In the
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

C.A. No. 03-1033

DOMINIQUE K. GANTT

vs.

SECURITY, USA, INC.

Appeal from the United States District Court for the District of Maryland
(Honorable Deborah K. Chasanow)

BRIEF FOR APPELLANT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the trial court erred, as a matter of fact, by determining that Sgt. Claggett actually believed that Gary Sheppard would not hurt Appellant Dominique Gantt, when she told Officer Harvey not to call the police;

B. whether the trial court erred, as a matter of law, by failing to consider that Claggett aided and abetted Sheppard's tortuous conduct, or conspired with Sheppard to allow him to violate the restraining order, knowingly causing Gantt severe emotional distress; and

C. whether the trial court erred, as a matter of law, in dismissing Gantt's claim, under the equal protection clause of the Fourteenth and Fifth Amendments of the United States Constitution, pursuant to 42. U.S.C. § 1983, for Security U.S.A.'s tolerance of, and fostering of, the sexual harassment of Gantt in her workplace by Gary Sheppard.

STATUTES AND REGULATIONS

1) The Fifth Amendment to the Constitution of the United States;

2) The Fourteenth Amendment to the Constitution of the United States; and

3) 42 U.S.C. § 1983.

JURISDICTIONAL STATEMENT

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1291 and Fed. R. App. Proc., Rule 4(a). The District Court had subject matter jurisdiction

of this matter pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and pendent jurisdiction over state claims, pursuant to 28 U.S.C. § 1332.

NOTICE OF APPEAL

Gantt filed her Notice of Appeal on December 18, 2002. (App. at 7) The parties participated in mediation. Mediation failed.

STATEMENT OF THE CASE

Procedural History, Course of Proceedings, and Disposition Below

Complaint

The docket of the District Court is included in the Joint Appendix. (App. at 1-6). On or about July 23, 1997, Dominique Gantt, through previous counsel, Stuart Robinson, filed a claim under Maryland's Workers' Compensation Act. (App. at 8) Security USA contested the claim and it remains unresolved. On December 2, 1999, Gantt filed a Complaint in the Circuit Court for Prince George's County, Maryland, against Security USA, Inc. and other individuals/corporations, alleging various tortuous conduct. On December 7, 1999, Gantt filed an amended complaint, *pro se*, adding a claim of sex discrimination, in violation of the equal protection clauses of the Fifth and Fourteenth Amendments of the United States Constitution, pursuant to 42 U.S.C.

§ 1983 and Title VII of the Civil Rights Act of 1964. On March 6, 2000, Security USA, Inc. filed a Notice of Removal of this case from State Court to Federal District Court. (Paper no. 1, hereinafter, "P.#") On May 15, 2000, Gantt filed her First Amended Complaint ("hereinafter, Complaint"), signed by current counsel. (App. at 9-25)

Motion to Dismiss/Summary Judgment

On May 31, 2000, Security USA, Inc. moved to dismiss Gantt's complaint and Gantt filed an opposition. The district court dismissed Gantt's negligence and sex discrimination claims, but left intact her claim of intentional infliction of emotional distress. (App. at 26-40) Gantt hereby appeals the court's January 8, 2001 dismissal of her sex discrimination claims under the Fifth and Fourteenth Amendments, pursuant to 42 U.S.C. § 1983.

On April 17, 2002, Security USA, Inc. filed a *Motion for Summary Judgment*. Gantt filed her *Opposition and Motion for Summary Judgment* with a *Statement of Undisputed Material Facts* (hereinafter, "Facts") (App. at 56-66). In its Motion for Summary Judgment, Security USA, Inc. maintained that no facts are in dispute. Security USA, Inc. elected not to file a *Reply*/Opposition to Gantt's *Motion for Summary Judgment* or to file a *Statement of Disputed Facts*.

On December 4, 2002, the district court granted *Security USA, Inc.'s Motion for Summary Judgment* and denied Gantt's cross-motion. (App. at 41-55)

The December 4, 2002 Order constituted a final order. There was never been a hearing, oral argument, status conference or any other court appearance.

STATEMENT OF FACTS

In 1996, Security USA, Inc. was under contract with the United States government to supply security to the New Carrolton Federal Building, Internal Revenue Service (IRS) Building located at 5000 Ellin Road, Lanham, Maryland for a duration of time including December 7, 1996 (hereinafter, the "IRS Building"), a building owned and operated by the United States government (Facts, ¶1, App. at 56; Answer to First Amended Complaint ¶ 5, (App. at 69) ("Answer to First Amended Complaint" hereinafter, "Answer," App. 69-74). Security USA, Inc. contracted with the United States government to provide security in government buildings in various regions of the United States. (Facts, ¶ 2, App. 56; Answer ¶ 6, App. at 69). During the period including December 7, 1996, Earl Wood was the Project Manager and supervisor of the operations of Security, USA, Inc. at the IRS Building. (Facts ¶ 4, App. at 56; Answer ¶ 8, App. at 69). On or about September 16, 1996, Project Manager, Earl Wood hired Dominique Gantt in the capacity of security officer. (Facts ¶ 5, App. at 56; Complaint ¶ 9, App. at 69.)

On or about November 6, 1996, Gantt had sought and obtained an Order for

Protection, or restraining order, from the Circuit Court for Charles County, Maryland against Gary Sheppard, her ex-boyfriend. (November 6, 1996 Order for Protection, App. at 75; Facts ¶ 7, App. 57; Complaint ¶ 9, App. at 69; Gantt depo. at 47-52, App. at 118-123) Gantt sought the Order for protection, or restraining order, because Sheppard had assaulted her, harassed her in attempts to re-establish their sexual relationship and threatened her life. (Facts ¶ 7, App. at 57; Gantt depo. at 50-52, App. at 121-123) The restraining order was issued to protect and otherwise prevent Sheppard from having any contact with Gantt, at her home, place of employment or any other place. (November 6, 1996 Protective Order, App. at 75-76; Facts ¶ 8, App. at 57; Gantt depo. at 52-53, App. 123-125.)

The November 6, 1996 Order for Protection specifically ordered that Sheppard "stay away from" Gantt's place of employment, as well her home and not to communicate with her by telephone or any other manner. (Facts ¶ 8, App. at 57; November 6, 1996 Protective Order, App. at 76; Gantt depo. at 52, App. at 123) On November 7, 1996, Gantt provided Earl Wood with a copy of the Order for Protection against Sheppard for the purpose of putting her employer on notice of Gary Sheppard's threatened harassment and threats of bodily harm to her in the workplace. (Facts ¶ 10, App. at 57-58; Gantt depo. at 77-78, App. at 147-148)

On or about November 7, 1996, Project Manager Earl Wood and/or other Security USA supervisors notified all personnel that Gantt was not to be assigned to

an outside post due to the threat posed by Gary Sheppard. (Facts ¶ 11, App. at 58; Claggett depo. at 13-15, 23, App. at 250-252; Jones depo. at 26-31, App. at 345-350; Harvey depo. at 20-22, 39-40, 51-57, App. at 385-387, 404-405, 415-421; Gantt depo. at 85-86, App. at 155-156) To protect her from Sheppard, Wood immediately removed Gantt from Post 9, an outside post and re-assigned her to an inside Post 6 (Facts ¶ 12, App. at 58; Claggett depo. at 23, App. at 260; Gantt depo. at 77-78, App. at 147-148)

