

11th CIRCUIT DOCKET NO.: 04-11842-H

IN THE 11TH CIRCUIT COURT OF APPEAL

WORLDWIDE FLIGHT SERVICES, INC.,

Appellant,

v.

TURRIE WEBB,

Appellee.

ON APPEAL FROM THE SOUTHERN DISTRICT OF FLORIDA

ANSWER BRIEF OF TURRIE WEBB

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CERTIFICATE OF INTERESTED PERSONS

Worldwide Flight Services, Inc. v. Turrie Webb, 11th Cir. Case No.: 04-11842-H

1. Hon. Cecilia M. Altonaga, United State District Judge
2. Magistrate Judge Ted E. Bandstra
3. Magistrate Judge Barry L. Garber
4. Hon. Donald L. Graham, United States District Judge
5. Hon. Paul C. Huck, United States District Judge, Trial Judge
6. Debra M. Lubkin of Akerman Senterfitt, counsel for Appellant,
Worldwide Flight Services, Inc.
7. Harold E. Morlan, II of Akerman Senterfitt, counsel for Appellant,
Worldwide Flight Services, Inc.
8. Neil Rose, Esq. and Neil Rose, P.A., appellate counsel
for appellee, Turrie Webb
9. Turrie Webb, plaintiff/appellee
10. Worldwide Flight Services, Inc., defendant/appellant
11. J. H. Zidell, Esq. and J. H. Zidell, P.A., trial counsel for
appellee, Turrie Webb

By: _____
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STATEMENT REGARDING ORAL ARGUMENT

Appellee, Turrie Webb, does not request oral argument in this appeal. The primary issue in this appeal concerns whether the trial court properly had jurisdiction of the claim. Here the employee cured the defect of a prematurely filed Florida Civil Rights Action against his employer by subsequently obtaining a right-to-sue letter from the Florida Commission on Human Relations prior to the filing of a timely action. In light of the comprehensive briefing by the parties on this issue and others, oral argument is not essential for the court.

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Concise Statement of the Basis of This Court's Jurisdiction

This court has jurisdiction of this appeal under 28 U.S.C. sec. 1291. This is an appeal from a final order of the district court, which had diversity jurisdiction.

STATEMENT OF THE ISSUES

1. Whether the trial court properly had jurisdiction of the claim where an employee cured the defect of a prematurely filed Florida Civil Rights Action against his employer by subsequently obtaining a right-to-sue letter from the Florida Commission on Human Relations prior to the filing of a timely action?

2. Whether the trial court properly denied judgment as a matter of law and submitted the claim to the jury where the evidence supported the claim for hostile work environment?

3. Whether the trial court properly denied Worldwide's motion for judgment as a matter of law on the claim for hostile work environment and submitted the claim to the jury where the evidence supported a rejection of Worldwide's affirmative defense on the claim?

4. Whether the trial court properly submitted the punitive damage claim to the jury?

5. Whether the punitive damage award was unconstitutional and violated Worldwide's due process rights?

6. Whether the compensatory damage award was excessive or was it supported by the evidence and the controlling case law?

7. Whether there was harmful error regarding evidence concerning a paper trail and work assignments regarding Webb?

8. Whether there were pernicious occurrences at trial which substantially prejudiced Worldwide?

INTRODUCTION

The appellant, Worldwide Flight Services, Inc., was the defendant below. The appellee, Turrie Webb, was the plaintiff below. Webb will be referred to by name. Worldwide Flight Services, Inc. will be referred to as AWorldwide@. The symbol [R__-__-__] will designate the volume, document number, and page number of documents contained in the record on appeal.

STATEMENT OF THE CASE

Turrie Webb filed a state court complaint against his employer Worldwide for race discrimination under the Florida Civil Rights Act. After removal based on diversity jurisdiction, Worldwide filed its answer and affirmative defense. R1-6. The trial court denied defendant's motion for summary judgment as to the hostile work environment claim and granted it as to the disparate treatment claim. R2-76. Worldwide moved to dismiss for lack of subject matter jurisdiction because the claim was initially filed prematurely. R2-75. This motion was granted on June 6, 2003. R3-85.

After procuring a July 3, 2003 right-to-sue letter from the Florida Commission on Human Relations (FCHR), Webb sought to re-file the complaint on July 8, 2003. R3-100. This letter recognized that more than 180 days had elapsed since Webb's complaint was filed. Therefore, according to the FCHR letter, pursuant to the authority of *Woodham v. Blue Cross & Blue Shield of Florida*, 829 So.2d 891 (Fla. 2002), the case is dismissed [by the FCHR] and Complainant may pursue this claim . . . in civil court within 1 year from the date of this dismissal provided such time period is not more than 4 years from the date the alleged violation occurred. Based on the FCHR right-to-sue letter, the trial court allowed Webb to re-file an amended complaint, and the case was reopened. R3-109; R3-112. The trial judge noted that the correspondence from the FCHR recognizes Plaintiff's compliance with Section

760.11(8) of the Florida Statutes, and that Plaintiff may proceed with his claim in civil court.@ R3-109-2. This order specifically rejected defendant's reliance on *Sweeney v. Florida Power and Light Co.*, 725 So.2d 380 (Fla. 3d DCA 1998) and other arguments regarding lack of jurisdiction. R3-109. The judge denied Worldwide's motion to reconsider this issue. R3-117. Worldwide's motion to dismiss the amended complaint for lack of jurisdiction was also denied. R3-124. Worldwide filed its answer and affirmative defense to the amended complaint. R4-127.

The case was tried by jury before Judge Paul C. Huck. R4-156; R4-161. The jury found in favor of Webb and awarded him \$300,000 in compensatory damages and \$100,000 for punitive damages. R4-163. The trial entered final judgment in favor of Webb consistent with these findings. R4-167. Worldwide appealed the judgment. R4-169. Worldwide filed three post trial motions: motion for new trial; renewed motion for judgment as a matter of law; and motion for remittitur of damages. R4-171; 172; 174. Webb responded to the motions. R4-194; 195; 196. The trial court denied the motion for judgment as a matter of law and the motion for new trial and granted in part the motion for remittitur of compensatory damages, reducing that amount to \$100,000. R5-207. Webb accepted the remittitur of compensatory damages to \$100,000. R5-208. The trial court entered an amended final judgment for Webb for \$100,000 in compensatory damages and \$100,000 in punitive damages. R5-209. Worldwide filed an amended notice of appeal as to the amended final judgment. R5-

213. The court entered an second amended final judgment to clarify that Webb's motion for attorney's fees and costs was still pending. R5-215.

STATEMENT OF THE FACTS

Turrie Webb brought this action under the Florida Civil Rights Act. The claim concerned the actions of Arthur Ambruster, the General Manager of the defendant Worldwide. Ambruster was the highest ranking Worldwide employee in Miami and was in charge of 860 employees. R7-199-97-98; R8-200-71-72]. Seven branch managers reported to him. R7-199-100. Worldwide employs 12 thousand people in the world; 7 thousand in the United States. R8-200-36.

Hostile Work Environment

Webb started working for Worldwide in October 2000 as a ramp agent, placing luggage on flights. R7-199-176. Webb had personal contact with Ambruster every day in 2000-2003. R7-199-176. During a two year period of time, **every day** Ambruster consistently called Webb face-to-face a nigger, monkey, and Afrom the tribe.@ R7-199- 177-179. One time Ambruster called Webb a nigger and told him to Aget your black ass back on that flight.@ R7-199-179. Because he could not take it anymore, Webb told Ambruster: ADon't F-ing curse at me. I am mad.@ R7-199- 179. Ambruster replied: AI can say what the fuck I want to say.@ R7-199-179.

Impact of Hostile Work Environment upon Webb

When Ambruster called Webb these derogatory names everyday, Webb felt stressed, out of place, and he did not feel like working, but he had to work

to feed his family. R7-199-180. He felt humiliated and depressed; it interfered with his work performance, and he could not work steadily, knowing he was getting abused at work. R7-199-180-181. He could not take it anymore, and he often skipped work because of the abuse, but he had to limit his absences. R7-199-180-181. At times, Webb could not eat right; he did not want to go anywhere and was Amessed up.@ R7-199-182. He needed psychiatric help, but did not have the money to see seek it (and did not have health insurance benefits). R7-199-182, 192. Even now, he is still frustrated by what happened. He can't take being picked on or Adowngraded,@ and it makes him very angry. R7-199-182.

Webb's Claims about Ambruster Supported by Co-workers

The evidence that Ambruster consistently called Webb derogatory names such as nigger, monkey, and Afrom the tribe@ during a period of years was supported by testimony of Webb's co-workers, including Robert Jackson, Alfred Gaitor, and Larry Williams, Marcy Daniel and Carlos Garcia. R7-199-146-149; 156-158; 29-30; 46-47; 58; 66; 75-76. According to Gaitor, Ambruster called Webb these names all the time; it happened too many times for Gaitor to count. R7-199-157. Consistent with Webb's testimony, Williams also testified that it occurred on a daily basis. R7-199-30; 46-47; 61.

Webb Complains to His Supervisor about Ambruster's Behavior

Webb reported complaints about Ambruster to his supervisor, Eileen Motte (the ramp cabin and baggage room manager). R7-199-179, 183, 127. This was an appropriate method for Webb to raise the problems with Worldwide. R8-200-123. Webb repeatedly complained to Motte, but things did not improve during the two year period of time. R7-199-183.

On cross examination, Webb explained that if he made any contradictory statements in his deposition regarding Ambruster's references or name calling, it was because Webb thought that the questions concerned only name calling on the radio, or he was otherwise mistaken in the deposition. R7-199-194-198. At trial he clarified that he did personally hear Ambruster call him by the terms *Anigger*, *monkey* or *tribe*.@ R7-1999-198-200.

