IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Civil Action No. 3:10-CV-00193

PAMELA PASCOE and MARGARET TAMBLING, Plaintiffs, vs. FURNITURE BRANDS INTERNATIONAL, INC., HDM FURNITURE INDUSTRIES, INC., and LARS SPICER, Defendants.	)	PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

INTRODUCTION[1]

This case raises a very poignant and present question, which is the extent of an employer's liability under state and federal law for the conduct of a seemingly mentally unstable supervisor who tormented his female employees with threats of violence, including gun violence, surveillance of their homes, and numerous bizarre sexual comments. Regrettably, the conduct at issue in this case is a cautionary tale of an employer that flubbed the handling of a potentially dangerous situation by initially ignoring glaring warning signs, subsequently severely under-reacting to them, and which ultimately chose to circle the wagons around the proverbial outlaw, rather than act as a responsible member of our corporate community. Thankfully, Spicer did not turn his guns on these women

[1] References to "defendants" are to defendants FBI and HDM. Defendant Spicer will be referred to as "Spicer". Depositions are cited as: MT __ for Margaret Tambling; PP __ for Pamela Pascoe and similarly for Kathy White, Lars Spicer, Kimberly Gleitsmann (Roland), Susan Dorety (Dwyer), Dr. Faye Sultan, Dr Puri-Sharma and Dr. Freeman-Kwaku.

as he said he might, but plaintiffs feared that he was fully capable of physically harming them. They have carried emotional scars left by Mr. Spicer's conduct; injuries made worse by their employer's betrayal of them. Defendants may aim to use their summary judgment motions to establish a low water mark of the protections afforded women in the workplace in North Carolina; however, plaintiffs respectfully submit that they have marshaled sufficient facts to permit a jury to answer that question.

FACTUAL SUMMARY

A. Spicer's hiring, authority and lack of training

Defendants FBI and HDM, through their regional manager, Kathy White, hired Spicer as manager of their Pineville furniture store on or about October 1, 2008. LS 11. Spicer's reported work history was running his own design business and as an independent sales representative for various furniture lines. LS 13-14. Although he now seems to claim otherwise by affidavit, he testified in his deposition that he had no experience working in, let alone managing, any kind of store. LS 16, 30. At the time Spicer was hired, the Pineville store had been without a store manager for several months and White was feeling pressure to fill the position. KW 26-27, 43, KG 44-45.

As store manager, Spicer's duties included ensuring the store was free of discrimination and harassment. KW 136. Despite bestowing on him that responsibility, defendants provided him with no guidance, let alone sexual harassment or discrimination training. When Spicer began his employment with defendants, he, like all other employees, was handed a stack of papers including multiple benefits forms and employer policies and told to sign off on a checklist

listing the documents. Ex. 1, LS 26-27, MT 27-30, PP 50, KG 31-35, 171-72, SD 34-36, 39-41. Spicer never read the documents, and that was the extent of his policy training. LS 26, KW 48-49.

Spicer did not review the materials because "the way the procedure goes is that you're given 100 or so pieces of paper, there's a list to check off you've received it, and you're to review it, and the whole time is less than five minutes and there's no way to review the paperwork." LS 26-27, 169-72. Spicer acknowledges that if he were given all the sexual harassment policies that existed in the store, he would not be able to tell which was in effect while he worked there. LS 188-89. That was because of his "very brief exposure to them...I think we all had that same exposure...There's a big pile, and sign..." LS 189.

After hiring Spicer, White paid very little attention to what was going on in the Pineville store. KW 56-57. She does not remember ever asking the employees how they were getting along with their new manager. KW 57. Spicer's assertions, made for the first time in his affidavit, that employees "resented his efforts to manage the store and oversee their work," are untrue. MT Decl. ¶20; PP Decl. ¶11.

Spicer had the appearance of, if not actual, authority over plaintiffs. Plaintiffs reported to him. Ex. 2; KW 135. Also, Spicer was responsible for providing formal counseling to employees and did so for several employees, including Pascoe. LS 34-36, KG 129- 131. To formerly discipline an employee, he would have to get White's permission, but he would administer the discipline. LS 45-46. When White came into the store, Spicer would sometimes say to the employees, "it's ok, I'm here, you report directly to me. Don't worry about her, it's just the princess of darkness." LS 47.

B. Spicer creates a sex-based hostile environment

Plaintiffs Pamela Pascoe and Margaret Tambling (formerly Margaret Stringfield) were already working for defendants when Spicer started. Pascoe began working as a designer for Boyles Furniture in 2003 and stayed on when the store became a Drexel Heritage store in 2006. PP 31-35. Tambling started as a receptionist in mid 2007. MT 18. Approximately five women, including Kimberly Gleitsmann Roland (Gleitsmann) and Susan Dorety Dwyer (Dorety), also worked as designers when Spicer started and Terrence Green (male) worked as controller. MT 19.

Initially, Spicer tried to impress the women with his design experience and expertise. SD 87-89. His façade quickly unraveled as the women discovered he knew very little about design. PP Decl. ¶10; SD 88-89. When he realized they were not buying his act, Spicer began to act unprofessionally, and his behavior "went from bad to worse." SD 88-89. Spicer's deterioration began very shortly after his start date. MT 80. He began to create an environment where he used sex and violent behavior to assert his dominance. It was an environment that was "frightening and scary." KG 170.

Spicer seemed to have a flair for the double entendre. He has an innocuous explanation for each of the multiple offensive behaviors attributed to him, but as Gleitsmann noted, Spicer "always seemed to be putting kind of a sexual spin on things..." KG 94-96. His body language was part of what made the women feel that his connotations were sexual; "It seemed like just a part of his personality..." KG 94, 169-70. Spicer would say inappropriate things on a daily basis. PP 147, KG 94, 170.

For example, he repeatedly said he was "moist," particularly in Tambling's presence. MT 83, PP 192, KG 94, SD 146-150. Though it appears he has convinced his supervisors he meant he was sweating during the Winter when some of these statements were made, that was not the impression he gave the female staff who consistently interpreted the statement to have sexual connotations akin to him conveying that he was sexually aroused. MT 121-123, 172, KG 96, SD 148.

Spicer also repeatedly called Tambling from the bathroom, just to tell her that he was in the bathroom. MT 83-84. When Tambling questioned why he was calling her, he would repeat, "I'm in the bathroom." MT 92. That occurred about ten to twelve times. MT 84, 93. Gleitsmann and Pascoe both witnessed the calls and Dorety was told about them. PP 174-77, KG 139-42, SD 162-65. It was the consensus of the women that they were intended as some kind of bizarre sexual innuendo. MT Decl. ¶ 2; PP 174-77, KG 139-142, SD 162-165. On one occasion, Tambling was away from her desk and Pascoe answered Tambling's phone when Spicer called from the bathroom. Spicer said, "I'm in the bathroom. When he realized it was not Tambling on the phone, he hung up. PP 174-75.

Tambling told Spicer to stop calling her from the bathroom and to stop saying he was moist and that he told her too much information and she did not want to hear it. MT 84. However, Spicer continued unabated calling her from the bathroom. MT 178-79. See generally, MT 172-77.

Spicer repeatedly said, in the presence of each of the four women who testified by deposition, all of whom are blonde, that he liked to snuggle with blondes. MT 83, PP 139, KG 55-56, SD 138-45. Pascoe remembers more

specifically that Spicer said that "he liked tall, thin blondes that he could snuggle between his groin and his nipple." PP 139. The women were all taken aback. KG 56. Spicer made the comment twice in Pascoe's presence – once in the design center and once by the front desk. PP 139-41.