Gary Sheppard was also a security officer, for Wackenhut Services, and was trained and qualified to carry and use weapons, including guns. (Facts ¶ 13, App. at 58; Gantt depo. at 57, App. at 128) Sgt. Angela Claggett worked for Security USA, Inc. on weekends, as a supervisor. She also worked with Sheppard, for Wackenhut Services, at the Government Accounting Office (GAO), during the weekdays and they were friends. (Facts ¶ 13, App. at 58; Claggett depo. at 11-14, 21, 53, App. at 248-252, 258, 290; Gantt depo. at 160, App. at 230) Sgt. Claggett frequently "gossiped" about the relationship between Sheppard and Gantt and told Officer Harvey that she had told Sheppard, "Don't worry about it," meaning his relationship with Gantt. (Facts ¶ 18, App. at 59; Harvey depo. at 49, 70, App. at 413, 433)

By November 7, 1996, Claggett had been informed that Sheppard had hit Gantt. (Facts ¶ 16, App. at 58; Claggett depo. at 21, App. at 258) and that

Sheppard had broken a window and Gantt's mother's house and attempted enter the house while Gantt was inside the house. (Facts ¶ 16, App. at 59; Claggett depo. at 20, App. at 257) Sheppard confided in Claggett that he was distraught over his dissolved relationship with Gantt. (Facts ¶ 13, App. at 58; Claggett depo. at 53-54, 75-78, App. at 290-291) Claggett was aware that Sheppard had told various co-workers that he was intended to kill Gantt, himself, his estranged wife and his children. (Facts ¶ 14, App. at 58; Claggett depo. at 22, App. at 259) Claggett reported Sheppard's threats of violence against Gantt, his family and himself, to Captain Sands of Wackenhut Services, Sheppard's employer. (Facts ¶ 15, App. at 59; Claggett depo. at 22-23, App. at 259-260; Gantt depo. at 68, 70, 164-165, App. at 138, 140, 234-235) Claggett did not report these threats to Gantt or to anyone at Security USA. (Facts ¶ 15, App. at 59; Claggett depo. at page 22-23, App. at 259-260)

Sheppard asked Sgt. Claggett to set up a meeting between him and Gantt for him, saying, "I need to see her." (Facts ¶ 13, App. at 58; Claggett depo. at page 21, App. at 258) Despite the restraining order, Sheppard's known assaults on Gantt and his threats to kill her, Claggett responded to Sheppard, "You all need to talk." (Facts ¶ 13, App. at 58; Claggett depo. at page 21, App. at 258) Claggett attempted to set up a meeting and conversations between Gantt and Sheppard (Facts ¶ 17,

App. at 59; Gantt depo. at 70-73, App. at 14--143), but Gantt refused. (Facts ¶ 17, App. at 59; Gantt depo. at 70-73, App. at 140-143)

At some point after November 6, 1996 Claggett transferred a phone call from Sheppard to Gantt while she was serving on her assigned post. (Facts ¶ 19, App. at 59; Gantt depo. at 72-75, 79-81, App. 142-145, 149-151) Gantt experienced severe emotional distress after receiving the phone calls from Sheppard at her assigned post and reported Sgt. Claggett's conduct to Earl Wood. (Facts ¶ 20, App. at 59; Gantt depo. at 81, App. at 151)

On Saturday, December 7, 1996, Claggett was the weekend supervisor for Security, USA, Inc. at the IRS Building. (Facts ¶ 21 App. at 60; Claggett depo. at 9, App. at 246; Gantt deposition, at 84, App. at 154). Gantt reported to the "Control Room," at 6:00 a.m. (Facts ¶ 22 App. at 60; Gantt depo. at 84, App. at 154) Sgt. Willie Jones was ending his shift and being relieved by Claggett. (Facts ¶ 22 App. at 60; Jones depo. at 20-21, App. at 339-340) Jones reminded Claggett, in the presence of Gantt, that Gantt was not to be assigned to an outside post. (Facts ¶ 22 App. at 60; Jones depo. at 21-24, App. at 340-343; Claggett depo. at 43-44, App. at 280-281)

After Jones left the Control Room, Claggett ordered Gantt assume Post #9, outside the building, entering the underground garage. (Facts ¶¶ 24- 25, App. at 60; Gantt depo. at 84-85, 87, App. at 154-155, 157; Harvey depo. at 15-16, App.

at380-381) Gantt refused to assume Post #9, reminding Claggett of the restraining order against Sheppard and Wood's instruction that she not be assigned to an outside post. (Facts ¶ 25, App. at 60; Gantt depo. at 84-85, 87, App. at 154-155, 157) Claggett insisted that Gantt assume Post # 9, despite Gantt's protests. (Facts ¶ 25, App. at 60; Gantt depo. at 84-85, 87, App. at 154-155, 157) Afraid of losing her job, Gantt assumed Post # 9. (Facts ¶ 25, App. at 60; Gantt depo. at 84-87, App. at 154-155)

Between 6:10 and 6:15 a.m., within fifteen minutes of assuming her assignment at Post #9, Sheppard called Gantt at her workstation, Post 9. (Facts ¶ 26, App. at 61; Gantt depo. at 89-91, App. at 159-161) The December 7, 1996 phone call from Sheppard was transferred to Post 9 from Claggett. (Facts ¶ 27, App. at 61; Gantt depo. at 127-128, App. at 197-198) Upon receiving the phone call from Sheppard, Gantt became emotionally distraught and feared for her safety. (Id.) Gantt called Claggett and again requested to be reassigned for her safety. (Id.)

Claggett again refused Gantt's request and required her to remain at Post #9. (Facts ¶ 28, App. at 61; Gantt depo. at 125-127, App. at 195-197) At approximately 7:00 a.m., on December 7, 1996, Sheppard suddenly appeared at the IRS Building, running toward Gantt at Post 9. (Facts ¶ ¶ 28-31, App. at 61; Answer ¶31, App. at 71) Gantt ran from Post # 9, toward an entrance to the IRS Building. (Facts ¶ 31, App. at 61; Answer ¶ 31, App. at 71) Sheppard pulled out a

shotgun from his trench coat. (Id.) With the shotgun drawn and aimed at Gantt, Sheppard chased Gantt through the area surrounding Post # 9, shouting, "Run! Run!" (Id.) Sheppard chased Gantt and grabbed her by her arm, pressing the shotgun against her chin and placed her in a "chokehold." (Facts ¶ 32, App. at 61; Answer ¶ 32, App. at 71) Sheppard then dragged Gantt along an outside area of the IRS Building, and forced her into his van and onto the floor of the passenger side of the vehicle. (Facts ¶ 33, App. at 61; Answer ¶ 33, App. at 71)

Sheppard assaulted and abducted Gantt in the presence of two fellow security guards stationed at the IRS Building. (Facts ¶ 33, App. at 62; Complaint ¶ 33) One of them, employed by a company other then Security USA, Inc., immediately reported it to Claggett, in the presence of Officer Darren Harvey, of Security USA, Inc. (Facts ¶ 33, App. at 62; Harvey depo. at 34, App. at 399) The officer specifically said that Sheppard had a gun and that he was forcing Gantt off the premises. (Facts ¶ 35, App. at 62; Claggett depo. at 29, App. at 266)

Claggett did not take any action in response to learning of Sheppard's abduction of Gantt, so another officer said that they should call the police. (Facts ¶ 36, App. at 62; Harvey depo. at 41, App. at 406) Claggett replied that there was no need to call the police, adding, "He only wants to talk to her. He's not going to hurt her." (Facts ¶ 37 App. at 62; Harvey depo. at 43, App. at 408) Officer Harvey was

surprised at Sgt. Claggett's response (Facts ¶ 38 App. at 62; Harvey depo. at 47-48, App. at 412-413)

