BENCH MEMO: Elizabeth Paroline v. Unisys Corp. and Edwin A. Moore, Civil Action 88-63-A; Defendants' Summary Judgment Motion; Plaintiff's motion to compel. Friday, 2:00.

ATTORNEYS

Plaintiff: Bruce Frederickson (Webster and Frederickson)

Defendants: Ronald M. Green (Epstein, Becker & Green, NYC)

Judge, this case comes before you on the defendants' motion for summary judgment (and on plaintiff's motion to compel, though I could not find the briefs in the file). As we have discussed, Judge, this arises out of a sexual harassment claim. Plaintiff has filed four claims against the defendants: (1) Title VII claims, for "hostile environment" and constructive discharge, against both defendants; (2) Assault and Battery, against Moore, in Count II; (3) "Negligent Failure to Warn/Reckless Endangerment" against Unisys in Count III; and (4) Intentional infliction of emotional distress against both defendants, in Count IV.

Judge, I have attached the plaintiff's statement of facts, which you should review or read quickly. It outlines all of her factual allegations. In a nutshell, she accuses Moore of sexual assault and Unisys of violating Title VII by allowing a hostile environment, thus constructively discharging her. She alleges that Moore had sexually harassed a number of female employees over time and that once she arrived on the job, he turned his attention toward her. Unisys, she alleges, knew or should have known about Moore's misconduct well in advance of his assault on her, and should have done something sooner. On Jan. 22, 1987, all Unisys employees were sent home early because of a major snowstorm. Paroline needed a ride home and reluctantly accepted one from Moore, in his four-

wheel drive vehicle. The drive home took 2 to 3 hours, because of the snow, and Moore allegedly harassed P. all the way home. He forcibly tried to hold her hand and kiss her. When home, he followed P. into her apartment, against her wishes, and once there had her make some coffee for him. He stood physically next to her and then, as he was shown the door, forcibly held, caressed and kissed Paroline against her will. She finally freed herself and got him out the door. That was the last incident she ever had with Edwin Moore, for she resigned shortly thereafter.

The next day she complained to the manager, Mr. Peterson. He was very upset about it, promised it would not happen again and immediately called the Co's EEOC investigator to look into the matter. She, Ms. Houge, came down to Rosslyn, the office, by Jan. 28 and promptly investigated. She interviewed Moore and Paroline, as well as other employees. She and Peterson decided there was a legitimate complaint and took action against Moore. While there is some dispute about whether some actions were later cooked up, only after P. filed her suit, it seems clear that Houge and Peterson met with Moore on Jan. 29 to discuss his behavior. At the meeting, it was agreed that "immediate, substantial and sustained improvement in Moore's behavior must occur." The following actions were also taken:

1. Moore was required to consult a counselor and inform Peterson of his counseling;

2. his contact with female employees was to be minimized and strictly limited to official company business;

3. his access to the SCIF area, where Paroline was to be soon working, was terminated (this was a high-security area requiring government clearances);

4. a planned promotion and salary increase for Moore were delayed by more than 6 months, causing a substantial pay loss for Moore;

5. A written memo. setting forth the conditions of his continued employment with Unisys was put in his personal file; and

6. Moore was informed that "if there are any recurrences or if any form of retaliation occurs, ... such will be grounds for immediate termination of your employement with Unisys."

Now, Judge, these are the defendants' statement of what happened. Most of it seems supported, but P. claims that the pay raise and promotion were not delayed until after she filed suit and defts. consulted their lawyers. Even if that is true, Moore was sternly warned about his behavior, and the evidence shows that it never happened again.

The problem is that Paroline quit shortly thereafter and thus did not give the Company's actions a chance to work. When told by Houge on Jan. 29 what the Company was doing with Moore, P. claimed it was not enough, that she could not work with Moore and that he must be fired. Bear in mind that while Moore was a higher-level professional and worked around Paroline, and while she was a new word processor, he did not have any formal authority over her.