Spicer reported, more than once to Pascoe and with others present, that he did not know how to cook and that he would just sit in bed, eating cereal naked. PP 151-53, MT 83. Tambling heard Spicer talking with a female customer about waking up sweaty in bed. MT Decl. ¶ 4. Gleitsmann recalls Spicer talking about "crumbs were going where they shouldn't." KG 152. In making the comment, he conveyed that "he wanted to leave the rest of his bed activity to [the womens'] imagination." PP 154.

On a daily basis, Spicer slouched in a chair in front of the store with his legs spread wide open, revealing the outline of genitalia. MT 82, PP 163-65, SD 90-91, 263-66.

Spicer was particularly flirtatious with Pascoe. KG 153-54. He asked Pascoe if she could find someone for him to go out with. PP 142, KG 153. Caught off guard, Pascoe asked, "male or female?" Spicer said, "at this point it doesn't really matter, I haven't had sex in so long." MT 84, PP 142. Spicer told one or more of the other designers that he and Pascoe had plans to go out for dinner and drinks. PP 204. He hugged Pascoe on two occasions. PP 209. When he did, his belly touched hers and his arms went around her back. PP 210. Pascoe stiffened, backed up and told Spicer "that's inappropriate." PP 211-212. He also asked Pascoe to go to a Neiman Marcus soiree with him. PP 205-06, 214. On multiple

occasions, he talked about being lonely and needing to meet people but not in a way that "normal coworkers talk about it." KG 97-99.

On one occasion, Tambling's 20 year old son, Tripp, was filling in as receptionist and talking with Pascoe (who was in her 40s). Spicer walked by and said, "you know, two beautiful people, you know, why don't the two of you hook up?" PP 148, MT 84, KG 157-58, SD 159-61. Pascoe expressed her shock to Spicer and said, "what are you saying,..he's a baby?" Spicer responded that age did not matter, "sex is just sex." PP 148. Pascoe was alarmed and upset. PP 148-49.

Spicer also made repeated unwelcome physical contact with several of the female staff. For example, Spicer came toward Tambling one day and tried to put his arms around her. MT 132. He often rolled his chair toward Tambling and came too close to her. MT 193, PP 164. He also regularly violated Susan Dorety's personal space. SD 93.

Spicer lived in Tambling's apartment complex and he told Tambling that he was out walking at three or four in the morning and noticed that her second floor porch door was ajar. MT 52. He repeatedly reminded Tambling that he was watching her from his apartment and conveyed the idea that "he hoped her window would be open so he could look in it." KG 87-92, MT 52-60, PP 178-82. Tambling was scared. KG 92. He also made clear to Pascoe that "he knew exactly where [she] lived." PP 217.

What raised Spicer's sexual remarks from harassing to terrifying was his bizarrely volatile behavior. The women never knew what minor infraction would set him off or if they would be his next target. For example, one day Spicer was extremely upset and yelling at the designers (all women) at a staff meeting about

some minor infraction, possibly "fluffing a bed." KG 60, 63. His behavior was such that some of the employees, including Pascoe, were crying during the meeting. KG 69. Gleitsmann told Spicer, "I don't think you can talk to us like that," and he flew at her, raging, about six inches away from her face, and reared back with his hand in the air as if to hit her. KG 60-61, 66. Spicer towered over Gleitsmann for a few minutes, shouting and pointing in her face; when she tried to walk away, Spicer stepped in front of her to block her. KG 62, 67-69. Spicer's behavior was "explosive." KG 75. Afterwards, all of the coworkers were concerned about what had happened and everyone wanted Gleitsmann to "do something about it." KG 70-73. It was "very scary and very violent." PP 160.

About an hour later, someone told Gleitsmann that Spicer had come to the design center looking for her and she was frightened. KG 74-75. When he found her, Spicer told Gleitsmann he was sorry, and balled up on a storeroom sofa, bawling loudly. KG 77-78. Spicer then grabbed Gleitsmann into a bear hug and began saying that he "hadn't been touched in a long time" and "it just felt good to have hug." KG 58-59, 82. Not wanting to incite him again, Gleitsmann told him to calm down, that it would be ok. KG 79-83. Gleitsmann, and the women, including plaintiffs, who witnessed the incidents, were terrified and Gleitsmann felt physically threatened. See generally KG Decl. ¶¶3-4, KG 58- 84, 106, MT 85-86, PP 159-163, SD 94-107.

Spicer displayed behavior similar to the Gleitsmann incident on a very regular basis, seemingly rotating among the women. SD 101. He exploded at Pascoe for leaving sticky notes on Green's computer. PP 166-67, SD 192-93. He screamed at Lisa Pryor, invading her personal space in a threatening way. PP 155-

56; KG 100-03. After that, Pryor was afraid to stay late in the store alone with Spicer and Gleitsmann stayed with her. KG 104-105. He ambushed Michelle Trizzino and leaned over her, screaming. PP 198. Spicer had many similar explosions during his managerial stint with defendants. PP 158.

During the holidays, Spicer became upset about something, told the women he "hated" them all, they were no longer his family, he was taking back all of their Christmas gifts, and "there would be no Christmas." SD 281, 288, MT 74, PP 183. He mentioned, during that rage, that he had an arsenal of weapons in his home that he was not afraid to use. PP 183. He was about two to three feet away from Pascoe at the time, shaking and jumping up and down, red in the face appearing "very scary angry." PP 190.

His threat about there being "no Christmas" was not the first time Spicer mentioned owning guns. Gleitsmann remembers him talking about it sometime before his attack on her and, during the attack, being afraid that Spicer might have a gun in his car. KG 156. Dorety remembers Spicer talking with a customer about feeling safe because he owned guns. SD 234-35. She also remembers Pascoe and Tambling talking about Spicer owning guns and that the knowledge of Spicer owning guns frightened them all. SD 236-39.

For all these reasons, the work environment was frightening and scary for the women. KG 173, MT 52. There was a general consensus among female staff about Spicer: "He was very scary to be around." MT 87-89. Spicer's characterization of his management style as "stern" but friendly, Spicer Brief p.3, is completely contrary to all of plaintiffs' evidence. Each employee who testified described the work environment as scary and all agreed that he seemed to have

no idea of what he was doing managing a store. KG 52, 170, SD 154-55, 262-63, MT 88-89, PP 136.

Spicer also discouraged the women from making complaints about him. On one occasion, Pascoe and Dorety sought help from Parker regarding a mattress purchase issue that Spicer had been unable to resolve. PP 199. When he found out, Spicer admonished them never to overstep him; that they were to come to him first. PP 199. Spicer called Dorety and "lit into" her. SD 117-18.[2] He told her: "don't you ever go to anybody above my head ever again." SD 118, LS 116-117 ("told Susan Doherty I did not appreciate her going over my head...") Spicer then immediately took disciplinary action on Dorety in the form of a Performance Improvement Notification. SD 202-206. Doherty told everyone about the phone call. SD 125. "If you went over his head, you were punished for weeks." PP 200-201. Spicer also threatened the female employees that if they betrayed him, "good luck getting another job" because his sister was a high-end designer in Charlotte...and that he had powerful attorneys. PP 213-14.

C. Effect on plaintiffs

Spicer's behavior significantly affected both plaintiffs. See Exs. 3 and 4. Pascoe held herself to very high standards in her work and obviously felt confident in her abilities. PP Decl ¶12, 17; PP 92, 95. Although she had significant other stressors in her personal life and other complaints about the company, she was used to being a high performer and assertive. FS 34-35.

[2] Dorety remembers Tambling being the other person involved in the mattress incident, but in fact it was Pascoe

Spicer changed that by transforming her workplace into a terrifying and intimidating place. PP 216-17, FS 71-72, 82-83. She feared that he would physically hurt her because he was so emotionally unstable. PP 216. "One minute he was happy, one minute he was sad, one minute he was angry...you never knew what to expect from him at any given moment with all the unsolicited outbursts and sexual innuendo." PP 216-217. Pascoe was also afraid because of Spicer's comment about having an arsenal of weapon and that "he knew where she lived." PP 217. Spicer's behavior made her nervous, upset and unable to sleep and function well. PP 250-51, FS 83. As a result, she suffered from anxiety and had to increase her anxiety medication. FS 83, PP 259-60.

