

No. 26-10051

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAUREN KELLEY,
Plaintiff-Appellant,

v.

LA SCALA MEDITERRANEAN BISTRO ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia, No. 4:23-cv-00182-WMR

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE IN SUPPORT OF
APPELLANT AND IN FAVOR OF REVERSAL

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**Certificate of Interested Persons
and Corporate Disclosure Statement**

Pursuant to Eleventh Circuit Rule 26.1-1(a)(4), amicus curiae the Equal Employment Opportunity Commission (“EEOC”) hereby submits the following Certificate of Interested Persons and Corporate Disclosure Statement. The undersigned counsel hereby certifies that, in addition to those identified in the Certificates filed by the parties, the following persons and entities may have an interest in the outcome of this case:

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Pursuant to Federal Rule of Appellate Procedure 26.1, the EEOC, as a government entity, is not required to file a corporate disclosure statement. The EEOC is not aware of any publicly traded corporations or companies that have an interest in the outcome of this case or appeal.

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STATEMENT OF INTEREST

Congress charged the Equal Employment Opportunity Commission with administering and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”). This appeal raises significant questions about the correct standards for assessing whether a hostile work environment is sufficiently severe or pervasive to violate Title VII, and for determining employer liability. Given the importance of these issues, the Commission offers its views to this Court pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUES¹

1. Did the district court err in setting aside the jury’s verdict that the plaintiff, a teenage server who was sexually pursued and touched by two much older coworkers, experienced severe or pervasive harassment?

2. Did the district court err in setting aside the jury’s verdict that the employer failed to take prompt, remedial action in responding to the sexual harassment, where the jury heard evidence that the employer knew about the sexual harassment, that it had no formal policies or procedures to

¹ We take no position on any other issue in the case.

address harassment, and that it took no meaningful action against either harasser?

STATEMENT OF THE CASE

A. Statement of the Facts²

La Scala Mediterranean Bistro is a restaurant in Rome, Georgia, owned by Anthony Barba. District Court Docket No. (“R.”) 89-147. La Scala hired Lauren Kelley as a hostess and server in the fall of 2020 when she was sixteen. R.89-144, 146. She reported to then-general manager Daniel Carpenter and executive chef and kitchen manager Logan Littlejohn. R.89-147; R.91-280.

In August 2021, just after Kelley turned seventeen, the restaurant hired Gerald Gates as a cook. R.89-147. Gates, who was approximately forty, regularly stared at Kelley and told her, “you’re so hot” and “you need a real man like me.” R.89-148, 151. Kelley testified this “definitely made me feel uncomfortable, because I was 17.” R.89-151. Logan Littlejohn, who supervised Gates, “was present for a lot of the conversations and the

² We describe the facts in the light most favorable to the plaintiff as the non-moving party and “assume that all of [plaintiff’s] testimony, and any other evidence favoring her position, is true.” *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 578 n.2 (11th Cir. 2000).

comments made.” R.89-153, 201. Once, after Gates told Kelley she “looked hot,” Littlejohn said, “She’s 17. You can’t say that.” R.89-153. Gates responded, “I don’t care. She’s not my daughter.” *Id.* When Gates cornered Kelley in the kitchen and asked for her phone number, she refused but added him to her Snapchat account “so he would move and I could go back up and continue my job duties.” R.89-151-52. Kelley testified that for the next five months, “he continued to make comments to me” “[a]lmost every day.” R.89-159-60. According to Kelley, Gates “would look me up and down when I would walk by” and “when I was doing my job duties.” R.89-160.

In late September, Kelley posted vacation pictures of herself on Snapchat. R.89-152. Gates messaged her, “I don’t mean to offend you, but I really would give you my chocolate.” *Id.* Kelley understood this comment from Gates, who is Black, as “referring to himself.” *Id.* She blocked him on Snapchat. *Id.*

Kelley reported Gates’s messages to Logan Littlejohn, who confirmed that Kelley said Gates had sent her “creepy” messages. R.91-276, 289-90. He testified that he did not ask Kelley for specifics because “people will lie to your face all the time” and “I don’t take people at face value.” R.91-301. He

did not inform Barba of Kelley's complaint because "I had the situation handled." R.91-290. Because Kelley could not show him the offensive Snapchat messages (which disappear quickly) and Gates claimed that Kelley had texted him first, Littlejohn told Gates, "You know how [Kelley] is. She has a history of causing problems and ... lying in general" and advised him "not to respond to her anymore if she texts you on Snapchat." R.91-276-77. He did not ask other employees if they had similar experiences with Gates because "I didn't feel it pertinent at the time," nor investigate further because "there was no evidence" and "I had no idea how to go any further with an investigation." R.91-277-78.

