

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)*

REPLY BRIEF FOR APPELLANT

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I. SECURITY, USA HAS MADE BLATANTLY FALSE STATEMENTS IN ITS BRIEF AND SHOULD BE SANCTIONED

A. SECURITY, USA HAS MADE BLATANTLY FALSE STATEMENTS REGARDING THE FACTS OF RECORD

False statements made by Security, USA, are listed below, followed by the evidence of record establishing the falsity of each statement.

1. SECURITY, USA'S FALSE STATEMENT, Brief, at 6:

In her Brief, Gantt can point to no evidence that she suffered any severe emotional distress a result of her assignment to an outside security post.

CONTRA, EVIDENCE OF RECORD. Gantt Brief, at 9:

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)

....

After escaping in his van, Gary Sheppard assaulted Dominique Gantt, raped her, threatened to kill her and otherwise terrorized her for the following six hours. (*Plaintiff’s Undisputed Statement of Facts* ¶ 45, JA 64; First Amended Complaint ¶ 52, JA 16; Maryland State’s Attorney confirmation of conviction of Gary Sheppard, JA 439)

2. SECURITY, USA’S FALSE STATEMENT, Brief, at 6:

There is no evidence that she refused the assignment, or that she felt so scared that she called the police¹ herself.

CONTRA, EVIDENCE OF RECORD. Gantt Brief, at 9:

(See responses to # 1, paragraphs 1-3)

¹ Security, USA suggests that Gantt could have called “the police;” however, police officers do not provide “bodyguard services” to people who are “scared.” Gantt obtained an Order or Protection against Sheppard. Police could do nothing until he violated it. Furthermore, local police and federal police (FPS) had delegated to Security, USA, the task of protecting persons at the IRS Building. Claggett was he Security, USA supervisor in the Control Room. Who, then, could Gantt have called?

3. SECURITY, USA’S FALSE STATEMENT, Brief, at 6:

There is no evidence that Gantt was feeling distress of any sort on December 7, 1996, other than perhaps her anger at her supervisor over the assignment.

CONTRA, EVIDENCE OF RECORD. Gantt Brief, at 9:

(See responses to # 1)

4. SECURITY, USA’S FALSE STATEMENT, Brief, at 6:

The only evidence concerning the time Gantt spent outside prior to the abduction is her testimony that she received a call from Sheppard and hung up on him (JA 159), and that he also spoke to a guard from another company, who stopped by her post.

CONTRA, EVIDENCE OF RECORD. Gantt Brief, at 9:

(See responses to # 1, paragraphs 1-3)

5. SECURITY, USA’S FALSE STATEMENT, Brief, at 6:

Gantt’s only other comment about that period of time was that it “was a normal morning.”

CONTRA, EVIDENCE OF RECORD. Gantt Brief, at 9:

(See response to # 1 and 2, above)²

6. SECURITY, USA’S FALSE STATEMENT, Brief, at 6:

Nothing in Gantt’s testimony points to anything more than an unwelcome telephone call from Sheppard, a call which he could have placed to her anywhere using a ploy, which Gantt had previously described to Sergeant Claggett, in which Sheppard would

²In light of Gantt’s full testimony, one is reminded of the cliché, “Other than that [the assassination of President Lincoln at the theatre], Mrs. Lincoln, how was the play?”

have someone else initiate the call and then give the telephone to Sheppard.

CONTRA, EVIDENCE OF RECORD. Gantt Brief, at 9:

(See responses to # 1, paragraph 2)

B. SECURITY, USA MADE BLATANTLY FALSE STATEMENTS REGARDING ARGUMENTS RAISED IN DISTRICT COURT

1. Security, USA Falsely States that Gantt Raised a Claim of Criminal Conspiracy

SECURITY, USA'S FALSE STATEMENT, Brief, at 6:

[Gantt's] filings contain broad allegations of tortuous conduct, and even a claim of *criminal* conspiracy (emphasis added)

CONTRA, EVIDENCE OF RECORD. Gantt Brief, at 26:

This is a civil case. Gantt's Brief discussed a civil, not *criminal* conspiracy:

Claggett may even have crossed "the line" between aiding and abetting and *civil* conspiracy to commit tortuous conduct. (Emphasis added)

2. Security, USA Falsely States that Gantt Raised a Constitutional Sexual Harassment Claim "for the First Time, on Appeal"

SECURITY, USA'S FALSE STATEMENT, Brief, at 13:

Gantt only raised "equal protection/sex discrimination arguments for the first time in this Court on appeal."

CONTRA, EVIDENCE OF RECORD.

First Amended Complaint

Gantt's May 15, 2000 *First Amended Complaint* stated, under "Background," at 1 (JA 9):

Plaintiff's *pro se Complaint* included a federal question involving a claim of sex discrimination in the form of sexual harassment/hostile work environment.

