

Record No. 06-7157

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**DAWN MARTIN, ESQUIRE
Plaintiff-Appellant**

v.

**HOWARD UNIVERSITY, HOWARD UNIVERSITY SCHOOL OF LAW,
AND ALICE GRESHAM-BULLOCK, ESQUIRE
Defendants-Appellees**

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA
(The Hon. Thomas F. Hogan)**

BRIEF OF APPELLEE ALICE GRESHAM-BULLOCK, ESQUIRE

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February 29, 2008

Certificate as to Parties, Rulings, and Related Cases

1. The Parties and Amici

A. Appellant: Dawn V. Martin, Esquire.

B. Appellees: Howard University

Howard University School of Law

Alice Gresham-Bullock, Esquire

C. Amicus Curiae: National Association of Women Lawyers (NAWL)

2. Rulings Under Review

Martin v. Howard University, 2006 WL 2850656 (D.D.C. 2006)

(Docket #503, JA 10,408), October 4, 2006 decision denying Appellant's Rule 59 and Rule 60 motions to amend August 21, 2006 judgment, and grant Appellant judgment as matter of law.

Martin v. Howard University, 1999 U.S. Dist. LEXIS 19516: 81 Fair Empl. Prac. Cas. (BNA) 964: 15 I.E.R. Cas. (BNA) 1587 (D.D.C. 1999) only to the extent that this ruling dismissed Appellant's claim of intentional infliction of emotional distress. (Docket #23, JA 552).

3. Related Cases

None.

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Did the trial court properly dismiss Appellant's claim for intentional infliction of emotional distress?

Did the trial court properly deny Appellant's motion for relief pursuant to Fed. R. Civ. P. 60(b)(3)?

STATEMENT OF THE CASE

Appellant was employed as a law professor at Howard University School of Law from July 1996 to May of 1998. On May 14, 1999, Appellant filed a complaint against Howard University, Howard University School of Law, Dr. H. Patrick Swygert ("Swygert") in both his capacity as President of Howard University and individually, and Alice Gresham-Bullock ("Bullock") in both her capacity as Dean of Howard University School of Law and individually. The complaint alleged sexual discrimination, sexual harassment/ hostile work environment, and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") and the District of Columbia Human Rights Act ("DCHRA") along with common law claims of intentional infliction of emotional distress, and breach of employment contract¹.

¹ On July 7, 1999, Appellant filed her First Amended Complaint in which she withdrew her claim against Swygert in his individual capacity.

Appellant's complaint alleged that she was the victim of sexual harassment/hostile work environment as the result of the conduct of a homeless person who was neither an employee, nor a student of Howard University, but regularly used the law school library. Appellant's complaint alleged that Appellees allowed the homeless person free access to the law school campus and buildings, thereby facilitating his sexual harassment of Appellant in her workplace. Appellant alleged that the inaction of Appellees constituted violation of both Title VII and DCHRA. Appellant alleged that this same inaction by Appellee Howard University and Appellee Bullock constituted intentional infliction of emotional distress. Additionally, Appellant claimed that when she complained about the homeless person, Appellee Bullock took retaliatory measures to ensure that Appellant was not offered a permanent professorship or a renewed visitor-ship on the faculty of Howard University School of Law, and that other retaliatory actions were taken against Appellant by Appellees. Lastly, Appellant alleged that Howard University and Howard University School of Law breached the oral promise made to Appellant to place Appellant in a tenure track position as soon as one became available by failing to renew her contract, or by failing to select her for a tenure track position.

In its Memorandum Opinion and Order of December 16, 1999, the trial court granted in part and denied in part the motion of Howard University to dismiss the complaint or in the alternative for summary judgment as to Appellees Howard University, Howard University School of Law, and as to Swygert and Appellee Bullock in their official capacities. Specifically, the trial court granted the motion with respect to the intentional infliction of emotional distress claim with respect to Howard University and Howard University School of Law, and with respect to the all of the claims against Swygert and Appellee Bullock in their official capacities.

In its Memorandum Opinion and Order of May 16, 2000, the trial court granted the motion of counsel for Appellee Bullock to dismiss Appellant's claim for intentional infliction of emotional distress as to Appellee Bullock in her individual capacity².