By December 30, Pascoe had reached her breaking point and decided she had no choice but to resign. PP 223. She knew that White had information that Spicer was unstable, and that she and others had complained about him. PP 227. White and Parker had been in the store a few weeks earlier together, and not spoken with any of the women. PP 224, 227-28. Spicer's unpredictability, along with his sexual harassment made the conditions no longer tolerable for Pascoe and she resigned on December 31. SD 177-182. Dorety left around the same time because she felt unsafe. SD 183, 184-193.

Interestingly, citing their own affidavits, defendants argue that Pascoe left for financial reasons, while simultaneously asserting that Pascoe's sales (and therefore commissions) increased in the months before she left. In any case, it is well-established that Pascoe had been having financial problems for quite some time yet remained in her job. What caused her to give up was Spicer. PP 223, FS 82, 105-108, SD 177-181.

Pascoe handed her resignation to Spicer on December 31 while White was in the store. Ex. 5; PP 115-117. No one asked Pascoe why she was leaving. PP 118-120. Spicer came looking for Pascoe before she left, said that he would help her find another job and that they should have dinner and drinks together. PP 119, 122, 215. Pascoe had a telephone exit interview with Diane Oliver, an HR employee. PP 130-31. During it, she told Oliver about the store's unstable and hostile environment. PP 131.

Tambling liked her job and was happy with her work environment until Spicer came along. MT 20, 48. She was afraid of Spicer because of the combination of his sexual comments and behaviors, his grossly erratic behavior, his inappropriateness, and the fact that he owned guns. MT 132-135. Because of her fear of Spicer, Tambling "experienced physical discomfort, anxiety that made her feel ill, physically ill, and had her leaving work, and that she's lying in her bed, hears a sound and assumes that it's him. She said, I didn't know what to do, I was sure it was Lars. I always assumed it (Spicer raping her) would happen one day." FS 228-29. Tambling began looking for a new job sometime in October, 2008, but could not quit her job with defendants because she was a single mother and needed the regular income. MT 39-40, 43, 77-78.

D. Complaints about Spicer

Both plaintiffs, and other designers, reported the various aspects of the aforementioned hostile work environment throughout November and December. MT 90-91, 192-96. Tambling recalls reporting Spicer's conduct approximately four to six times, with the first occurring in November. MT 91, 196. Tambling told White that she was frightened about Spicer because he talked about owning

guns, that he lived across the parking lot from her and made a point of talking about her apartment, that Spicer made inappropriate sexual comments like the "snuggling blondes" comment, that his repeated calls from that bathroom had a sexual connotation to them and his inappropriate use of the word "moist." MT Dec. ¶ 6; MT 90-91, 133, 192-96. In response to hearing the snuggling blondes comment, White said: "Margaret, he's gay". MT 112. Dorety heard Tambling say that "she complained before and nothing happened." SD 173-74.

Pascoe attempted to complain to White as well. On a telephone call in the latter half of November, Pascoe told White, "we have problems with Lars." PP Dec. ¶ 6; PP 221. White interrupted Pascoe and said, "we know Lars is unstable," and ended the conversation. Id.

Pascoe also had good reason to be dubious about what would happen if she escalated her complaint activity. Shortly before Spicer started, Pascoe expressed concern to White about a reduction in her draw. PP 103. White told her if she did not like it to "call HR," which Pascoe did. PP 104. After Human Resources confirmed the decision, White called Pascoe back to the office and said, tauntingly, "I know you called HR and it didn't work." PP 109. Pascoe was also aware of Spicer's threats toward potential "betrayers." PP 200, 213; PP Dec. ¶ . Gleitsmann agreed that she did not feel like she could go to White with problems. KG 46-47.

Nevertheless, Gleitsmann made an official report of her frightening experience sometime around mid-December. KG 112-16. Defendants have no record of the report. Ex. 6. Gleitsmann recalls being told that White and Parker would come and talk with Spicer and that she and the other employees would be

interviewed. KG 115-17. Yet, that was the last Gleitsmann heard of her complaint. KG 116; KG Dec ¶ 9.

On December 30, 2008, Tambling emailed White to tell her that she wanted to talk with White about Spicer. Ex. 7. It was the first time she mentioned Spicer's conduct in writing and she was nervous about doing so because of White's previous inaction and Spicer's threats toward his potential betrayers. MT 104-05; MT Dec. ¶ 11. Given the multiple, serious complaints about him, when White made it known that she and Parker were coming to the store on December 31, the entire staff thought Spicer would be fired. MT 98.

E. Defendants' inaction

On December 31, White and Parker came to the Pineville store for a "regularly scheduled visit." KW 59. Shortly after their arrival, White spent about 10-15 minutes talking with Tambling at her desk at the front of the store. MT 100, KW 62-63, 70. During that conversation, Tambling seemed agitated and upset. KW 64. White recalls that Tambling reported that she was frightened by Spicer looking into her apartment, that he repeatedly described himself as "moist" and that "moist" had a sexual connotation to it and that he sat in the lobby with his legs spread in a sexual way. KW 65. White also remembers hearing about the "snuggling blondes" comment and the bathroom calls but does not know whether she already knew that before December 31. KW 138-39. Despite Tambling's descriptions, White did not think Tambling was making a complaint of sexual harassment. KW 66.

White's erroneous conclusion was not surprising, considering the company gave her no sexual harassment training. KW 146. She believed that an

individual's behavior had to fall under one of the specific examples listed in the employer's policy in order to be considered harassment. KW 147.

White then met with Spicer and Parker and relayed a watered-down version of Tambling's and Gleitsmann's complaints. KW 72-73, LS 61-72. Spicer had an excuse for each allegation. Id. The conversation lasted about fifteen minutes during which White did little more than obtain Spicer's side of the story. KW 72-75. Spicer was not even told that his behavior might be considered sexual harassment. LS 172-75. Neither White nor Parker said anything about there being any improper connotations in his behaviors. LS 73-75. In fact, White seemed embarrassed to ask Spicer to stop his behavior. LS 56-57. Even in their brief, defendants seriously understate Gleitsmann's version of Spicer's attack on her and fail to acknowledge her poignant testimony about it. Def. Brief. p. 6.

Neither White nor anyone else investigated the complaints. KW 75. No one spoke with any of the other women or looked further into the complaints. KW 74-75. No one from Human Resources ever went to the store. KW 155. And Spicer remained in his position and in daily contact with the women. MT Dec ¶ 11. Although he eventually received a Performance Improvement Notification (PIN) almost 2 weeks later, it seriously understated the Gleitsmann incident, and barely mentioned Tambling's complaints. Exs 8, 18, 19; see also LS 61-65. He also suffered no consequences, and, true to their earlier practices, defendants did not require him to attend any training or education in sexual harassment or discrimination. LS 75-76, 83-84, 193.

After they met with Spicer, White and Parker left for lunch, leaving Spicer in the store with the women. KW 74, KG 118-19. Later that day, Tambling sent White an email summarizing their conversation. MT 101, 110-11, 121-22.

Although White gave lip service in an email that the company was "taking her complaints seriously," Tambling, Gleitsmann nor anyone else, had any reason to believe that was true. MT Dec. ¶¶10-11, 17; MT 128-30, 167; KG Dec. ¶9. The women had no idea what was said to Spicer because they never received any report that anything was being done about their complaints and they believed that nothing was being done. MT 129-30.