Claggett testified that her first reaction, upon hearing of the abduction, was to be "scared." (Facts ¶ 39, App. at 63; Claggett depo. at 49, App. at 286) Sgt. Claggett said that *she thought about Sheppard* killing Gantt and/or himself and/or *going to jail.* (Facts ¶ 39, App. at 63; Claggett depo. at 74-75, App. at 311-312)

Sheppard immediately drove away from the IRS Building and removed Gantt from the jurisdiction and protection of local authorities by leaving Maryland and driving to Delaware, with Gantt in his van. (Facts ¶ 44, App. at 63; Complaint ¶ 49) Even according to Claggett's account, she waited at least 5-10 minutes before calling the police after she was notified that Sheppard had abducted Gantt at gunpoint. (Facts ¶ 41, App. at 63; Claggett depo. at 74-75, App. at 311-312) Claggett admitted that, based on her training in security, she is specifically aware that 5 minutes – or less -- can mean the difference between life and death when someone has a gun. (Facts ¶ 40, App. at 63; Claggett depo. at page 72, App. at 309)

At the point that Claggett called the Prince George's County police, officers had already been dispatched, based on someone else's call. (Facts ¶ 42, App. at 63; Claggett depo. at page 58-59, App. at 295-296) Several hours after the abduction, Claggett was asked by an officer whether she had called Federal Protective Services, as was the appropriate procedure in such situations. (Facts ¶ 43, App. at

63; Harvey depo. at 68-69, App. at 431-432) Claggett replied that she had not, and, at Harvey's suggestion, called in his presence. (Id.)

Sheppard held Gantt captive by for six hours, driving her as far away as Delaware, to evade police. During these six hours, Sheppard raped and otherwise physically and verbally terrorized her, including repeatedly threatening to kill her, with the shotgun close at hand. (Facts ¶ 45, App. at 63-64; Complaint ¶ 52, App. at 16-17) Gantt begged for her life, for the sake of her son, for the entire six hours of her captivity. (Id.) Gantt eventually convinced Sheppard that she would reconcile with him and tell police that she had gone with him willingly. (Id.) Sheppard eventually hid the shotgun and surrendered to the police. (Id.)

Gary Sheppard was convicted of the kidnapping, first-degree rape and violation of the restraining order, based on his conduct on December 7, 1996 against Dominique Gantt. Gary Sheppard was sentenced to twenty (20) years imprisonment. (Facts ¶ 46, App. at 64; Complaint ¶ 53, App. at 17; December 10, 1997 letter to Gantt from Office of the State Attorney for Prince George's County Courthouse, App. at 439)

When Gantt returned to work, she told Earl Wood that she believed that Sgt. Claggett had acted in cooperation with Sheppard to make her accessible to him by forcing her to assume Post 9 and by failing to immediately call police. (Facts ¶ 47, App. at 64; Gantt depo. at 101-107, App. at 171-177) She also

conveyed this belief to Internal IRS Investigative Officers Naomi Proctor and Anthony Martin. (Facts ¶ 48, App. at 64; Gantt depo. at 161-162, App. 232-233)

After December 7, 1996, employees of Security USA discussed Claggett's actions and criticized Claggett for forcing Gantt to assume Post 9, since they were all aware that she should not have been assigned to an outside post, due to the restraining order against Sheppard. (Facts ¶ 49, App. at 64-65; Jones deposition, 32, App. at 351; Harvey depo. at 51-58, 64-66, 70-71, App. at 415-422, 427-429, 433-434) When Gantt returned to Security USA, she was forced to work under Claggett, who maintained her position as a supervisor and rank of sergeant. (Facts ¶ 51, App. at 65; Gantt depo. at 96, App. at 166) Gantt changed her shift to avoid working under Sgt. Claggett. (Facts ¶ 52, App. at 65; Gantt depo. at 97, App. at 167)

As a result of the emotional distress of the abduction and rape of December 7, 1996, Gantt continues to experience recurring nightmares, physical anxiety attacks and other physical and mental health issues that have dramatically reduced her quality of life. (Facts ¶ 52, App. at 65; Gantt depo. at 155-159, 167-171, 23-26, 93, App. at 225-229, 237-241, 94-97, 163) Gantt has undergone medical and psychological treatment. (Facts ¶ 52, App. at 65; Gantt depo. at 146-150, App. at 216) Gantt has suffered losses for medical expenses and wages, as

well as physical and mental injury. (Facts ¶ 52, App. at 65; Gantt depo. at 146-150, App. at 220)

SUMMARY OF ARGUMENT

Sgt. Claggett, a supervisory employee, was acting within the scope of her employment when she committed intentional acts against Dominique Gantt. Claggett used her position as Gantt's supervisor to aid and abet Gary Sheppard, providing him access to Gantt, in violation of a restraining order. Claggett's acts facilitated, aided and abetted Sheppard in violating the restraining order, assaulting her and otherwise intentionally inflict emotional distress upon her.

The Court erred in holding that Gantt's claims for sexual harassment must be dismissed for failure to state a violation of the Fifth and Fourteenth Amendments of the Constitution, guaranteeing equal protection under the law, pursuant to 42 U.S.C. § 1983. Security USA, Inc. acted "under color of state law," because it performed a "public function" of policing, on behalf of, and in cooperation with, the federal and state governments. Security USA, Inc. deprived Gantt of equal protection of the law by discriminating against her on the basis of sex by failing to take reasonable steps to end, and indeed, facilitated, the sexual harassment by Sheppard, creating a hostile work environment.

ARGUMENT

I. Standard for Summary Judgment

Pursuant to Rule 56(c), a party is only entitled to Summary Judgment where "the evidence in the record shows that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c) requires that, for purposes of summary judgment, "the evidence of the non-movant is to be believed and all justifiable inferences drawn in his favor," citing *Thompson Everett, Inc. v. National Cable Advert, L.P.* 57 F3d 1317, 1323 (4th Cir. 1995). *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 255 (1986). Summary Judgment should only be granted where "no reasonable juror" or "rational fact finder" could find in favor of the non-moving party. *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 148 (2000).

II. The Trial Court Erred by Finding "Disputed" Facts

The trial court held that it "considered the parties' respective memoranda and the exhibits attached thereto and has construed all facts and reasonable inferences drawn therefrom in the light most favorable to the respective non-movant." (December 2, 2002 opinion, at 9-10.) Security USA, Inc. has specifically stated that there is no genuine issue of material fact in this case. (App. 440-443)

In its *Statement of the Facts* in its *Motion for Summary Judgment* (App. 440-448) Security USA, Inc. did not even offer its own version of the facts, but rather, repeated Gantt's allegations and concurred with them, even offering evidence to support Plaintiff Gantt's allegations. (App. 441-443) Security, USA, Inc. elected not to file a *Reply/Opposition to Plaintiff's Motion for Summary Judgment*, a *Statement of Disputed Facts*, or otherwise dispute any of the facts stated in *Plaintiff's Statement of Undisputed Material Facts* (App. at 56-66), submitted with *Plaintiff's Opposition to Defendant's Motion for Summary Judgment and Cross Motion for Summary Judgment* (App. 449-465).

Where Security USA, Inc. has chosen not to dispute *any* fact asserted by Gantt, and has specifically stated that the facts are undisputed, the court errs in determining, *sua sponte*, that the facts are in dispute. The December 4, 2002 opinion, at 3, footnote 1, cites testimony of Claggett claiming that she did not actually assign Gantt to Post 9 and that she called Captain Shirley Stevens, who told her that Gantt had requested a change in her Post.