On April 18, 2006, the jury returned a verdict in favor of Appellee Howard University and Appellee Howard University School of Law with respect to Appellant's remaining three claims - sexual harassment/hostile work environment,

² In her opposition to Appellee Bullock's motion, Appellant conceded that her claims of sexual harassment/hostile work environment under Title VII and DCHRA, and her breach of contract claim did not apply to Appellee Bullock. Appellant opposed Appellee Bullock's motion only with respect to Appellee Bullock's request to dismiss the claim of intentional infliction of emotional distress against Appellee Bullock in her individual capacity.

retaliation, and breach of contract.

Appellant filed her notice of appeal from the trial court's Order of December 16, 1999 that dismissed Appellant's intentional infliction of emotional distress claim, and the trial court's Order of October 4, 2006 that (for purposes of Appellee Bullock's brief) denied Appellant's post-trial motion for relief from jury verdict. Appellant has not filed a notice of appeal from the trial court's Order of May 16, 2000 that dismissed Appellant's intentional infliction of emotional distress claim against Appellee Bullock in her individual capacity.

To the extent allowed by the Rules of this Court, Appellee Bullock adopts the brief submitted in this matter by Appellee Howard University.

SUMMARY OF ARGUMENT

The trial court correctly dismissed Appellant's claim for intentional infliction of emotional distress because even assuming that all of the allegations made in Appellant's complaint to be true, Appellant did not allege facts that would lead a reasonable juror to conclude that the conduct of Appellees was sufficiently outrageous or extreme to rise to the level of intentional infliction of emotional distress.

The jury did not rely upon perjured testimony in reaching its conclusion that Appellee Bullock did not understand that Harrison's conduct constituted sexual harassment.

ARGUMENT

Standard of Appellate Review

Appellate review of the grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) is de novo. Broudy v. Mather, 373 U.S. App. D.C., 460 F.3d 106, 116 (D.C. Cir. 2006). In deciding whether to dismiss a claim under Fed. R. Civ. P. 12(b)(6), the court can only consider the facts alleged in the complaint, the documents attached as exhibits or incorporated by reference in the complaint, and matters about which the court can take judicial notice. EEOC v. St. Francis Xavier Public School, 117 F.3d 621, 624-625 (D.C. Cir. 1997). The court should assume

the allegations of the complaint to be true, and grant the benefit of all reasonable inferences that can be derived from the facts alleged. Trudeau v. FTC, 372 U.S. App. D.C., 456 F. 3d 178, 193, (D.C. Cir. 2006). Given the foregoing, the motion should be granted and the claim dismissed under Fed R. Civ. P. 12(b)(6) where the plaintiff does not provide enough facts to state a claim of relief that is plausible on its face. Bell Atlantic Corp. v. Twombly, ___ U.S. ___, 127 S. Ct. 1955, 1974 (2007).

Appellate review of a trial court ruling on a Fed. R. Civ. P. 60(b) motion is only for abuse of discretion, i.e. determining whether the trial court did not apply the correct legal standard in making its ruling. See Smalls v. U.S., 374 U.S. App. D.C. 63, 471 F. 3d 186, 191-92 (D.C. Cir. 2006).

**I. Appellant's Intentional Infliction of Emotional Distress
Claim Was Properly Dismissed**

To state a claim for intentional infliction of emotional distress, Appellant must allege that Appellees engaged in: (1) extreme and outrageous conduct that (2) intentionally or recklessly caused (3) severe emotional distress to Appellant. Joyner v. Sibley Mem. Hosp., 826 A.2d 362, 373 (D.C. 2003), quoting Kerrigan v. Britches of Georgetowne, 705 A.2d 624, 628 (D.C. 1997); see also Darrow v. Dillingham Murphy, LLP, 902 A.2d 135, 139 (D.C. 2006). This very demanding

standard is only infrequently met. Dale v. Thomason, 962 F. Supp. 181, 184 (D.D. C. 1997). Typically, conduct is extreme or outrageous when the recitation of facts to an average member of the community would raise resentment against the actor and lead one to exclaim “outrageous”. See King v. Kidd, 640 A. 2d 656, 668 (D. C. 1993). Only truly outrageous behavior that goes beyond all possible bounds of decency, and which is “... regarded as atrocious and utterly intolerable in a civilized society” meets this requirement. See, Homan v. Goyal, 711 A.2d 812, 818 (D. C. 1998), and Jackson v. District of Columbia, 412 A.2d 948, 956-57 (D.C. 1998). The alleged conduct must truly be extraordinary (Carey v. Edgewood Mgmt. Corp., 754 A.2d 951, 956 (D.C. 2000), which establishes the standard for a successful intentional infliction of emotional distress claim as being as severe as any in the law. Waldon v. Covington, 415 A. 2d 1070, 1076 (D.C. 1980).