During Tambling's short conversation with White on December 30, White acknowledged, "it sounds like Lars is emotionally unstable." MT 115. When White and Parker left the store with Spicer still in it, Tambling said to Pascoe, and maybe others, "I can't believe Kathy White thinks he's unstable, yet she's just going to just walk out the front door and leave us here with him." MT 118. Spicer learned about Tambling's comment and confronted White about it. LS 132-33. When White denied it, Spicer decided Tambling had said it and proceeded to lobby for Tambling's termination, even drafting a termination PIN. Ex. 9; LS 135-38, 144. A long discussion ensued about whether Tambling should apologize to Spicer, which only cemented Tambling's feelings that the company, specifically White, failed to take her concerns seriously. MT Dec. ¶ 10; LS 138-39, MT 165, KW 113-114.

After the fallout over the "unstable" incident ended, Tambling never heard another word about her complaint. MT 128-30, KW 81. She sent a follow up email shortly after the first of the year, and spoke with Christine Bonnell, a

human resources representative, a couple of times to find out "if anything was going to be done." Ex. 10; MT 108, 167. Bonnell simply said that "things were being taken care of" but would give Tambling no further information. MT 167. "We're handling it", seemed to be the standard reply from management. Ex. 11.

Although Spicer distanced himself from her after her complaint, going to work with him daily and waiting for the other shoe to drop was "terribly upsetting" to her. MT ¶ 12; MT 130. Even after Spicer left, Tambling continued to feel anxious and panicky, and saw her family doctor for treatment. MT 150. Spicer's erratic behavior continued; on January 14, he called White and accused her of slandering him, raising his voice with her. KW 124. Gleitsmann would find it hard to believe that any action was taken against Spicer, because "his actions didn't change at all." KG 124-25. She thought his behavior warranted termination. KG 127. In any case, "their complaints were never "justly talked about and dealt with." KG 135. See also KG ¶ 5, 6, 9.

Even after December 31, defendants received information about Spicer's unstable and frightening behavior, yet did nothing. Ex. 12, 13, 14, 15; SD 226-230. They continued to ignore his behavior, even when White finally started to believe he was capable of being untruthful. Ex. 16.

Spicer was eventually terminated in early March 2009 for violating a minor store policy. Ex. 17; KG 135-36. At the time of his termination, despite the additional information the company had from Pascoe and Dorety after their departures, Spicer still had never been told that anyone said there was a hostile work environment. LS 120, 158.

SUMMARY JUDGMENT STANDARD

Summary Judgment is inappropriate where a reasonable jury could return a verdict for the non-moving party. See Mosby-Grant v. City of Hagerstown, 2010 U.S. App. LEXIS 25850, *17 (4th Cir. 2010) (denying summary judgment where "reasonable jury" could conclude that plaintiff was exposed to a hostile work environment because of her sex). In reviewing a motion for summary judgment, the Court reviews the facts in the light most favorable to the plaintiff. Smith v. First Union, 202 F.3d 234 (4th Cir. 2000). "In addition, the non-moving party is entitled to have the credibility of [her] evidence as forecast assumed, [her] version of all that is in dispute accepted, all internal conflicts in it resolved favorably to [her], the most favorable of possible alternative inferences from it drawn in [her] behalf; and finally, to be given the benefit of all favorable legal theories invoked by the evidence so considered." Charbonnages de Fr. v. Smith, 597 F.2d 406, 414 (4th Cir. 1979); see also Metric/Kvaerner Fayetteville v. Fed. Ins. Co., 403 F.3d 188, 197 (4th Cir. 2005). Further, courts are cautioned to be particularly careful when considering a motion for summary judgment in employment discrimination cases, because motive is often the critical issue. Ballinger v. N.C. Agr. Extension Serv., 815 F.2d 1001, 1005 (4th Cir. 1987). See also, Moser v. MCC Outdoor, L.L.C., 630 F. Supp. 2d 614, 621 (M.D.N.C. 2009).

Despite these well-established standards, defendants' statement of facts is liberally peppered with assertions set forth in over seventy pages of affidavits from Spicer, White and Bonnell. Yet defendants fail to acknowledge that many of their facts and inferences directly contradict those set forth in the depositions of plaintiffs, Gleitsmann and Dorety. Plaintiffs have done their best to bring these

contradictions to the court's attention without creating even more superfluous verbiage. See generally, Declarations of Tambling, Gleitsmann and Pascoe.

ARGUMENT

I. BOTH PLAINTIFFS HAVE SET FORTH FACTS SUFFICIENT FOR A JURY TO FIND A TITLE VII VIOLATION

A. Plaintiffs were subjected to a hostile work environment based on sex

An employee may prove a hostile work environment based on sex by showing: (1) harassment "because of" sex; (2) unwelcomeness of the harassment; (3) the harassment was severe and pervasiveness enough to create an abusive work environment; and (4) a basis for imputing liability to the employer. Smith v. First Union, 202 F.3d 234, 241 (4th Cir. 2000). The unwelcomeness prong is not in dispute in this case. With respect to the remaining elements, plaintiffs set forth evidence sufficient for a reasonable jury to find that they were subjected to a hostile environment.

(1) The Hostile Work Environment Was Gender Motivated.

Regrettably, defendants encourage this Court to adopt the same myopic and limited view of unlawful harassment under Title VII, as did its untrained manager, Kathy White. It is well established that Title VII hostile work environment prohibition encompasses behavior well beyond sexual advances and propositions. Smith v. First Union Nat'l Bank, 202 F.3d 234, 242 (4th Cir. 2000); EEOC v. Fairbrook Med. Clinic, P.A., 609 F.3d 320, 328 (4th Cir. 2010) ("easily" dismissing defendants' argument that harasser did not make offensive comments because of sex because he was generally a crude person); See also, e.g., Smith v. St. Louis University, 109 F.3d 1261, 1265 (8th Cir. 1997). "Instead, an employer violates

Title VII "when 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 . . . .'" Id. (*citing* Harris, 510 U.S. at 21). Ziskie v. Mineta, 547 F.3d 220 (4th Cir. 2008) (harassment due to personality conflicts insufficient but plaintiff may prove sex-based discrimination in the workplace even though she is not subjected to sexual advances or propositions, if she can show that she is the individual target of open hostility because of her sex)

Courts have found a hostile work environment to be gender motivated based on a harasser's gender-biased statements, and/or by the fact that the harasser targeted women (but not men) for the harassing conduct at issue. Compare Yanke v. Mueller Die Cut Solutions, Inc., 2007 U.S. Dist. LEXIS 14630 (W.D.N.C. Feb. 28, 2007) (construing references such as "I am going to bop you" or telling a female employee that her "headlights were on" to be sexual in nature evincing gender motive in denying summary judgment on HWE claim) with Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 269-70 (8th Cir. 1993), rehearing denied, 1994 U.S. App. LEXIS 1094 (8th Cir. Jan. 21, 1994) (finding gender based HWE where harasser "primarily" targeted women in conduct that included yelling, swearing, threatening and physically endangering and where his conduct toward women was more serious in nature than the males); Zakre v. Norddeutsche Landesbank Girozentrale, 396 F. Supp. 2d 483, 511 (S.D.N.Y. 2004) (**"**contention that [harasser] was more abusive to women than to men may be enough to meet [because of gender] element").

Here, Plaintiffs can show both that Spicer made gender based statements and that he subjected women to a hostile work environment while exempting, Green, the male from it. The evidence shows that Spicer had a bias toward women through his repeated descriptions of White as the "princess of darkness," which is reasonably considered derogatory and dismissive of her authority. MT Aff. ¶13. Spicer also arguably expressed an interest in tall, skinny blondes and asked Pascoe to go out with him socially, which also evince a gender motive. Relatedly, Spicer asserted his dominance over his female subordinates through behavior that ranged from the sexually strange to the violently menacing.