Paragraph 2 of the *First Amended Complaint*, at 2, reads (JA 10):

This Court has jurisdiction over this action because it raises a federal question under the equal protection guarantees of the due process clause of the Fifth Amendment of the United States Constitution, pursuant to 28 U.S.C. 1331, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, with respect to sexual harassment in the workplace.³

The *First Amended Complaint*, lists "Count II" as "Sexual Harassment/Hostile Work Environment." (JA 11) The *First Amended Complaint*, ¶ 65 (JA 19) reads:

Security, USA, Inc., its agents and employees, had a duty to prevent sexual harassment in the workplace, pursuant to the equal protection clause of the Fifth Amendment of the United States Constitution.⁴

³ Sexual harassment is only prohibited by Title VII because it is discrimination on the basis of sex. *Meritor Savings Bank, v. Vinson*, 477 U.S. 57, 64, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986).

⁴ The district court record contains additional references to, and arguments in support of, Gantt's constitutional sexual harassment claims; however, these filings were not included in the *Joint Appendix*, filed with Gantt's Appellate brief, because Gantt never anticipated that Appellee would falsely claim that the constitutional sexual harassment claims were not raised at the District Court

January 8, 2001 Order (JA 37):

“Gantt also asserts a claim of sexual harassment...”

On page 2 of its *Opposition to Gantt’s Motion to Supplement Joint Appendix*, and *Appellee’s Motion for Reconsideration of Court’s July 3, 2003 Decision to Strike Supplemental Joint Appendix*, Security, USA states:

Gantt’s “sexual harassment/hostile work environment” claim (Count II of her First Amended Complaint) was dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Since Security, USA now acknowledges that the Court dismissed Gantt’s “sexual harassment/hostile work environment” claim, and that this constitutional, equal protection claim of sex discrimination was Count II of Gantt’s *First Amended Complaint*, it has indirectly conceded that its entire argument that Gantt did not raise a constitutional claim of sexual harassment/hostile work environment at the District Court level was frivolous. As such, Security, USA is obligated to withdraw this frivolous argument.

Since Security, USA continues to maintain this frivolous argument, Gantt respectfully asks this Court to incorporate this admission into its decision. Costs and sanctions against Security, USA, are particularly appropriate since Security,

level. *See Gantt’s Motion to Supplement Joint Appendix, Motion for Reconsideration of Court’s July 3, 2003 Decision to Strike Supplemental Joint Appendix and Reply to Appellee’s Opposition to Gantt’s Motion to Supplement Joint Appendix, and Appellee’s Motion for Reconsideration of Court’s July 3, 2003 Decision to Strike Supplemental Joint Appendix.*

USA's misrepresentation of the record required Gantt's counsel to cite the portions of the record that rebut Security, USA's claim, and to photocopy and bind the filings from the District Court into proposed Volume III, at a cost of approximately \$200.00 for photocopying and binding alone, not to mention attorney's fees. Security, USA only admitted that Gantt did raise a constitutional claim of sexual harassment after it was confronted with the repeated references to, and discussion of, the sex discrimination claim in the District Court record.

3. Security, USA Falsely States that Gantt Raised a Fourteenth Amendment/§ 1983 Claim for the First Time, on Appeal

SECURITY, USA'S FALSE STATEMENT, Brief, at 11:

On page 11 of its Brief, Security, USA states that Gantt has raised a Fourteenth Amendment/§ 1983 claim for the first time, on appeal, claiming that:

Indeed, neither the number "1983" nor the words "Fourteenth Amendment" appear anywhere in Gantt's Complaint or in either of the District Court opinions.... Thus, Gantt may not raise any § 1983 or Fourteenth Amendment arguments in this Court for the first time.

CONTRA, EVIDENCE OF RECORD

District Court's January 8, 2001 Decision, at 12 (JA 39):

Security, USA's alleged sexual harassment was in no way compelled or influenced by the federal government or its regulations. *See id.* (discussing *Rendell v. Kohn*, 457 U.S. 830, 842-43 (1982), in which the Supreme Court found that a school, although subject to extensive regulation, was not a state actor for purposes of § 1983 suit, as state regulations in no way compelled or influenced the decision to fire plaintiff.... Accordingly, *Gantt's claim of*

sexual harassment based on any theory will be dismissed.
(Emphasis added)⁵

II. ARGUMENT

A. SECURITY, USA IGNORES TORT LAW ON AIDING AND ABETTING TORTUOUS CONDUCT

On pages 22-26 of her Brief, Gantt set out the explicit law in the Fourth Circuit⁶ and the State of Maryland,⁷ as well as other jurisdictions,⁸ adopting the doctrine of “aiding and abetting” tortuous acts for imposing liability on a person who aids another in the commission of a tort. The aider and abettor need not intend the specific harm actually caused, but only be “generally aware” of his/her role in substantially assisting the principal violation. (Gantt Brief at 22-26)

The aider and abettor is held liable for all tortuous conduct committed by the principal tortfeasor, even if such harm was not intended or foreseen. (*Id.*) It is

⁵ The district court record contains additional references to, and arguments in support of, Gantt’s Fourteenth Amendment/§1983 claims; however, these filings were not included in the *Joint Appendix*, filed with Gantt’s Appellate brief, because Gantt never anticipated that Appellee would falsely claim that the constitutional/§1983 claims were not raised at the District Court level. Gantt is prohibited, by this Court’s July 3, 2003 Order, from citing them.