Appellant’s First Amended Complaint (“Complaint”) at paragraphs 350 through 365 contain Appellant’s allegations of intentional infliction of emotional distress against Appellees. At paragraph 351, Appellant alleges that Appellee Bullock’s “...deliberate refusal in her official capacity to take reasonable steps to protect Plaintiff from a sexual harrasser/stalker in the workplace was outrageous and shocks the conscience ...” At paragraph 352, Appellant alleges that Appellee

Bullock's "... deliberate efforts and false statements made to ensure that Plaintiff not secure a permanent position on the faculty at Howard University School of Law, were outrageous and shock the conscience ...". At paragraph 354, Appellant alleges that Appellees "... could reasonably foresee that their actions would cause, were causing and did cause severe emotional distress for Plaintiff ...".

As noted by the trial court, none of Appellant's allegations of intentional infliction of emotional distress, even if taken as true, state outrageous or extreme conduct that rises to the level of intentional infliction of emotional distress required by law. The trial court correctly ruled that, as a matter of law, no reasonable juror could or would deem the allegations of intentional infliction of emotional distress that were alleged in the Complaint sufficient to constitute a claim for which relief could be granted.

Appellant's brief argues that Appellee Bullock's alleged failure to follow Appellee Howard University's security procedures to protect Appellant, and Appellees' allegedly retaliatory actions against Appellant "could certainly meet a jury's standard of outrageous conduct". Appellant argues that because Appellee Bullock had control over Appellant's workplace and livelihood, and because Appellee Bullock's conduct violated public policy, it should be considered outrageous. Appellant's arguments are simply wrong.

Courts are particularly demanding when intentional infliction of emotional distress claims are made in an employment context. Paul v. Howard University, 754 A.2d 297, 307 (D.C. 2000). Employer-employee conflicts generally do not, as a matter of law, rise to the level of outrageous conduct required to state a claim for intentional infliction of emotional distress. Howard University, v. Best, 484 A.2d 958, 986 (D.C. 1980), and Duncan v. Children's National Medical Center, 702 A.2d 207, 212 (D.C. 1997). Allegations of discrimination (sexual or otherwise) must be particularly egregious, such as a pattern or campaign of harassment, intimidation or abuse, to rise to the required level of extreme or outrageous conduct. Richardson v. Bell Atlantic Corp., 946 F. Supp. 54, 77 (D. D. C. 1996).

Appellant cites Woodner v. Breeden, 665 A.2d 929, 935 (D.C. 1995) to support her argument that a jury could have found that her allegations of intentional infliction of emotional distress against Appellees met the required standard of "outrageous", or "extreme" conduct. The Woodner case is not persuasive authority in this regard because the facts of the Woodner case did not arise in a employment context. As noted above, employer-employee conflicts generally do not, as a matter of law, rise to the level of outrageous conduct required to state a claim for intentional infliction of emotional distress. Best, 484 A.2d at 986. The Woodner case involved a landlord-tenant relationship, not an

employer-employee relationship. Additionally, the Woodner case involved the intimidation of tenants (to include brandishing of a firearm) to vacate the property by agents of the landlord. Just the kind of conduct that has been held to rise to the level of extreme or outrageous conduct required to support a claim of intentional infliction of emotional distress. Richardson, 946 F. Supp. at 77. Nowhere in Appellant's Complaint is there any allegation that is tantamount to the type of intimidation and covert threats of violence that were present in the Woodner case. The allegations of Appellant's Complaint simply do not present "facts" that establish that Appellees engaged in extreme and outrageous conduct, that was intentional or reckless, and that caused severe emotional distress to Appellant.

