

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

KYNDRA ROTUNDA,	.	Civil Action No. 1:09cv752
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	May 21, 2010
	.	10:20 a.m.
JOSEPH C. ZENGERLE,	.	
DANIEL D. POLSBY, and	.	
THE RECTOR AND VISITORS OF	.	
GEORGE MASON UNIVERSITY,	.	
	.	
Defendants.	.	
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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF:	RICHARD T. SEYMOUR, ESQ. NELLIE A. STAKER, ESQ. BRIAN WOODARD, ESQ. The Law Office of Richard T. Seymour, P.L.L.C. 1150 Connecticut Avenue, N.W. Suite 900 Washington, D.C. 20036-1454 and ADAM AUGUSTINE CARTER, ESQ. The Employment Law Group, P.C. 888 17th Street, N.W., Suite 900 Washington, D.C. 20006
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(APPEARANCES CONT'D. ON FOLLOWING PAGE)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

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THE COURT: All right. I'm granting summary judgment in favor of the two defendants who are named -- I believe that covers Counts 3, 6, and 7 -- in that I clearly find that the evidence in this case, No. 1, clearly shows that the two candidates had totally different backgrounds.

We all know in the legal profession law clerks get a premium just for having clerked for a district judge. It's a 10 or 15,000 dollar premium. A person who's clerked for a U.S. Supreme Court justice in our profession automatically goes into the world with an extra star and always has a higher salary differential.

And this man had clerked for, I believe it was Chief Justice Burger. He had a long history in the government. He'd been an assistant secretary of defense. The background between Mr. Zengerle and Ms. Rotunda is like mixing apples and oranges.

I tell you frankly I was very close to dismissing these claims at the motion to dismiss but let them go forward to give the plaintiff the benefit to develop her evidence. It's just not there.

I also think it is extremely probative that the salary decisions were all made before, as I said earlier, Ms. Rotunda ever came on the scene. These were salary decisions based in a totally nondiscriminatory, totally neutral, simply economically based environment, and they could not possibly be the basis for an

1 equal pay claim, so summary judgment is granted on those claims.

2 Now, the next issue is this retaliation issue. Other
3 than a letter of reprimand and some allegation that there were
4 additional duties that were imposed on Ms. Rotunda after she made
5 the formal sexual harassment complaint in June of 2007, is there
6 any other evidence, Mr. Seymour, any other instances of
7 retaliation that you are alleging in this case? Because I
8 understood that was really it.

9 The letter of reprimand --

10 MR. SEYMOUR: The letter of reprimand which placed her
11 in reasonable fear that she was going to be terminated. In
12 addition, Dean Polsby insisted -- backed up Mr. Zengerle in
13 insisting that the nature of her job be changed so that
14 Mr. Zengerle no longer be a mentor but be a close supervisor and
15 required her to have frequent meetings by herself with
16 Mr. Zengerle after she had notified him that she was in reasonable
17 physical fear of him because of his demeanor towards her: the
18 bullying style, the yelling in her face, the shaking the finger in
19 her face, invading her personal space, and the body brush against
20 her in the hallway, which was something that had to be deliberate
21 because the hallway at that point is so wide it could not have
22 happened except by being deliberate.

23 Indeed, Mr. Zengerle in his deposition said he thought
24 it's possible that some of his clothing might have brushed against
25 her, and then he said he was wearing summer clothing, a polyester

1 shirt. So he was not carrying a coat or anything like that. It
2 had to be him brushing against her.

3 Those are conditions of employment that would be so
4 intolerable to a reasonable person that the only alternative would
5 be to resign, and those are retaliatory. They happened after she
6 complained.

7 Once she complained, Dean Polsby changed his position.
8 No longer was Zengerle to be a mentor. No longer is he telling
9 Zengerle to back off and give her more room to run. He's saying,
10 "You must treat him as a supervisor. You must have all of these
11 meetings with him," and so forth.