⁶ *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).

⁷ *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).

⁸ *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 538 (6th Cir. 2000); *Cox v. Administrator U.S. Steel and Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994), *mod. on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110.

not necessary, then, that Sgt. Claggett intended that Sheppard kidnap and rape Dominique Gantt, in order for her, and vicariously, Security, USA, to be held liable for the tortuous conduct committed by Sheppard against Gantt. It is only necessary that she was generally aware that her acts would substantially assist Sheppard in gaining access to Gantt, which she knew would likely cause Gantt severe emotional distress.

Security, USA, has refused to address this issue at all. Security, USA has absolutely no defense to the mandate that the aiding and abetting doctrine be applied to this case. Sgt. Claggett abused her law enforcement position and authority delegated to her by Security and FPS to aid and abet Gary Sheppard in his efforts to call Dominique Gantt, see her and confront her, in violation the Court's Order of Protection.

As Security, USA acknowledges, Sgt. Claggett knew that Sheppard was threatening to kill Gantt and "others" (himself, his estranged wife and his children). (Security, USA's Brief, at 24; Gantt Brief at 7) Sgt. Claggett was also aware that Sheppard had already assaulted Gantt, which was the basis for the Protective Order, and that he had broken a window in her mother's house trying to get to her. (Gantt Brief, at 7)

Claggett told Sgt. Jones that she knew that Gantt was not to be assigned to an outside post (Gantt Brief, at 7); then, immediately after Jones left the site,

Claggett ordered Gantt to assume the outside post, over Gantt's vehement protests. (Gantt Brief, at 8-9) Claggett forwarded a call from Sheppard to Gantt, within moments after the assignment (Gantt Brief, at 9) Gantt called Claggett, protesting the fact that Claggett had forwarded the call to her, expressed her fear of being at the post, and again, requested that she be assigned to an inside post where Sheppard could not reach her. (Gantt Brief, at 9) Claggett ordered Gantt to stay at the outside post (Gantt Brief, at 9), like a "sitting duck" for Sheppard. Sheppard arrived within minutes, wielding a shotgun, attacking Gantt, and kidnapping her from the open, outside post. (Gantt Brief, at 9-11) Finally, while Sheppard was shoving Dominique Gantt into his van, at gunpoint, Security, USA's Sgt. Claggett specifically ordered subordinate Security, USA officers **NOT** to call the police, saying, "He only wants to talk to her. He's not going to hurt her." (Gantt Brief, at 10)

If there had been any doubt, up until this time, whether Claggett was aiding and abetting Sheppard in his tortuous conduct and crimes against Gantt, Claggett's refusal to call the police while Gantt was being kidnapped from federal property eliminated all doubt. Claggett aided and abetted Sheppard's "getaway," and thus, his kidnapping of Gantt, by ordering her subordinates not to call the police, while Sheppard physically forced Dominique Gantt to submit to him, at gunpoint. An immediate call could well have prevented Sheppard's

escape, and consequently, the continued false imprisonment, rape and additional assaults upon Dominique Gantt.

Claggett admitted that *she was “scared” that Sheppard would be arrested!* (Gantt Brief, at 11) Claggett was clearly more concerned about Sheppard being arrested than she was about preventing the physical and emotional injuries that Sheppard was inflicting upon Gantt at that very moment. Claggett was the supervising officer specifically designated to provide protection to employees and visitors in the federal IRS building. There was nowhere else to turn, and Claggett knew it.

Claggett’s aiding and abetting of Sheppard is so clear that a reasonable juror could even conclude that they met the higher criteria of civil conspiracy; nonetheless, it is not necessary for Gantt to meet that criteria, since the aider and abettor is held to the same accountability/liability as the co-conspirator. As fully discussed in Gantt’s Brief, pages 19-28, Sgt. Claggett, and her employer, Security, USA, must be held liable for her aiding and abetting of Sheppard in his tortuous conduct against Gantt. No reasonable juror could conclude otherwise.

B. SECURITY, USA CONCEDES THAT THE TRIAL JUDGE ERRED, FAILING TO APPLY HER OWN STATED CRITERIA FOR A CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In its Brief, at 22-23, Security, USA recognizes that the trial judge erred by not applying her own stated criteria for establishing a case of intentional

infliction of emotional distress. The trial judge cited the controlling Maryland law that set forth that criteria, which included “intentional or reckless conduct.” (JA 52) The trial judge then made a *factual determination* that Claggett did not intend for Plaintiff to experience emotional distress or even *recklessly disregard* the possibility of the harm actually inflicted upon Gantt by Sheppard:

Even taken as true that Claggett assigned Plaintiff to the outside post and failed to call the police after the abduction,⁹ there is still no evidence to suggest that Claggett *intended* for Plaintiff to suffer, (emphasis in original) *or even recklessly disregarded* (emphasis added) the possibility of, the severe emotional trauma of being abducted, assaulted, threatened and raped. To the contrary, the evidence agreed to by Plaintiff in her statement of undisputed facts shows that Claggett told Harvey that Sheppard only wanted to talk to Plaintiff and would not hurt her.

