BENCHMEMO: Counterman v. A & P; CA 86-377-R; Trial set for Tuesday, October 28, 1986, at 9:00 a.m.

ATTORNEYS: Plaintiff - Jay J. Levitt
Defendant - James Mcelligott, Jr.
Eva Tashjian-Brown

Judge, this matter is before you for resolution at a trial to the bench as to the Title VII claims and at a jury trial as to the state claims, assaults and batteries and intentional infliction of emotional distress. (You previously denied the plaintiff's motion for an advisory jury as to the Title VII claims.) There is diversity as to the state claims since A&P is a Maryland corporation.

There are several outstanding motions to be aware of: (1) defendant's motion to dismiss or alternatively for summary judgment, filed Oct. 9, 1986; (2) plaintiff's motion to strike defendant's expert witness, filed Oct. 24, 1986. Because the motion to dismiss or for summary judgment was filed so close to the trial date and due to conflicts of counsel, both parties' counsel agreed to postpone a decision on the motion and proceed to trial.

SUMMARY OF THE CASE

This case involves a claim of sexual harassment and related claims of assault and battery and intentional infliction of emotional distress. The plaintiff alleges in her complaint that she was sexually harassed beginning in November, 1983 until May, 1985 by Earl Granger, an A&P employee. The plaintiff, Ms. Counterman, worked as a cashier in the A&P store located at 7041 Three Chopt Road (the Village Shopping Center) and Granger worked in the meat market area. Ms. Counterman states that she did not encourage, welcome or consent to the harassment, but that she did protest and resist Granger's conduct. Ms. Counterman further alleges that she complained to the defendant A&P's store manager, Bob Hendricks, about Granger's misconduct and that despite this, the misconduct continued until May 1985. Ms. Counterman further alleges that she complained to defendant A&P's personnel manager, Daniel Nienaber, about Granger's misconduct and that in response to her complaint, he wrote a letter stating that Ms. Counterman could be sued for slander and that no action would be taken by defendant to stop the harassment. Plaintiff also claims that Mr. Nienaber, who was a trustee of the union health fund, influenced a denial of plaintiff's legitimate medical claims by the union health fund in reprisal of Ms. Counterman's complaint against Granger.

The defendant A&P denies the plaintiff's allegations. The defendant claims that during part of the period about which Ms.

Counterman complains, plaintiff and Mr. Granger were assigned to different stores. Defendant also states that while Ms. Counterman did complain to Mr. Nienaber about the harassment, when he asked her if she had complained to Mr. Hendricks, she stated that she had not. The defendant states that Mr. Nienaber and Mr. Hendricks responded to this complaint in January, 1985 immediately after it was made and that on March 17, 1985, Mr. Granger was transferred from the Three Chopt store. Defendant also denies the claims regarding Mr. Nienaber's reprisal against Ms. Counterman in any denial of medical claims.

UNRESOLVED MOTIONS

(1) Plaintiff's motion that defendant's expert witnesses be stricken

Plaintiff made a motion on October 24 to which the defendant has not responded that all defendant's expert witnesses should be stricken for failure to comply with the Court's pretrial order concerning expert witnesses. The defendant notified Mr. Levitt on October 15 that it might call four expert witnesses in the case. Mr. Levitt responded on October 20 that he objected to the expert witnesses since calling them would violate the pretrial order. The pretrial order required all discovery to be concluded two weeks prior to the trial date and required such witnesses to identified in a timely fashion. In addition, A&P 's answer to interrogatory number 1 which had requested information on expert witnesses did not include any information about expert witnesses. I am sure Mr. Levitt will bring this up in court, Judge, should the defendant attempt to call expert witnesses.

(2) Defendant's motion to dismiss or alternatively for summary judgment

The defendant lists six grounds on which it asks for dismissal or summary judgment. I will list and discuss each ground.

1. Plaintiff's claims for assault and battery and emotional distress are barred by the Virginia Worker's Compensation Act, Virginia Code section 65.1-40, according to defendant. Defendant states that employees are precluded from maintaining common law

actions against their employers for employment-related injuries, and that even if the injury is the result of intentional action by a fellow employee or a third party, the injury may be accidental within the meaning of the act. Defendants further claim that all that is required is that the claimant "prove that the assault was directed against him as an employee or because of his employment" citing the Virginia Supreme Court. A&P also claims that psychological injuries are also covered by the Worker's Compensation Act. Cases decided by the Circuit Court of Richmond are cited for the proposition that "any claims for damages for emotional injury would be barred by the . . . Act."