Webb's Claims about Ambruster Confirmed by Webb's Supervisor

Webb's supervisor, Eileen Motte, confirmed Ambruster's severe verbal harassment and derogatory name calling of Webb. R7-199-126. Ambruster *never* referred to Webb by name, instead always referring to him as *nigger*, *monkey*, or *tribes*. R7-199-126-127. Ambruster spoke this way to Webb constantly, on a daily basis, for at least a period of two years. R7-199-126-127; 129. Motte explained that Webb was very upset and very depressed about the name calling, and it affected his job performance. R7-199-127-128.

Ambruster's Conduct toward Webb Reported to Worldwide's

Headquarters

Motte promised Webb she would take care of the situation, and she did report it to the Human Resources Department at Worldwide Headquarters in Dallas by telephone and in writing. R7-199-179, 130, 143.

Worldwide's Preliminary Investigation into Ambruster's Actions

As part of Worldwide's preliminary investigation, two persons, Michelle Smith and Alvin Brown, came to Miami from Worldwide headquarters and interviewed Motte, who explained the details regarding Ambruster's treatment of Webb. R7-199-130, 143. Alvin Brown is a Human Resources Manager at Worldwide in Dallas. R8-200-67-68. He conceded that Motte told him about Ambruster's references to African Americans as niggers and monkeys, and he said that he would report it to David Cunningham, director of employee relations. R8-200-21; 70-71. Smith and Brown assured Motte that they would speak to Ambruster and do something about the problem. R7-199-130.

Marcy Daniel, a ramp crew and cabin service supervisor, informed Worldwide that Ambruster was calling Webb a monkey on the radio. R7-199-67. Michelle Smith, who performed the preliminary investigation, is the manager of Worldwide's HR department. R8-200-55. She conceded that

Daniel told her that Ambruster referred to certain groups of employees as monkeys and niggers. R8-200-56-57.

Worldwide's Formal Investigation into Ambruster's Actions

In July 2001, shortly after the preliminary investigation by Michelle Smith and Alvin Brown of Worldwide, Worldwide performed a formal investigation into Ambruster's actions by Wayne Eichel and Isaac Yeffet. R7-199-143; R8-200-12-12; 22. Motte specifically told these investigators that Ambruster extensively used improper, hurtful, racial slurs and epithets regarding Webb. R7-199-144. Webb participated in the formal investigation of Ambruster's racial abuse of Webb. R7-199-184; 186-187. Webb told the investigators all the details of Ambruster's improper behavior. R7-199-187.

Like Motte, Gaitor also told the Worldwide investigators that Ambruster regularly called Webb nigger, monkey, and Afrom the tribe.® R7-199-158. In the formal investigation, Daniel informed Worldwide that Ambruster referred to Webb as a monkey and Afrom the tribe.® R7-199-68. Carlos Garcia also told the Worldwide investigators that Ambruster used Anigger or monkey® to refer to Webb. R7-199-77-78.

Worldwide claims that it did a thorough investigation, with 20 or more interviews, including that of Eileen Motte. R8-200-15-16. Inexplicably using the Abeyond a reasonable doubt standard,® Worldwide claims it was not able to substantiate the allegations against Ambruster. R8-200-29-31.

Ambruster's Continuing Harassment of Webb After Worldwide's

Investigation

During the investigation, Worldwide promised Webb that it would remedy the situation, but it did not do so. R7-199-184. Worldwide never even contacted Webb to inform him of the results of the investigation, or if it took any action against Ambruster. R7-199-188. Despite the investigators' promise, the situation became worse. R7-199-158-159; 184; 188. Ambruster retaliated against Webb to an even greater degree after the investigation, assigning him to harder flights. R7-199-184; 188. Ambruster regularly placed Webb on larger flights requiring extra work. R7-199-159-161. Webb could not take it anymore. R7-199-162.

Daniel also confirmed that the abuse continued after the investigation. R7-199- 69. Garcia stated that the Worldwide did resolve the Ambruster problem. R7-199-78. Ambruster's conduct did not improve after the investigation; Ambruster repeatedly referred to Webb as a nigger throughout the remainder of 2001 (after the investigation) and in 2002. R7-199-78-79; 89-90; 95.

After the investigation, Ambruster wanted to fire Webb and told Motte to make a paper trail[®] to cover his file. R7-199-133. This further depressed Webb and affected his work performance. R7-199-132. Ambruster also

altered Webb's assignments. R7-199-134. He made Webb work on heavy flights, which took much longer than normal to unload. R7-199-136. He even ordered Webb's Ablack ass@ to do a flight in the lightning, when the ramps would normally be closed. R7-199-135.

Worldwide's Knowledge of Ambruster's Continuing Harassment After Investigation

After Worldwide's investigation into Ambruster's misconduct, several months passed and Motte never heard anything, so she called Worldwide headquarters and **informed headquarters that the situation had become much worse and Ambruster's harassment of Webb had not stopped.** R7-199-130-131; 133. Defendant totally ignores this evidence when it claims that Worldwide was never informed after the investigation that Ambruster's harassment of Webb was continuing. Motte even asked headquarters why they did absolutely nothing to stop Ambruster from continuing to act improperly to Webb after the investigation, but they gave her no answer other than that they had discussed the situation with Ambruster. R7-199-137. Gaitor, like Motte, also called Worldwide headquarters in Dallas **after** the investigation because Ambruster's conduct was not changed as a result of Worldwide's investigation and action. R7-199-158; 162-163.

Ambruster Promoted After the Worldwide Investigation

Incredibly, after the investigation and after the reports of continued abuse by Ambruster, Worldwide promoted him to General Manager in November or December of 2001. R8-200-39.

Result of Worldwide-s Investigation

Interestingly, Ambruster testified that Worldwide-s investigation in the summer of 2001 did not involve the making of racial slurs by him! R7-199-111-113. Ambruster heard **nothing** from Worldwide for several months after the investigation, until **he** raised the issue. R7-199-114. Worldwide told him that the allegations were contradictory or unsubstantiated. R7-199-110-111. He was not warned, disciplined, or reprimanded at all. R7-199-114-115; 112; R8-200-45. Ambruster resigned - on good terms - from Worldwide in July 2003 to get a better job. R7-199-64, 112. Worldwide never asked him to resign and did not fire him. R8-200-45. Notably, Worldwide admitted that after the investigation it took no action against Ambruster other than counseling him. R8-200-32-34.

Worldwide-s Policy Regarding Racial Harassment

Worldwide-s policy is that the use of racial epithets in the workplace is not acceptable. R8-200-31. The employee handbook states that discrimination and harassment are not tolerated and that Worldwide enforces the policy. R8-200-119. If the allegations against Ambruster had been proven beyond a reasonable doubt, Worldwide claims that the general manager would have been fired. R8-200-32. Worldwide conceded that if Ambruster had referred to African Americans as niggers or monkeys, it would be considered a

hostile work environment. R8-200- 34. It was appropriate for Webb to raise the problems he had with Ambruster to his Webb-s supervisor, Eileen Motte. R8-200-123.

In support of the punitive damage claim, plaintiff introduced brief evidence that Worldwide-s revenues for 2002 were \$350,000,000. R8-200-159.

SUMMARY OF ARGUMENT

The district court properly determined that it had jurisdiction of this claim. Although Webb's initial lawsuit against his employer under the Florida Civil Rights Act was premature, Webb cured the prematurity by obtaining a right-to-sue letter from the Florida Commission on Human Relations prior to the filing of a timely action. Especially when the court gives a liberal construction to the Florida Civil Rights Act and gives deference to the agency's interpretation, this court must conclude that the trial court had jurisdiction.

Next, the evidence fully supported the claim for hostile work environment. Moreover, the evidence supported a rejection of Worldwide's affirmative defense to this claim. The trial court thus correctly denied judgment as a matter of law and submitted Webb's claim to the jury.

The trial court properly submitted the punitive damage claim to the jury. The evidence supported the conclusion that Worldwide acted with reckless indifference to Webb's rights. In addition, the jury instructions and verdict form regarding punitive damages correctly reflected the law. Worldwide also failed to properly preserve this issue. The punitive damage award was not unconstitutional and did not violate Worldwide's due process rights.

Further, the compensatory damage award was not excessive and was supported by the evidence and the controlling case law. There was no harmful

error regarding evidence concerning a paper trail and work assignments regarding Webb. Finally, there were no pernicious occurrences at trial which substantially prejudiced Worldwide. The case must be affirmed.

RESPONSE TO ARGUMENT I

WHERE AN EMPLOYEE CURED THE DEFECT OF A PREMATURELY FILED FLORIDA CIVIL RIGHTS ACTION AGAINST HIS EMPLOYER BY SUBSEQUENTLY OBTAINING A RIGHT-TO-SUE LETTER FROM THE FLORIDA COMMISSION ON HUMAN RELATIONS PRIOR TO THE FILING OF A TIMELY ACTION, THE TRIAL COURT PROPERLY HAD JURISDICTION OF THE CLAIM.

Standard of Review

A statutory interpretation is a question of law subject to *de novo* review.[@] *Bellsouth Telecommunications, Inc. v. Meeks*, 863 So.2d 287, 289 (Fla. 2003); *State v. Glatzmayer*, 789 So.2d 297, 301 n. 7 (Fla. 2001).

Argument

Webb's original action under the Florida Civil Rights Act was dismissed for lack of subject matter jurisdiction based on premature filing. Following the dismissal, Webb requested and received a notice of dismissal and right-to-sue letter from the FCHR dated July 3, 2003. Webb was allowed to re-file the complaint based on the right-to-sue letter.

Judge Altonaga's December 9, 2003 order reopening the case eloquently supports the decision below:

On June 6, 2003, this action was dismissed for lack of subject matter jurisdiction as a result of Plaintiff's premature filing of this suit. Specifically, the Court found that the complaint was filed 170 days after Plaintiff had presented his charge of discrimination with the Florida

Commission on Human Relations (AFCHR®), ten days short of the time period required by Section 760.11(8) of the Florida Statutes.