(JA 55)

The *glaring flaw* in the District Court’s opinion is that, when that Claggett told Officer Harvey (her subordinate) not to call the police, Claggett was keenly aware that Sheppard was, at that very moment, assaulting and abducting Dominique Gantt! (Gantt Brief, at 21-22, 10-12) Sheppard had already “hurt” Gantt, dragging her from her IRS post into his van, in a chokehold, with a shotgun pressed against her chin. (*Id.*) The District Court’s “factual” determination, then, was made in direct contradiction to the undisputed facts of

⁹ These facts must be taken as true, since they are undisputed and even admitted in Security, USA’s Answer to the Complaint. (Gantt Brief at 15-19)

record. This glaring material error, alone, constitutes reversible error and requires correction by the Fourth Circuit.

Security, USA apparently recognized that, even if the aiding and abetting doctrine were completely ignored, Claggett's actions, at minimum, did constitute reckless disregard for the strong possibility that Sheppard would come to Gantt's post and confront her, assault her, as he had done in the past, or even kill her, as he had threatened to do.

Security, USA actually said that the District Court "went so far as to *ignore* the *Maryland law* cited above, which requires a deliberate intent to injure." (Emphasis added) (Security, USA Brief at 23) Where a party accuses the District Court of "ignoring" the applicable law, that party cannot also argue that the District Court's opinion is correct and should not be disturbed. Both parties agree that the Court erred, though for different reasons.

The District Court did correctly state the well-established criteria intentional infliction of emotional distress, and properly determined that this tort is not barred by the WCA. The error is that the Court did not apply these criteria to the facts of this case. In addition, the Court made errors regarding material facts and granted summary judgment to Security, USA, based those erroneous findings.

**C. SECURITY, USA IGNORES THE CONTROLLING CASE OF
FEDERATED STORES V. LE**

Most of Security, USA's *Motion to Dismiss* was devoted to issues involving the interplay of the Maryland Worker's Compensation Act ("WCA") and general tort law, which were hotly disputed and fully briefed. The result was that the negligence claims were dismissed, as barred by the WCA, but that the intentional infliction of emotional distress claim was upheld. Security, USA completely ignores the controlling case of *Federated Department Stores v. Le*, 324 Md. 71, 81 595 A.2d 1067, 1972 (1991), which the District Court relied upon when denying Security, USA's *Motion to Dismiss* Gantt's claim of intentional infliction of emotional distress. (District Court's January 8, 2001 Decision, JA 35-37; Gantt Brief at 28) *Le* specifically held that intentional infliction of emotional distress claims are not barred by the WCA.

Security, USA baldly asserts that the well-established criteria for a claim of intentional infliction of emotional distress in the Courts of Maryland,¹⁰ do not apply to employment cases because the WCA bars negligence claims against employers by employees, citing *Johnson v. Mountaire Farms of Delmarva*, 503 A. 2d 708 (Md. 1986); however, *Johnson* merely held that negligence claims,

¹⁰ *Green v. The Wills Group, Inc.*, 161 F. Supp. 2d 618, 623 (D. Md. 2001), citing, *Harris v. Jones*, 281 Md. 560 (Md. 1977); *Christian v. Minesota Min, & Mfg. Co.* 126 F. Supp. 2d 951 (D. Md. 2001); *Manikhi v. Mass Transit Administration*, 360 Md. 333 (Md. 2000); District Court's December 4, 2002 *Memorandum Opinion*, at 10-11, JA 52-53.

even where there is gross negligence, are barred by the WCA. *Le*, decided five years later, clarified any possible misinterpretation of *Johnson*.¹¹

D. GANTT’S CONSTITUTIONAL CLAIMS OF SEX DISCRIMINATION/SEXUAL HARASSMENT WERE THOROUGHLY ARGUED AT THE DISTRICT COURT LEVEL AND ARE PROPERLY BEFORE THIS COURT ON APPEAL

As stated on pages 4, Security, USA falsely states, in Brief, at 13:

Gantt only raised “equal protection/sex discrimination arguments for the first time in this Court on appeal.”

Based on this false allegation, Security, USA proceeds to argue, in its Brief at 13, that the issue of equal protection/sex discrimination is not properly before this Court.

As discussed on pages 4-7 of this *Reply*, all of Gantt’s pleadings, including her *First Amended Complaint* contained in the *Joint Appendix* (JA 9, “Background,” and JA 10, ¶ 2) addressed her Constitutional, equal protection, sex discrimination case, in the form of sexual harassment. Indeed, sexual harassment is only prohibited by federal law because it is discrimination on the basis of sex. *Meritor Savings Bank, v. Vinson*, 477 U.S. 57, 64, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986).

¹¹ *Harris v. Jones*, 281 Md. 560 (Md. 1977) was also an employment case and continues to be cited as the precedent for establishing the criteria for a case of intentional infliction of emotional distress. *Green v. The Wills Group, Inc.*, 161 F. Supp. 2d 618, 623 (D. Md. 2001), 161 F. Supp. 2d 618, 623 (D. Md. 2001).