The stark contrast between Spicer's treatment of the women versus his treatment of Greene likewise reasonably implies that he targeted the women due to their gender. MT Decl. ¶12; KG Decl. 7. The record shows that this male employee seemingly enjoyed a safe harbor in Spicer's storm of misconduct, while the women were almost uniformly targeted. Id. Thus, there is no evidence that Spicer yelled at, threatened, hugged, discussed his sex life or otherwise directed harassing behavior to the male employee.

Against this phalanx of gender based evidence, defendants offer up Spicer's alleged homosexuality as a panacea or balm negating any possible gender bias. At the outset, there is a material issue of fact as to Spicer's sexual orientation since he admitted a willingness to date women, he flirted with Pascoe and never told staff he was gay. However, whether he is gay or not, courts have found a harasser's declared sexuality to be irrelevant to the merits of hostile work environment claims. Tanner v. Prima Donna Resorts, 919 F. Supp. 351, 355-56 (D. Nev. 1996) ("As long as a plaintiff can prove he or she was harassed because of his

or her sex, the sexual preference of the parties is irrelevant to whether a claim is stated.); Marciano v. Kash n' Karry Foodstores, 1996 U.S. Dist. LEXIS 10491 (M.D. Fla. July 1, 1996) (sexual preference and sexual orientation are incidental occurrences which this Court finds irrelevant to hostile work environment cases.).

Moreover, it is well recognized among workplace experts and in the legal system that a harasser creates a hostile work environment not for sexual gratification, but to use sex to establish power over other individuals. See Ex. 21; Gregory v. Daly, 243 F.3d 687, 700 (2d Cir. 2001) (citing EEOC v. Farmer Bros. Co., 31 F.3d 891, 898 (9th Cir. 1994) (noting that in many circumstances "the employer or supervisor uses sexual harassment primarily to subordinate women, to remind them of their lower status in the workplace, and to demean them," and that in such cases, "the 'sexual' element of the harassment is only secondary")).

(2) Taken Cumulatively Spicer's Conduct Satisfies the Severe and Pervasive Prong

"There is no mathematically precise test for determining if an environment is objectively hostile or abusive." EEOC v. Fairbrook Med. Clinic, P.A., 609 F.3d 320, 328 (4th Cir. 2010). Instead, the Court must make a determination from the perspective of a reasonable person in plaintiffs' position and consider all of the circumstances, including, the frequency of the conduct, the severity of it, "whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. In fact, the Supreme Court has set forth a "totality of the circumstances" test. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81-82, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) ("The real social impact of workplace behavior often depends on a

constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."); Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993) ("whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances").

In applying this totality of the circumstances test it is improper to consider each offensive event in isolation; rather a reasonable jury is to consider the combined effect of all of the behaviors and the context of them, including the relative power of the harasser and his victim. Jackson v. Quanex Corp., 191 F.3d 647, 660 (6th Cir. 1999) (citation omitted) (improper to consider each offensive event in isolation, "as the very meaning of 'environment' is 'the surrounding conditions, influences or forces which influence or modify"). Thus, in Conner v. Schrader-Bridgeport Int'l, Inc., 227 F.3d 179, 193 (4th Cir. 2000), the district court improperly failed to consider, in addition to a small handful of off-color comments, other behavior that made the plaintiff's work environment difficult or humiliating, including (among other things) that male employees mocked plaintiff when her machine malfunctioned; plaintiff was singled out for discipline relating to her absences and was timed with a stopwatch when she went to the bathroom. See also EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 318 (4th Cir. 2008) (noting that although "[a]ny of the [alleged] incidents, viewed in isolation, would not have been enough to have transformed the workplace into a hostile or abusive one... [w]e cannot...view the conduct without an eye for its cumulative effect"); Davidson-Nadwodny v. Wal-Mart Assocs., 2010 U.S. Dist. LEXIS 29165, 18-19 (D. Md. Mar. 26, 2010) ("A reasonable jury considering the combined effect of each instance of

[defendant's] alleged touching, along with her stares, in a work area that required close physical proximity, could determine that this repeated physical contact created a work environment that was sexually humiliating and offensive to plaintiff").

Among the factors to consider is whether the harasser's behavior was physically threatening. Sunbelt Rentals, Inc., 521 F.3d at 318 ("While the presence of "physical threats undeniably strengthens a hostile work environment claim," we have not held that such evidence is required"); EEOC v. Whirlpool Corp., 2009 U.S. Dist. LEXIS 118624, 20-24 (M.D. Tenn. Dec. 21, 2009) ("harassment that involves "an element of physical invasion" is considered to be more severe than harassing comments alone); Jessen v. Babbitt, 1999 U.S. App. LEXIS 33627, 7-9 (10th Cir. 1999) (considering harasser's physical intimidation of plaintiff by blocking her path down and directing hostile facial expressions and body language to be evidence of severe and pervasive harassment despite fact that physical intimidation may not appear on its face to be related to his attitudes about gender or sex); Robinson v. Sappington, 351 F.3d 317, 329-30 (7th Cir. 2003) (plaintiff met her burden by showing (1) "several overtly sexual remarks; (2) intimidating and threatening behavior and (3) "other gestures that, although innocuous in themselves, when put in the larger context, served as constant reminders of [the harasser's] interest in her and in exercising control over her.)

According to the Fourth Circuit, a court may also consider harassing conduct toward other employees, even if not directly observed by the plaintiff:

> While courts must focus primarily on a plaintiff's personal experience, comments made to others are also relevant to determining whether an employee was subjected to severe or

> pervasive religious harassment. For courts are concerned with the "environment" of workplace hostility, and whatever the contours of one's environment, they surely may exceed the individual dynamic between a complainant and his coworkers.

Sunbelt Rentals, Inc., 521 F.3d at 318. See also King v. McMillan, 594 F.3d 301, 310 (4th Cir. 2010) (testimony from other employees describing their own experiences of harassment by the defendant is often relevant to a plaintiff's hostile work environment claim); Ziskie v. Mineta, 547 F.3d 220, 224 (4th Cir. 2008) ("the Fourth Circuit has rejected the contention that only conduct directed at a plaintiff can be considered in evaluating a hostile work environment claim"); Conner, 227 F.3d at 200. ("The fact that two female machine operators later hired into the Department . . . experienced the same types of unwelcome conduct [as plaintiff] is also highly supportive of the jury's determination of a gender-based hostile work environment)

Courts also consider whether plaintiff has suffered emotional distress in determining whether the conduct was sufficiently severe or pervasive. See., e.g., Mosby-Grant v. City of Hagerstown, 2010 U.S. App. LEXIS 25850, *23 (4th Cir. 2010) (considering severe emotional distress suffered by plaintiff among other factors in determining she was subjected to hostile work environment).

Taking reasonable inferences in plaintiffs' favor, there is an ample constellation of both severe and pervasive conduct to rise to an unlawful level. Indeed, the outrageousness of Spicer's threats of violence and the dangers of ignoring them are painfully punctuated by the assassination attempt in Tucson, Arizona. Spicer threatened both plaintiffs that he knew where they lived, and that he had a gun collection and was not afraid to use it. On other occasions he

raised his fist as if to strike Gleitsmann or charged aggressively into the women's personal spaces. As a result, plaintiffs and several other female employees have testified to their genuine fear of physical harm by this disturbed man.

His overtly threatening behavior was made all the more effective in creating a hostile environment because of his emotionally erratic behavior. Even White, acknowledged that he was "unstable." Plaintiffs were convinced that this man was unstable enough to snap and actually effectuate his threats.

The already troubling threatening behavior was infused with extremely odd, yet persistent sexual references directed at the women there. White was (at best) gullible and (at worst) complicit in buying Spicer's dubious explanation that he used the term "moist" to describe that he was perspiring, particularly in the Winter. The women who heard the comments first hand understood that Spicer used the term sexually to describe that he was aroused, no different than if he was advertising that he had an erection. His repeated calls to Stringfield from the bathroom only to tell her that's where he was can also be reasonably interpreted as sexual. There was no business reason for the calls, thus it could only have been for an ulterior purpose. The fact that the calls were made from a restroom where people inherently disrobe plausibly suggests the ulterior purpose was sexual.