In this instance, the allegation was not only *undisputed* by Security USA, Inc., but Security, USA, Inc. specifically *admitted* that Claggett assigned Gantt to Post 9 on December 7, 1996. (Answer ¶ 24, App. at 70) The trial judge went beyond the evidence cited by either party and combed the depositions to find testimony that contradicted facts stated by Gantt, even though Security USA had

specifically admitted that Gantt's account was accurate and two other witnesses corroborated Gantt's account. Claggett's self-serving statement as not corroborated by anyone.

The trial court should be bound by the position of the parties with respect to undisputed facts where there is evidence in the record to support the facts asserted and the weight of the evidence does not compel a dispute. The trial judge need not create a defense for Security USA, Inc. that it did not argue for itself. Security USA is a major corporation that has employed several law firms during this litigation. It is not a *pro se* litigant that might need assistance in presenting a defense. Security USA, Inc. may well have made intelligent, strategic and/or ethical decisions by electing not to rely on Claggett's statement. At the time of Claggett's deposition, presumably, she had not yet read the depositions of Sgt. Willie Jones and may not have realized that Jones had directly contradicted her statement. Counsel for Security USA was aware of all of the deposition testimony and based its defense on the total evidence produced. In light of that evidence, Security USA would be wise not to rely solely on Claggett's own suspect and disputed word to dispute the claims of two to three other witnesses.

The trial court Opinion, page 5, states that Claggett "allegedly" told Officer Harvey that there was no need to call the police while Sheppard was

abducting Gantt. The term "allegedly" is inappropriate, since Security USA, Inc. did not dispute it. The trial court characterizes Claggett's statement as disputing that she "resisted" calling the police, since she said that she called them within 5-10 minutes of the abduction. There is no question that Claggett deliberately delayed calling the police, even if only by five or ten minutes. (Facts ¶ 39, App. at 63, Claggett depo. at 49, App. at 286) Claggett further admitted that waiting 5 minutes or less in case involving a gun could mean the difference between life and death. (Facts ¶ 40, App. at 63, Claggett depo. at 49, App. at 286)

Claggett admitted that she was "scared" that Sheppard would go to jail. Five to ten minutes left Sheppard ample time to drive far enough away from the IRS premises to evade police. Apparently, Claggett was more "scared" that Gary Sheppard would go to jail than she was that Dominique Gantt would be killed, or otherwise continue to be assaulted and terrorized. Claggett aided and abetted Sheppard's "getaway," and consequently, his imprisonment of, and assaults upon Dominique Gantt.

The trial court also stated that Gantt "alleges" that Sheppard was convicted on November 5, 1997 of kidnapping, rape and violation of a protective order and was sentenced to 20 years imprisonment for these crimes. (December 4, 2002 opinion, page 5, footnote 2) Again, these allegations are undisputed and are

public record; however, since Gantt does have documentation of the conviction in her possession, it is attached (App. at 77)

The Court states that Gantt "claims" that she has undergone medical treatment for physical and mental injury, including anxiety attacks, nightmares and other "mental health issues." (December 4, 2002 opinion, at 5-6) These claims are undisputed by Security USA, Inc. and Gantt produced medical records. These are therefore undisputed facts for purpose of this litigation.

Since there are no material facts to be determined by a jury on the issues of liability, Gantt respectfully submits that the district court not only erred in awarding summary judgment to Security USA, Inc., but also erred in denying summary judgment to Gantt on the issues of liability.

III. The Trial Judge Erred in Granting Summary Judgment to Security USA, Inc. on Gantt's Claim of Intentional Infliction of Emotional Distress

In a case of intentional infliction of emotional distress, a plaintiff must show that: 1) the conduct was intentional or reckless; 2) the conduct must be extreme and outrageous; 3) there must be a causal connection between the wrongful conduct and the emotional distress; and 4) the emotional distress must be severe. *Manikhi v. Mass Transit Administration*, 360 Md. 333, 366 (Md. 2000), citing *Harris v. Jones*, 281 Md. 560, 566 (Md. 1977).

A. **Claggett's Actions were "Intentional or Reckless"**

The trial court opinion, page 12 (App. at 53), recognized that Gantt satisfied the intent requirement for intentional infliction of emotional distress:

> … Gantt has forecasted evidence that Claggett's assignment of Gantt to Post 9 was an intentional act given that Claggett was aware that Sheppard had talked about killing Gantt, that Gantt was afraid of Sheppard, and that she had obtained a restraining order against him. … [O]ne could conclude that Claggett intentionally assigned Gantt to a post where she knew Gantt would be in fear and then refused Gantt's requests to leave the post after Sheppard called her there.

B. Sgt. Claggett's Conduct was Extreme and Outrageous

Gantt has met the second prong of the test for a claim of intentional infliction of emotional distress. "The extreme and outrageous character of the Security USA, Inc.'s actions may arise from his abuse of a position of authority over him, or power to affect plaintiff's interests." *Harris v. Jones*, 281 Md. at 566, quoting *Restatement of Torts*, Section 46. Security USA, Inc. employs a para-military hierarchy. Security officers are trained to strictly obey orders, since life and death could depend on such obedience.

Claggett's specific job was to prevent crimes against persons and property at the IRS Building. Claggett directly violated her duties as a security officer on federal property and as Gantt's supervisor while her friend, Sheppard, committed various violent crimes and torts against Gantt. By assigning Gantt to Post 9, Claggett facilitated a violent confrontation between Sheppard and Gantt,

endangering Gantt, other officers, IRS employees and anyone else on or near the premises. Claggett's conduct violates the sense of decency in a civilized society, shocks the conscience and was both egregious and "outrageous" No reasonable juror could conclude otherwise.

C. **The Trial Judge Erred in Concluding that Sgt. Claggett's Wrongful Conduct was not Causally Connected to Gantt's Emotional Distress**

1. The Trial Judge Erroneously Concluded that Sgt. Claggett Actually Believed that Sheppard would not "Hurt" Gantt

The December 2, 2002 opinion erroneously concluded that Claggett did not have the requisite state of mind to be held liable for intentional infliction of emotional distress, based on a statement taken completely out of context:

> Even taking as true that Claggett assigned Gantt to the outside post and failed to call the police after the abduction, there is still no evidence to suggest that Claggett intended for Gantt to suffer, or even recklessly disregarded the possibility of, the severe emotional trauma of being abducted, assaulted, threatened and raped. **To the contrary, the evidence agreed upon by Gantt in her statement of undisputed facts shows that Claggett told Harvey that Sheppard only wanted to talk to Gantt *and would not hurt her*.** (*See* P.# 49, Attach. ¶ 37). Once again, the causal link between wrongful intentional conduct and severe emotional distress required by the third prong is absent. Because Gantt has not provided evidence sufficient to establish a causal connection between intentional conduct and severe emotional distress, and there is no genuine dispute as to a fact material to this question, Security USA, Inc. is entitled to judgment as a matter of law. (Bold added.)

The trial judge appears to have misunderstood the context of Claggett's statement in making the erroneous factual determination relied upon in her

decision. Even if Sheppard had only wanted to "talk" to Gantt, Claggett was obligated to immediately call the police to enforce the restraining order preventing him from "talking" to her. Moreover, Sheppard had already done much more than "talk" to Gantt. He had already committed a series of federal and state crimes against her. Sheppard had brought a shotgun onto federal property, in violation of 18 U.S.C. § 930. He had used the shotgun to assault, batter and kidnap an officer from federal property. Sheppard *was in the process of escaping with Gantt as his prisoner* at the very moment that Claggett instructed her officers not to call the police!

Claggett may have hoped that her friend, Gary Sheppard, would not kill Gantt, but let her go, on his own and avoid arrest; but she could not have actually believed that Sheppard was not "hurting Dominique Gantt" while she lay in Sheppard's van, held prisoner, at gunpoint.