Kelley also complained to Carpenter about the messages, and about additional inappropriate conduct involving Gates touching her. R.89-152, 158-59. As Kelley described the touching incident, Gates cornered her at the hostess stand and "grabbed me. He grabbed my butt very harshly. And he said that he had thoroughly enjoyed it." R.89-156. She recounted, "I was very embarrassed because I was 17 and this grown man ... cornered me into an area where I could not leave. And I just wanted to go outside because I was afraid ... And I didn't know what to do." *Id.* Later in the trial, she gave additional testimony about the grabbing. Kelley's attorney

asked: "When [Gates] groped you, did he get his hand between your legs?"

She replied, "Yes." R.89-172.

When Kelley reported Gates's conduct to Carpenter, she told him by telephone that "Gerald [Gates] makes me uncomfortable. He has touched me. He has said inappropriate things. And I don't like working with him." R.89-153. She testified that she described the grabbing incident shortly after it happened. R.89-157. The record does not indicate that Carpenter acted on this report. Kelley remained afraid of interacting with Gates. R.89-156. On October 5, she texted Carpenter from La Scala to ask if he was on his way because "[I]'m hiding in the back" from Gates. Carpenter replied that she should "go to the office" because "nobody would bother me there[.]" Pl.Exh.3; R.89-154-55.

Kelley continued unsuccessfully to seek management's help to address Gates's conduct. R.89-156-57, 171-72. It appears that neither Logan Littlejohn nor Carpenter understood they had the ability, or obligation, to address harassment. La Scala offered no evidence to the jury that it had formal procedures in place for harassment investigations. Instead, Barba testified that he "had an open-door policy" and "tried to be available" to his employees. R.91-392. Barba explained that "anything that's brought to

one of the management [team] ... the first thing they do is try to get all the information they can through an investigation” and then “if they deemed it appropriate, would bring it to my attention.” R.91-392-93. Barba testified that he had no human resources training, including training to investigate sexual harassment claims, “just life.” R.91-421. He did not provide “formal” harassment training to managers. *Id.*

In late November, Kelley asked Barba to meet about Gates because “[n]othing had been done.” R.89-207. She texted him, “I told Logan and Daniel about it a long time ago, but [Gates] was always touching all over me.... I told him so many times that I am a minor and you cannot touch me or talk to me like that.” Pl.Exh.4; R.89-171. Barba responded, “We are meeting about him today anyway! Thank you for the info.” *Id.* Kelley met with Barba on November 29 to tell him about Gates’s behavior and her previous reports to Carpenter and Logan Littlejohn. R.89-171-73. Barba asked for proof and advised Kelley to “be aware of what you’re wearing.” R.89-172. Kelley confirmed that she told Barba about Gates groping her. *Id.* Barba “said he would think about things.” *Id.* According to Barba, Kelley told him “there had been a bunch of inappropriate messages sent” but she “couldn’t produce them.” R.91-400. Barba testified that Gates denied

sending any messages and Barba recommended that he “avoid contact with [Kelley] moving forward.” R.91-401. Barba did not believe Gates’s behavior merited termination because “I didn’t have any evidence.” R.91-402. Barba conceded that he did not try to confirm Kelley’s complaints with anyone in the kitchen. R.91-415.

La Scala never disciplined Gates for his conduct targeting Kelley. Barba testified that he fired Gates in January for failing to show up for work. R.91-402. However, there was evidence that Gates quit: Logan Littlejohn texted Kelley that Gates’s two weeks’ notice “was up today” and “he’s just hanging around until his next job actually starts in a couple of weeks[.]” Pl.Exh.5; R.89-159. He added, “I honestly don’t want [Gates] there I just can’t afford to lose him right now.” *Id.*

Kelley continued working at La Scala without incident for approximately seven months, during which time Kayla Greenway became the general manager. R.89-160-61, 164. In August of 2022, just after Kelley turned eighteen, La Scala hired Logan Littlejohn’s cousin Nicholas (“Nick”) Littlejohn, who was 36, as a server. R.91-321-22; R.89-161. Kelley testified that during one of the first shifts they worked together, he would not move out of her way at the hostess stand so she had to brush against him. R.89-