P. was allowed to go home early the day after the incident, and early every day that following week. When Houge talked to her, she encouraged P. to seek counseling at company expense to help her deal with the crisis and encouraged her to take <u>two weeks</u> off for counseling and to think about whether to keep the job. Paroline did take the two weeks off with pay, and immediately started looking for another job--which she found. She had told Houge that she didn't think she could continue to work there. However, when P., who had found and started her new job on Feb. 10 or 11, called Ms. Houge on Feb. 15 and told Houge she was resigning, Houge urged P. not to resign and urged her to first undergo counseling. P. had

admitted during that call that she had not looked for or started counseling, as Houge had urged. And that was the end of Paroline's employment at the Company and her dealings with Moore.

According to Peterson, the manager of the Rosslyn office, no further incidents involving Moore or any other employees have occurred at the Rosslyn office. Unisys has always had a company policy that prohibits sexual harassment. It has a procedure in p lace by which employees can complain and take action, which Paroline properly used in this case. The investigation was prompt and in accordance with company procedures. Finally, Peterson even held a meeting of employees to make clear that such conduct would not be tolerated, once about 6 months prior to this incident and again shortly after it. Unisys contends that this incident was not enough to constitute a hostile environment nor constructive discharge, and that the company's action was appropriate and prompt, and successful, even though P. never gave it a chance to work.

That summarizes the facts, Judge. Again, more of plaintiff's allegations are set forth in her statement of facts, attached, which I suggest you skim. As explained below, I think you should rule as follows: (1) DENY summary judgment on the Title VII "hostile environment" and "constructive discharge" claims against Unisys, and against Moore, because there are fact issues for the jury; (2) GRANT summary judgment for Unisys on the "negligent failure to warn/ reckless endangerment" claim, because this arose in the course of employment and is thus barred by the Va. Workers Comp. Act; (3) GRANT summary judgment to Unisys on the intentional infliction of emotional distress claim, because as to Unisys, this is barred by the Workers Comp. Act, but DENY summary judgment for Moore on this

intentional infliction claim, because his actions were not accidental or "arising out of" or "in the course of" employment. Thus, he does not enjoy the workers' comp. bar, and it is a jury question whether his actions amount to intentional infliction; finally, (4) DENY s.j. for Moore on the assault and battery claim, because these actions were not accidental by Moore, nor were they arising out of, or in the course of, employment. Again, he does not enjoy the workers' comp. bar for his intentional tort actions.

I. The "Hostile Environment" Claim, Title VII

Defts. claim that this claim must fail, because the actions alleged are not sufficiently severe or pervasive as to constitute hostile environment sexual harassment under Title VII. Further, Unisys took prompt and appropriate action to correct the problem, thus insulating it from liability under Title VII law in the Fourth Circuit. As noted below, Judge, while the law does make such claims difficult to prove and while it is a close question, I think the safer course of action is to deny s.j. and allow this claim to go to the jury.

The Law. While "hostile environment" claims are actionable under Title VII, for such sexual harassment to be grounds for liability, the harassment must be so "severe or pervasive" as to alter the conditions of the plaintiff's employement and to create an abusive working environment. Meritor Savings Bank v. Vinson, 106 S.Ct. 2399, 2405-06 (U.S. 1986). Further, the 4th Circuit has held that to prove a claim of hostile-environment discrimination, the plaintiff "must show that the conduct in question was unwelcome,

that the harassment was based on sex, ... that the harassment was sufficiently severe or pervasive to create an abusive working environment... [and] some basis for imposing liability on the employer." Swentek v. US AIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (the stewardess case). As the Court made clear in Katz, plaintiff must also show "the propriety of holding the employer liabile under some theory of respondeat superior." Katz v. Dole, 709 F.2d 251, 255 (4th Cir. 1983). Plaintiff must show that sexually harassing actions took place, and:

> if this is done, the employer may rebut the showing either directly, by proving that the events did not take place, or indirectly, by showing that they were isolated or genuinely trivial. Second, the plaintiff must show that the employer knew or should have known of the harassment and took no effectual action to correct the situation. This showing can also be rebutted by the employer directly, or by pointing to prompt remedial action reasonably calculated to end the harassment.