After the Court dismissed his action, Plaintiff returned to the FCHR and obtained a right to sue letter. Plaintiff now seeks to re-file the complaint based on the right to sue letter. That letter . . . states that the requisite 180 days have passed since the discrimination charge was dual-filed with the EEOC. Thus, the correspondence from the FCHR recognizes Plaintiff's compliance with Section 760.11(8) of the Florida Statutes, and that Plaintiff may proceed with his claim in civil court.

Nevertheless, Defendant maintains that the FCHR letter should be disregarded as a procedural nullity and as contrary to law. In support of this argument, Defendant cites to *Sweeney v. Florida Power and Light Co.*, 725 So.2d 380, 381 (Fla. 3d DCA 1998). This Court relied on *Sweeney* in its determination that a prematurely filed action under the Florida Civil Rights Act (AFCRA®) mandates dismissal. However, in its reliance, the Court did not extend the holding of *Sweeney* to preclude Plaintiff from curing the defect of his improperly filed Complaint. Indeed, the plaintiff in *Sweeney* did not attempt to re-file his complaint after its dismissal, and so this issue was not considered.

Defendant also relies on *dictum* in *Sweeney* wherein the Court stated that the very act of filing the complaint served to divest the commission of jurisdiction to proceed.® *Sweeney*, 725 So.2d at 381. Contrary to Defendant's position, however, *Sweeney* does not hold that a premature lawsuit requires the Plaintiff to restart the administrative process by re-filing his charge of discrimination with the FCHR and then waiting another 180 days before bringing suit. In another case procedurally similar to the present action, U.S. District Judge Adalberto Jordan has opined that the language in Fla. Stat. Sec. 760.11(5) may be interpreted to mean that the FCHR is divested of jurisdiction only when a proper civil action is filed. See *Gaitor v. Worldwide Flight Servs. Inc.*, Case No. 02-21758-CIV-JORDAN (August 14, 2003). The undersigned agrees.

Defendant also maintains that the issue of whether a plaintiff may re-file a complaint was addressed in *Dixon v. Sprint-Florida, Inc.*, 787 So.2d 968 (Fla. 5th 2001). As in this case, the plaintiff in *Dixon* filed her suit prior to the lapse of 180 days. *Dixon*, 787 So.2d at 969. Faced with a

motion for summary judgment due to premature filing, the plaintiff voluntarily dismissed her claim. *Id.* The plaintiff then chose to restart the administrative process by refileing her complaint with the FCHR. *Id.* As a result, the Dixon court found that plaintiff had not circumvented the statutory framework because she had allowed the FCHR the full 180 day time period to review her complaint. *Id.* at 971 (distinguishing *Sweeney; Ayers v. Wal-Mart Stores, Inc.*, 941 F.Supp. 1163 (M.D. Fla. 1996); and *Brewer v. Clerk of Cir. Ct., Gadsden County*, 720 So.2d 602 (Fla. 1st DCA 1998).

Properly interpreted, *Dixon* does not hold that a plaintiff is required to ~~restart~~ the administrative process. Rather, the *Dixon* court found that by doing so, the plaintiff there was allowed to properly file a second lawsuit. A key factual distinction between the present case and *Dixon* is that in *Dixon*, the FCHR had notified the plaintiff that it had dismissed her first administrative complaint because it was deemed withdrawn by her filing in circuit court. *Id.* At 969 n.6. As a result, the *Dixon* plaintiff did have to renew her administrative claim. No such notification of dismissal from the FCHR was given to Plaintiff, Turrie Webb.

Defendant has not presented any authority that compels this Court to ignore the FCHR right to sue letter attached to Plaintiff=s Motion. As the FCHR is the agency charged with enforcing the FCRA, the FCHR finding that the requisite time has passed is entitled to deference by this Court. . . . Allowing Plaintiff to re-file his Complaint is consistent not only with the agency=s handling of Plaintiff=s claim, but also with a liberal construction of Section 760.11(5), Fla. Stat., which is mandated by the Florida Supreme Court. See *Woodham v. Blue Cross and Blue Shield of Florida, Inc.*, 829 So.2d 891 (Fla. 2002).

Judge Jordan=s December 19, 2003 order allowing Alfred Gaitor to re-file his complaint in the sister case of Alfred Gaitor v. Worldwide Flight Services, Inc. provides additional rationale to support the trial court=s finding of jurisdiction:

In the prior order, I held that the Florida Commission on Human Relations (AFCHR®) had either retained or regained jurisdiction to complete its consideration over Mr. Gaitor=s complaint after the July 17,

2003, dismissal of the civil action [D.E. 86 at 2]. I still believe this is the case. The FCRA is silent as to what happens when a complainant prematurely files a civil action prior to the determination of reasonable cause. . . . Given this silence, the lack of any case authority to the contrary, and in light of the Florida Supreme Court's instruction to construe sec. 760 liberally, I hold that nothing prohibited the FCHR from completing its determination as to Mr. Gaitor's complaint for the remainder of the time required by the statute.

This is precisely what the FCHR did in this case, which provides further support for my ruling. Once I dismissed his complaint without prejudice, Mr. Gaitor went back to pursue his remedies with the FCHR. At that point, the agency certainly had the ability to require Mr. Gaitor to start the entire process over, by filing a second complaint before the commission. The agency, however, did not require a new complaint. Instead, it resumed its consideration of Mr. Gaitor's original complaint and, after the remaining 10 days had passed, issued a right to sue notice to Mr. Gaitor. *See Donato v. American Telephone and Telegraph Co.*, 767 So.2d 1146, 1153 (Fla. 2000) (AWe recognize the general rule that the interpretation of a statute by the administrative agency or body charged with its enforcement is entitled to great deference and should not be overturned unless clearly erroneous or in conflict with legislative intent of the statute®) (internal quotation and citation omitted); *accord BellSouth Telecommunications, Inc. v. Johnson*, 708 So.2d 594, 596 (Fla. 1988). In light of the silence of the statute on this question, I find that it was not clear error for the FCHR to interpret sec. 760.11 as returning jurisdiction to the agency to complete its consideration of a complaint dismissed for premature filing. . . .

The cases cited by Worldwide in its motion, i.e., *Brice-Northard v. The Sports Authority*, 1998 U.S. Dist. LEXIS 20408 (M.D. Fla. 1998) and *Ayers v. Wal-Mart Stores*, 941 F. Supp. 1163 (M.D. Fla. 1996), do not convince me otherwise. The courts in those cases rejected the plaintiff's attempts to cure a filing deficiency by amending the complaint in the *same action*, under the rationale that the problem was the plaintiff's failure to complete the administrative process, not just the passage of time. *Ayers*, 941 F.Supp. at 1167 (AThe Court will not allow Ayers, by halting her investigation and filing suit before the 180 days expired to circumvent the carefully-crafted procedural requirements set forth under

the FCRA.®); accord *Brice-Northard*, 1998 U.S. Dist. LEXIS 20408 at 8. The present situation is factually and legally distinct from *Brice-Northard* and *Ayers*, in that Mr. Gaitor refiled his civil action having met the FCRA procedural prerequisites. See *Dixon v. Sprint-Florida, Inc.*, 787 So.2d 968, 970 (5th DCA Fla. 2001) (distinguishing *Sweeney* and *Ayers* because A[a]lthough each of these cases involve situations where an employee prematurely filed a lawsuit before the expiration of the statutory 180 day time period, none of the cases involves a situation where the employee was able to cure the error by later complying with the Act's time requirements prior to filing a subsequent and timely lawsuit.®). By going back to the FCHR after the dismissal, Mr. Gaitor gave the agency the opportunity to complete its determination. By waiting to refile his suit until after the agency made its decision, moreover, he eliminated the threat that he was trying to circumvent the agency's procedures or avoid dismissal of his complaint. Cf. *Id.* at 971 (plaintiff who filed a second timely complaint, waited 180 days, and then filed a second lawsuit did not circumvent the procedures of the FCRA or prevent the possibility of the FCHR dismissing her complaint).

Judge Jordan thus found that Gaitor completed the necessary steps to cure the defects of his complaint and properly maintain this action. **Three** different federal judges¹ have all fully supported this precise determination after comprehensive analysis under

¹ In our case Southern District Judges Cecilia M. Altonaga and Paul C. Huck (who tried the case) repeatedly entered orders strongly supporting Webb's position on jurisdiction. In the sister Gaitor case, Southern District Judges Adalberto Jordan and Paul C. Huck (who tried the case) also consistently found jurisdiction.

the same facts in the instant case and in the sister case of *Alfred Gaitor* (presently on appeal before this court in Case 04-12270-C).

Worldwide's reliance on *Sweeney v. Florida Power & Light Co.*, 725 So.2d 380 (Fla. 3d DCA 1998) is misplaced. Worldwide contends that Gaitor's claim should be permanently barred because he failed to wait 180 days before the *initial* premature filing of the complaint against Worldwide Flight. However, *Sweeney* never held that a claimant could not cure the defect of a prematurely filed complaint. In fact, the

plaintiff in *Sweeney* did not attempt to re-file his complaint after its dismissal, and the court never reached that issue.²

² The court's conclusion that Sweeney could not cure the defect - and Sweeney's lack of attempt to re-file his complaint after its dismissal - may be explained by the perceived statute of limitations at the time of that decision. Until the Supreme Court's decision two years later in *Joshua v. City of Gainesville*, 768 So.2d 432 (2000), Sweeney, and for that matter the court, may have acted under the impression that a one year statute of limitations barred Sweeney from ever curing the defect. It was not until *Joshua* when the Supreme Court held that the general four-year statute of limitations for statutory violation, section 95.11(3)(f), Florida Statutes (1995), applies to actions filed pursuant to chapter 760, Florida Statutes, if the Commission on Human Relations does not make a reasonable cause determination on a complaint within the 180 days contemplated by section 760.11(8), Florida Statutes (1995).[@] The Supreme Court thus rejected the position that a

claimant had a year and a half from the filing of a complaint with the Commission to bring a civil action (180 days for the Commission to fail to make a decision plus one year from that time).