163. When she reported it to Greenway, Greenway responded, “he’s Logan’s cousin, so I doubt that he would be going anywhere.” R.89-164. Nick Littlejohn obtained Kelley’s number from an employee group chat and began texting her messages such as, “you are a cute one,” “I like workin with ya” and “Do I find you attractive? Yep. For reasons not to be discussed. Am I ever hitting on you? No. It’s just work.” Pl.Exh.6; R.89-166-68. Kelley testified, “I’ve never received a message like that from somebody before” and it “was very awkward, very uncomfortable” and “not something I would have expected to receive from a co-worker.” R.89-168. Nick Littlejohn knew Kelley’s age yet offered her alcohol when they both worked special events and “asked me a couple of times to come to his house and drink.” R.89-174. He also commented on Kelley’s body and asked her if she was a virgin; he told her she was “a white girl with a fat ass” “[m]ultiple times” and that she “had a nicely shaped butt.” R.89-177. After he added Kelley to Snapchat and asked her repeatedly during a shift why she had not added him back, she relented. R.89-173. She testified, “I felt pressured to do it just to maintain a positive work environment.” *Id.* Kelley stated that, following her report to Greenway, no one interviewed witnesses or investigated Nick Littlejohn’s behavior. R.89-173-74.

On December 15, Kelley worked a large Christmas party at a private event space called The Loft, located on La Scala's upper level. R.89-174-75. Nick Littlejohn, who was bartending, approached Kelley as she was handing out drinks from a cooler, and told her "the only reason I made that much money was because I was bent over the cooler." R.89-177. Because Kelley's shift ended late and began early the following morning, she stayed overnight in one of The Loft's upstairs bedrooms. R.89-175-76. At approximately 2:30 a.m., Nick Littlejohn came into Kelley's room, which had only a sliding barrier that could not be locked in the closed position. R.89-181. Kelley testified that Littlejohn, who had been drinking, "approached the side of the bed and he put his hands on either side of my face and he tried to kiss me." *Id.* Kelley added, "I pushed back on either side of his wrists and I said no," and "he was saying, 'Don't you see we have this connection or don't you see we're close?' And I said 'no.'" R.89-182. He left when Kelley asked him to get a co-worker who was supposed to be staying with her in the room, but he returned when Kelley fell asleep. *Id.* She said, "I was on my left side facing the wall, then the door cracked open.... And the person got in the bed and then began rubbing my back. And I looked over and I see Nick. And I said, 'What are you doing in here?"

What are you doing?' And he said, 'What, you don't like it?' I said, 'No.'"

Id. She then was able to convince him to leave. R.89-183.

Nick Littlejohn texted Kelley the same morning, "my apologies for trying to kiss you last night" and "In all fairness, you did tell me to try when it wasn't 2:30 a.m." Pl.Exh.7; R.89-187. Kelley responded, "[W]hat? no, I didn't." Pl.Exh.7; R.89-188. He insisted, "I asked if 2:30 in the afternoon was better, and you said yes. I was caught in the moment. While I'm sure I would enjoy a kiss or more from you, I also know it's not a good idea." *Id.* Kelley did not respond and deleted him from Snapchat. R.89-189-90. The next day, when he texted her to ask if he did something to upset her, Kelley responded, "You lie." Pl.Exh.7; R.89-189. She testified, "I was upset that he had accused me of stating he could try [kissing her] at a later time in the day ... because that's not what happened." R.89-189. Nick continued to text Kelley, stating "At least let me know what I did [that] was so wrong." Pl.Exh.7; R.89-191.

Kelley testified that when she told Greenway about this incident that Friday morning, December 16, Greenway "was shocked" and "concerned" but "[s]he said that there wasn't going to be anything done about it and I might as well quit because Anthony [Barba] wouldn't believe me anyways,

so there's just no point in me even bothering with it." R.89-185. Then, when she worked her regular shift the following Monday, coworker Randy Brownlow had already heard about Nick Littlejohn coming to her room and told her that Barba "already knows about it and he said you're a little shit-starter." R.89-192. Brownlow also informed her that Barba was planning to promote Nick Littlejohn to general manager, replacing Greenway, within the next few weeks. *Id.* Kelley testified that her conversations with Greenway and Brownlow, and her previous experience with Gates, "led me to feel as though [Greenway] was absolutely right" and making a complaint to Barba would be pointless. R.89-208.

Kelley resigned the next day by texting Greenway, "I quit. Mail me my check." R.89-192. Barba texted Kelley asking why she had quit abruptly and suggesting she had acted inappropriately. Pl.Exh.8; R.89-193-94. Barba claimed that at the time, he "didn't know anything about [Kelley's sexual harassment complaint about Littlejohn]." R.91-350. When asked at trial if he had investigated further, he responded, "How would I have done that?" and "Lauren had already resigned" so "there was nowhere further for me to go." R.91-352.