The sexual nature of this conduct is made even more plausible by the explicitly sexual comments Spicer made. For example, multiple witnesses corroborated that Spicer said he liked to snuggle with skinny blondes, or more specifically that "he liked tall, thin blondes that he could snuggle between his groin and his nipple." His regular comments about being naked in his bed or eating naked in his bed also reasonably had a sexual flavor to them. He also

propositioned Pascoe to set him up with a date with a man or a woman and suggested that she have sex with Tambling's son who was many years her junior.

Indeed, the jury could reasonably conclude that the bizarreness and peculiarity of the sexual comments at issue in this case are potentially more severe or disturbing than more common sexual banter. Indeed, the odd sexual comments were part and parcel of a broader range of conduct that conveyed a craziness or instability.

Finally, arguably resolving any remaining doubt as to the severity or pervasiveness of the conduct, is the fact that both plaintiffs have suffered emotional distress as a result of Spicer's conduct. See supra pp. 10-12.

At the very least, the Court should hold that it is a close enough call that it the province of the jury to decide whether the severe and pervasive element is satisfied. Indeed, the Fourth Circuit has repeatedly noted that whether harassment is sufficiently severe or pervasive is "quintessentially a question of fact" for the jury." Smith v. First Union Nat'l Bank, 202 F.3d 234, 243 (4th Cir. N.C. 2000) (reversing district court's for incorrectly resolving issue of fact on sever and pervasiveness that jury should have decided) (quoting Beardsley v. Webb, 30 F.3d 524, 530 (4th Cir. 1994)); *Cf.* Homesley v. Freightliner Corp., 1999 U.S. Dist. LEXIS 22643, 24-25 (W.D.N.C. July 15, 1999) (Mag. J. Cogburn) ("It is for a jury to decide whether this progressive discipline of [the harasser] was "prompt" and "appropriate" under the circumstances, given the lewd, offensive, and personal nature of [harasser's] conduct"), adopted by district court judge, 122 F. Supp. 2d 659(W.D.N.C. 2000), jury verdict in plaintiff's favor aff'd, 2003 U.S. App. LEXIS 7545 (4th Cir. April 22, 2003).

(3) Defendants' Response (or Lack Thereof) Falls Well Short of Establishing a Ellerth /Faragher Defense.

An employer seeking to avoid liability for an otherwise unlawful hostile work environment has the burden of proving that "it exercised reasonable care to prevent and correctly promptly any" harassing behavior, and that plaintiff "unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." Ellerth, 524 U.S. at 765; Faragher v. City of Boca Raton, 524 U.S. 775, at 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 ("The defense comprises two necessary elements").

The mere existence of an anti-harassment policy does not allow a defendant to establish it exercised reasonable care to prevent harassment. "While the 'adoption of an effective anti-harassment policy is an important factor in determining whether it exercised reasonable care,' the policy must be effective in order to have meaningful value." EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 320 (4th Cir. 2008) (*quoting* Smith, 202 F.3d at 244; White, 375 F.3d at 299-300)."

Thus, the Fourth Circuit has found an employer's failure to respond to a plaintiff's initial verbal complaints of harassment to preclude the affirmative defense, even though the defendant subsequently took some corrective action after the plaintiff made a written complaint. Sunbelt Rentals, 521 F.3d 306, 320 (defendant failed to engage in any meaningful response to the plaintiff's verbal complaints despite promises to do so); EEOC v. Federal Express Corp., 188 F. Supp. 2d 600, 609-10 (E.D.N.C. 2000) (rejecting affirmative defense where plaintiff reported various harassment incidents to her supervisor verbally and supervisor failed to document, investigate or report them up her chain of

command, notwithstanding that an investigation did ultimately ensue months later after plaintiff filed an internal written harassment complaint where tardy investigation was also flawed in that it did not include interviews of potential witnesses identified by plaintiff).

Indeed, the affirmative defense should not be applied even if plaintiff failed entirely to report or make a complaint about the harassment, if the Company otherwise had actual or constructive knowledge. Ocheltree v. Scollon Prods., 335 F.3d 325, 334 (4th Cir. 2003) ("An employer cannot avoid Title VII liability for coworker harassment by adopting a 'see no evil, hear no evil' strategy. Knowledge of harassment can be imputed to an employer if a 'reasonable [person], intent on complying with Title VII,' would have known about the harassment.") (citing Spicer v. Virginia, 66 F.3d 705 710 (4th Cir. 1995)); Zeuner v. Rare Hospitality Int'l, Inc., 338 F. Supp. 2d 626, 645 (M.D.N.C. 2004) (plaintiff's failure to formally report harassment to HR or immediate supervisor did not permit affirmative defense where supervisor otherwise had actual or constructive knowledge to some of the alleged incidents giving rise to the HWE and plaintiff had otherwise made vague complaints to him about the harasser).

The affirmative defense can also be rejected where the employer failed to conduct an adequate investigation or failed to take sufficient disciplinary action against the accused harasser. EEOC v. Cent. Wholesalers, Inc., 573 F.3d 167, 178 (4th Cir. 2009) (Considering company's failure to respond to all reports of harassment and its failure to demote, suspend, reduce pay or issue written reprimand to alleged harassers as evidence that company was not entitle to affirmative at summary judgment); Smith v. First Union Nat'l Bank, 202 F.3d 234,

245 (4th Cir. 2000) (denying affirmative defense in part on "inadequate investigation" that was led by person with no sexual harassment experience, focused on management style issues and ignored sexual content of remarks and threatening behavior, and that culminated in company only placing harasser on probation and permitting him to work in physical proximity to plaintiff).

The fact that the harassment may have stopped after a defendant took corrective action does not mean that summary judgment should be granted for an employer. Kopp v. Samaritan Health Sys., Inc., 13 F.3d 264, 270 (8th Cir. 1993) (refusing to grant SJ on the affirmative defense even though harassment ceased since reason for harassment ceasing was not necessarily the corrective action taken by defendant). Furthermore, the fact that a company's delinquent response ultimately resulted in the sexual harassment stopping also failed to support the affirmative defense, where the harassment merely transitioned to being retaliatory in nature. EEOC v. Federal Express Corp., 188 F. Supp. 2d 600, 609-10 (E.D.N.C. 2000) (rejecting affirmative defense notwithstanding that plaintiff acknowledged that sexual harassment stopped after her written complaint where plaintiff testified that she was treated in hostile fashion, different and otherwise alienated).

Here, defendant's policy and its "enforcement" of that policy is rife with flaws and shortcomings that doom its eligibility for the Ellerth/Faragher defense. At the outset there is a material issue of fact as to whether the Company can even claim to have an effective harassment policy in place. Defendants' enforcement of its harassment policy stopped and ended at the proverbial printer. Indeed, according to Spicer, while the harassment policy may have been in a stack of papers presented at orientation, there was no effort or time given to actually review

it. Similarly, Defendants also failed to follow up the questionable dissemination of the policy with any sexual harassment training of any kind. Ocheltree, 335 F.3d at 334 (finding "sexual harassment policy" contained in employee handbook deficient for multiple grounds including its failure to provide any sexual harassment training).

Defendants' lack of commitment to its harassment policy is made even more evident by White's failure to respond to the various verbal reports of Spicer's harassing conduct. Prior to Tambling's written complaint, she verbally reported Spicer's conduct to White approximately four to six times. In addition, Gleitsmann made an official report of her frightening experience sometime around mid-December. Yet, despite these repeated and corroborated reports of the hostile work environment Spicer was creating, White did nothing and as a result the harassment continued. White's inaction is ample basis for finding defendants failed to take prompt corrective action.