2. **The Trial Judge Erred, as a Matter of Law, Failing to Consider that Claggett Aided and Abetted Sheppard**

The trial judge failed to address Gantt's aiding and abetting arguments. Instead, the December 4, 2002 opinion, page 12, erroneously limited the responsibility of Claggett, and thus the vicarious liability of Security, USA, to the emotional distress that Gantt suffered *while waiting at Post 9 for Sheppard to attack her.* The court refused to consider any liability of Security USA, Inc. for the emotional distress to Gantt once Sheppard arrived.

> Although the court finds evidence to support the claim that Claggett acted intentionally in placing Gantt at Post 9 and requiring her to remain there, Gantt has not established that the fear that she suffered *while waiting at the post* meets the "high burden imposed by the requirement that a Gantt's emotional distress be severe.'"
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> ….
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> Evidence of the emotional distress suffered by Gantt as a result of the abduction, rape and other horrific acts perpetrated by Sheppard likely would meet the high burden of "severe emotional distress." That emotional trauma, however, was caused by Sheppard, not Claggett.

The State of Maryland has explicitly recognized tort liability for persons who aid and abet others in their tortuous conduct. *Alleco Inc. v. Harry and Jeannette Weinberg Found.*, 340 Md. 176, 200-201, *citing, inter alia, Halberstam v. Welch,* 705 F.2d 472 (D.C. 1983).

Liability for civil conspiracy attaches when two or more persons have an agreement, which may be "tacit," rather than explicit, to participate in an unlawful act that results in harm to another, whether or not that particular harm was intended. *Halberstam v. Welch,* 705 F.2d 472. Less is required for liability under the theory of aiding and abetting tortuous conduct, for which the aider and abettor is liable just as if he/she had personally committed the tortuous conduct. The *Halberstam* court, 705 F.2d at 483, summarized the elements of aiding and abetting tortuous conduct as follows:

Aiding and abetting includes the following elements: 1) the party whom the Security USA, Inc. aids must perform a wrongful act that causes an injury; 2)

the Security USA, Inc. must be generally aware of his role as part of an overall illegal or tortuous activity at the time that he provides the assistance; 3) the Security USA, Inc. must knowingly and substantially assist the principal violation …. Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortuous, it has the same effect upon liability of the advisor as participation or physical assistance.

In *Halberstam*, the defendant was held civilly liable for wrongful death for a murder resulting from a burglary, both under theories of civil conspiracy and aiding and abetting tortuous conduct. The defendant did not personally commit the murder or the burglary. She was not even present and had no specific knowledge that the murder or burglary would take place; however, since the defendant managed money for the burglar, her boyfriend, and should have realized that he was burglarizing homes, she aided and abetted him.

This Court has adopted the reasoning in *Halberstam*, for analyzing the closely related tort of civil conspiracy. *McNabb v. North Carolina*, 2001 U.S. Dist. LEXIS 13182 at 40-41 (4th Cir. 2001); *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997) (publisher held liable for wrongful death for publishing "hit man" manual). *Halberstam* has also been adopted by other circuits, not only for setting forth the elements of civil conspiracy, but also for ascertaining the elements necessary for tort liability for aiding and abetting

tortuous conduct. *Browning v. Clinton*, 292 F.3d 235, 245 (D.C. Cir. 2002); *Temporamandibular Joint Implant Recipients v. Dow Chemical Co.*, 113 F.3d 1484, 1496 (8th Cir. 2001); *Easter Trading Co. V. Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000); *Aetna Cas. and Sur. v. Leahy Constr.*, 219 F.3d (6th Cir. 538 (6th Cir. 2000); *Cox v. Administrator U.S. Steel and Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110.

> *Halberstam* set forth an excellent survey of cases from numerous jurisdictions involving various fact patterns resulting in holdings that: "A person who encourages another to commit a tortuous act may also be responsible for other foreseeable acts done by such person in connection with the intended act," 705 F.2d at 842, *quoting American Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 626 (Kan. 1968).

Claggett admits that she encouraged Sheppard to talk to Gantt. This was unlawful act, in violation of the restraining Order issued by the Circuit court for Prince George's County. Even if it had not been unlawful, subjecting Claggett to civil conspiracy liability, it aided and abetted Sheppard in his intentional actions causing Gantt intentional infliction of emotional distress.

Gantt testified that Claggett forwarded calls to her from Sheppard, in her workplace, again, in violation of the Court order and tried to convince her to talk to him. Even if Claggett did not specifically conspire with Sheppard to make Gantt accessible to him on December 7, 1996, she aided and abetted him in his

confrontation of, and attacks upon, her. Certainly, it was foreseeable that such a confrontation would take place if Gantt were placed in an outside post. The Project Manager, Earl Wood, had already foreseen the danger and ordered that Gantt be kept on inside posts. Sgt. Jones and Officer Harvey foresaw the danger and testified that it was discussed and foreseen by the officers generally, such that all understood that she should not be on an outside post. Gantt certainly reminded Claggett for the foreseeable danger when she vehemently protested the assignment and repeatedly requested to be moved to an inside post where Sheppard could not reach her.

Claggett may have even crossed "the line" between aiding and abetting and civil conspiracy to commit tortuous conduct. Although there is no direct evidence that Claggett and Sheppard spoke on the phone on the morning of December 7, 1996,[1] there is circumstantial evidence that they did, and a reasonable jury could so conclude.

On the one morning that Gantt had been assigned to an outside post since the restraining order was issued, Sheppard knew that Gantt was on Post 9. Sheppard had previously called Gantt since the Order was issued. Claggett had

[1] Such direct evidence would have to come from the testimony of either Sgt. Claggett or Gary Sheppard, neither of whom would be likely to implicate him/herself in the additional crime/tort of conspiracy to commit certain crimes/torts. Gantt's counsel actually visited Gary Sheppard in prison. Sheppard informed Gantt's counsel that he is appealing his case and would plead the Fifth Amendment to all questions if deposed.

transferred the calls to Gantt's new, inside post. Sheppard knew that Gantt was on Post 9 as he rushed up on her booth, drawing a shotgun out of his coat. She had been on Post 9 for approximately half an hour when Sheppard arrived. It had to take Sheppard some time to drive from his home in Maryland to the IRS Building. Most of Gantt's co-workers did not even know that she was on Post 9 until she was abducted. Gantt was not supposed to be there; however, Sheppard's friend, Claggett knew that Gantt was on Post 9 because she had ordered her to go there.

It was not likely a "lucky guess" by Sheppard that Gantt was on Post 9 that morning when he came running to her post, pointing a sawed off shotgun at her. Gantt's testimony is that Claggett transferred a call from Sheppard to her on Post 9. This is circumstantial evidence that Claggett had spoken to Sheppard before transferring the call. This circumstantial evidence could certainly meet the civil standard of "more probable than not" and constitute not only aiding and abetting of the torts of assault, battery, false imprisonment, and intentional infliction of emotional distress, but also conspiracy to commit some or all of these torts. Even if Claggett's acts do not rise to the level of civil conspiracy, they certainly fit the definition of aiding and abetting Sheppard's tortuous conduct against Gantt. Under either theory, Claggett, and vicariously, her employer, are liable to Gantt for the emotional distress intentionally inflicted upon Gantt by Sheppard. Indeed,

they could also be liable for assault, battery and false imprisonment; however, the primary harm that Gantt experienced on that terrible day was emotional. Her body has sense healed, but she continues to suffer emotional distress from the experience and her employer's reaction to it.

Sheppard's acts do not relieve Claggett or Security USA of responsibility. Sheppard's acts were not superceding, intervening causes of Gantt's injuries any more than a speeding train would be a superceding intervening cause of her death if Claggett had tied her to the tracks in its path.