Kelley testified that the harassment “definitely affected me” particularly because of her age. R.89-197. After Gates left, she “dealt with it the first time and it got better.” *Id.* She “liked the job overall” and “needed the money.” *Id.* But when Nick Littlejohn was hired, “it kind of just started back over.” *Id.* She testified she had trouble trusting men, worried that “something like this would happen to me or something worse and nothing would be done about it....I have a lot of nightmares about people harming me, specifically men....They sexually assault me. They hurt me. Kill me.” R.89-198.

Kelley filed suit alleging, *inter alia*, that La Scala subjected her to a hostile work environment because of her sex in violation of Title VII. R.1-12-14. The case proceeded to a jury trial. After the parties presented their evidence, the district court instructed the jury that a hostile work environment exists “if the plaintiff was subjected to offensive acts or statements about sex ... so severe or pervasive that they materially altered the terms or conditions of the plaintiff’s employment,” considering “all of the circumstances....” R.92-515-16. The court further instructed, “[a] material alteration is a significant change in conditions.” R.92-516.

The jury returned a verdict for Kelley, finding that La Scala negligently exposed Kelley to a hostile work environment due to both Gates's and Nick Littlejohn's harassment.³ La Scala filed a renewed motion for judgment as a matter of law under Rule 50(b) challenging the sufficiency of the evidence to support the jury's verdict. R.72.

B. District Court's Decision

The court granted La Scala's motion and entered judgment accordingly. R.78-1. The court ruled that Kelley's evidence was insufficient to support the jury's finding that the harassment she suffered was sufficiently severe or pervasive to alter the terms and conditions of her employment or to establish a basis for holding La Scala liable "under Eleventh Circuit case law." R.78-11.

First, the court held that the harassment was not objectively "severe and pervasive." R.78-12 (emphasis added). The court determined that a reasonable person would not consider Gates's comments offensive and

³ The verdict form asked the jury to evaluate the harassment by Gates and by Nick Littlejohn independently. R.65. The jury found for Kelley on both and awarded her \$10,000 in compensatory damages for Gates's harassment, \$10,000 in compensatory damages for Littlejohn's harassment, and \$25,000 in punitive damages for Littlejohn's harassment. *Id.*

asserted that “a man can compliment a woman’s looks or express an interest in her without fear of being found guilty of sexual harassment for having done so.” R.78-13. The court calculated Gates’s offending conduct over four months as “three boorish or flirtatious comments, continuous staring, and one isolated incident of touching over a four-month period,” which, the court said, falls short of hostile work environment cases decided by the Supreme Court. R.78-14. The court also suggested that it was obliged to follow Eleventh Circuit cases – published and unpublished – and two district court decisions against plaintiffs despite “more egregious conduct than alleged in this case.” R.78-14-16 & n.6 (collecting cases).

According to the district court, Kelley’s “harassment by Littlejohn was even less than that of Gates.” R.78-17. His comments were mere “flirtatious conduct in the workplace” and not “severe and pervasive[.]” *Id.* The court acknowledged that Littlejohn entered a bedroom where Kelley was sleeping and “attempted to kiss her, and rubbed her back,” but said Littlejohn complied when she asked him to leave. R.78-18. Moreover, the court said, because the Eleventh Circuit found “far more serious” conduct insufficiently severe or pervasive in *Mitchell v. Pope*, 189 F. App’x 911, 913-

14 n.3 (11th Cir. 2006), Littlejohn’s harassment “cannot be construed as objectively severe and pervasive.” *Id.*

The district court also held that there was no basis for holding La Scala liable because the restaurant “undertook remedial action, or attempted to do so.” R.78-19. The court stated that restaurant management successfully told Gates to stop messaging Kelley via Snapchat, met with Gates after the groping incident, and fired Gates ten days later, albeit for unrelated reasons. R.78-20-21. This, the court said, did not amount to a sufficient evidentiary basis for holding that La Scala failed to take prompt remedial measures. R.78-20-21. As to Nick Littlejohn, the court acknowledged that Kelley reported discomfort with his behavior but reiterated that it “does not rise to [the] level of actionable harassment.” R.78-21. And, the court emphasized, although Kelley reported Littlejohn’s attempt “to kiss her and rub her back,” she “quit before anyone at La Scala, including Mr. Barba, could investigate her complaint or take any remedial action....” R.78-21-22.

