend against Plaintiffs' claims," the Court found itself left with "no other option but to dismiss plaintiffs' claims with prejudice." *Id.* at *6.

Judge Rambo's reasoning for why lesser sanctions would not suffice applies cleanly to the instant matter.. Anything short of such a drastic remedy would **encourage litigants to dispose of unfavorable evidence**, hoping that they can overcome limiting instructions or an adverse inference by taking advantage of judges. *Id.* (emphasis added).

Plaintiffs hereby moves the Court, pursuant to Fed. R. Civ. P. 37(e) and 26(g), for:

1) Default Judgment against Defendants;
2) Punitive monetary sanctions to deter future disregard of discovery duties by Defendants;

3) Fees and costs for the time and effort expended by Plaintiff in pursuing this discovery and securing relief;

4) An adverse inference that Defendants destroyed evidence harmful to their defense of the claims filed against them;

5) A presumption that the lost or destroyed evidence harmed Defendants and supported Plaintiff's claims; and

6) Any other remedy or relief the Court deems just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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