D. **Even the Emotional Distress that Gantt Suffered, Waiting for her Attacker, at her Post, is Actionable**

Even if the scope of Gantt's injury were limited to the time that she spent waiting at her post, in fear of Sheppard, a jury could well determine that the emotional distress that she suffered was severe enough to establish a claim. In *Federated Stores v. Le*, 324 Md. 71, 80 (1991), the Court permitted an employee to sue his employer for the intentional torts of false arrest, defamation and intentional infliction of emotional distress. The employee's supervisor had accused the plaintiff of stealing and detained the employee to investigate the accusations. The court found the embarrassment and emotional distress of being accused of being a thief, in the presence of co-workers, constituted severe emotional distress sufficient to support a claim. Certainly, being portrayed as a thief cannot be more emotionally distressing for an employee than being assigned

to a post, for nearly an hour, that makes that employee a "sitting duck" for a man who has threatened to kill her on that post. Gantt has more than met the standard of establishing severe emotional distress, and at minimum, is entitled to a jury determination on the issue.

E. Security USA, Inc. Continued to Inflict Emotional Distress on Gantt after her Abduction by Ratifying Claggett's Tortuous Conduct

Even after the abduction of Ms. Gantt, Claggett was not removed from her supervisory position for this conduct or otherwise reprimanded. Instead, Gantt had to return to work under Claggett's supervision, thus compounding her emotional distress. An employer's retention of an employee who has committed a tort may constitute ratification of the tortuous conduct. *Prunty v. Arkansas Frieghtways,* 16 F.3d 649 (5th Cir. 1994). By failing to remove, reprimand or notify GSA of Claggett acts as security risks, Security USA, Inc. tolerated, supported and/or ratified the actions of its supervisory employee, at the para-military rank of sergeant, and should be held liable for her actions, based on *respondeat superior*.

V. The Trial Court Erred, as a Matter of Law and Fact, in Dismissing Gantt's Sexual Harassment Claims under the Fifth and Fourteenth Amendments to the United States Constitution

The trial court erred in dismissing Gantt's claims for sexual harassment. This Court has acknowledged that a claim for sexual harassment is not limited to Title VII, but may be brought for violations of the equal protection provisions of

the United States Constitution, under the Fifth and Fourteenth Amendments, pursuant to 42. U.S.C. § 1983. *Riley v. Buckner,* 2001 U.S. App. LEXIS 240, at 6 (4th Cir. 2002), *citing Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994), *citing Davis v. Passman*, 442 U.S. 228, 234-235 (1979); *Pontarelli v. Stone*, 930 F2d. 104, 113-114 (1st Cir. 1991); *Starrett v. Wadley*, 876 F.2d (10th Cir. 1989); *Bohen v. City of East Chicago*, Indiana, 799 F.2d 1180 (1986).

Security USA, Inc. did not address Gantt's equal protection claims in its *Motion to Dismiss Gantt's Complaint*; consequently, there was no motion to dismiss this cause of action before the trial Court. Security USA, Inc. only argued that Gantt did not exhaust her administrative remedies under Title VII.[2] The trial court concluded that Gantt could assert no theory of sexual harassment, determining that Security USA, Inc. did not act under color of state law, pursuant to 42 U.S.C. § 1983. This conclusion was both an error of law and fact.

A. Security USA May be Sued Pursuant to 42 U.S.C. § 1983, since its Employees Acted "under Color of State Law"

42 U.S.C. § 1983 provides, in pertinent part:

[2] Gantt did not timely file a charge with the Equal Employment Opportunity Commission (EEOC); however, within weeks after her abduction from her workplace, Gantt did call the United States Department of Labor and inquired as to whether she could lodge a complaint against her employer for sex discrimination. She was told that the facts did not qualify for such a charge and she was not told that she should call the EEOC to file a charge, nor was she referred to the Department of Labor's Office of Contract Compliance (OFCCP) to report sex discrimination by a federal government contractor, Security USA, as she should have been referred.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law.

An under 42 U.S.C. § 1983 applies where there is both a Constitutional right to be protected and the violator has acted "under color of state law," applying a "public function test" to determine whether security officers are acting "under color of state law." *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953); *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946); *Jackson v. Metropolitan Edison Co*., 419 U.S. 345, 350-51, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974); *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002); *Payton v. Rush Presbyterian St. Luke's Medical Center*, 184 F.3d 623 (7th Cir. 1999).

In *Katz*, a plaintiff was able to maintain a claim under 42 U.S.C. § 1983 against a private corporation, as a "state actor," where the corporation leased public property that remained open to the public and employed security officers to "police" the property. This policing included the regulation of speech, and, plaintiffs alleged, infringed upon their First Amendment rights. Since the security officers performed the "public function" of enforcing the laws and regulations of the city, they were state actors and their employer could be held liable for their actions under 42 U.S.C. § 1983.

The Court in *Payton*, 184 F.3d at 628-630, offers a detailed analysis of the possible liability of security officers and their employers under Section 1983:

> … privately employed railroad police have been deemed state actors. *United States v. Hoffman*, 498 F.2d 879, 881-82 (7th Cir. 1974). In well-reasoned opinions, district courts in this circuit have held that private hospital security guards and university policemen also can be state actors. *See* *Scott v. Northwestern University School of Law*, 1999 U.S. Dist. LEXIS 2815, 1999 WL 134059 at *3-4 (N.D. Ill. March 8, 1999); *Stokes v. Northwestern Memorial Hospital*, 1989 U.S. Dist. LEXIS 8543, 1989 WL 84584 at *3-4. (N.D. Ill. July 20, 1989).
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> ….
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> Railroad officers had previously been clearly defined as state actors. *See* *United States v. Belcher*, 448 F.2d 494, 497 (7th Cir. 1971). …*See also* *Henderson v. Fisher*, 631 F.2d 1115, 1117-18 (3rd Cir. 1980) (*per curium*) (campus security officers delegated the "same powers which the municipal police force of Pittsburgh possesses" save for stricter geographic restrictions were state actors); *Scott v. Northwestern University School of Law*, 1999 U.S. Dist. LEXIS 2815, 1999 WL 134059at *3-4 (N.D. Ill. March 8, 1999) (state statute granting university police "the powers of municipal peace officers . . . including the power to make arrests for violations of state statutes, municipal or county ordinances" with geographic limitations placed defendant's actions within ambit of color of state law).
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> ….
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> Underlying all of these cases is the notion that if the state cloaks private individuals with virtually the same power as public police officers, and the private actors allegedly abuse that power to violate a Gantt's civil rights, that Gantt's ability to claim relief under § 1983 should be unaffected.

Security USA satisfies the "public function" test. Security USA, Inc. officers performed duties that would otherwise be performed by FPS officers and/or local police officers within the State of Maryland. In fact, to be an armed federal officer stationed in Maryland, a security officer had to be issued a handgun permit by the State of Maryland. (Claggett depo. at 61, App. at 298)

The IRS, by contracting with Security USA, Inc. to protect persons and property on federal property at the IRS Building, delegated its duty to provide security in the building to Security USA, Inc. Security USA, Inc. officers worked under the direct supervision of FPS officers on federal property. Security USA, Inc. officers were stationed at government worksites and their activities are controlled extensively by federal government law, regulations, policies, procedures and direct supervision. ("The General Services Administration and Federal Protective Service" publication, attached to *Gantt's Opposition to Security USA, Inc.'s Motion to Dismiss* as Ex. B) Security officers hired by Security USA, Inc. to work in government buildings must be "GSA certified." (Id.) They must be trained and certified by the federal government as qualified in the areas of weapons training and extensive classroom preparation in the areas of constitutional law, torts, criminal law, CPR and first aid. (Id.) After classroom training, the officers must pass a "T-2" written examination administered by the Federal Protective Service ("FPS") (Id.)