Ms. Counterman cites the recent opinion of Judge Merhige in Roberts v. Southland Corp., CA 86-418-R. That case was also a sex harassment case under Title VII with diversity state claims for assault and battery and IIED. By memorandum opinion and order dated Oct. 22, 1986, Judge Merhige denied the defendant's motion to dismiss and held that the Virginia Worker's Compensation Act did not apply to state claims for assault and battery and emotional distress because, although the injuries occurred during the course of employment, they did not arise out of plaintiff's employment. As that opinion states, "to prove that a claimant's injury arose out of her employment, the claimant must show ' a causal connection between the claimant's injury and the conditions under which the employer requires the work to be performed.'(citations omitted). In an assault case, the necessary causal connection has been established by proof that 'the attack was directed against the claimant as an employee or because of the employment.'" Judge Merhige concludes that since the plaintiff's evidence may show that the assaults were of a purely personal nature, like those in the Braxton case, 335 S.E.2d 259 (1985), thus falling outisde of the scope of worker's comp coverage, the court cannot conclude that it lacks subject matter jurisdiction over the claims. Thus, Mr. Levitt urges that this Court has jurisdiction over these claims. Since Judge Merhige appears to have done a thorough job researching the issue, we should probably follow this precedent.

2. The defendant claims that it cannot be held liable under the doctrine of respondeat superior with respect to the state claims. According to the defendant, a plaintiff must establish the following in order to hold an employer responsible under respondeat superior: (1) the relation of master and servant between the parties, (2) that at the time of the commission of the tort the servant was about his master's business, and (3) that the servant was acting within the scope of his employment. A&P cites cases to support the rule that torts committed by an employee because of "an independent and personal motive" are not within the scope of his employment and do not subject the employer to liability. A&P further argues that as a matter of law, the alleged conduct was not and could not have been within the scope of Granger's employment, citing Rabon, 571 F.2d 1277, 1279 (4th Cir. 1978) which applied South Carolina law. In Rabon, the Fourths held that under respondeat superior, the employer was not liable for the employee's intentional tort, noting that the assault was not in furtherance of the employer's business. A&P cites two Virginia cases which give guidance on this issue. In Master Auto Service Corp. v. Bowden, 179 Va. 507, 19 S.E.2d 679 (1942), the court stated that "if it appears from the evidence that, at the time of the commission of a tort by a servant, the servant had temporarily abandoned the business of his master and was engaged in some activity of his own entirely disconnected with hs master's business, then the master is not liable, . . . "

In the City of Richmond v. Braxton, 230 Va. 161, 335 S.E.2d 259 (1985), the Supreme Court found that a supervisor's assault and harassment of another employee did not arise out of the employment. There the court stated that "[the applicable test] excludes an injury which cannot fairly be traced to the employment as a continuing proximate cause and which comes from a hazard to which the [worker] would have been equally exposed apart from the employment." The court then held that the assault in that case was "of a personal nature as it was not directed against the employee as part of the employment relationship and was in no way in furtherance of the employer's business." Id. at

262. Braxton involved a worker's comp claim, as noted in the discussion above of issue 1. The court was not considering the doctrine of respondeat superior. In addition, it seems that A&P is trying to have it both ways. Regarding issue 1 and worker's comp, A&P argues that the claim arose in the course of employment, and is therefore barred by worker's comp coverage. Regarding isssue 2 and respondeat superior, A&P argues that the claim did not arise out of the employment.

Plaintiff argues that Davis v. United States Steel Corp., 779 F.2d 209 (4th Cir. 1985), is controlling. In Davis, the Fourths discuss Rabon cited by A&P and discussed above and note this distinction: The employer would not be liable for the employee's activities before the employee's superior observed the breach of company policy and failed to take action against the employee. But at the point in time when a supervisory employee observed improper behavior and failed to take action, the matter then could be said to have progressed beyond the employee's own "frolic" to behavior known and condoned by the employer. In such a case, an employer could be held liable under respondeat superior, as the observations and inaction of a supervisory employee could be imputed to the employer. (A copy of Davis is attached for your perusal, Judge). The Fourths cite the Restatement for additional support for this distinction.

Plaintiff does not cite any Virginia cases on point, but does discuss a case dealing with the safety of an invitee, analogizing the duty owed by an owner of premises to use ordinary care to maintain the premises in a reasonably safe condition to the duty of an employer. In Roll 'r' Way Rinks v. Smith, 218 Va. 321, 327 (1977), the Supreme Court stated that if the owner of the premises is shown to have knowledge of the unsafe condition, then the owner will be liable for injury sustained by the invitee.

It seems that the law as set forth by the Fourths in Davis should apply. I also note that Katz v. Dole which is a Title VII case and does not include state claims, sets forth this standard regarding liability of an employer under respondeat superior

where the harassing behavior was that of a co-employee and not a supervisor, proprietor, partner or corporate officer: "We believe that in a 'condition of work' case the plaintiff must demonstrate that the employer had actual or constructive knowledge of the existence of a sexually hostile working environment and took no prompt and adequate remedial action (citations omitted). The plaintiff may do this by proving that complaints about the harassment were lodged with the employer or that the harassment was so pervasive that employer awareness may be inferred." 709 F.2d at 255.