Since more than two years had passed from the time Sweeney filed his claim until the appellate decision, limitations had passed and Sweeney could not correct the defect. Webb, on the other hand, *could and did* cure the defect. The legal effect of *such* events was not considered or reached in *Sweeney*.

In *Sweeney*, the plaintiff's discrimination claim was precluded because it had been prematurely filed before the expiration of the 180 day period provided by section 760.11(3), (8), Florida Statutes for the determination of the merits of the complaint by the Florida Commission on Human Relations.® *Id.* at 380. The court explained that under section 760.11(4)(a), an aggrieved person may not bring a civil action unless either the commission has made an affirmative determination of a reasonable cause to believe that a discriminatory practice ha[s] occurred,® or under section 760.11(8), the commission has failed to act on the complaint for 180 days. *Id.* at 381. *Sweeney* determined that in this instance (emphasis supplied), the complaint prevented the existence of either condition precedent to and thus the very accrual of the cause of action the plaintiff sought to assert. The filing of the complaint before the 180 days rendered it burdened by far more than a >[m]ere prematurity, which [was] . . . curable simply by the passage of time.® [emphasis in original]. *Id.* at 381. According to *Sweeney*, dismissal was therefore required.

Sweeney, however, is significantly distinguished from our case. Webb does not claim the defect of the premature filing was curable *asimply* by the passage of time.® Unlike *Sweeney*, Webb *actually cured the defect* of the premature filing by obtaining the right-to-sue letter from the FCHR before filing this action within the statute of limitations. Thus, in our case the defect was curable *and* cured by Webb.

The facts of our case are more like those encountered by the Fifth District Court of Appeal in *Dixon v. Sprint-Florida, Inc.*, 787 So.2d 968 (Fla. 5th DCA 2001). In *Dixon*, the Fifth District carefully considered the *Sweeney* decision, as well as the decisions in such cases as *Ayers v. Wal-Mart Stores, Inc.*, 941 F.Supp. 1163 (M.D. Fla. 1996), and *Brewer v. Clerk of Cir. Ct., Gadsen County*, 720 So.2d 602 (Fla. 1st DCA 1998). *Dixon* explained: “Although each of these cases involve situations where an employee prematurely filed a lawsuit before the expiration of the statutory 180 day time period, none of the cases involves a situation where the employee was able to cure the error by later complying with the Act’s time requirements prior to filing a subsequent and timely lawsuit.” *Id.* at 970.

Dixon noted that unlike in *Sweeney*, the premature filing of Dixon’s first lawsuit and the subsequent dismissal thereof did not make it impossible for FCHR to have 180 days to consider the administrative complaint because Dixon filed a second administrative complaint within the applicable 365 day time period and then allowed FCHR more than 180 days to issue a reasonable cause determination before she filed her second lawsuit. Thus, the court ruled that “Dixon’s premature lawsuit did not prevent FCHR from performing its administrative duties nor prevent Dixon’s cause of action from accruing.” *Id.* at 971. The court similarly distinguished *Brewer* and *Ayers*, like *Sweeney*, because “the facts there involved a single prematurely filed lawsuit *with*

no subsequent compliance with the Act's time requirements prior to filing a timely lawsuit. @ *Id.* at 971. (emphasis added).

Florida Statute section 760.11(5) states in pertinent part: AA civil action brought under this section shall be commenced no later than 1 year after the date of determination of reasonable cause by the commission. The commencement of *such* action shall divest the commission of jurisdiction of the complaint, except that the commission may intervene in the civil action as a matter of right. @ (emphasis added). That language may be interpreted to mean that the FCHR is divested of jurisdiction only when a *proper* civil action is filed. R2-86.

In our case, Webb's original premature filing was not commenced after the date of the determination of reasonable cause by the commission or after the commission had 180 days to consider the claim. Therefore, the original premature filing was not Asuch an action@ that would divest the commission of jurisdiction of the complaint.

To conclude otherwise would be illogical. If the *original premature* filing meant that the court did not have jurisdiction to proceed with the claim, then the commission logically must have retained jurisdiction to correct the jurisdictional defect in the court by issuing a right to sue letter after the 180 days expired (which it did). Conversely, if a mature, timely claim were filed in

court, then the court would obviously have jurisdiction and the commission would not.

Worldwide Flight, of course, would like to have its cake and eat it too. Thus Worldwide Flight maintains the untenable position that the original premature filing failed to provide jurisdiction in the trial court and simultaneously divested the commission of jurisdiction to cure the prematurity defect. Such a position is completely illogical, as it would put Webb's claim in some sort of jurisdictional no-man's-land, from which escape is impossible. Some entity - either the commission or the court - *must* have had jurisdiction. Therefore, if the original premature filing prevented the court from maintaining jurisdiction, then the only logical conclusion must be that the commission was *not* divested of jurisdiction because there was no properly filed claim in court.

Liberal Construction of the Florida Civil Rights Act

Section 760.01(3) of the Florida Civil Rights Act requires that the Act be interpreted according to the fair import of its terms and *liberally construed* to further the general purposes of the Act. This policy was recognized by the court in *Dixon. Id.* at 971. As the Supreme Court has stated in *Joshua v. City of Gainesville*, 768 So. 2d 432, 435 (Fla. 2000) and *Woodham v. Blue Cross and Blue Shield of Florida, Inc.*, 829 So.2d 891, 897 (Fla. 2002): We are guided by the Legislature's stated purpose for enacting this chapter and its directive that the Act be liberally construed in reaching our

decision.[@] The stated purpose of the FCRA is to secure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status.[@] See *Green v. Burger King Corp.*, 728 So.2d 369, 370-771 (Fla. 3d DCA 1999) (FCRA should be liberally interpreted as a remedial statute). See also *Kukral v. Merkas*, 679 So.2d 278 (Fla. 1996) (error to dismiss medical malpractice claim based on alleged failure to comply with the statutory presuit investigation requirements as long as compliance accomplished within limitations period).

The very purpose of the Act is to secure for Webb freedom from discrimination because of his race or color. Worldwide Flight's position essentially holds that once Webb inadvertently filed his original action ten days early, his action was fatally barred forever no matter what. This position would maintain that Webb's entire right to be secure from discrimination was precluded - even though Webb corrected the defect by timely refiling the action *after* obtaining the right-to-sue letter from the FCHR. In light of the expressed purpose of the Act, and in light of the liberal construction which must be given to the Act, this cannot be the law!

Court's Deference to Agency's Interpretation of Statutes

Courts generally defer to an agency's interpretation of the statutes it is charged with administering. *Wells Fargo Guard Services Inc. of Florida v. Lehman*, 799 So.2d

252 (Fla. 3rd DCA 2001). See also *McGhee v. Sterling Casino Lines, L.P.*, 833 So.2d 271, 275 (Fla. 5th DCA 2002) (deferring to EEOC finding that plaintiff's filing of discrimination charge was not defective). In our case, Webb returned to the FCHR and obtained a right-to-sue letter following the federal court dismissal. The correspondence from the FCHR recognized Webb's compliance with section 760.11(8) of the Florida Statutes and recognized that Webb may proceed with his claim in civil court.

Consistent with this court's decision in *Lehman*, this court should give deference to the FCHR's interpretation that the requisite time has passed under the Florida Civil Rights Act and find that jurisdiction proper here. See also *McGhee v. Sterling Casino Lines, L.P.*, 833 So.2d 271, 275 (Fla. 5th DCA 2002) (deferring to EEOC finding that plaintiff's filing of discrimination charge was not defective). Determining that Webb properly filed this action after obtaining the right to sue letter is consistent not only with the agency's handling of Webb's claim, but also with the required liberal construction of section 760.11(5).

RESPONSE TO ARGUMENT II

WHERE THE EVIDENCE SUPPORTED THE CLAIM FOR HOSTILE WORK ENVIRONMENT, THE TRIAL COURT PROPERLY DENIED JUDGMENT AS A MATTER OF LAW AND PROPERLY SUBMITTED THE CLAIM TO THE JURY.

Standard of Review

A district court's denial of a motion for judgment as a matter of law is reviewed de novo. *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002). All the evidence is reviewed in the light most favorable to, and with all reasonable inferences drawn in favor of, the non-moving party. A district court's denial will thus be upheld if reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. *Id.* at 1275.

Argument

The trial court properly submitted the claim for hostile work environment to the jury. A hostile work environment claim under Title VII is established upon proof that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993). The Eleventh Circuit has repeatedly instructed

that a plaintiff wishing to establish a hostile work environment claim show: (1) that he belongs to a protected group; (2) that he has been subject to unwelcome harassment; and (3) that the harassment must have been based on a protected characteristic of the employee, such as national origin; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment either a theory of vicarious or of direct liability.@ *Miller* at 1275.

When considering all the evidence presented at our trial, fair minded jurors could reasonably have concluded that Webb suffered severe and pervasive harassment sufficient to alter the terms or conditions of his employment. For a period of two years or more, Turrie Webb, an African American, was subjected to severe **daily** racial harassment, humiliation, and derogatory comments from Worldwide=s general manager, Arthur Ambruster. Every day at work, Ambruster, a superior to Webb, consistently called Webb to his face a nigger, a monkey, or Afron the tribe@. Webb objected to the harassment and complained to his direct supervisor, Eileen Motte, which Worldwide conceded was an appropriate method for him to raise the issue with the company. Webb=s claim was supported by testimony from a number of his co-workers, who confirmed the daily severe racial harassment and

humiliation by Ambruster. Webb's supervisor also confirmed the severe racially motivated actions of Ambruster. The hostile work environment created by Ambruster had strong negative impact upon Webb.³ Webb's supervisor also explained that Webb was very upset and very depressed about the name calling, and it affected his job performance.