ARGUMENT

As this Court has explained, “[j]udgment as a matter of law for a defendant is appropriate ... [when] no jury reasonably could have reached

a verdict for the plaintiff.” *Ruckh v. Salus Rehab., LLC*, 963 F.3d 1089, 1099 (11th Cir. 2020) (citation modified). Here, after the jury rendered a verdict for Kelley, the district court entered judgment as a matter of law, holding that no reasonable juror could have concluded that Kelley experienced actionable harassment or that La Scala was liable for that harassment. In doing so, the court erred.

I. The district court misstated and misapplied the severe or pervasive standard for assessing whether a hostile work environment is actionable.

For conduct to violate Title VII, 42 U.S.C. § 2000e-2(a)(1), harassment must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.” *Harris v Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 808 (11th Cir. 2010) (en banc). In assessing whether harassment meets this standard, it is necessary to “look to all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” *Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116 (2002) (quoting *Harris*, 510 U.S. at 23). Applying those

standards to the evidence presented at trial, the jury determined that Gates's and Littlejohn's harassment each "created a hostile work environment for [Kelley]" for which La Scala was liable. The court's decision setting aside that determination rested on multiple legal errors.

A. Actionable harassment is "severe *or* pervasive."

The district court's order regularly articulated the standard incorrectly as "severe *and* pervasive." R.78-12; 13-14, 17, 18. Indeed, the court misstated the standard fifteen times, notwithstanding clear circuit precedent addressing the conjunction question. *See Reeves*, 594 F.3d at 807 ("Either severity *or* pervasiveness is sufficient to establish a violation of Title VII."). To be sure, the district court also referred to the standard properly at times, as severe "or" pervasive, *see, e.g.*, R.78-14, 18, and nowhere explicitly rested its ruling on a failure to show severity "and" pervasiveness. But the court's frequent use of the word "and" likely was not a mere slip of the court's pen because the court elsewhere in its order indicated it understood the significance of that word: in discussing the requirement that a severity/pervasiveness analysis has subjective and objective components, the court underlined the word "and" and stressed that a plaintiff "must establish both elements." R.78-12; *see also* R.78-11-12

(“Harassment is severe or pervasive for Title VII purposes only if it is both subjectively and objectively severe *and* pervasive.” (citation omitted) (emphasis added)). There is thus a reasonable basis to think that the court misunderstood the correct severe-or-pervasive standard.⁴

B. The district court failed to assess the evidence in context, collectively, and by looking at the totality of the circumstances.

In evaluating objective severity or pervasiveness, the court contravened precedent by failing to assess the totality of the circumstances and by failing to view Kelley’s evidence cumulatively, collectively, and

⁴ As noted above, the jury instructions required a finding that the harassment be sufficiently severe or pervasive to “materially” alter the terms and conditions of the plaintiff’s employment and define “*material alteration*” to mean a “*significant change*” in work conditions. These adjectives add requirements not found in Supreme Court precedent or the en banc decision of this Court. *See, e.g., Harris*, 510 U.S. at 21 (harassment must be “sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment” (quotation omitted)); *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78, 81 (1998) (same); *Reeves*, 594 F.3d at 807 (an actionable hostile work environment “changes” the terms and conditions of employment). Nor are these adjectives found in the statutory provision addressing discriminatory “terms” and “conditions.” *Cf. Muldrow v. City of St. Louis*, 601 U.S. 346, 350, 354-55 (2024) (plaintiff need not show that actionable harm was “significant,” “serious,” “substantial,” or “any similar adjective suggesting that the disadvantage ... must exceed a heightened bar”). Here, neither party objected to the instructions (R.92-483-84) and the jury found in favor of Kelley even under the heightened “material” standard. However, this Court should avoid invoking the incorrect materiality requirement.

contextually. Harassment's severity "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (quoting *Harris*, 510 U.S. at 23), ... and "requires careful consideration of the social context in which particular behavior occurs and is experienced by its target." *Id.* The court neither considered the perspective of a reasonable person in Kelley's position nor considered the evidence cumulatively.