Claims for intentional infliction of emotional distress that have been dismissed because the alleged conduct did not rise to the level of "outrageous" or "extreme" as required by law are numerous; Duncan, *supra*, where employer's transfer of pregnant employee to position requiring exposure to radiation, and termination of employee after she refused transfer, held not outrageous; Kidd, 640 A. 2d at 670-674, where supervisor failed repeatedly to respond to employee's sexual harassment complaints; and Paul, 754 A. 2d at 307, where employer wrongfully denied tenure, reassigned students and grants, requested that employee vacate her office after termination of employment, and otherwise discriminated

against employee. See also Waldon and Dillingham , *supra*.

The trial court was not required to accept the inferences drawn by Appellant in her Complaint because such inferences are unsupported by the facts set out in the Complaint. See Kowal v. MCI Communications Corp., 16 F. 3d 1271, 1276 (D.C. Cir. 1994). Similarly, the trial court was not bound to accept the legal conclusions stated by Appellant in her Complaint. See Taylor v. FDIC, 328 U.S. App. D.C. 52, 135 F. 3d 753, 762 (D.C. Cir. 1997). In order for Appellant's claim of intentional infliction of emotional distress to survive a motion to dismiss, Appellant needed to provide more than labels and conclusions or a formulaic recitation of the elements of a cause of action. Erickson v. Pardus, ___ U.S. ___, 127 S. Ct. 2197, 2200, 167 L. Ed. 1081 (2007). Appellant's Complaint offers labels and conclusions rather than "facts" that state a claim for intentional infliction of emotional distress, and was properly dismissed by the trial court pursuant to Fed. R. Civ. P. 12(b)(6). The ruling of the trial court should be affirmed.

II. The Jury Did Not Rely Upon The Perjured Testimony of Appellee In Reaching Its Verdict

After the jury's verdict was rendered, Appellant filed a post trial motion pursuant to Fed. R. Civ. P. 60(b)(3) seeking relief from the jury verdict on the

grounds of fraud, misrepresentation or other misconduct of Appellees. More specifically, Appellant argued that the jury had relied on perjured testimony to conclude that Appellee Bullock did not understand that Harrison's conduct constituted sexual harassment.

Fed. R. Civ. P. 60 (b)(3) provides that a party may seek relief from a final judgment or order for fraud, misrepresentation, or other misconduct of an adverse party. To prevail, the moving party must prove by clear and convincing evidence some sort of fraud, misrepresentation or other misconduct. See Shepard v. American Broadcasting Cos., 62 F. 3d 1469, 1477 (D.C. Cir. 1995). The moving party must show actual prejudice has resulted from the misconduct, misrepresentation, or fraud. Summers v. Howard University, 374 F. 3d 1188, 1193 (D.C. Cir. 2004). Additionally, it is within the trial court's discretion to grant such a motion. Id.

In its October 4, 2006 Order, the trial court denied Appellant's motion for relief under Fed. Civ. P. 60(b)(3), and found that Appellant had not proven with clear and convincing evidence that Appellees engaged in fraud, misrepresentation, or other misconduct.

On appeal, Appellant disagrees with that ruling of the trial court and again argues that the jury's finding that Harrison's conduct was not sexual harassment

contradicts Appellees' admissions and cannot be supported by the evidence at trial. To support this argument, Appellant states that at trial Appellee Bullock testified that she did not perceive Harrison's conduct to be sexual harassment, and that when she read Appellant's November 25, 1997 memorandum complaining of Harrison's stalking, Appellee Bullock did not perceive the memo to be a complaint of "sexual harassment". Appellant then states that in Appellee Bullock's July 1, 1999 memorandum to the general counsel of Howard University, Appellee Bullock states that she perceived Harrison as a threat to women on campus who he might stalk or otherwise harass. From these statements, Appellant then argues that Appellee Bullock's testimony constituted perjury, that the jury verdict is not supported by the evidence, and must therefore be set aside. Appellant's argument is wrong.

As noted in the trial court's October 4, 2006 Order, Appellee Bullock's testimony along with the other evidence cited by Appellant, taken in the light most favorable to Appellees, does not indicate that Appellees admitted that Appellant's gender was the reason for Harrison's conduct. It was clearly within the purview of the jury to determine whether Harrison's conduct was driven by Appellant's gender. The evidence cited by Appellant as well as all of the evidence adduced at trial was not so one sided that a reasonable jury could only have reached the

determination that Harrison's conduct was driven by Appellant's gender as argued by Appellant.