The Court specifically addressed Gantt’s Constitutional sexual harassment claims in its January 8, 2001 decision (JA 37-39) and even subtitled this section “*Sexual Harassment.*” It is incredulous; therefore, that Security, USA has pretended that Gantt is raising the issue of sex discrimination/sexual harassment for the first time. As discussed on pages 6-7 of this *Reply*, Security, USA has now admitted that this issue was addressed at the trial court level; yet, Security, USA has not withdrawn its frivolous argument. As discussed on pages 6-7, costs and sanctions should therefore be assessed against Security, USA.

On pages 21 and 26, Security, USA complains that Gantt discussed her own counsel’s precedent-setting Title VII, sex discrimination/sexual harassment case against Howard University, *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516, 1999 WL 1295339, 81 FEP Cases 964 (BNA), 15 IER Cases 1587 (D.D.C. 1999); however, *Martin* addresses a major issue in the case at bar – the liability of an employer for the sexual harassment of an employee by a non-employee.¹² Gantt thoroughly discussed *Martin* and numerous other sex discrimination/sexual harassment cases at the district court level, again demonstrating that her sex discrimination/sexual harassment claim was extensively briefed, and certainly not raised for the first time on appeal. In fact, *Martin* and the corresponding EEOC

¹² It is not clear why Security, USA is troubled that counsel’s own case is similar to that of Gantt. Gantt was referred to current counsel specifically because of her expertise in Title VII law and because of her own success in her litigation against Howard University.

Regulation, 29 C.F.R. 1604.11(e) were cited in Gantt’s First Amended Complaint ¶ 67 (JA 19) and other filings at the district court level.

E. GANTT’S FOURTEENTH AMENDMENT/§ 1983 CLAIM WAS ADDRESSED BY THE DISTRICT COURT AND IS PROPERLY BEFORE THIS COURT ON APPEAL

As discussed on page 6 of this *Reply*, on page 11 of its Brief, Security, USA falsely states that Gantt has raised a Fourteenth Amendment/§ 1983 claim for the first time, on appeal, claiming that:

Indeed, neither the number “1983” nor the words “Fourteenth Amendment” appear anywhere in Gantt’s Complaint or in either of the District Court opinions.... Thus, Gantt may not raise any § 1983 or Fourteenth Amendment arguments in this Court for the first time.

The number “1983” does appear in the January 8, 2001 opinion:

Security, USA’s alleged sexual harassment was in no way compelled or influenced by the federal government or its regulations. *See id.* (discussing *Rendell v. Kohn*, 457 U.S. 830, 842-43 (1982), in which the Supreme Court found that a school, although subject to extensive regulation, was not a state actor for purposes of § 1983 suit, as state regulations in no way compelled or influenced the decision to fire plaintiff.... Accordingly, *Gantt’s claim of sexual harassment based on any theory will be dismissed.* (Emphasis added)

As discussed on pages 6-7 of this *Reply*, Security USA has, once again, based its argument on a misrepresentation of the record. The district court dismissed Gantt’s constitutional, equal protection, sexual harassment claim based

“on any theory,”¹³ citing the law under both the Fifth and Fourteenth Amendments and § 1983. Relying on a § 1983 case, *Rendell-Baker v. Kohn*, 457 U.S. 830, 842-843 (1982) (involving the issue of whether the defendant performed a *state* government function), the District Court determined that Security USA did not perform a government function and was therefore, not a “state actor.” (JA 9)

Security, USA’s reliance, in its Brief, at 11, on *Thompson v. Potamic Electric Power Co.*, 312 F.3d 646, 651, n. 2 (4th Cir. 2002) and *Davis v. North Carolina*, 263 F.3d 95, 101 n. 4 (4th Cir. 2001), is misplaced. In those cases, the plaintiffs did not raise claims of hostile work environment at the District Court level, under *any* statute or any legal theory. Gantt certainly raised the issue of

¹³ Gantt’s original attorney, Stuart Robinson, never filed a charge with the EEOC or otherwise made a claim for sexual harassment/sex discrimination; consequently, Plaintiff missed her opportunity to timely file an EEOC charge to preserve her rights under Title VII. At the time that current counsel was retained, nearly three years after the incident, there was a question as to whether Gantt could still bring a Title VII claim. Shortly after her abduction, Gantt had attempted to file a claim of sex discrimination against Security, USA, with the Department of Labor; however, the Department of Labor Representative told her that she did not have a sex discrimination case. Gantt’s former attorney, unfamiliar with Title VII litigation, told Gantt that she did not have a Title VII case. Gantt’s current counsel is aware of case law holding that administrative remedies are exhausted when the complainant attempts to file a charge with the EEOC, but the EEOC fails to accept it. Ultimately, counsel concluded that Gantt would not be able to carry her burden of persuading the Court that she had actually called the Department of Labor and tried to exhaust her administrative remedies.

sexual harassment as a violation of her Constitutional right to equal protection, at the District Court level.