The perspective of a reasonable person in Kelley's position would reflect that she was a teenager at work dealing with sexual advances from two much older men – advances she consistently refused. The court omitted the age and power disparity from its analysis of objective hostility, and it failed to factor in Kelley's vulnerability and inexperience in the workplace. *See, e.g.*, R.78-13 ("a man can compliment a woman's looks or express an interest in her without fear of being found guilty of sexual harassment"); R.78-21 ("Plaintiff felt uncomfortable with [his expressed romantic interest] because Littlejohn was her co-worker."). These omitted factors are important because they can intensify the perceived hostility of the behavior and exacerbate its effect. *See EEOC v. R&R Ventures*, 244 F.3d

334, 340 (4th Cir. 2001) (severity of harassment “was compounded by” fact that harasser “was an adult male in a supervisory position over young women barely half his age” and “incessant put-downs, innuendos and leers directed at ... young women” could create objectively hostile environment); *EEOC v. Mgmt. Hosp. of Racine, Inc.*, 666 F.3d 422, 433 (7th Cir. 2012) (jury could find that “age disparity” between harasser and victim contributed to objective hostility of harassment).

Additionally, the district court failed to consider the evidence as a whole in the light most favorable to the nonmoving party, as required in this procedural posture. *See Bailey v. Swindell*, 89 F.4th 1324, 1328-29 (11th Cir.), *cert. denied*, 145 S. Ct. 162 (2024). Instead, the court improperly isolated, minimized, and then dismissed each instance of harassment. *Mack v. ST Mobile Aerospace Eng'g, Inc.*, 195 F. App'x 829, 838 (11th Cir. 2006) (district court improperly “viewed the plaintiffs’ allegations in isolation, discounting each, to conclude that the conduct was not sufficiently severe or pervasive”); *cf. Andrews v. City of Phila.*, 895 F.2d 1469, 1484 (3d Cir. 1990) (“A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.”).

Specifically, the court downplayed Gates's behavior as "three boorish or flirtatious comments, continuous staring, and one isolated incident of touching over a four-month period" and deemed "overtly offensive" only his grabbing her and the message he would "give her his 'chocolate.'" R.78-13. The court omitted Kelley's testimony that she reported to Barba that Gates "was always touching all over me," and overlooked that he groped her in a confined space, aggressively grabbing Kelley's buttocks as he put his hand between her legs, which he told her he "thoroughly enjoyed." R.89-156, 171-72. The court assessed Nick Littlejohn's conduct as "even less" as he "flirted with her by complimenting her appearance, expressing an interest in her, and making a few comments about her posterior over a four-month period," minimizing his texts and propositions as "innocuous" "flirting" and his bedroom intrusions in the middle of the night as "relatively harmless." R.78-7, 21, 27. The district court overlooked that Littlejohn returned to the room where Kelley slept after she had earlier rebuffed him and got in bed with her and started rubbing her back, conflating the two unwanted advances and omitting the most egregious details.

Furthermore, the court failed to consider that this episode was the culmination of several months of sexually inappropriate comments and propositions and occurred less than a year after Gates's harassment. The court did not assess the impact of two periods of relatively similar harassment in the same workplace, even though Kelley testified that she had just recovered from Gates's harassment when "it started back over" with Nick Littlejohn. R.89-197. The proper focus, this Court has explained, is on the cumulative effect of the series of acts. There is "not simply some magic number" of offenses that preclude summary judgment, but rather "it is repeated incidents of ... harassment that continue despite the employee's objections that are indicative of a hostile work environment." *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1276 (11th Cir. 2002) (citation modified). Properly assessed, this evidence is not "'so one-sided that [La Scala] must prevail as a matter of law.'" *Combs v. Plantation Patterns*, 106 F.3d 1519, 1526 (11th Cir. 1997) (citation omitted).

C. The district court erroneously applied inapposite and/or unpublished cases.

The district court erred in its treatment of prior cases in several respects. In addressing published case law, the court treated the cases in

which the plaintiff prevailed as a floor – the minimum required for actionable harassment – and drew mechanical comparisons between the cases in which the plaintiff lost and Kelley’s.

As to the cases where the plaintiff prevailed, the court cited *Hulsey v. Pride Restaurants*, 367 F.3d 1238, 1246 (11th Cir. 2004), as an example of a case that set the floor. *See* R.78-16-17. But as the Supreme Court and this Court have recognized, this “floor” gloss is not the correct way to view prior cases. *See Harris*, 510 U.S. at 22 (“appalling conduct” alleged in prior cases does not “mark the boundary of what is actionable”); *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1303 n.49 (11th Cir. 2012) (same). Indeed, the Supreme Court’s analysis in *Harris* came in the context of a case that arguably was less severe than this one. *See Harris*, 510 U.S. at 19, 23 (remanding case involving a plaintiff who was herself a manager and who pointed to company president’s gendered insults, unwanted sexual innuendos, and suggestions that female employees pick up objects he had thrown on the ground or get coins from his pocket).