A jury verdict must stand unless the evidence together with all inferences that can reasonably be drawn therefrom is so one-sided that the reviewing court cannot conclude a reasonable jury could have reached that verdict. Bennett Enter., Inc. v. Domino's Pizza, Inc., 310 U.S. App. D.C. 192, 45 F. 3d 493, 497 (D.C. Cir. 1995). The court must consider, as was done by the trial court, the evidence in the light most favorable to the prevailing party. Id. Here, the trial court noted that the evidence was sufficient to support the jury verdict. The jury did not see or hear evidence that Harrison's conduct involved conduct typical of sexual harassment such as groping, touching, or making sexual advances. There was even some evidence presented that Harrison was also stalking at least one male professor at another university.

The trial court correctly considered the argument and evidence offered by Appellant in support of her Fed. R. Civ. P. 60(b)(3) motion against the appropriate legal standard. In exercising its discretion, the trial court found that there was sufficient evidence for a reasonable jury to support the finding that Harrison's conduct was not sexual in nature, or because of Appellant's gender, and that the evidence was not so one-sided such that a jury could only reach one conclusion.

Most importantly, Appellant failed to offer clear and convincing evidence to support her motion. In making its ruling, the trial court applied the correct legal standard, and Appellant did not prove with clear and convincing evidence that Appellees engaged in fraud, misrepresentation, or other misconduct. The decision of the trial court to deny Appellant's Fed. R. Civ. P. 60(b)(3) motion should be affirmed.

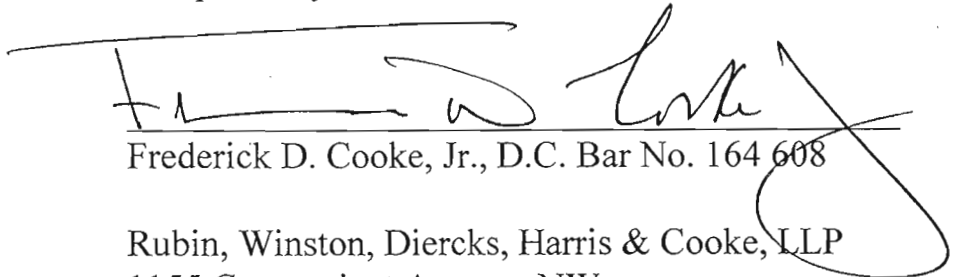
Appellant's brief also argues that Appellee Bullock's alleged perjured testimony constitutes fraud upon the court and jury. Appellant's argument is not well founded.

Fraud upon the court is defined in terms of its effect on the judicial process not in terms of the content of a particular alleged misrepresentation or concealment. See, Bullock v. U.S., 763 F. 2d 1115, 1121 (10th Cir. 1985) and Baltia Airline v. Transaction Mgmt., Inc., 321 U.S. App. D.C. 191, 98 F. 3d 640, 642-43 (D.C. Cir. 1996). Perjury by a party or witness is not fraud upon the court as is argued by Appellant. Baltia, 98 F.3d at 642-643.

CONCLUSION

For the foregoing reasons, Appellees respectfully request that the judgments of the trial court, (1) dismissing Appellant's claim for intentional infliction of emotional distress, and (2) denying Appellant's motion for relief under Fed. R. Civ. P. 60(b)(3), be affirmed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frederick D. Cooke, Jr.", is written over a horizontal line. The signature is fluid and cursive.

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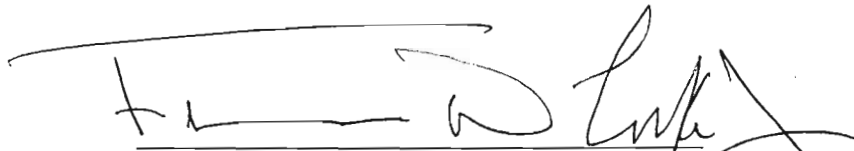
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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

Certificate of compliance with type-volume limitation, typeface requirements, and type style requirements.

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 3951 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B) (iii) and D. C. Circuit Rule 32(a)(2).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because it has been prepared in a proportionally spaced typeface using Wordperfect 14 Times New Roman font.



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