The District Court made no distinction between state and federal government functions allegedly performed by Security, USA. Since law enforcement is both a federal and state function, any distinction is blurred. The Fifth Amendment is invoked because Security, USA performed the public function of federal law enforcement on federal property, the IRS Building. The Fourteenth Amendment and thus, § 1983, are invoked because local law enforcement, the Prince George's County Police Department had jurisdiction over Gary Sheppard once he left federal property with Dominique Gantt as his prisoner. Claggett had a duty to inform FPS that Sheppard had committed a crime on federal property and to inform local police that he had fled, armed, into their jurisdiction, with his kidnapped victim.

The District Court pleadings reflect a merger of the equal protection arguments under the Fifth and Fourteenth Amendment/ § 1983, just as the federal police and local police merged at the scene(s) of the crimes and tortuous acts committed against Gantt. The District Court held that Gantt could not prevail on a constitutional claim of sexual harassment “*under any theory.*” “*Any theory*” included the state “government function” theory of § 1983 in *Rendell v. Kohn*, 457 U.S. at 842-43, specifically cited by the Court.

As Security, USA has pointed out, the Court's January 8, 2001 *Memorandum Opinion* was issued without the benefit of discovery.¹⁴ (Appellant Brief at 8) If Gantt had filed a motion to amend the Complaint to conform to the evidence produced during discovery, or, proceeding to trial on the claim of intentional infliction of emotional distress, moved to amend the complaint to conform to the evidence produced at trial, Security, USA would certainly argue that Gantt was precluded from reinstating her § 1983 claim because the Court had already considered and dismissed her § 1983 claim. The District Court would not likely allow Gantt to amend the complaint for the Court to consider whether Security, USA performed a *state* government function, since the Court has already determined, unequivocally, that Security, USA did not perform a government function. The Court specifically cited case law discussing both federal and *state* government functions, to conclude that Gantt could not prevail on "any theory" that Security, USA performed a government function. Not only

¹⁴ Gantt respectfully requests that, if this Court determines that Gantt's § 1983 claim was not addressed at the District Court level, that Gantt be permitted to amend to Complaint to conform to the evidence produced in discovery and/or at trial and restore her § 1983 claim. The § 1983 claim turns substantially on facts that involve the factual working relationship between FPS, Security, USA, and the Prince George's County police department and the authority of each of these law enforcement agencies. In the alternative, Gantt requests that the issue be remanded for an evidentiary hearing in order to assess the relationship between Security, USA, federal police and Prince George's County police, as cooperating law enforcement entities, to determine whether Security, USA performed a government function. No discovery at all was conducted on this issue, since it was dismissed prior to discovery.

would such a motion to amend the complaint be futile, but it could be deemed frivolous, subjecting Gantt to possible sanctions. Conversely, Security, USA's argument that Gantt's § 1983 was not raised at the District Court level, and that this Court therefore has no jurisdiction to address it, must therefore fail.

F. THE TRIAL COURT ERRED IN CONCLUDING THAT GSA SECURITY OFFICERS DO NOT PERFORM A "GOVERNMENT FUNCTION"

On page 20 of its *Appellee Brief*, Security, USA states:

In this case, Security USA is performing a purely private function, protecting the property at the IRS Building. (JA 18, ¶ 62) Security USA has no authority to enforce the laws of regulations of the United States.

Security, USA's statement is incorrect in all respects. First, Security, USA has neglected a GSA guard's most important mission: protecting *persons*, as well as property at the IRS Building. These persons are federal, or public employees, and the non-employees entering the building are additional members of the public. Protecting the public against crime is a "public," or "government" function. Second, IRS property is not "*private*" property at all. It is *government* property. Protecting it is a *government* function.

General Services Administration, "GSA," guards perform functions of *law enforcement*, which is traditionally a government function. This is not a situation where a private company has hired a minimum wage "night watchman," or "rent a cop" for an amusement park or nightclub hiring private security to protect its

private property. GSA guards are extensively regulated, supervised and certified by federal police officers, or “FPS” officers, pursuant to the authority of the General Services Administration to enforce federal, state and local law on federal property. *Myers Investigative and Security Services, Inc.*, 275 F.3d 1366, 1368 (Fed. Cir. 2002) (GSA is responsible for providing guard services for federal civilian facilities and may contract with private security firms to do so); *Myers Investigative and Security Services, Inc.*, 47 Fed. Cl. 605, 607 (Ct. Cl. 2000) (GSA supplies armed and/or unarmed guards for federally owned and/or leased properties); *Seattle Sec. Services, Inc. v. United States*, 45 Fed. Cl. 560, 572 (Fed. Cl. 2000) (when determining whether contract with security company should be cancelled, in favor of another, Court must consider **the “danger to the public”** and the **“public interest,”** weighing against interruption of a security company’s GSA contract for guards in federal building); *Johnson and Gordon Security, Inc. v. GSA*, 857 F.2d 1435, 1436 (Fed. Cir. 1988) (GSA guards stationed in federal buildings in the State of Maryland were required to be licensed private detectives, pursuant to Maryland law in order to carry handguns, in addition to meeting GSA requirements); *U.S. v. Burton*, 888 F.2d 682, 684, 685, 682 (10th cir. 1989) (guards in federal buildings, controlled by GSA, shall have the powers of special police officers); *Roy v. U.S.*, 527 A.2d 742, 744 (D.C. App. 1987) (contract guard initially responded to complaint of assault on federal property, rather than calling