The FPS performs "background checks" on all candidates for GSA certification. (Id.) All security officers employed by Security USA, Inc. are supervised by FPS officers, stationed at each of the government buildings where Security USA, Inc. officers are stationed. (Id.) FPS officers controlled Security USA, Inc.'s officers' posts and inspected daily logs recorded by Security USA,

Inc. officers. (Id.) Where a Security USA, Inc. officer was reprimanded, the FPS was responsible for revoking the officer's GSA certification. (Id.) Security USA, Inc. acted under color of state law. Security USA, Inc. also deprived Gantt of her Fifth and Fourteenth Amendment rights to equal protection of the law.

B. Title VII Analysis Applies to Sexual Harassment Claims Raised under the Equal Protection Clause

In assessing a claim of sexual harassment under the equal protection clause, the same standards applied in Title VII cases of sexual harassment/hostile work environment are adopted. *Riley v. Buckner,* 2001 U.S. App. LEXIS 240, at 6, *citing Beardsley v. Webb,* 30 F.3d at 529; *Bourtos v. Canton regional Transit Auth.* 997 F.2d 198, 202-203 (6th Cir. 1993); *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990); consequently, case law developed under Title VII offers the appropriate analysis of the sexual harassment/hostile work environment.

Although this Court has not previously considered a case of employer liability for sexual harassment of an employee by a non-employee in the workplace, all circuits considering this issue have adopted the applicable regulation promulgated by the United States Equal Employment Opportunity Commission (EEOC), 29 C.F.R. Section 1604.11(e):

> an employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate action.

The Second circuit adopted the EEOC regulation in *Murrary v. New York University*, 57 F.3d 243 (2d Cir. 1995) (student intern allegedly harassed by patient at dental clinic). The Fifth Circuit resolved this issue in *Waltman v. International Paper Co.*, 875 F. 2d 468, 471 (5th Cir. 1989) (employee harassed by independent contractor of employer while on a travel assignment) and *Dornbecker v. Malibu Grand Prix*, 828 F. 2d 307, 309 (5th Cir. 1987) (employee harassed by consultant and employer took swift corrective action). The Eighth Circuit similarly adopted the regulations in *Christ v. Focus Homes*, 122 F.3d 1107 (8th Cir. 1997) (employees harassed by mentally incapacitated residents). The Ninth Circuit found a hostile work environment, based on sexual harassment, where a corporate service manager was terminated after reporting that she was raped by a customer during a business dinner. *Little v. Windermer Relocation, Inc.*, 301 F.3d (9th Cir. 2001) The Ninth Circuit had precedent for employer liability for sexual harassment by a non-employee in *Folkerson v. Circus Enterprises, Inc.*, 107 F.3d 754 (9th Cir. 1997) (employee of circus harassed by patron while performing pantomime act). Cases in the Tenth Circuit are often cited by other circuits on this issue. *Turnbull v. Topeka State Hospital*, 255 F.3d 1238 (10th Cir. 2001) (psychiatrist harassed by patient); *Lockard v. Pizza Hut*, 162 F.3d 1062 (10th Cir. 1998) (waitress harassed by customer); *Adler v. Wal-Mart Stores*, 144 F.3d 664 (10th Cir. 1998) (employer liability for co-worker

harassment is analyzed using the same standard as is harassment by a non-employee).

Decisions of district courts within Fourth Circuit have been consistent with other circuits. *McGuire v. Virginia*, 988 F. Supp. 980 (W.D. Va. 1997) (executive secretary sexually harassed at worksite by son of Chairman of Board); *Mullis v. Mechanics and Farmers Bank*, 994 F. Supp. 680 (M.D. N. C. 1997) (loan secretary sexually harassed by bank vice president at work site to which she was temporarily detailed by another employer).

District courts have applied and expanded the legal framework set by the Courts of Appeals, since the facts vary, and may even be bizarre, requiring a case by case analysis to determine whether a hostile work environment existed, whether the employee appropriately notified the employer of the harassment, and whether the employer took reasonable steps to end the harassment. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516; 81 FEP Cases 964 (BNA), 15 IER Cases 1587 (DDC 1999) (law professor was stalked on the law school premises by a homeless man who targeted African-American female professors and attorneys around the country, in search of a fictitious "wife"); *Ligenza v. Genesis Health Ventures of Massachusetts, Inc.*, 995 F. Supp. 226 (D. Mass. 1998) (respiratory therapist harassed by patient at employer's health clinic); *Jarman v. City of Northlake*, 950 F. Supp. 1375 (N.D. Ill. 1997) (deputy clerk

sexually harassed by elected official); *Kudatsky v. The Galbreath Co.*, 1997 U.S. Dist. LEXIS 14445 (S.D. New York 1997) (real estate sales person sexually harassed by client); *Mart v. Dr. Pepper Co., et al.,* 923 F. Supp. 1380 (D. Kan. 1996) (account sales manager sexually harassed by client); *Hallberg v. Eat "n Park*, 1996 U.S. Dist. LEXIS 3573; 70 Fair Empl. Prac. Cas. (BNA) 361 (waitress sexually harassed by custom); *Otis v. Wyse, et al.,* 1994 U.S. Dist. LEXIS 15172 (D. Kan. 1994) (nurse trainer harassed by independent medical provision); *Hernandez v. Miranda*, et al., 1994 U.S. Dist. LEXIS 10598 (D. P. R. 1994) (office manager harassed by a customer). *Powell v. Los Vegas Hilton, Corp.*, 841 F. Supp. 1024, 1029 (D. Ct. Nev. 1992) (casino liable for sexual harassment of employee by customers); *Churchman v. Pinkerton*, 756 F. Supp. 515, 518-519 (D. Ct. Kan. 1991) (female security officer harassed by employer's client); EEOC Decision 84-3, 1984 (waitress subject to unwelcome sexual conduct by customer).

In *Lockard v. Pizza Hut*, 162 F.3d 1062 (10th Cir. 1998), the plaintiff was a waitress who was harassed by a customer. The *Lockard* court explained: "An employer who condones or tolerates the creation of such an environment should be held liable regardless of whether the environment was created by a co-employee or a non-employee, since the employer ultimately controls the conditions of the work environment." 162 F.3d at 1073.

The "non-employee harasser" cases, in particular, can involve novel and even bizarre sets of facts. Some, as in the case at bar, raise serious issues regarding employer responsibility with respect to the safety of women in the workplace when they are targeted, as women. This point is demonstrated by a case decided by the Chief Judge in the federal district court for the neighboring District of Columbia, and the attention that it has received, though it has not yet proceeded to trial. *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516; 81 FEP Cases 964 (BNA), 15 IER Cases 1587(DDC 1999). In *Martin,* a law professor was stalked on campus by homeless man with a criminal record and a history of violence. The serial stalker pursued other African-American female professors around the country, claiming that he was "searching" for the physical embodiment of a fictitious character in a book, whom he believed was his "natural wife.

The professor repeatedly requested that the stalker be barred from campus and the law school community be notified of his possible presence and danger. The professor's request was consistent with the instructions to the University from the local police department, which had filed a stalking report and prepared to arrest the stalker if he appeared again on campus. Howard University's own policies procedures required that the stalker be barred from campus and notices

posted. The law school administration promised take this actions, but failed to take even the simplest measures to keep the stalker out of the workplace.