Katz, 709 F.2d at 256; Swentek, 830 F.2d at 558. The ultimate burden remains at all times on the plaintiff to prove the existence of and the intentional nature of the harassment. Katz.

Finally, in deciding whether an employee is a supervisor in a case such as this, the courts must look to whether the employee "exercised corporate authority as an instrument for harassment," and whether the plaintiff alleges "actionable harassment perpetrated in the exercise of that responsibility." Swentek, 830 F.2d at 557-58. The court should consider whether the offending employee had the authority to hire, fire, promote, demote or determine the work assignments of the victim employee. Id. Under this favorable law, Unisys and Moore contend that P. has failed to establish her case as a matter of law. While you could grant summary judgment, Judge, I think the

wiser and safer course is not to, because P. does allege facts which circumvent Defts' arguments and because I have not had the time with this case that I should. I'll present defendants' arguments, and then facts showing why you should DENY summary judgment.

Defts' contend that these facts are not sufficiently severe and hostile to state a Title VII claim. First, these incidents (the claim) were "isolated or trivial" under Katz, and thus fail under Title VII. Courts hold that occasional or isolated incidents are insufficient to establish a claim of "hostile environment" sex harassment. The incidents must occur with some frequency, and not be a single incident; they must have a repetitive and debilitating effect on the plaintiff; and this must be a pattern or practice of harassment against her or him. Highlander v. KFC Nat'l Mgmt. Co., 805 F.2d 644 (6th Cir. 1986); Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986). In short, plaintiff should show evidence of "continuous, sustained, or pervasive sexually oriented misconduct." Wimberly v. Shoney's Inc., (S.D.Ga. 1985).

However, while plaintiff's evidence may not be overwhelming, she does allege that Moore harassed her in other ways a number of times prior to the forced-kissing incident in her apartment. See her statement of facts. The court cannot say as a matter of law that these incidents are too "trivial" to add support to her claim --this is a jury question. While she did not complain until after the Jan. 22 kissing incident, the jury could conclude that she was tolerant or afraid to complain about Moore, a higher up, because he was the new kid in the office. Only after Jan. 22 was she so upset that she literally couldn't take it anymore and was forced to complain to Peterson about Moore's ongoing misconduct.

Therefore, while the law is pro-defendant and while it may be difficult for P. to convince a jury of her claim for hostile environment, it is nonetheless a jury question. The court cannot rule on the significance of these harassing actions as a matter of law; finally, the evidence about what exactly happened involves disputed eyewitness testimony, which the jury will have to resolve.

Next, defts' contend that the "prompt and appropriate remedial action taken by Unisys" precludes any Title VII liability for the Company. Again, while this is a close question on summary judgment, I think it is better a jury question whether the actions taken were sufficient, or too little too late. It is clear that prompt, appropriate corrective action by the Company will insulate it from Title VII liability for the sexual harassment by one of its employees. In Katz, the 4th Circuit indicated that an employer can preclude liability by showing that it took "prompt remedial action reasonably calculated to end the harassment." 709 F.2d at 256. In Swentek, 830 F.2d at 558, the Court reiterated that to avoid liability, the "employer is obligated to investigate the charges and to present a reasonable basis for its subsequent actions."

While it is indisputable that once the Company learned of the Jan. 22, incident, it responded very promptly (and probably appropriately or reasonably), the plaintiff alleges facts which show that this response was "too little, too late". In other words, Moore had been harassing women in the office all along, and had even bothered plaintiff prior to Jan. 22. Unisys knew or should have known of Moore's sexual misconduct, and yet it did nothing but tolerate him until the Jan. 22 incident, which drove the plaintiff to quit her job. Thus, its actions were truly not

prompt or reasonable, because Unisys wilfully ignored these facts until it could no longer, without baldly violating Paroline's rights. Stated this way, the facts alleged by plaintiff do show a real jury issue on whether the actions were sufficiently prompt and reasonable.