FPS or local police); *U.S. v. Ramsey*, 871 F.2d 1365, 1366 (8th Cir. 1989) (GSA contract guard was not distinguished from FPS officer, where perpetrator was charged with forcibly disrupting the duties of a federal employee and guard subdued protester with a nightstick on federal property); *Transco Security, Inc. v. Freeman*, 639 F.2d 318, 322 (6th Cir. 1981) (**federal contract guards perform “services that are essential to the daily operation of important government facilities”**); *Jarecki v. U.S.*, 590 F.2d 670 (7th Cir. 1979), *cert. denied*, 444 U.S. 829; *Hoehn v. International Security Services and Investigations, Inc.* 244 F. Supp. 2d 159, 173 (W.D.N.Y. 2002) (all GSA contract guards must meet the physical and other requirements established by GSA); *U.S. v. Brasch*, 1996 WL 720090 (S.D.N.Y. 1996) (contract security guards supervised and regulated by FPS, under GSA, are authorized to enforce federal law and regulations in government buildings); *City of Wisconsin v. Hough*, 142 Wis.2d 941, 419 N.W. 360 (Wis. App. 1987) (acting under the authority of FPS, a contract security guard was authorized to uphold ordinances and maintain the peace in a federal building); *James v. Golden*, 1986 WL 155522, at *1, 3 (D.D.C. 1986) (GSA mandates that all federal contract guards pass a suitability check, be approved by GSA and comply with the provisions of the Federal Protective Service Handbook, and GSA may revoke the guard’s certification, or “GSA card” for failure to meet those requirements, barring him/her from working at any federal

building as a guard); *Middleton v. United States*, 305 A.2d 259, 261 (D.C. App. 1973) (all authority exercised by FPS is derived from GSA); *Whelan Security Co., Inc., v. United States*, 7 Cl.Ct. 496 (Ct. Cl. 1985) (GSA had authority to regulate duties of contract guards and to investigate and fine security company for failure to pay contract guards in accordance with Department of Labor standards); Gantt Brief at 32-34.

“FPS,” and the duty to regulate and supervise GSA guards, were transferred to the United States Department of “Homeland Security,” pursuant to the Homeland Security Act of 2002, § 1315, Pub.L. 107-296, Nov. 25, 2002, 116 Stat. 2135; *see also*, 6 U.S.C.A. § 542; 40 USCA § 318;

www.gsa.gov/federalprotectiveservice. This transfer highlights the special responsibility of GSA contract guards to protect the public, public property and to fulfill a “public” or “government” function, rather than simply serve private interests. *See also Seattle Sec. Services, Inc. v. United States*, 45 Fed. Cl. at 572 (GSA contract security guards serve “**public interest**” and their absence in federal buildings poses a “**danger to the public**”); *Transco Security, Inc. v. Freeman*, 639 F.2d at 322 (GSA contract guards perform “sensitive” services that “**are essential to the daily operation of important government facilities.**”)

GSA trains contract guards on terrorist attacks and acts of violence in federal facilities, in addition to the FPS contract guard standards, which includes

at least (80) hours of classroom training on security related topics, First-Aid/CPR training certification, and firearms training. 41 C.F.R. 101-16.1103 (proposed). GSA's background checks, hiring requirements, certification, regulation and supervision of GSA officers highlights their importance to law enforcement, public safety and national security – certainly government functions. GSA guards are authorized and trained to enforce the law on federal property – in fact, it is their specific duty to do so.¹⁵

Defendant admits, on at 5 of its Brief, that Gantt alleged, in her *First Amended Complaint* ¶ 48 (JA 16), that due to Sgt. Claggett's actions, Gantt was deprived of the opportunity for police protection from local police. Absent Security, USA's performance of the government function of law enforcement, Gantt would have been protected by local police. Security, USA's usurption of that function deprived her of that protection.

¹⁵ Security, USA, on pages 16-19 of its Brief, argues that the Ninth Circuit's decision in *Vincent v. Trend Western Technical Corp*, 828 F.2d 563 (9th Cir. 1987) is "instructive" in this case; however, even if this Court adopted the Ninth Circuit's rationale, it would not apply to this case. In *Vincent*, the Ninth Circuit determined that the government contractor, a private contractor providing maintenance services for military aircraft, did not perform a traditional "government function," and was therefore not a government actor; however, Gantt does not suggest that every government contractor, including janitorial services, mechanics, food services, construction companies and other contractors that provides goods and services to the federal government is a government actor performing a government functions.

In its Brief, at 20, Security, USA argues that its officers could not have done anything to protect Gantt except call the police. This is not so. GSA officers are hired and trained to subdue and arrest intruders and attackers. They are trained to use firearms, nightsticks or “batons” and administered handcuffs in order to protect persons under attack on federal property. *U.S. v. Ramsey*, 871 F.2d at 1366. In its Brief, page 10, Security, USA argues its officers did not enforce the law because, ultimately, they would have to call “the police;” however, there is no jail, crime lab or courthouse on the IRS property. Even FPS officers and local police would have to call additional “police” to the crime scene to investigate and process and/or jail a suspect.