In reviewing the elements required by the Eleventh Circuit in *Miller* to maintain a hostile work environment claim, it is undisputed that the first three elements are present: (1) As an African American, Webb belongs to a protected group; (2) he has been subject to unwelcome harassment; and (3) that the harassment was based on a protected characteristic of the employee (his race).

In addition, a reasonable jury could easily have determined the presence of the fourth element: that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment. As *Miller* explained, the Supreme Court defined the fourth element to contain[s] both an objective and a subjective component.[@] *Miller* at 1276. To be actionable, the behavior must result in an

³ Please review the Facts of the Case, especially those described in the section entitled *Impact of Hostile Work Environment upon Webb*,[@] *supra* at pages 4-5.

environment that a reasonable person would find hostile or abusive and an environment that the victim subjectively perceives . . . to be abusive. *Id.*

To evaluate the objective severity of the harassment, the court considers certain factors such as: (1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance. *Miller* at 1276. No single factor controls; rather, the court focuses on the totality of the circumstances approach. *Miller* at 1276. In our case, both of the objective and subjective component were easily met. To be sure, Ambruster's behavior resulted in an environment that a reasonable person would find hostile or abusive and that the victim subjectively perceived to be abusive.

There was substantial evidence to support the existence of a hostile work environment under the totality of the circumstances. First, in regard to the frequency of the conduct, the jury considered evidence that Worldwide's general manager called Webb (an African American) a nigger, a monkey, or from the tribe to his face **every day for more than two years (more than 700 days)**. It is inconceivable that such harassment not be considered sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment.

Certainly it was not unreasonable of the jury to find that it was so. As *Miller* noted, while there is no magic number for frequency, repeated incidents of verbal harassment that continue despite objection from the employee satisfy the test. *Miller* at 1276.

Next, Ambruster's conduct was sufficiently severe to create a discriminatorily abusive working environment. Short of physical violence, it is hard to imagine what would be more severe in a working environment than an African American being consistently called a nigger every day for more than 700 days. Over the course of two years, this conduct strongly impacted Webb.

Looking at the third factor, the conduct was utterly humiliating and distressing to Webb, as it would be to any man who has any dignity. The conduct in this case was hardly a mere offensive utterance. The conduct went to the core of a man's dignity, repeatedly for more than two years. And although there were not direct physical threats, Ambruster did cause Webb physical discomfort by purposefully reassigning him to heavy flights with insufficient assistance so that Webb was subject to increased physical labor because of his race. In one case, Ambruster caused Webb to risk life and limb by requiring him to load a plane during a lightning storm when such work was against company policy.

There was also evidence to support the presence of the fourth factor (whether the conduct unreasonably interferes with the employee's job performance). The evidence showed that Webb repeatedly complained to his supervisor about Ambruster's conduct. Webb's supervisor explained that Webb was very upset and very depressed about the name calling, and it affected his job performance.

All in all, when considering the totality of the circumstances, it is no surprise that the jury was able to find present the fourth element necessary to prove a hostile work environment (harassment sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment).

Finally, the fifth element of a hostile work environment is that the employer is responsible for such environment either a theory of vicarious or of direct liability. In *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) the supreme court held that an employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim.[@] Thus, unless Worldwide demonstrated its affirmative defense - *as a matter of law* - which it did not (as seen in the Response to Argument III), then Worldwide will be held

vicariously liable for Ambruster's conduct. The trial judge therefore properly denied the motion for judgment as a matter of law on the claim for hostile work environment and properly submitted the claim to the jury.

RESPONSE TO ARGUMENT III

WHERE THE EVIDENCE EASILY SUPPORTED A REJECTION OF WORLDWIDE-S AFFIRMATIVE DEFENSE ON THE CLAIM FOR HOSTILE WORK ENVIRONMENT, THE TRIAL COURT PROPERLY DENIED WORLDWIDE-S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE CLAIM AND PROPERLY SUBMITTED THE CLAIM TO THE JURY.

Standard of Review

(Same as in Response to Argument II)

Argument

In *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141

L.Ed.2d 662 (1998), the Supreme Court held:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defendant employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8[c]. **The defense comprises two necessary elements:** (a) that the employer exercised reasonable care to prevent and correct promptly any [racially] harassing behavior, **and** (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor-s harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Id. at 807-808. (Emphasis added).

Initially, there was no affirmative defense available for Worldwide because Ambruster's harassment culminated in a tangible employment action.

As part of the harassment, Ambruster altered the scheduled assignments of Webb and reassigned Webb to work heavier flights without assistance, requiring much extra work. Ambruster even ordered Webb to work a flight in the lightning, which was against company policy, thus callously placing Webb in risk of grave physical danger. These acts constitute undesirable reassignments by Ambruster. Because the supervisor's harassment culminated in tangible employment action, there simply was no affirmative defense available to Worldwide.

Even assuming that Worldwide was entitled to maintain an affirmative defense, the jury had more than reasonable evidence to reject **both** elements of the defense. And since the defense comprises **two** necessary elements,⁶ even if there was evidence to support the rejection of only **one** of the elements, then it was proper of the jury to reject the affirmative defense as a whole.

Let us examine the first element of the defense: that the employer exercised reasonable care to prevent and correct promptly any racially harassing behavior. As to this element, the jury could reasonably have found a failure of proof on the part of Worldwide. Of course, Worldwide highlights

the investigation(s) it made to show what reasonable care it took to prevent and promptly correct Ambruster's racially harassing behavior.⁴ However, that argument failed miserably with the jury - and for good reason.

Both investigations (the preliminary investigation by Michelle Smith and Alvin Brown and the formal investigation by Wayne Eichel and Isaac Yeffet) gave Worldwide direct knowledge of the severe racial abuse by Ambruster upon Webb. Brown, a Human Resources Manager at Worldwide headquarters, conceded that Eileen Motte told him about Ambruster's references to African Americans as niggers and monkeys. Webb also told the investigators all the details of Ambruster's improper behavior. Smith also conceded that Marcia Daniels told her that Ambruster referred to certain groups of employees as monkeys and niggers. Alfred Gaitor also told the investigators that Ambruster regularly called Webb nigger, monkey, and Afrom the tribe.®

⁴ See *Hately v. Hilton Hotels Corp.*, 308 F.3d 473 (5th Cir. 2002) (merely having an investigation was not enough to prove affirmative defense where the evidence supported the jury's finding that the investigation was inadequate and that defendant failed to take reasonable measures to correct or prevent the harassment).

Given this direct knowledge of Ambruster's severe, regular harassment and derogatory name calling of Webb, what kind of reasonable care did Worldwide take to prevent and promptly correct Ambruster's racially harassing behavior? Essentially nothing! First, despite all this evidence, Worldwide - inexplicably using a *beyond a reasonable doubt standard* - claims it was not able to substantiate the allegations against Ambruster. Although Worldwide promised Webb it would remedy the situation, it did not do so. Worldwide never even gave Ambruster a warning. In fact, Ambruster heard nothing at all from the company for months until *he* raised the issue.

Firing Ambruster would have been *reasonable care*. Instead, Worldwide allowed Ambruster to keep his job (even promoting him to general manager in late 2001) until he elected to resign from the company in 2003 to get a better job. By allowing him to keep his job for two more years after the investigation, **Worldwide allowed Ambruster to keep on racially harassing Webb for another year and a half**, thus failing to exercise reasonable care to prevent and correct promptly any racially harassing behavior.

Failing to take proper remedial steps after the investigation (or penalize Ambruster in any way) was surely bad enough to obviate the first element of the affirmative defense. To make matters even worse, Worldwide compounded its lack of *reasonable care* when it was informed that

Ambruster's harassment of Webb *continued after the investigation* and Worldwide continued to do nothing whatsoever to curtail the harassment. Motte specifically testified that **after** the investigation, she contacted Worldwide's headquarters and informed headquarters that *the situation has become much worse and this harassment [by Ambruster of Webb] worst (sic) has not stopped.* R7-199-131. Gaitor also called Worldwide's headquarters in Dallas **after** the investigation because Ambruster's conduct was not changed as a result of Worldwide's investigation and action. R7-199-158; 162-163]. Interpreting the evidence in the light most favorable to Webb, the jury could have determined that Worldwide was aware that the racial harassment continued after the investigation. Defendant, of course, would rather ignore this evidence, and the inferences therefrom, when denying such knowledge.

Worldwide pretends that it took *reasonable care* in preventing the harassment because it had written policies decrying it. However, having a written policy and enforcing it are two different things. In light of the evidence showing that Worldwide did nothing to stop the severe harassment - of which it had direct knowledge - it is understandable how the jury could have reasonably determined that the employer failed to exercise reasonable care to prevent and correct promptly any racially harassing behavior. Thus,

Worldwide cannot be entitled to a judgment as a matter of law on this first required element of its affirmative defense.

There was also substantial evidence from which the jury could have failed to find - as Worldwide had to prove - that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.⁶ In other words, if Webb acted reasonably in taking advantage of any preventative or corrective opportunities provided by Worldwide or in otherwise avoiding the harm, then Worldwide cannot meet the required second element of affirmative defense - and the affirmative defense fails.

Not only did Webb object to Ambruster's conduct, he also regularly and repeatedly complained to his supervisor about Ambruster's conduct. Worldwide conceded this was a proper method to raise the issue with the company. The jury could have reasonably found that Webb acted reasonably in trying to prevent or correct the adverse situation in the context of the opportunities provided by Worldwide to stop the harm. Since there was evidence from which the jury could have rejected the second required element of the affirmative defense, that is fatal to Worldwide's ability to prove the defense as a matter of law. The trial court thus properly allowed the jury to decide the claim.