3. The defendant claims that plaintiff cannot demonstrate facts supporting a claim for intentional infliction of emotional distress (IIED). The standard according to A&P is whether conduct was "outrageous and intolerble in that it offends against the generally accepted standards of decency and morality." Womack v. Eldridge, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974). A&P contends that the plaintiff cannot contend that the conduct was "atrocious and utterly intolerable in a civilized community" (the restatement 2d of torts standard) because she worked under these conditions from 1983 until 1985. A&P also cites a Michigan case which held that a claim for IIED could not be brought against an employer but only against the individual who intentionally inflicted the damage. A&P claims that the notes Ms. Counterman wrote to Mr. Hendricks during this time contradicts her claim of IIED.

Plaintiff argues that (1) if plaintiff proves her assault and battery claims, then she need not prove IIED but can recover for mental anguish, humiliation and embarassment resulting from the assaults and batteries, distinguishing between injury resulting from impact and injury resulting without impact. (2) Plaintiff further claims that Granger's intentional actions were "knowingly, wilfully, and maliciously permitted, encouraged, approved, and ratified" by A&P, and that it is up to the jury to decide whether A&P can be held liable for IIED.

4. Defendant argues that plaintiff's state claims are barred by the statute of limitations. Federal courts have held that

actions for emotional distress are governed by Va. Code Ann. section 8.01-243(A)'s two year limitation period. Moore v. Allied Chemical Corp., 480 F. Supp. 364, 369 (E.D. Va. 1979); Warren v. Bank of Marion, 618 F. Supp. 317 (W.D.Va. 1985). Thus, plaintiff's claims which fall outside the two year limitation period are barred according to the defendant. Defendant notes that no reported decisions specify the limitation period applicable to assault and battery claims.

Plaintiff says both claims are clearly governed by the two year limitation period which applies to "every action for personal injuries, whatever the theory of recovery..." Plaintiff further claims that the IIED and assaults and batteries began in January 1983 and continued into March of 1985 (slightly different dates than those in the complaint), and that since the offenses were continuing and cumulative and ever increasing due to A&P's inaction, the limitations defense should not be applicable to even a portion of the claims.

5. Defendant next argues that the plaintiff's claims for medical reimbursement were denied by the union welfare and health fund and that therefore A&P could not be guilty of reprisal against plaintiff. Defendant claims that the facts are undisputed that the medical bills were denied because the plaintiff failed to have her treatment approved, as she was directed. Plaintiff claims that the evidence will show that defendant's personnel director, Nienaber, was a management trustee on the fund, that he showed hostility to plaintiff and her husband by threatening a defamation suit against them, and that Nienaber voted against reimbursement for plaintiff's medical claims in reprisal against her complaints about Granger. Although defendant seems to have a very good argument on this issue, it may be that the plaintiff can produce enough evidence on this issue to submit it to the jury.

6. Defendant's final argument is that since plaintiff voluntarily resigned her position with A&P, she cannot be the victim of retaliatory discharge and cannot show damages cognizable under Title VII which does not permit recovery of

compensatory damages. On these facts, neither injunctive nor declaratory relief are appropriate. Defendant cites Cramer v. VCU, 486 F. Supp. 187 (E.D. Va. 1980)(copy attached), which held that an employee's claims for an injunction and declaration that sex discrimination had occurred were moot where the plaintiff had abandoned his claim for back pay and obtained new employment.

Plaintiff states that in her deposition and interrogatory answers, Ms. Counterman explains that she took early retirement only because of the harassment and bad treatment by A&P. Plaintiff states that injunctive relief would be appropriate even though Ms. Counterman no longer is employed based on the policy underlying Title VII. Plaintiff also argues that she does not have to prove any economic injury or loss in order to prevail under Title VII, citing the recent Supreme Court case, Meritor Savings Bank v. Vinson, 477 U.S. __, 91 L.Ed. 2d 49, 106 S. Ct. 2399 (1986). The holding of the case as it relates to this issue was that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment without showing an economic effect on the plaintiff's employment. (copy attached). In Katz v. Dole, 709 F.2d 251 (4th Cir. 1983), the Fourths noted that there are two basic varieties of sexual harassment: (1) condition of work type, harassment that creates an offensive environment; and (2) harassment in which a supervisor demands sexual consideration in exchange for job benefits ('quid pro quo' type). Ms. Counterman's claim would fall into category (1).

Despite Meritor Savings Bank, the Cramer opinion appears to be a fair representation of the law that would apply to this case and the Title VII claim unless Ms. Counterman can make out a case of constructive discharge. It is well-settled that two factors must be shown to make out a case of constructive discharge: (1) plaintiff must have been subjected to intolerable working conditions and (2) the employer's actions must have been "deliberate." Sparrow v. Piedmont Health Systems Agency, Inc., 593 F. Supp. 1107 (N.C. 1984). I do not believe that plaintiff has specifically alleged a case of constructive discharge.

Judge, these are the basic issues in the case. I do not expect the defendant to argue the motion for summary judgment on the morning of the trial, according to the conversations I had with them last week. My guess is that they will let the plaintiff present her evidence and then move for a directed verdict on the issues which warrant such a motion.

DAH