On the other hand, the district court’s analysis of plaintiff-losing cases it deemed more egregious than this one failed to consider key contextual factors that heightened the harm in Kelley’s case. In *Gupta v.*

Florida Board of Regents, the only published case in this category that the district court cited, the male supervisor of a newly hired female professor called her at home at night, invited her to lunch, commented on her appearance, and stared at her. 212 F.3d 571, 578-79 (11th Cir. 2000). He touched her clothing, accessories, and thigh or knee; and once unbuckled his pants in her presence to tuck in his dress shirt (which he had taken off because “the air conditioning was broken and it was very hot”). *Id.* at 579. The court of appeals considered this behavior annoying but innocuous. *See id.* at 584-86. But there, the plaintiff was an adult professor with far more education and experience than Kelley. Here, by contrast, two harassers more than twice Kelley’s age pursued her and subjected her to what a jury could reasonably view as aggressive, overtly sexual touching. Because of this critical distinction, the court erred in relying on *Gupta* to overturn the jury verdict for Kelley.

To the extent the district court viewed unpublished cases and district court decisions as dictating a loss for Kelley, it strayed from this Court’s directives. Unpublished decisions are not merely less “forceful,” as the court believed. R.78-16 n.6; *see also* R.78-14 (citing a string of unpublished decisions as representative of “Eleventh Circuit case law”). Rather,

unpublished decisions “may be relied on only to the extent they are persuasive.” *Searcy v. R.J. Reynolds Tobacco Co.*, 902 F.3d 1342, 1355 n.5 (11th Cir. 2018); *see also Ray v. McCullough Payne & Haan, LLC*, 838 F.3d 1107, 1109 (11th Cir. 2016) (“In this Court, unpublished decisions, with or without opinion, are not precedential and they bind no one.”). And of course, “[t]he general rule is that a district judge’s decision neither binds another district judge nor binds him.” *McGinley v. Houston*, 361 F.3d 1328, 1331 (11th Cir. 2004). If the district court here did “not necessarily agree,” R.78-16 n.6, with the unpublished circuit and district court cases, it need not and should not have followed them.

The cases the district court cited may also be distinguished as involving more sophisticated plaintiffs, smaller power differentials between harassers and their victims, and less subjective offense,⁵ but doing

⁵ *See, e.g., Dar Dar v. Associated Outdoor Club, Inc.*, 248 F. App’x 82, 85-86 (11th Cir. 2007) (no allegations of age or power differential; inappropriate comments by coworkers unrelated to plaintiff herself); *Mitchell v. Pope*, 189 F. App’x 911, 913-14 (11th Cir. 2006) (no evidence of age or power differential and no testimony that plaintiff was embarrassed or afraid); *Lockett v. Choice Hotels Int’l*, 315 F. App’x 862, 866 (11th Cir. 2009) (no evidence of subjective offensiveness); *Guthrie v. Waffle House, Inc.*, 460 F. App’x 803, 806-07 (11th Cir. 2012) (same).

so is unnecessary. The jury was instructed as to the law and it had the context it needed to rule in Kelley's favor under the unique circumstances of her case. Neither case law nor evidence compelled the court to hold otherwise as a matter of law.

II. The district court erred in setting aside the jury's verdict holding La Scala liable for the hostile work environments.

The district court erred in setting aside the jury's verdict holding La Scala liable for both hostile work environments. Because Gates and Nick Littlejohn were Kelley's coworkers, a negligence standard applies. *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013) ("If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions"). As the district court instructed the jury, an employer is liable for the hostile work environment where the plaintiff shows that a supervisor "knew or should have known of the hostile work environment" and "did not take prompt remedial action to eliminate" that environment. R.92-517; *see also Miller*, 277 F.3d at 1278 (similar). The district court erred in its analysis under this negligence standard.

A. The jury reasonably could have found that the restaurant failed in its duty to take remedial measures long before Gates’s unrelated departure.

The district court was wrong to hold that Gates’s unrelated departure from La Scala relieved the restaurant of liability as a matter of law. *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999) (“Just as an employer may escape liability even if harassment recurs despite its best efforts, so it can also be liable if the harassment fortuitously stops, but a jury deems its response to have fallen below the level of due care.”). In fact, the jury heard evidence that, for months, managers at La Scala knew about Gates harassing Kelley but took no meaningful action to address it.