Worldwide wrongly contends that as a matter of law Webb unreasonably delayed in reporting the harassment to Worldwide. First, Worldwide waived this delay issue by failing to specifically raise it at trial during the motion (and renewed motion) for judgment as a matter of law. R8-200-76-81; R8-200-127.

Not only did Worldwide fail to even mention Adelay in reporting,@ but it moved for a judgment as a matter of law as to the insufficiency of evidence to prove plaintiff-s case in chief, not as to Worldwide-s affirmative defense. To preserve a claim, argument, theory, or defense for appeal, a party must first clearly present it to the district court in such a way as to give the judge an opportunity to recognize and rule and rule on it. *United States v. Land, Winston County*, 163 F.3d 1295 (11th Cir. 1998).

Next, even if this argument were not waived, Worldwide is not correct. Citing only page 179 of the first day of trial (R-7-199-179), Worldwide alleges that AWebb testified that Ambruster made racial comments since 2000, yet he did not report them to Motte until sometime in 2001.@ (Initial Brief, p. 32). However, this citation is just not accurate. A review of that page of testimony does not demonstrate any such details about the exact date or year that Webb complained to Motte about the particular event discussed therein. To the contrary, the evidence interpreted in the light most favorable to Webb is that he repeatedly complained to Motte from the onset of the racial abuse. There

was no delay in reporting the harassment. After Webb complained, Motte even tried to stop Ambruster from continuing this misconduct, and when that did not work, she eventually reported the misconduct to Worldwide by telephone and in writing. Thus, Worldwide cannot show *as a matter of law* that Webb unreasonably delayed in complaining to his supervisor Motte, which Worldwide agrees was an appropriate method for an employee to raise the issue.

If the jury had sufficient evidence to reject *even one* of the two elements of the affirmative defense, then Worldwide's renewed motion for judgment as a matter of law must be denied. Here there was more than enough evidence to reject both elements of the defense. Webb's claim was thus properly submitted to the jury.

RESPONSE TO ARGUMENT IV

THE TRIAL COURT PROPERLY SUBMITTED THE PUNITIVE DAMAGE CLAIM TO THE JURY.

Standard of Review

This court reviews *de novo* a denial of a motion for judgment as a matter of law on the issue of punitive damages. *EEOC v. W & O, Inc.*, 213 F.3d 600, 610 (11th Cir. 2000). A challenge to the amount of the jury's award of punitive damages is reviewed under an abuse of discretion standard. *Id.* Constitutional issues merit *de novo* review. *Cooper Industries v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431, 121 S.Ct. 1678, 1683, 149 L.Ed. 2d 674 (2001).

Argument

A. Worldwide Acted with Reckless Indifference to Webb's Rights

Worldwide contests the trial court's submission of punitive damages to the jury. The Supreme Court has explained that in a Title VII case (and thus the FCRA) the plaintiff must come forward with substantial evidence that the employer acted with actual malice or reckless indifference to his federally protected rights for the issue of punitive damages to reach the jury. See *Kolstad v. Am. Dental Ass'n.*, 527 U.S. 526, 536-37, 119 S.Ct. 2118, 2125-26, 144 L.Ed.2d 494 (1999). A malice or reckless indifference is established by a

showing that the employer discriminated in the face of the knowledge that its actions would violate federal law.@ *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1280 (11th Cir. 2002). Punitive damages will generally not be assessed against employers with only constructive knowledge of harassment; instead, punitive damages can only be considered where the discriminating employee was high up the corporate hierarchy or where higher management countenanced or approved the behavior. *Id.* at 1280.

There was substantial evidence that Worldwide acted with reckless indifference to Webb's protected rights. In addition, Worldwide had actual,⁵ not just constructive knowledge of harassment. Further, even if Worldwide had only constructive knowledge of harassment, the discriminating employee (Ambruster) was high enough up the corporate hierarchy to subject Worldwide to punitive damages. Even if he was not high enough up the corporate hierarchy, higher management countenanced and approved his behavior, thus subjecting Worldwide to punitive damages.

⁵ Actual notice is established by proof that management knew of the harassment, whereas constructive notice will be found where the harassment was so severe and pervasive that management should have known of it.@ *Miller*, 277 F.3d 1269, 1278.

First, trial evidence supported the conclusion that Ambruster was high enough up the corporate ladder to subject Worldwide to punitive damages for his actions. As General Manager, Ambruster was the highest ranking Worldwide employee in Miami and was in charge of 860 employees, out of approximately seven thousand employees of Worldwide in the United States. Ambruster was thus in charge of about 12 percent of Worldwide's nationwide work force. Seven branch managers reported to him.

Worldwide relies upon *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317 (11th Cir. 1999) to support its position that Ambruster was not high enough up the corporate ladder to subject Worldwide to punitive damages. In *Dudley*, the court determined that neither the store co-manager or store manager A is high enough up Wal-Mart's corporate hierarchy B *if* they can be said to be in the corporate management hierarchy at all B to allow their discriminatory acts to be the basis for punitive damages against the corporation. In addition, [the claimant] has not shown that anyone higher than these two men had notice or knowledge that her demotion was discriminatory. . . . In short, [the claimant] failed to prove that Wal-Mart B the company B had the kind of notice and engaged in the kind of egregious acts required to award punitive damages.@ *Id.* at 1323.

Our facts are different. Wal-Mart is a giant business and has more than 2000 stores, thus placing the store managers in *Dudley* in charge of about .05 percent of Wal-Mart's employees, a minuscule proportion compared to Ambruster's control over a significant portion (12 percent) of Worldwide's American work force. In short, there was a triable issue whether Worldwide afforded Ambruster sufficient authority and discretion that he should be considered to have been high up the corporate hierarchy for purposes of assessment of punitive damages.

Additionally, Worldwide representatives higher than Ambruster did have notice or knowledge of his continuing harassment - and did not stop it. Therefore, Webb proved that Worldwide had the kind of notice and engaged in the kind of egregious acts required to award punitive damages. Accordingly, even if Ambruster was not high enough up the corporate hierarchy, higher management countenanced and approved his behavior, thus subjecting Worldwide to punitive damages.

Worldwide, of course, argues that there was no evidence that it acted with malice or reckless indifference to Webb's rights. However, there was more than sufficient evidence to submit the punitive damage issue to the jury under the appropriate legal standards. To be sure, both investigations gave Worldwide **actual, direct** knowledge of the severe racial abuse by Ambruster

upon Webb. Alvin Brown, a Human Resources Manager at Worldwide headquarters, conceded that in the preliminary investigation Eileen Motte told him about Ambruster's references to African Americans as niggers and monkeys. Michelle Smith, the manager of Worldwide's HR department, admitted that Marcia Daniel told her and Brown that Ambruster referred to certain groups of employees and monkeys and niggers. In the formal investigation, Motte told the investigators that Ambruster extensively used improper racial slurs regarding Webb. Gaitor also told the investigators that Ambruster regularly called Webb nigger, monkey, and Afrom the tribe.® Daniel also informed the investigators that Ambruster referred to Webb as a monkey and Afrom the tribe. Garcia also confirmed the racial improprieties.

Given this **actual, direct** knowledge of Ambruster's severe, regular harassment and derogatory name calling of Webb, there was sufficient evidence for the jury to find that Worldwide acted with reckless indifference to Webb's rights. Once Worldwide acquired actual, direct knowledge of Ambruster's conduct, Worldwide did essentially *nothing* to prohibit Ambruster's racially harassing behavior. First, despite all the damning evidence against Ambruster, Worldwide - inexplicably using a A beyond a reasonable doubt standard® - claims it was not able to substantiate the allegations against Ambruster. Although Worldwide promised it would remedy the situation, it did

not. Worldwide never even gave Ambruster a warning. In fact, Ambruster heard nothing at all from the company for months until *he* raised the issue.

Failing to take proper remedial steps after the investigation (or penalize Ambruster in any way) was reckless and indifferent to Webb's rights. Worldwide compounded this reckless conduct when it was informed that Ambruster's harassment of Webb *continued after the investigation* and Worldwide continued to do nothing whatsoever to curtail the harassment. Because Motte heard nothing, and the situation worsened, she called Worldwide headquarters about it. The severe conduct continued throughout 2001-2002. **After the investigation Motte informed Worldwide that Ambruster's racial harassment of Webb had not stopped.**

Incredibly, after the investigation and after the reports of continued abuse by Ambruster, instead of suspending or firing him, Worldwide actually promoted him to general manager in November or December of 2001 - thereby permitting the harassment to continue unabated for another year and one half (until he resigned in 2003 to get a better job). The jury could have easily determined that higher management of Worldwide countenanced and approved his behavior, thus subjecting Worldwide to punitive damages. The evidence showed that Worldwide did nothing to stop the severe harassment - of which it had actual knowledge - and actually rewarded Ambruster with a

promotion, granting him carte blanche to continue violating Webb's rights. The jury could have reasonably determined that the employer acted with recklessness or indifference to Webb.

B. Submitting Punitive Damages to the Jury Did Not Taint the Trial

If this court somehow determined that it was improper for the punitive damage claim to go the jury, such a determination should not affect the validity of the compensatory damage award. There was very limited testimony which related solely to the punitive damage claim. That evidence consisted of details of Worldwide's net income. In light of the fact that other testimony already informed the jury that Worldwide was a large company with 7,000 employees in the United States alone, the net income information was superfluous and hardly prejudicial, especially in light of the fact that the punitive damage award was only \$75,000 (one and one-half times the amount of the compensatory award. See *Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269 (11th Cir. 2002) (court vacates punitive damage award while upholding compensatory damage award).