12 THE COURT: Well, but as you know, I mean, after your
13 client complained, there was this OEDS investigation, which I know
14 you disagree with the results of that, but there's a very, I
15 think, dispassionate, thorough, 11-page report that was issued by
16 that agency in which they came to the conclusion that these were
17 personnel-related concerns, not gender-related concerns, and those
18 are at the heart of this conflict.

19 And one of the things that, you know, came out very
20 clearly in this report -- and this may have been a failing on the
21 part of the university or on the dean -- that apparently there was
22 not early on in this employment relationship a clear explanation
23 of the line of supervision.

24 Your client apparently believed that she reported
25 directly to Dean Polsby and that Mr. Zengerle had nothing to do

1 with supervising her, and obviously, that was not his
2 understanding, and it sounds as though it wasn't the dean's
3 understanding, either, but requiring that she work more closely
4 with her supervisor, it's hard to say how that can be considered
5 to be retaliation. That seems to be trying to address some of the
6 administrative concerns that were pointed out as a result of this
7 report.

8 But I think, frankly, that the most traditional evidence
9 of retaliation would be the letter of reprimand. That's the more
10 traditional kind of thing we see in these kinds of cases, and as
11 you know, in the Fourth Circuit, in order to make a retaliation
12 and claim, it's a three-part test.

13 You have to show the plaintiff engaged in protected
14 activity, which your client did in June of 2007; and then you have
15 to show that the employer took a materially adverse action, which
16 you allege among other things is this letter; and there's a causal
17 connection, that is, that the letter of reprimand was partly
18 caused out of retaliation for having engaged in protected
19 activity.

20 There does not appear to be a dispute in this case that
21 what generated that letter was Mr. Zengerle's position that your
22 client was continuing to be insubordinate and in particular had
23 submitted summer school grades to the registrar before running
24 them through him for approval or whatever.

25 And the problem, I think, is that first of all, a letter

1 of reprimand by itself, there's no case law that says that that
2 constitutes sufficient adverse action, but secondly -- and I think
3 this is the most compelling evidence in this case -- is your
4 client has a job now at Chapman University in California. I think
5 her salary there is almost twice what she was making at George
6 Mason, so it certainly is an improvement.

7 And it's clear from the record, from her deposition
8 among other things, that George Mason was consulted when Chapman
9 was doing its check into her background, and nothing of a negative
10 nature kept her from getting that job, and there's no evidence in
11 this record that that letter of reprimand had any effect
12 whatsoever on her ability to get that, that job.

13 I don't see on this record again how the plaintiff has
14 produced sufficient evidence of a materially adverse action by the
15 employer that would justify a finding of retaliation, so I'm
16 granting summary judgment on the retaliation claims as well.

17 Now, on the constructive discharge, I'm not going to
18 hear argument, because I'm satisfied again that the evidence does
19 not in any respect come close to showing that the conditions were
20 so intolerable that a person of reasonableness would have felt
21 that they had no choice but to resign.

22 In addition, there is significant evidence that your
23 client's resignation was generated by this book offer that she
24 got. The letter of resignation is, as I understand it, one day,
25 unless I misunderstand the record, one day after the book contract

1 went through; is that correct?

2 MR. SEYMOUR: Yes, Your Honor, but the book contract is
3 really a nonentity in this. Ms. Rotunda has stated in a
4 declaration because it wasn't gone into in the deposition that she
5 never expected to have substantial royalties from that. She -- it
6 did not motivate her decision in any way.

7 What motivated her decision was the change in her job
8 description and a change in job responsibilities has been held by
9 the Fourth Circuit to be sufficient to support a claim for
10 retaliation. And remember, it's a change over time, because in
11 the fall, Dean Polsby was taking the position Zengerle is to be
12 your mentor. Back off. Don't try to supervise her closely.

13 Then in the spring, after she's made her complaint,
14 that's all changed. The expectations have changed. She no longer
15 can perform according to the contract that she has and the job
16 description that she has, but Zengerle's got to supervise her
17 every move.