Logan Littlejohn witnessed Gates’s inappropriate comments to Kelley firsthand. R.89-153, 201. Those comments did not prompt any investigation in response. Kelley reported Gates’s inappropriate messages “immediately” after they occurred around late September 2021, R.89-158, but Logan Littlejohn simply told Gates that Kelley was a liar, so it was best not to contact her. R.91-276-77, 301. She likewise reported the grabbing incident immediately after it occurred in late September or early October 2021, R.89-158-59, and Littlejohn again did nothing. And on October 5, 2021, after Carpenter received a text from Kelley telling him she was

“hiding in the back,” he merely directed Kelley where to hide from Gates before Carpenter arrived; he did not discipline Gates or take measures to separate him from Kelley. Pl.Exh.3; R.89-228-29.

In late November, when Kelley reached out to Barba because the harassment continued despite earlier complaints, Barba told Kelley to watch what she was wearing. R.89-172, 195, 207. The district court indicated that La Scala fired Gates ten days later, R.78-21, but in fact, Gates did not leave until January 2022, over a month after Kelley’s escalation to Barba. R.89-159. And even at that point, it is unclear whether La Scala fired him for poor attendance or retained him as long as possible because they “could not afford to lose him right now.” *Id.* The jury could reasonably have credited Kelley’s evidence that La Scala took no action against Gates “let alone that which would rise to the level of appropriate and immediate.” *Miller*, 277 F.3d at 1280.

This inaction is, perhaps, unsurprising: La Scala offered no evidence at trial that it had an adequate anti-harassment policy or complaint procedure – a fact the district court never mentioned. Barba testified that he had “an open-door policy,” but did not provide “formal” harassment training to his managers – although they were supposed to do an

investigation and bring it to his attention “if they deemed it appropriate.”

R.91-392-93, 421.

The district court noted that Barba may have been in the hospital when the problems with Gates reached their apogee, R.78-5, 20, but the court never considered whether managers’ apparent inability to take remedial measures during this period reflected a flaw in La Scala’s anti-harassment mechanisms. The absence of an adequate anti-harassment policy, complaint procedure, and training program to ensure employees understand their rights and responsibilities is important in a negligence inquiry. *Miller*, 277 F.3d at 1279-80 (anti-harassment policy was not effective where it was not thoroughly disseminated or posted in the workplace, managers were not familiar with it, it was not in the complainant’s personnel file, and the employer’s actual practice indicated a tolerance of harassment or discrimination). The employer’s “combined knowledge and inaction may be seen as demonstrable negligence, or as the employer’s adoption of the offending conduct and its results, quite as if they had been authorized affirmatively as the employer’s policy.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 789 (1998); *Vance*, 570 U.S. at 446 (“[A]n

employer will always be liable when its negligence leads to the creation or continuation of a hostile work environment.”).

B. The district court erred in ruling that Kelley’s decision to quit precluded the restaurant’s liability for Littlejohn’s conduct.

The district court wrongly held that La Scala bore no liability for Nick Littlejohn’s conduct because Kelley quit before allowing “anyone at La Scala, including Mr. Barba” to “investigate her complaint or take remedial action regarding the [December 15] incident.” R.78-22. Where it would be futile for an employee to stay in the job, she need not continue to work there and suffer further for liability to accrue. Here, Kelley stayed long enough to understand that staying in the hopes of remedial action would be futile. Hours after Nick Littlejohn’s attempt to kiss her and give her an unwanted back rub while she slept, Kelley reported his conduct to Greenway, who took no remedial action. Instead, she told Kelley to quit, advising that Barba would not believe her and “there wasn’t going to be anything done about it.” R.89-185. Furthermore, Kelley knew that Nick Littlejohn was Logan Littlejohn’s cousin and was about to become her boss. R.89-192. And her complaints about Gates had already gone completely unaddressed. Therefore, the jury could reasonably have concluded that her

decision to quit was reasonable and did not cut off La Scala's liability. Cf. *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 437 (5th Cir. 2005) ("If ... 'it becomes objectively obvious that the employer has no real intention of stopping the harassment, the harassed employee is not obligated to go through the wasted motion of reporting the harassment.'") (quoting *Woods v. Delta Beverage Grp.*, 274 F.3d. 295, 300-01 (11th Cir. 2001)); *Frederick v. Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1316 (11th Cir. 2001) (factual issue on the employer's liability existed where supervisor dissuaded her from filing a complaint).

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's judgment and reinstate the jury verdicts.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,481 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

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CERTIFICATE OF SERVICE

I certify that on May 27, 2026, I electronically filed the foregoing brief in PDF format with the Clerk of Court via the appellate CM/ECF system. I certify that all counsel of record are registered CM/ECF users, and service will be accomplished via the appellate CM/ECF system.

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