C. There was no Prejudice to Worldwide by any Failure to Define or Eliminate the Use of the Term "Higher Management Official"

Next, Worldwide claims that the jury instructions, verdict form and closing argument misled the jury. However, the jury instructions and verdict

form regarding punitive damages correctly reflected the law and Worldwide did **not** object to (and actually agreed with) the court's instructions and verdict form. The complaints regarding the instructions and verdict form must therefore be rejected.

As the Eleventh Circuit Court of Appeals noted in *Farley v. Nationwide Mutual Insurance Company*, 197 F.3d 1322, 1329 (11th Cir. 1999), "Federal Rule of Civil Procedure 51 reads in pertinent part, 'no party may assign as error an instruction unless he objects thereto *before* the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection.' See Fed.R.Civ.P. 51 (emphasis added). We interpret Rule 51 strictly, and require a party to object to a jury instruction or jury verdict form *prior* to jury deliberations in order to preserve the issue on appeal. . . . A party who fails to raise an objection to a verdict form interrogatory or jury instruction prior to jury deliberations waives its right to raise the issue on appeal. . . . This requirement ensures that a trial judge has an opportunity to correct any error before a jury has begun its deliberations.@ The trial judge is also accorded wide discretion as to the style and wording employed in jury instructions and verdict forms. *Id.* at 1329. If the charge taken as a whole did not unduly confuse the jury, there is no reversible error. *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999).

Prior to closing argument, the judge reviewed the final jury instructions and verdict form with counsel for both parties. During *initial* discussions regarding the jury instructions and verdict form Worldwide (and the trial court) expressed some concern about the phrase Ahigher management official of the defendant,@ which was undefined in the pattern jury instructions. R8-200-146-150]. However, at some point, the trial judge expressed greater concerns to counsel for Worldwide: Al am having serious problems with **your** punitive damages instruction.@ R8-200-151]. (Emphasis added). The colloquy continued:

THE COURT: Maybe we ought to reconsider using the one pattern instruction. It's not as simple as the one you suggested, but it fits into the overall parameters of - -

.

MR. MORLAN: **Yes, sir. I would much rather go with the pattern.**

THE COURT: **We can keep the higher management official in there.**

That is where the language comes from. I think that is the way to go. Start with the bracketed part. The plaintiff also claims the act of the defendant was done with malice and reckless indifference.

THE COURT: Legally protected rights. Rather than federally protected rights.

MR. MORLAN: **Yes, Your Honor.**

THE COURT: **Having rethought it, what do you think?**

MR. MORLAN: **WE-LL AGREE. WE-LL USE THE STANDARD PUNITIVE INSTRUCTION.**

THE COURT: . . . **So we are keeping higher management official acted with malice and reckless indifference.**

R8-200-151-152.

Worldwide thus actually agreed and stipulated to the very instruction and terminology about which it now complains. Worldwide consented to the instruction and to the use of the undefined term Ahigher management official®. Worldwide has failed to preserve and has specifically waived its argument, which must therefore be rejected.

Even if there was no waiver, the instruction was based on the Eleventh Circuit Pattern Instruction and accurately reflects the law regarding punitive damages. In *Farley v. Nationwide Mutual Insurance Company*, 197 F.3d 1322 (11th Cir. 1999), the court gave deference to an instruction taken from a well-know federal jury pattern instruction book. Here the instruction was taken from the Eleventh Circuit-s own Pattern Instructions.

In spite of this fact, Worldwide complains that the jury might have believed that the General Manager Ambruster was a Ahigher management

official.⁶ However, as previously explained, there was a factual dispute as to this issue. There was enough evidence for the jury to determine that he was in fact, a higher management official. Even so, Worldwide complains that leaving the term undefined was prejudicial. However, even the Supreme Court has trouble making definitions in this context. In *Kolstad v. American Dental Association*, 527 U.S. 526, 543, 119 S.Ct. 2118, 144 L.Ed.2d 494, the Supreme Court explained that an employee's conduct subjects an employer to liability for Title VII punitive damages when "an employee serving in a managerial capacity" committed the wrong while "acting in the scope of employment."⁷

Unfortunately, no good definition of what constitutes a "managerial capacity" has been found, and determining whether an employee meets this description requires a fact-intensive inquiry. In making this determination, the court should review the type of authority that the employer has given to the employee, the amount of discretion that the employee has in what is done and how it is accomplished. Suffice it to say here that the examples provided in the Restatement of Torts suggest that an employee must be "important,"⁸ but perhaps need not be the employer's "top

management, officers, or directors,⁶ to be acting in a managerial capacity.⁶

Id. at 543. (citations and internal quotation marks omitted).

In this context, the failure to define the term a higher management official⁶ was not error. The determination simply required a fact-intensive inquiry by the jury, taking into account the evidence in the case. The jury verdict on punitive damages is supported by the conclusion that Ambruster was such a higher management official.⁶ Alternatively, the jury could have found that the corporate officials who came down from Worldwide headquarters in Dallas **certainly** constituted a higher management officials⁶ such that Worldwide could be subject to liability for punitive damages. The evidence supported either - or both - conclusions.

Worldwide also complains that comments made by plaintiff's counsel in closing argument compounded the prejudice regarding the jury instruction as

⁶ Alvin Brown was a Human Resources Manager at Worldwide in Dallas who was part of the preliminary investigation. Moreover, he reported his findings to David Cunningham, Worldwide's Director of Employee Relations. Additionally, Michelle Smith was a Human Resources Manager of Employment Compliance, who participated in the preliminary investigation. Wayne Eichel, Worldwide's Director of Security, participated in the formal investigation. Based on the investigations, a higher management officials⁶ of Worldwide had knowledge and engaged in conduct which supported the punitive damages award.

to punitive damages. However, Worldwide concedes that it never made any objections to plaintiff's closing argument. Again Worldwide has waived its argument.

Worldwide inaccurately claims that Webb's summation compounded the confusion and further misled the jury because counsel referred to the court's general instruction that "when a corporation is involved, of course it may act only through people as its employees. And in general, a corporation is responsible under the law for any of the acts and statements of its employees which are made within the scope of their duties as employees of the company." R8-200-181.

Worldwide wrongly suggests that these comments were made in the context of a punitive damages argument. To the contrary, these comments immediately followed counsel's discussion of Worldwide's liability for the hostile work environment created by Ambruster. R8-200-180-181. This was the context under which counsel discussed the "corporation" jury instructions, to which of course Worldwide made no objection. The comment was legally proper. There was no objection. Worldwide's argument must be rejected.

Next, Worldwide complains about the trial court's response to the jury's question regarding special interrogatory 7(b). However, Worldwide's counsel agreed that the jury should be referred to the definition of reasonable care.

R8-200-201-202. The judge instructed the jury accordingly. R8-200-201-202.

Worldwide preserved no issue in this regard. There is no error. There is no harm.

Worldwide also complains about the evidence from David Cunningham, Worldwide's director of employee relations, that the company required proof beyond a reasonable doubt[®] before the company will take action against an employee. (Initial Brief, pp. 48-51). As the judge noted in the order on defendant's post trial motions (R5-207-6), this testimony that the company used a beyond a reasonable doubt[®] standard for the investigation could have allowed a reasonable jury to conclude that the company did not use reasonable care in establishing preventative and corrective measures due to the high standard of proof required to demonstrate harassment was occurring.[®] The judge also noted that this fact was one factor (among many) that have showed Worldwide's deliberate indifference or lack of good faith regarding Webb's complaints, thus permitting the imposition of punitive damages. R5-207-9. This analysis was correct. The evidence was relevant. Moreover, there can be no harmful error because there was a wealth of additional evidence which supported the punitive damage award against Worldwide.

RESPONSE TO ARGUMENT V

THE PUNITIVE DAMAGE AWARD WAS NOT
UNCONSTITUTIONAL AND DID NOT VIOLATE
WORLDWIDE-S DUE PROCESS RIGHTS.

Standard of Review

(Same as in argument IV)

In a cursory fashion, Worldwide contends that the punitive damage award is excessive, unconstitutional, and should be remitted. Worldwide is wrong on all counts. First, as explained in the response to argument IV, *supra*, it was appropriate for the punitive damage issue to be submitted to the jury. Suffice it to say that plaintiff presented substantial evidence that the employer acted with actual malice or reckless indifference to his protected rights for the issue of punitive damages to reach the jury. See *Kolstad v. Am. Dental Ass-n.*, 527 U.S. 526, 536-37, 119 S.Ct. 2118, 2125-26, 144 L.Ed.2d 494 (1999). Moreover, the punitive damage award here does not even approach any constitutional limitations. See *Bogle v. McClure*, 332 F.3d 1347, 1360 (11th Cir. 2003).

RESPONSE TO ARGUMENT VI

THE COMPENSATORY DAMAGE AWARD IS NOT
EXCESSIVE AND IS SUPPORTED BY THE
EVIDENCE AND THE CONTROLLING CASE LAW.

Standard of Review

The district court's ruling upholding the jury's award of compensatory damages and denying remittitur is reviewed for abuse of discretion. *Ferrill v. The Parker Group, Inc.*, 168 F.3d 468, 476 (11th Cir. 1999).

Argument

The award of \$100,000 (after remittitur from the \$300,000 jury award) to plaintiff for compensatory damages is easily supported by the evidence and the controlling case law. Although compensatory damages must be proven, general compensatory damages, as opposed to special damages, need not be proved with a high degree of specificity and may be inferred from the circumstances. A plaintiff may be compensated for intangible, psychological injuries as well as financial, property, or physical harms. Humiliation and insult are recognized, recoverable harms, and a plaintiff's own testimony of embarrassment and humiliation can be sufficient to support an award for compensatory damages.@ (citations and internal quotations omitted). *Bogle v. McClure*, 332 F.3d 1347, 1359 (11th Cir. 2003). Moreover, A[t]he standard of

review for awards of compensatory damages for intangible, emotional harm is deferential to the fact finder because the harm is subjective and evaluating it depends considerably on the demeanor of the witnesses.⁶ *Id.* at 1359.