18 And with respect to the grades, if Your Honor doesn't
19 mind my addressing that, there is a material dispute of fact as to
20 that, because the grades for the spring 2007 semester were
21 submitted to Mr. Zengerle to his satisfaction after they'd been
22 submitted to the registrar, and there's -- Mr. Zengerle may have
23 thought that he had something else as an expectation, but that was
24 what was satisfactory to him.

25 He had no involvement in the summer of 2007 class beyond
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1 10 or 15 minutes of just dropping in on one class. He didn't
2 observe the performance of the students, so he didn't have a
3 first-hand basis on which to take a look at those grades.

4 But -- now, those are the, those are the things on which
5 you base both the retaliation and the constructive discharge
6 claims.

7 And with respect, Your Honor, again, I know Your Honor
8 has already ruled on that, but seeing -- Ms. Rotunda was in a
9 badly depressed state for months after this period of time. Her
10 emotional state was severely damaged by Mr. Zengerle's conduct
11 towards her, and it may not seem like much on the cold record that
12 you have to meet with your supervisor, but when your supervisor is
13 a person who insists on placing his arms around you in order to
14 type on your keyboard or move your mouse, who insists on close
15 personal contact, who shifts his chair over in order to rub up
16 against her and so forth, these are things that are not pleasant
17 for a reasonable person.

18 THE COURT: All right, I understand that. We haven't
19 finished all these claims yet in this case --

20 MR. SEYMOUR: Okay.

21 THE COURT: -- but I'm looking right now at the federal
22 claims, and they are, you know, there are strict pleading
23 requirements and strict evidentiary requirements.

24 One of the other problems that you have in this case is
25 that this plaintiff is an attorney, and any lawyer especially

1 educated in the last 10 or 12 years in law school would be
2 expected to understand that if you believe you are the victim of
3 gender-based discrimination or harassment, then you've got to tell
4 the employer that that's the problem.

5 I think this record is, is quite clear, now, I believe
6 there are even e-mails from Mr. Rotunda to Mrs. Rotunda telling
7 her, "You've got to put this in writing," that she did not
8 complain of gender-based discrimination or harassment until June.

9 All that other time period, there's no question there
10 was horrible personnel problems going on there. I mean, again, I
11 think that the investigation from the university hit it right on
12 the head. There was absolutely bad chemistry between these two
13 people, but the question is whether that was gender-based, and
14 there is not even an allegation by your client to anybody who
15 could have actually addressed that issue that it was gender-based
16 until June, and quite frankly, unfortunately, by that point, there
17 had been so much water over the dam, you know, that that's the
18 problem.

19 So many of these claims that you are relying upon now as
20 instances of gender-based harassment or hostile environment, your
21 client was not characterizing them as such at the time they were
22 happening, and that was what makes this case difficult, and
23 frankly, it's what in my view dooms those claims.

24 The other thing is as you know, the standard in the
25 Fourth Circuit for a sexually gender-hostile environment is

1 extremely high, and there are numerous cases where the
2 gender-based harassment involves far more explicit sexual conduct
3 than is involved in this case. Many of the instances in this case
4 may be instances of belligerence, of hostility, but there's
5 evidence in this record that Mr. Zengerle had an intense
6 personality. Several of his students testified to that.
7 Mr. Compton, I think was the one student whose name I seem to
8 recall that Zengerle got intense and that he yelled or screamed,
9 that it wasn't just at Ms. Rotunda, he was intense with students,
10 and being intense, maybe even being obnoxious or overbearing, does
11 not make out a gender discrimination case.

12 I don't find sufficient evidence in this case to make
13 out the prima facie case of a sexual discrimination or hostile
14 environment based on sex, and those claims are also, I'm granting
15 summary judgment for the defendants on those claims.

16 I'm also finding that the constructive discharge claims,
17 there's not sufficient evidence that the environment was so
18 intolerable that the plaintiff could not have continued to work
19 there.

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