It was only after Tambling effectively forced the issue by putting her concerns in writing that White finally reacted, but even then her response was feckless. Spicer complains in his brief that plaintiffs have "made additional allegations which go beyond those that were addressed in the December 31, 2008 formal counseling session." Spicer Brief p.4. That is exactly the point here. Although Tambling, Gleitsmann and Dorety certainly shared enough information with White over the months to paint an accurate picture of the sexually harassing and frightening environment to which they were subjected, none of that was conveyed to Spicer. KW 72-73; LS 61-72.

Instead of taking action commensurate with the severity of the complaints, White, lacking any sexual harassment training, conducted an "investigation" that lasted approximately twenty-five minutes and omitted interviewing several potential witnesses, including: Gleitsmann, Dwyer or Pascoe. She obtained no written statements and created no notes.

Having conducted an investigation in a manner to seemingly not obtain evidence against Spicer, White then not only issued a minimal disciplinary action, she sanitized the language in the document of the most serious allegations. Yet, juxtaposed against the free pass White gave Spicer over the harassment reports, the company abruptly fired him for violating a pricing procedure. Regrettably, that disparity reveals a company with its priorities widely skewed and undeserving of protection under Ellerth/Faragher.

Finally, defendants cannot also otherwise evade responsibility under Ellerth/ Faragher on the grounds that plaintiffs "unreasonably failed to take advantage of any preventative or corrective opportunities." Tambling reported Spicer's harassing conduct at least four to six times verbally and once in writing. Reporting harassment to the victim's immediate supervisor is permissible under the Company's sexual harassment policy. Upon receiving each report, it was White's obligation to notify Human Resources; she did not do so until receiving Tambling's December 31 complaint.

Admittedly, Pascoe was not as active in her reporting the conduct, although she did notify White that there were problems with Spicer and would have elaborated further had White not cut her off. Ocheltree, 335 F.3d at 335 (rejecting affirmative defense where plaintiff tried unsuccessfully to report

harassment to management and was referred to her line supervisor or told to get back to work). In any event, Pascoe's failure to complain is rectified by the fact that Tambling and Gleitsmann reported much of the same conduct Pascoe would have reported, thus establishing defendants otherwise had actual or constructive knowledge. Indeed, when White visited the store on December 31st, she failed to interview Pascoe and thus is at least as equally at fault as Pascoe for her not learning of Pascoe's experiences with Spicer.

II. PLAINTIFFS HAVE MARSHALLED SUFFICIENT EVIDENCE TO SURVIVIVE SUMMARY JUDGMENT ON THEIR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS.

The elements for the intentional infliction of emotional distress claims are (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress. Brown v. Burlington Industries, Inc., 93 N.C. App. 431, 435 (N.C. Ct. App. 1989). Extreme and outrageous conduct is considered conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 493, 340 S.E.2d 116, 123, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 141 (1986) (*quoting* Restatement (Second) of Torts § 46, comment d (1965).

Courts have consistently recognized IIED claims in the employment setting, with most of those cases involving incidents of overt sexual harassment. Brown, supra. (finding IIIED based on sexually suggestive remarks and gestures toward plaintiff and implications that plaintiff would benefit in employment for sex with harasser notwithstanding lack of physical element to harassment);

Hogan, 79 N.C. App. at 490-91, 340 S.E.2d at 121 (extreme and outrageous behavior found where defendant made sexually suggestive remarks and physical insinuations to plaintiff and when she refused his advances he screamed profane names at her, threatened her with bodily injury and slammed a knife down on the table in front of her); McLain v. Taco Bell Corp., 137 N.C. App. 179, 527 S.E.2d 712, *disc. review denied*, 352 N.C. 357, 544 S.E.2d 563 (2000) (extreme and outrageous behavior found where defendant, after physically assaulting plaintiff, began masturbating, and ejaculated on plaintiff).

However, the touchstone of the IIED tort is that there be extreme and outrageous conduct; there is no requirement that the conduct necessarily or even predominantly be sexual. Indeed, courts have considered combinations of sexual and non-sexual conduct in finding meritorious IIED claims. See, e.g., Watson v. Dixon, 130 N.C. App. 47, 53, 502 S.E.2d 15, 20 (1998), *aff'd*, 352 N.C. 343, 532 S.E.2d 175 (2000) (extreme and outrageous behavior found where defendant frightened and humiliated plaintiff with cruel practical jokes, made obscene comments to her, made indecent physical suggestions and threatened her personal safety); Bryant v. Thalhimer Bros., 113 N.C. App. 1, 9-10 (N.C. Ct. App. 1993) (finding jury issue on IIED claim arising from a combination of initial sexual harassment perpetrated by supervisor followed by retaliatory harassment in supervision of plaintiff after reporting the harassment internally); Ruff v. Reeves Bros., 122 N.C. App. 221, 227 (N.C. Ct. App. 1996) (considering incidents of non-sexual nature in addition to incidents of sexual harassment in denying SJ on IIED claim, including horseplay).

Here, the Court is presented with a cocktail of extreme and threatening conduct that included threats of gun violence and surveillance of employees at their personal homes, aggressively invading employee's personal space (including raising a hand to strike) coupled with extremely odd sexual comments and behavior. Significantly, this conduct was perpetrated by a man that even White acknowledged was "unstable," which made the foregoing conduct all the more scary for the women at the store. The net effect of said conduct resulted in plaintiffs and other women literally fearing for their safety. Plaintiffs have also suffered the requisite severe emotional distress as set forth in Dr. Sultan's expert reports. Exs. 3 and 4. Accordingly, for these reasons and those set forth in greater detail in the Title VII section of this brief, there is ample evidence for the Court to permit the jury to determine whether Defendants should be liable for Spicer's extreme and outrageous conduct.

Disputing plaintiffs' claims that they suffered severe emotional distress, Spicer seems to argue that both plaintiffs experienced greater emotional distress before they met him and therefore they cannot show that he caused them emotional distress. Spicer Brief p. 7-10. Defendants cite to no case that stands for the proposition that a person alleging emotional distress cannot have previously experienced emotional distress or that, in order to allege emotional distress, the emotional distress must be greater than any emotional distress experienced by that person in the past.

Injecting inappropriate credibility questions into the summary judgment proceedings, Spicer also argues that the Court should disregard plaintiffs'

evidence of emotional distress because they were dishonest about their backgrounds. Spicer's arguments are far off-base.

With respect to Tambling, she had readily admitted to experiencing emotional distress in connection with her former marriage and has described her difficult divorce, which anyone would consider to be a considerable stressor. MT 162-64, FS 55-56. However, after the divorce and before Spicer started (in 2007 and most of 2008), Tambling had no complaints about stress. Throughout Spicer's employment she was extremely anxious and experienced what she believed to be panic attacks. MT 181-82, TT 44-52. In March, 2009, she sought medication from her family physician. By April 2009 (after Spicer was gone but while Tambling was still working part time), she had begun to improve. While complaining that Tambling never told her family doctor about Spicer when reporting her anxiety attacks, Spicer neglects the fact that her anxiety problems were a matter of serious discussion between Tambling and her boyfriend (now husband) and that she saw her doctor in part because he encouraged her to do so and also Tambling's reasonable explanation for why she did not provide her doctor with details about Spicer. TT 35-43, PS 32-33, MT 184-85

With respect to Pascoe, Spicer cites to Dr. Freeman-Kwaku's deposition to argue that Pascoe did not complain of sexual harassment when she saw her doctor on October 21. He conveniently ignores, however, the very logical explanation for that fact, which is that on October 21 Pascoe went in for treatment for a urinary tract infection and did not see Dr. Freeman-Kwaku but one of her partners. FK 40. Despite that, Dr. Freeman-Kwaku remembers Pascoe telling her about Spicer's harassment at some point while it was ongoing.