In reducing the jury's award to \$100,000 for emotional damages, the judge considered the frequency of the racial harassment, hearing evidence that Worldwide's general manager called Webb a nigger, a monkey, or Afrom the tribe⁶ **every day for more than two years (more than 700 days)**. The hostile work environment created by Ambruster had a strong negative impact upon Webb.⁷ Webb's supervisor confirmed that he was very depressed and that the harassment affected his job performance. Short of physical violence, it is hard to imagine what would be more severe in a working environment than an African American being consistently called a nigger every day at work. Over the course of two years, this conduct humiliated and depressed Webb so much that he could not eat properly; he did not want to go anywhere; and it affected his job performance. The conduct was utterly humiliating and distressing to Webb, as it would be to any man who has any dignity. The

⁷ See Facts of the Case, especially those described in the section entitled Impact of Hostile Work Environment upon Webb,⁶ *supra* at pages 4-5.

conduct in this case was hardly a mere offensive utterance. The conduct went to the core of a man's dignity, repeatedly for more than two years.

Contrary to Worldwide's suggestion, the award is hardly excessive, and Eleventh Circuit case law supports awards even ten times greater. See *Bogle v. McClure*, 332 F.3d 1347 (11th Cir. 2003). Contrary to Worldwide's suggestion that the \$100,000 award for emotional damages is excessive, awards much greater than that level have been consistently undisturbed by the Eleventh Circuit Court of Appeal. See *Farley v. Nationwide Mutual Insurance Company*, 197 F.3d 1322, 1355 (11th Cir. 1999) and *Lambert v. Fulton County*, 253 F.3d 588 (11th Cir. 2001).

RESPONSE TO ARGUMENT VII

THERE WAS NO HARMFUL ERROR REGARDING
EVIDENCE CONCERNING A PAPER TRAIL AND
WORK ASSIGNMENTS REGARDING WEBB.

Standard of Review

This court reviews the district court's rulings on the admissibility of evidence for abuse of discretion. *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir. 1997).

Argument

Defendant also complains about the evidence that Ambruster required Webb to work Aheavy@ flights and the evidence that Ambruster wanted to Apaper@ Webb=s file. In light of more than 700 days of severe racial harassment by Ambruster, and Motte=s testimony that Ambruster wanted to fire Webb because he was black, the jury could easily have determined that such assignments and the treatment of Webb were part of the hostile work environment created by Ambruster and permitted by Worldwide. See *Miller*, 277 F.3d 1269. There was no error here. Even if this evidence should have been precluded, it was harmless error. Any such evidence could not have been harmful in light of more than 700 days of direct, severe racial harassment

by Ambruster. There was no prejudice here. There was no injustice here.
The jury's awards should not be disturbed.

RESPONSE TO ARGUMENT VIII

THERE WERE NO PERNICIOUS OCCURRENCES
AT TRIAL WHICH SUBSTANTIALLY PREJUDICED
WORLDWIDE.

Standard of Review

This court reviews the district court's rulings on the admissibility of evidence for abuse of discretion. *Goulah v. Ford Motor Co.*, 118 F.3d 1478, 1483 (11th Cir. 1997).

Argument

Worldwide initially complains about alleged leading questions at trial. The first complaint concerns a question asked by Webb's counsel to co-worker Larry Williams. R7-199- 60. On redirect examination, counsel asked: AMr. Williams, just to make clear, did you ever take out a notepad and write down all the times that you heard Mr. Ambruster referring Mr. Webb by those words, monkey, tribe or the N world?@ R7-199-60. Earlier, on direct exam, Williams had already testified that Awhen Mr. Ambruster came down *all the time* he would call us monkeys and nigger.@ R7-199-29. On cross examination, counsel for Worldwide pressed Williams for details about specific recollections of particular events. R7-199-50-59. The question on redirect about the existence of a notepad was a fair response to the attempt on cross

examination to discount the testimony for lack of details. In other words, the question (and negative answer) was just an effort to explain why a witness may not recall specific dates and details of events that happened *all the time*. Contrary to Worldwide's suggestion, the witness did not miraculously remember the names used by Ambruster; the witness had already discussed them on direct exam. The question and answer were proper and were hardly pernicious.

Next, Worldwide complains about certain questions asked to Williams on direct examination. (Initial Brief, p. 59, citing R7-199-29, 30). Ironically, Worldwide did not even object to these questions, yet now on appeal Worldwide complains for the first time about such pernicious occurrences at trial which substantially prejudiced Worldwide. Generally, an argument must be raised in the district court for it to be an issue. *Ferrill v. The Parker Group, Inc.*, 168 F.3d 468 (11th Cir. 1999).

Worldwide also raises an issue regarding its objection to another question presented to Williams at R7-199-32. However, this objection was sustained, and Worldwide never moved to strike any response from the witness. There simply is no adverse ruling by the trial judge to which Worldwide may complain. Similarly, Worldwide's objection at R7-199-77 was sustained. As to the purported errors committed by the trial judge by allowing

leading questions regarding Aname calling@ at R7-199-126, R7-199-129, R7-199-148, R7-199-157, R7-199-177 and R7-199-178 (See Initial Brief, p. 59, fn 7), **there was no such objection even made.** Worldwide also complains about a leading question at R7-199-137, but there was never any such objection made on that basis to the question (and the question did not even relate to Aname calling@). Essentially the Apernicious occurrences@ about which Worldwide complains were so Apernicious@ that Worldwide never even bothered to object most of the time.

The two objections to questions of co-worker Carlos Garcia about which Worldwide complains (R7-199-75,76) (Initial Brief, p. 60) were actually sustained, and no answers were given. There was no adverse ruling by the trial court and Worldwide has no grounds for complaint.

Worldwide also complains about its inability to re-cross Garcia after the witness clarified on redirect that Ambruster directly implied that Webb was stealing. Garcia testified that Ambruster looked at Webb while telling Garcia to Akeep your eyes on those niggers@. R7-199-94; R7-199-88. Worldwide suggests that on direct exam Garcia testified that Webb was outside the airplane and not present to hear the comment. However, Garcia testified on direct exam that Ambruster was outside the airplane on the ramp when he made the comment. R7-199-88. Therefore, Webb, who was outside at the

time, could have heard the comment, especially if Ambruster was able to look at Webb while making the comment. If there was a substantial inconsistency between Garcia's testimony on direct and redirect exam, Worldwide could have pointed this out to the jury. The trial court's decision not to permit more questioning to further clarify this testimony was well within his discretion. Moreover, in light of the multiple instances of racial abuse noted by Garcia and a multitude of other witnesses, even if there were any error in this regard it was harmless.

Finally, Worldwide suggests that the presentation of trial and deposition testimony was confounded and misleading to the prejudice of Worldwide. Worldwide notes that the trial court *granted* its motion in limine regarding evidence of other employees' claim of discrimination against Worldwide. Thus, there was no adverse ruling about which to complain.

Worldwide then complains that the trial testimony was disjointed or misleading, citing as an example Ambruster's testimony regarding Worldwide's investigation. R7-199-105-112. (Initial Brief, p. 61). Following Worldwide's objection to questions regarding the investigation, the court held a lengthy sidebar conference out the presence of the jury. R7-199-106-112. After much discussion, the colloquy revealed that the witness did not even know that the investigation was about racial slurs; he thought it was just about a few

disgruntled employees complaining about his use of swear words. R7-199-112. The court stated: "Maybe that solves the problem. That is all he knows about." R7-199-112. When the trial continued, the witness in fact testified that the investigation did not involve his making racial slurs. R7-199-112. Since the witness did not know about any investigation in his use of racial slurs (whether it involved Webb or any other employee), Worldwide succeeded in preventing this witness from testifying regarding other claims. There was no error whatsoever. There was no harm. This argument must be rejected.

Worldwide raises an issue regarding the perceived prejudicial effect of deposition testimony from Worldwide's representatives procured in other cases. First, it was not Webb's fault that some Worldwide representatives did not attend trial. Webb properly used those deposition transcripts to present evidence in the case. See Fed.R.Civ.P. 32(a). Worldwide's supposition that the presentation of evidence lacked continuity and Worldwide's theory that this resulted in mass confusion for the jury is sheer speculation.

The only specific complaint Worldwide mentions about the use of deposition testimony concerns the alleged substitution of Webb's name in the context of testimony relating to Jackson. (Initial Brief, p. 63) (R8-200-68-69). Although Worldwide claims that the jury heard improper evidence, a careful review of the record at R8-200-68-69 confirms that there was no such

testimony in which Webb's name was substituted for Jackson's. In fact, neither name was mentioned before the jury on those pages.

Moreover, the judge quickly held a sidebar conference, sustained Worldwide's objection to testimony regarding Jackson, granted the motion to strike, and instructed the jury to disregard the last question and answer (even though the jury did not even hear the evidence in question). R8-200-69. There was no ruling adverse to Worldwide, no error, and no prejudice. Contrary to Worldwide's argument, the one example it cited does not support its theory. There was no reversible error regarding the use of deposition testimony.

CONCLUSION

The appellee, Turrie Webb, requests that this court affirm the trial court's final judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was sent via U.S. Mail this 9th day of December 2004 to: Harold E. Morlan, II, Akerman Senterfitt, Citrus Center, 17th Floor, 255 South Orange Avenue, Orlando, FL and Debra M. Lubkin, Akerman Senterfitt, Las Olas Centre II, Suite 1600, 350 East Las Olas Blvd., Ft. Lauderdale, FL 33301-2229. Internet upload was completed on or before the date of service.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 13957 words. This brief is submitted in Times New Roman 14-point font.

By: _____
Neil Rose, Esq.