Furthermore, plaintiff contends that Unisys should have fired Moore, because Moore had made working conditions for Paroline intolerable. Defts' cite case law which supports their action in not firing Moore; yet I still think this is a jury issue, because Plaintiff is alleging and relying on incidents that occurred over time prior to the Jan. 22 forced-kissing incident, and that Unisys knew about these all along, but chose to ignore them.

Therefore, these facts alleged by P. challenge the very reasonableness and timing of the Company's corrective action. Whether she should have stayed on the job to give the remedy a chance to work, while it looks like she probably should have, is also a jury issue. Again, this is almost a contributory negligence or failure-to-prove-damages issue, a classic one of fact for the jury.

For these reasons, Judge, I think you should DENY summary judgment on the Title VII "hostile environment" claim against Unisys and Moore.

SIDE NOTE: Moore's liability under Title VII. Defts' claim that the Title VII claims must be dismissed as to Moore, because he is not an "employer" under the Act, and thus not liable for any sexual harassment. Well, that is only part of the picture. Under Title VII, an "employer" includes the person engaged in an

industry affecting commerce (here, Unisys), and "any agent of such a person." 42 U.S.C. Sec. 2000e(b). Moore, under the facts as alleged and supported by plaintiff's evidence, could constitute such an agent for Unisys. The courts have held that individual employees may be liable as agents of the employer, where they have supervisory or managerial responsibilities for the Company. Where defendant is in a supervisory role with respect to the plaintiff, he may personally be liable for his sexually harassing actions under Title VII. Duva v. Bridgeport Textron, 633 F.Supp. 880 (E.D. Pa. 1985). And individual liability will also be imposed on the basis of "active discriminatory conduct by that individual." Hendrix v. Fleming Companies, 650 F.Supp. 301 (W.D.Okla. 1986). Such liability may be imposed where a "party's deliberate conduct is so extreme that it intentionally interferes with another's ability to practice a profession or earn a livelihood." Kryiazi v. Western Electric Co., 476 F.Supp. 335 (D.N.J. 1979).

Because plaintiff has alleged facts that Moore indeed did have supervisory responsbility over her job as a word processor, the Title VII claims cannot be dismissed as to him. She has cited testimony and evidence that he did have this role, and so it becomes a jury question on the issue whether Moore was such an agent of Unisys that he can be liable for his actions under Title VII. Therefore, the Title VII claims cannot be dismissed against Moore for this reason.

The next issue is whether Paroline has a Title VII claim for "construtive discharge" from her employment.

II. The Constructive Discharge Claim, Title VII

Defts contend that, as a matter of law, the constructive discharge claim must fail because the conditions of which P. complains were not sufficiently intolerable to cause her to resign. Moreover, they say, plaintiff cannot show that the alleged actions of Unisys and Moore were in any way intended to force her to so resign. Rather, she quit before she gave the remedies any reasonable opporunity to work. Under these circumstances, say defendants, her resignation must have been voluntary and precludes any liability against Unisys or Moore under Title VII.

This is a very close question, Judge, and if you chose to grant summary judgment on this claim I am almost certain you would be affirmed on appeal. To prove her claim of constructive discharge under this Circuit's decisions, P. must show that her employer deliberately made her working conditions intolerable and thereby forced her to quit her job. Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied 475 U.S. 1082 (1986); Holsey v. Armour & Co., 743 F.2d 199, 209 (4th Cir. 1984), cert. denied. Thus, "a plaintiff alleging constructive discharge must therefore prove two elements: deliberateness of the employer's action, and intolerability of the working conditions." Bristow, 770 F.2d at 1255 (emphasis added).

Plaintiff, of course, contends that the evidence shows that Unisys all along knew or should have known of Moore's misconduct and thus wilfully tolerated or sanctioned his behavior and the intolerable conditions that Paroline faced, thus driving her out of her job. However, the 4th Circuit test is so stringent that

I'm not sure P. has presented a jury question on this issue. It is really for you to decide in your discretion, Judge: do the facts and evidence plaintiff cites in her statement of facts, state the kind of deliberate actions and intolerable conditions that are necessary for a constructive discharge claim? I think probably not, but maybe the jury should hear this as well.