FK 33-38, 45-49. Pascoe refilled her anxiety medication (alprazolam – xanax generic) on November 8 and December 29. Ex. 20.

Tambling takes particular issue with Spicer's position that she initially provided false information to the Court in her discovery responses. "False" information is entirely different from "inaccurate" information and the Court must made credibility judgments in favor of the non-moving party, plaintiffs. In her deposition, Tambling readily admitted that she had taken anxiety medication in the past. MT 162. She also readily admitted that she had been through a long and messy divorce and that her ex-husband had cheated on her. MT 162, 163-64. As she stated in her supplemental discovery responses, to which defendants cite, she forgot that, in connection with her entire ugly divorce proceedings, she had a one time visit to a psychologist. The notes of this visit were procured and immediately produced to defendants. It is difficult to imagine what motive Tambling could have to hide the fact of this visit when she discussed so openly the rest of her history, problems with her ex-husband and divorce, both in her deposition and with Dr. Faye Sultan. MT 162-64; FS 55-56. It is also certainly understandable that Tambling, a lay person, would not know the difference between what she admitted was a long and drawn out divorce proceeding and the complaint of emotional distress against her ex-husband during those proceedings.[3]

[3] During the divorce, Tambling's ex-husband began mailing documents, including a very explicit and personal affidavit obtained during the proceedings, to Tambling's friends, family and others, even the principle in Tambling's son's school. This behavior was the basis for the emotional distress Complaint.

The same is true for any discrepancies in Pascoe's discovery responses. Pascoe was extremely forthcoming in her deposition and in her reports to Dr. Sultan about her background. In fact, defendants learned of Pascoe's abusive boyfriend because she provided that information through Dr. Sultan's report, and not because defendants asked the question in discovery.

III. PLAINTIFFS' ASSAULT, RETALIATION AND CONSTRUCTIVE DISCHARGE CLAIMS.

Plaintiffs voluntarily withdraw their Assault claims; Tambling voluntarily withdraws her Retaliation claim and Pascoe voluntarily withdraws her Constructive Discharge claim to maximize judicial efficiency in the adjudication of their other claims.

IV. THERE ARE SUFFICIENT FACTS FOR A JURY TO FIND THE COMPANY RESPONSIBLE FOR SPICER'S TORTIOUS CONDUCT.

Defendants are liable for Spicer's intentional infliction of emotional distress on them because they ratified his conduct. To establish that an employer has ratified an employee's actions, it must be shown that the employer had "full knowledge of all the material facts," . . . or had "knowledge of facts which would lead a person of ordinary prudence to investigate further." Denning-Boyles, 123 N.C. App. 409, 415, 473 S.E.2d 38, 42 (1995) (citations omitted) (reversing MSJ on ratification of IIED claim and rejecting employer's argument that it did not know all material facts about the sexual harassment and finding it ratified said conduct through failure to investigate the allegations further); Carolina Equipment & Parts Co. v. Anders, 265 N.C. 393, 401, 144 S.E.2d 252, 258 (1965) ("When [principal] has such information that a person of ordinary intelligence

would infer the existence of the facts in question, the triers of fact ordinarily would find that he had knowledge of such fact." (citing Restatement (Second) of Agency, § 91, Comment c, p. 232 (1958)).

The employer must also be shown to have "signified his assent or his intent to ratify by word or by conduct which was inconsistent with an intent not to ratify." Carolina Equipment, 265 N.C. at 400-01. "The jury may find ratification from any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent's unauthorized acts[,] and "such course of conduct may involve an omission to act." Burlington Industries, 93 N.C. App. at 437, 378 S.E.2d at 236 (citation omitted).

Thus, numerous courts have found an employer's failure to promptly investigate a report of sexual harassment to establish ratification, even where the employer may have ultimately taken corrective action. See Burlington Industries, supra. (jury question presented regarding company's ratification of defendant's actions, notwithstanding company's eventual discharge of defendant, where plaintiff's immediate supervisor took no action for two years and omission to act in that time period was deemed ratification by employer); Guthrie v. Conroy, 152 N.C. App. 15, 28 (N.C. Ct. App. 2002) (holding jury question regarding employer liability for ratifying civil assault by co-worker arising from touching neck and shoulders and throwing soil and water where employer failed to take any action against harasser after plaintiff first several reports, but ultimately issued a written reprimand that ceased the conduct).

Here, defendants had actual or constructive knowledge of Spicer's tortuous conduct by virtue of the five to six verbal complaints it received from Tambling, Gleitsmann and Dorety. Any components of the hostile work environment not explicitly conveyed in those complaints should otherwise be constructively attributed to defendants by White's failure to properly investigate those complaints, including her cutting short Pascoe's attempt to complain.

In addition to having knowledge of the tortious conduct, defendants ratification of Spicer's tortuous conduct is established in at least three ways. First, White's failure to respond to the first five to six complaints about Spicer's conduct illustrate that she condoned it. Second, when White was effectively forced to respond by Tambling's complaint, she conducted an investigation that failed to include interviewing obvious witnesses and reasonably appears to have been designed to vindicate Spicer. Third, the performance document she issued to Spicer whitewashed the most serious allegations against him and she followed that meager effort up with not even mentioning the complaints in his evaluation. Accordingly, a reasonable jury could find that White (as defendants' agent) ratified his conduct.

V. PLAINTIFFS HAVE SET FORTH SUFFICIENT FACTS TO GO FORWARD ON THEIR NEGLIGENT RETENTION AND SUPERVISION CLAIMS

An employer can be liable under the negligent retention and supervision tort where the employer's "incompetent employee committed a tortious act resulting in injury to plaintiff and that prior to the act, the employer knew or had reason to know of the employee's incompetency." Hogan, 79 N.C. App. at 495 (finding employer liable for supervisors IIED on plaintiffs and employer had

notice of supervisor's sexual proclivities). Spicer committed a tortious act by intentionally inflicting emotional distress upon plaintiffs, which resulted in the emotional distress injuries suffered by them. Defendants had actual knowledge of much of Spicer's conduct as a result of the various verbal complaints by Tambling and Gleitsmann, which obviates any failure on Pascoe's part to file a formal complaint. See Wood v. N.C. State Univ., 2008 N.C. App. LEXIS 695, 11-12 (N.C. Ct. App. Apr. 15, 2008) (plaintiff's failure to file formal complaint of sexual harassment did not absolve defendant in negligent supervision claim where defendants agents were otherwise aware of allegations); Gonzales v. N.C. State Univ., 189 N.C. App. 740, 745 (N.C. Ct. App. 2008) ("NCSU could and should have requested a written complaint, made written documentation of [plaintiff's] oral complaint, and conducted a further investigation to determine the veracity of the claim. Any of these actions could have forestalled [harasser's] subsequent misconduct."). For the same reasons identified above, defendants failed to respond appropriately in putting a stop to Spicer's conduct after it was repeatedly notified of his conduct and thus should be liable for the injuries suffered by plaintiffs.

CONCLUSION

Plaintiffs respectfully ask the Court to deny the defendants' Motions for Summary Judgment.

This the 24th day of January, 2011.

/s/Ann E. Groninger

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CERTIFICATE OF SERVICE

I certify that, on January 24

, 2011, a copy of this RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT was sent via the Court's CM/ECF electronic case filing system to defendants' counsel, as listed below:

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Ann E. Groninger

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Plaintiffs hereby certifies that the foregoing PLAINTIFFS' MEMORANDUM IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT is less than 12,000 words (excluding case caption and any certificates and signatures by counsel) as reported by word-processing software word count. Plaintiffs combined their response briefs, with permission, therefore allowing for a total word count of 12,000.

s/Ann E. Groninger
Ann E. Groninger