The Court denied Howard University's motion to dismiss the professor's claims of sexual harassment/hostile work environment, retaliatory non-renewal, and breach of contract. *Martin v. Howard University* has been cited in numerous commentaries, such as law review, Larson's on Employment Law, BNA Daily Labor Reporter, websites and radio programs.[3] Motions for summary judgment are currently pending and trial is expected in the fall of 2003.

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[3] *Martin v. Howard University* has been cited in: 1) **Fair Employment Practice Reporter**, 81 FEP Cases (BNA) 964 (D.C. D.C. 1999); 2) **Individual Employee Rights** Reporter, 15 IER Cases 1587 (BNA) (D.C. D.C. 1999); 3) **EEOC Newsletter,** January 2000; 4**) BNA Daily Labor Report**, ISSN 0418-2693, January 11, 2000; 5) **Daily Labor Reporter**, ISSN 1043-5506, January 17, 2000; 6) 3-46 Larson on Employment Discrimination @46.05n.127; 7) 3-46 Larson on Employment Discrimination @46.034 n.62; 8) **The Twenty-Fourth Annual Law Review Symposium*:*** *Sexual Harassment in the Workplace: Fifteen Years after Meritor Savings Bank: Symposium Article: Have We Come Full Circle?* 27 Ohio N.U.L. Rev 439 (2001); 9) 5 No. 12 **Andrews Sex. Harassment Litig. Rep.** 5 (February 2000); 10) **WOL A.M. radio**, May of 2000; 11) **WPFW, F.M. radio,** June of 2000; 12) Holland and Knight, P.C. (law firm representing Howard University warned other universities not to act as Howard did) http://www.hklaw.com/newsletters.asp?ID=95&Article=467; 13) Lawroom, www.lawroom.com/download /CR005.pdf, 14) Venable Bates, P.C., http://www.venable.com/newsletters/wlu/2003/newslttr1.pdf, 15) http://www.ncbl.com/archive/02-00labor.html, 16) Hand Arendall, P.C. http://www.handarendall.com/0400NLRev.htm,17) http://www.michbar.org/publications/labor2000.html, 18) College Publications, www.collegepubls.com/ref/SfxNdx35.shtml; 19) Presentation before American Association of University Professors, http://www.cg2consulting.com/AAUP-Presentation.html; 20) *Law Offices of Dawn V. Martin*, www.firms.findlaw.com//dvmartinlaw.

Where women are targeted, attacked and otherwise harassed in the workplace, because of their sex, the terms and conditions of their employment is not, and cannot be, equal to that of men. In order to achieve any sense of equality, women employees must at least feel that they can go to work without the fear that they will be sexually harassed, stalked, or even attacked in their workplaces by dangerous men who prey on women. The courts have recognized that the employer must reasonably respond to known threats against women in the workplace. The employer cannot simply ignore it, regard it as a "personal problem," discount the hostile work environment or retaliate against the victim of the harassment. [4]

[4] Numerous legal commentators have addressed this issue. The Twenty-Fourth Annual Law Review Symposium*: Sexual Harassment in the Workplace: Fifteen Years after Meritor Savings Bank: Symposium Article: Have We Come Full Circle?* 27 Ohio N.U.L. Rev 439 (2001); 9); 5 No. 12 Andrews Sex. Harassment Litig. Rep. 5 (February 2000); Sandra L. Snaden, "*Baring it All in the Workplace? Who Bears the Responsibility?* 28 Conn. L. Rev. 1225 (Summer, 1996); David S. Warner, *Third-Party Sexual Harassment in the Workplace: An Examination of Client Control,"* 12 Hoftstra Lab L.J. 361 (Spring, 1995); Justin S. Weddle, *Title VII Sexual Harassment: Recognizing An Employer's Non-Delegable Duty to Prevent a Hostile Workplace,"* 95 Colum. L. Rev. 724 (April, 1995); Frank Ravitch, *"Hostile Work Environment and the Objective Reasonableness Conundrum: Deriving a Workable Framework from Tort Law for Addressing Knowing Harassment of Hypersensitive Employees,"* 36 B.C. L. Rev. 257 (March, 1995); Robert Aalberts and Lorne H. Seidman, "*Sexual Harassment of Employees by Non-Employees: When Does the Employer Become Liable?* 21 Pepp. L. Rev 447 (Jan. 1994); Peter Jan Honisgberg, *"When the Client Harasses the Attorney – Recognizing Third-Party Sexual Harassment in the Legal Profession,"* 28 U.S.F. L. Rev. 715 (Spring, 1994); David Benjamin Oppenheirmer, *"Negligent Discrimination,"* 141 U. Pa. L. Rev. 899 (Jan. 1993).

Security USA, Inc., by and through its agents, particularly Claggett, deprived Dominique Gantt of her right to equal protection of the law, on the basis of sex, by allowing/facilitating Sheppard's sexual harassment in her workplace. Furthermore, as discussed in Section IV, E, an employer may be liable for the tortuous conduct of an employee where it fails to terminate or otherwise take corrective action against the offending employee. The Court in *Little v. Winderer Relocation, Inc,* 301 F.3d at 968, held that "employers are liable for harassing conduct by non-employers where the employer either ratifies or acquiesces in the harassment when it knew or should have known of the conduct."

As in the case at bar, the plaintiff in *Little* was raped and otherwise assaulted by a non-employee. The court held that rape was so severe that even one incident created a hostile work environment for the plaintiff. In the present case, a supervisory employee, Claggett, facilitated the sexual harassment of Gantt; yet, Security USA, Inc. took no action against Claggett and forced Gantt to continue working under Claggett's supervision, creating a continued hostile work environment. Security USA's actions constituted a violation of the equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Gantt respectfully requests that this Court fully reverse the decision of the trial court granting summary judgment to Security USA, Inc. and denying *Gantt's Motion for Summary Judgment.* **N**o material facts are in dispute. Appellant Gantt is entitled to summary judgment, as a matter of law.

Respectfully submitted,

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Request for Oral Argument

Counsel for Appellant respectfully requests oral argument. The sexual harassment claim in this case involves issues of first impression in this Circuit with respect to the liability of an employer for sexual harassment of an employee by a non-employee and may well set precedent for the Fourth Circuit on this issue.

The issue of harassment of employees by non-employees in the workplace one of public interest and concern, particularly with respect to an employer's responsibility to take reasonable steps to prevent physical attacks, as well as verbal sexual harassment, against women employees. The societal interest in furthering equal protection of the law for women and allowing them to work without the fear of being targeted and attacked as women, compels an open discussion by this Court with counsel for the parties.

In addition, Homeland Security will be offering many new contracts to private security companies. Private security companies are increasingly assuming the public function of policing, it is appropriate to engage in a dialogue regarding the responsibilities of those private security companies to hire, train and manage their employees in a manner consistent with the responsibilities of performing a public function. This includes obligation, as law enforcement officers and peace keepers, not to aid, abet, or otherwise facilitate unlawful

conduct, or conduct that that are likely to create, incite or facilitate dangerous or disruptive situation, as was created by St. Claggett in this case.

The decision in this case will send a message to those private contractor security companies with respect to their hiring, training, compensation and disciplinary policies and practices. The result will affect us all.

ADDENDUM

TEXT OF STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment of the United States Constitution provides, in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. 14.

The Fifth Amendment of the United States Constitution provides, in relevant part:

> "No person … shall be deprived of life, liberty, or property, without due process of law…."

STATUTES

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 2000e-2(a), Title VII of the Civil Rights Act of 1964, provides, in pertinent part:

> "It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms and conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2003, a copy of the foregoing Appellant's *Appellate Brief* and the Joint Appendix were mailed, first class, postage prepaid, to the following person.

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