In any event, "deliberateness" exists only if the actions of the employer are intended by the employer to force the employee to quit. Moreover, the employee must provide proof of the employer's specific intent to force the employee to leave. Bristow, 770 F.2d at 1255; J.P. Stevens & Co. v. NLRB, 461 F.2d 490, 494 (4th Cir. 1972). Can you believe this harsh standard, Judge?

In addition, the intolerability of the working conditions must be assessed by the "objective standard of whether a 'reasonable person' in the employee's position wouldhave felt compelled to resign." Bristow, 770 F.2d at 1255. An employee may not be unreasonably sensitive to her working conditions and the employee's own subjective perceptions may not govern a constructive discharge claim. Id. It is the reasonable person standard which governs.

Under this law, Judge, you can easily conclude that plaintiff has failed to allege or point to evidence showing that Unisys acted with the requisite deliberateness and specific intent to force her to leave her job. In fact, the evidence shows that Ms. Houge asked her not to leave and to seek counseling first; in addition, Paroline did not give the remedial action a chance to work. If you accept this, Judge, then you should grant summary judgment only as to Unisys on the constructive discharge claim; I think Moore

is still vulnerable to this claim, unless you find no dispute and the facts and conclude that her conditions were not so intolerable as to drive a reasonable person to resign. If you conclude that, and I am not sure you should, then you can grant SJ for Moore on this issue as well.

The next issues are the plaintiff's state tort law claims, some of which should be dismissed because barred by the exclusive remedy doctrine under the Virginia Workers' Compensation Act (VWCA).

III. The Claim for "Negligent Failure to Warn/ Reckless Endangerment", Count III.

This claim is asserted only against the employer, Unisys. It contends that the claim is barred by the VWCA, and that even if it was not so barred, this does not constitute a cause of action under these circumstances, under Virginia law. I do not reach the latter question, Judge (even though it is more interesting) but conclude that the claim is barred by the Workers Comp. Act.

Plaintiff alleges the these injuries occurred in the course of her employement with Unisys and as a result of the company's alleged negligence. The VWCA provides an administrative scheme for compensation claims for work-related injuries, whether they are negligently or intentionally inflicted. Haigh v. Matsushita Electric Corp., 676 F.Supp. 1332, 1354 (E.D.Va. 1987) (Spencer, J.). Such employer's and co-employee's liability under the Act is exclusive of all other liability, precluding common law tort suits. Va. Code Sec. 65.1-40.

The VWCA applies and is exclusive when the following elements are established: (1) the existence of an injury caused by an accident or occupational disease; (2) the injury must have occurred

"during the course of" the plaintiff's employment; and (3) the injury must have "arisen out of" the plaintiff's employment. Va. Code Sec. 65.1-7. Based on these criteria, defendant is right that the "negligent failure to warn/reckless endangerment" tort falls within the coverage of the Act and bar.

All three of these elements have been shown by the allegations of this negligent failure to warn tort. First, the injuries plaintiff claims to have suffered are the result of an "accident" as that term is defined by the Virginia courts. Alleged negligence of an employer, such as that claimed here, is an "accident" within the meaning of the VWCA. Feitig v. Chalkley, 185 Va. 96, 98 (1946).

Further, according to the allegations, this tort occurred during the course of and "arose out of" the employment. Thus the second and third elements are established. These requirements are liberally construed by the courts in such a case of negligence that allegedly took place on the job. An accident "arises out of" employment "when the injury can fairly be traced to the employment as at least a contributing cause." Haigh, 676 F.Supp. at 1353. An injury occurs "in the course of" employment when it takes place within the period of employement, at the place where the employee is reasonably fulfilling his duties or engaged in somethin incidental to his work. Lucas v. Lucas, 186 S.E.2d 63 (1972).

