

Summary Judgment Review

Case Name: *Clark v. Alloy Wheel Repair Specialists, LLC et al.*

Nature of the Order: Magistrate's Report & Recommendation

Magistrate Judge: Regina D. Cannon

District Judge: Michael L. Brown

Claims & Outcomes:

1. **Claim:** *Quid Pro Quo* Sexual Harassment (Title VII)
 - a. **Outcome:** Recommend Summary Judgment Denied
2. **Claim:** Retaliation (Title VII)
 - a. **Outcome:** Recommend Summary Judgment Granted
3. **Claim:** Battery (GA State Law)
 - a. **Outcome:** Recommend Summary Judgment Granted
4. **Claim:** Negligent Retention (GA State Law)
 - a. **Outcome:** Recommend Summary Judgment Granted

Whether R&R Followed: N/A

For Race/Gender Discrimination Cases:

Race of Plaintiff: N/A

Gender of Plaintiff: Female

Summary

Plaintiff Dawn M. Clark ("Clark" or "Plaintiff") was hired by Defendant Alloy Wheel Repair Specialists, LLC ("AWRS") in September 2014. Clark met Defendant Rob Wheeley ("Wheeley") at a work convention in March 2015, when he was owner of an AWRS franchise. Wheeley and Clark flirted at that convention, but she ultimately ignored his sexual advances. Then, in late 2015, Wheeley was made CEO of AWRS and continued his sexual advances. Fearful that rejecting Wheeley would cost her her job, Clark began a sexual affair with Wheeley from December 2015 to January 2017. After meeting Wheeley's wife in March 2016, Clark tried where possible to avoid Wheeley without angering him by directly ending the affair. In August 2016, Clark informed her then-supervisor, Ginny Nye ("Nye") about the affair. She asked Nye to not make her (Clark) come to the Atlanta office when Wheeley was in town, but she also asked Nye not to tell HR about the affair. Nye nevertheless disclosed the affair to HR Director Tammey Sigmon ("Sigmon"), who felt she could not do anything unless Clark complained to her. Later, in May 2017, Clark had heated email exchanges with Sigmon and her new supervisor, Duane Coad ("Coad"). In these exchanges, Clark accused Sigmon and Coad of "harassment" regarding the work demands that were placing on her, and they accused her of insubordination.

Coad tried to fire Clark at that time, but Wheeley overruled him and instructed Coad and Clark to work together. Later still, in September 2017, AWRS terminated Nye. Nye immediately hired an attorney, who sent a demand letter to AWRS that, among other things, disclosed the previous sexual affair between Clark and Wheeley. Around that time, another employee overheard Coad and Wheeley discuss the need to “fire that bitch” with reference to Clark. On October 25, 2017 – after another dispute with Sigmon and Coad regarding Clark’s work responsibilities – AWRS terminated Clark’s employment.

Clark filed suit against AWRS and Wheeley, alleging *quid pro quo* sexual harassment in violation of Title VII, retaliation in violation of Title VII, and state law claims of battery (against Wheeley) and negligent retention/supervision (against AWRS). The Defendants moved for summary judgment on all claims.

Magistrate Judge Regina D. Cannon recommended **denying** summary judgment as to the *quid pro quo* sexual harassment claim. Defendants argued that (1) the alleged harassment was not “unwelcome” because Clark consented to the sexual affair and (2) the alleged harassment did not cause Clark’s termination because Wheeley wasn’t involved in the termination decision and Clark’s own insubordination caused the termination. (1) Regarding unwelcomeness: Judge Cannon explained the distinction between the voluntariness of the sexual intercourse and the welcomeness of Wheeley’s sexual advances. (“The correct inquiry is whether the [plaintiff] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 457, 68 (1986)). Judge Cannon acknowledged the evidence could be read both ways, but for summary judgment purposes, Judge Cannon concluded that there was sufficient evidence that Clark did not welcome Wheeley’s advances. Even if she initially welcomed the advances, the evidence indicates that she later tried to avoid Wheeley, asked Nye to protect her by preventing her from having to go to the Atlanta office when Wheeley was there, and feared that rejecting Wheeley would cost her her job. (2) Regarding causation: Judge Cannon found there was sufficient evidence that, despite his denials, Wheeley was involved in the decision to terminate Clark. This included evidence of the following: (i) Wheeley had previously exercised control to overrule a supervisor (Coad) who wanted to terminate Clark, (ii) Nye’s attorney had recently sent a demand letter disclosing the affair, and (iii) a third-party witness later overheard Wheeley and Coad discussing the need to “fire that bitch” in reference to Clark.

In contrast, Judge Cannon recommended **granting** summary judgment as to the Title VII retaliation claim because Clark had not engaged in protected activity. When Clark reported the affair to Nye, she gave no indication that she believed unlawful discrimination or harassment was occurring. Her references to “harassment” in 2017 referred to Sigmon’s and Coad’s placement of work demands on her, not to Wheeley’s sexual advances. And Plaintiff’s Complaint for Damages never alleged “third-party retaliation” for Nye’s attorney’s demand letter, so that claim could not now be asserted at summary judgment.

Judge Cannon recommended **granting** summary judgment as to the battery claim against Wheeley. Under Georgia law, battery claims require offensive physical contact (i.e. contact made out of anger or lust, threatening contact, contact which induces fear in the victim) to which

the alleged victim has not consented. Judge Cannon found that Clark admitted under oath that Wheeley never touched her in anger or made her afraid with his touch. Her generalized fear of Wheeley was not tied to any unlawful touching. And all of the physical touching was consensual. (Judge Cannon explained that the issue for battery claims was whether there was offensive touching without consent. This is distinguished from the “unwelcomeness” issue of Title VII sexual harassment claims, which looks beyond just physical touching to the sexual advances...and examines whether the sexual advances were unwelcome even if the victim ultimately consented to the sexual intercourse itself.)

Finally, Judge Cannon recommended **granting** summary judgment as to the negligent retention/supervision claim against AWRS. Negligent retention claims are derivative and only survive if the alleged negligence allowed an underlying state law tort to occur. Here, there was no such underlying tort. Federal sexual harassment claims do not constitute a state law tort. And Judge Cannon had already determined that the underlying state law battery claim did not survive summary judgment.

Judge Cannon, therefore, recommended DENYING summary judgment on Plaintiff’s *quid pro quo* sexual harassment claim and GRANTING summary judgment on all the other claims.