Clearly, this alleged negligence on the part of Unisys occurred on and during the job, and is therefore barred by the VWCA. In a similar case, the Virginia Supreme Court recently held such claims to be barred by the VWCA. In Plummer v. Landmark Communications, Inc., 366 S.E.2d 73, 77 (Va. 1988), the Court held

that a negligence claim based on allegations that the employer failed to provide a safe place to work, to take reasonable measures to protect its employees, and to warn her of potential harm from others, was exclusively within the coverage of the VWCA and thus the tort claims were precluded. In Plummer, the plaintiff was a newspaper carrier who was injured by a gunwielding trespasser while on the job.

And courts in other states have held such claims as this, founded on sexual harassment, to be barred by applicable workers' comp. statutes.

IV. Intentional Infliction of Emotional Distress Claim is Barred against Unisys, not against Moore

The fourth count sues both defendants for intentional infliction of emotional distress. Because I think the claim against Unisys is barred by the VWCA, you should GRANT Summary Judgment for Unisys on this claim; however, you should DENY summary judgment for Moore, because his actions which give rise to this claim were not accidental, nor were they "arising out of" or "in the course of" plaintiff's employment.

The law seems clear in Virginia that intentional torts committed by third persons or co-employees are considered "accidental" when they occur in the course of employment. Joyce v. A.C. and Sons, Inc., 785 F.2d 1200, 1206 (4th Cir. 1986); A. N. Campbell & Co. v. Messenger, 199 S.E. 511 (Va. 1938). And Judge Spencer has recently held squarely that intentional torts committed by the employer are covered exclusively by the VWCA, because they are "accidental" within the meaning of the Act. Haigh v. Matsushita, 676 F.Supp. at 1353. I guess they

are accidental from the perspective of the employee-victim, if not from the perspective of the employer.

Thus, this was accidental, and in the course of employment as far as Unisys's actions are concerned. However, I do not think it was "in the course of" or "arising out of" plaintiff's employment so far as Moore's actions are concerned. Thus, while you should grant S.J. for Unisys, you should not for Moore.

Again, the chief event which precipitated this lawsuit was Moore's alleged assault of plaintiff in her apartment, on Jan. 22, 1987, the day of the snowstorm. This was clearly notin the course or employment, nor did it arise out of employment, even if you assume that it was "accidental." While Moore was a fellow worker and thus not a stranger to the business, the assault took place off the work premises, after hours and in a private apartment. Courts have held that such assaults are not barred by worker's comp. laws, for this same rationale. Gaines v. Monsanto Co., 655 S.W.2d 568 (Mo.App. 1983); see Fouts v. Anderson, 250 S.E.2d 746 (Va. 1979).

Finally, Judge, Unisys argues that the facts as alleged fail to state a claim for intentional infliction of emotional distress, as that is defined under Virginia law. I think this is probably a jury issue, but the elements of the claim are: (1) intentional or reckless conduct; (2) "extreme and outrageous conduct" that offends generally accepted standards of decency and morality; (3) a causal connection between the wrongful conduct and the emotional distress; and (4) severe emotional distress. Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974); Gaiters v.

Lynn, 831 F.2d 51, 54 (4th Cir. 1987); Brown v. Loudoun Golf and Country Club, 573 F. Supp. 399, 404-05 (E.D. Va. 1983) (your decision).

Unisys contends the conduct was not so extreme and outrageous as to allow liability, nor was the emotional distress suffered by the plaintiff sufficiently severe, as a matter of law. Again, this is your call, Judge, but I think you should leave this claim as to Unisys up to the jury.

V. The Assault and Battery Claim Against Moore

Finally, Judge, Moore claims this allegation is also barred by the VWCA, but I disagree. The actions giving rise to this claim for physical, sexual assault and battery clearly occurred off premises and after work hours, and thus are not in the course or, or "arising out of" the employment. Even if this is deemed "accidental" under the law, it is not barred by the Act and the tort claim should proceed against Moore to a jury trial. Summary judgment should be DENIED to Moore on this count.

That about covers it, Judge. I apologize for the length of this benchmemo, but the briefs themselves total over 125 pages. Let me know if there is anything else you need.

DRW, 6/24/88