The security officers who witnessed Sheppard’s attack upon Gantt, which was the culmination of his sexual harassment of her in her workplace, did have a duty to rescue Gantt. Unfortunately, they were ill-equipped to do so at the time. Although the guards were supposed to be armed, they had not yet been issued their weapons. (JA 298-299)¹⁶ These unarmed officers were not inclined to attack the shot-gun wielding Sheppard bare-handed. By the time the abduction

¹⁶ Whether the officers should have been armed by that time involves questions of negligence; negligence claims are barred by the Maryland Workers’ Compensation Act. Similarly, there are questions as to why security officers in the control room, with Claggett, did not see the abduction on the television monitors provided for alerting officers to crimes in progress. It is also not clear why the officer who witnessed the abduction was not equipped to radio for assistance.

was reported to the control room, Sheppard had left federal jurisdiction. It was therefore appropriate to call the Prince George's County police to apprehend him and rescue Gantt; yet Clagget prevented her subordinate Security, USA officers from making that call.

Security, USA appears to concede that, if this Court recognizes Gantt's Constitutional claims, Title VII case law should be followed in assessing the sexual harassment. As discussed in Gantt's Brief at 34-41, the Title VII cases and EEOC regulations hold the employer liable for the sexual harassment of an employee by a non-employee, when the employer knew or should have known of the sexual harassment and failed to take reasonable measures calculated to prevent the harassment.¹⁷

¹⁷ Security, USA, Brief at 20, implies that Gantt's claims do not constitute sex discrimination because the alleged facilitator of the sexual harassment is female; however, in *Martin*, the then Dean of Howard University School of Law, Alice Gresham Bullock, also female, was the alleged facilitator of the sexual harassment by the homeless stranger. Similarly, in *Little v. Windermer Relocation, Inc.*, 301 F.3d 968, discussed on pages 35 and 41 in Gantt's Brief, one of the superiors to whom Ms. Little reported the sexual harassment was female. The failure of a supervisor to take reasonable measures to prevent the sexual harassment of a female employee is no less actionable because the non-responsive/facilitating supervisor is also female.

CONCLUSION

Gantt respectfully requests that this Court fully reverse the decision of the trial court granting summary judgment to Security, USA. and denying summary judgment to Gantt. No material facts are in dispute. Appellant Gantt is entitled to summary judgment, as a matter of law. In addition, costs and sanctions should be assessed against Security, USA for its false statements and frivolous, bad faith arguments to this Court.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

It is understandable that Security, USA's four attorneys of record, from two different law firms, are not clamoring to defend the Brief it filed. The Brief was filed by "The LEX Group," a professional brief service that also solicited Gantt. The firm of Vandeventer Black LLP was only retained after Gantt filed her Appellate Brief. Dirska and Levin represents Security, USA's insurance carrier and entered the case at the close of discovery. Security, USA was consecutively represented by two previous law firms.

Contrary to Appellee's assertions, the issue of whether a company providing security in a federal building is liable for the intentional torts of its employees, when that conduct jeopardizes lives, is a matter of public concern properly before the Courts. The accountability of private security companies to which our government delegates the task of protecting the public, ensuring national security and enforcing the laws of land, are issues of primary concern. Accountability translates higher standard in the future. This is not a matter for the legislature. Tort law already provides a remedy, if the Courts enforce it.

A body of law addressing sexual harassment, increasingly involving issues of safety for women in the workplace, has been developing under Title VII. Title VII analysis has been increasingly applied to sex discrimination cases under the Constitution. In addition, stalking laws have been passed by nearly every state in

the nation; however, if employers ignore Protective Orders and allow stalkers or other threatening persons access to their intended victims in their workplaces, the laws are meaningless. This Court should have an opportunity to ask any questions pertinent to its decision. Gantt should have an opportunity to respond to any concerns held by the Court.

Security, USA has attempted to trivialize serious issues and to personally demean Dominique Gantt. Security, USA has even sarcastically claimed that Dominique Gantt's sexual harassment claim "is a belated attempt to find a 'deep pocket to compensate her for the pain and suffering inflicted upon her by her now- incarcerated ex-boyfriend.'" (Security, USA Brief at 10) Actually Gantt told Security, USA's Project Manager and IRS investigators, immediately after her abduction, that she believed that Sgt. Claggett "was directly involved in it." (JA 232-233) Gantt changed her shift in order to avoid Claggett, since Claggett was not terminated after the incident. (Gantt Brief at 13)

Gantt retained counsel, Stuart Robinson, almost immediately after the abduction, to represent her in any and all claims that she had against Security, USA. Robinson filed a Workers' Compensation claim against Security, USA, which Security, USA contested. Gantt called the Department of Labor to file a charge of sex discrimination, but was incorrectly told that her case did not qualify as sex discrimination.

Gantt has always blamed Claggett and Security, USA, for their facilitation of Sheppard's attack upon her. Sheppard has been continually incarcerated since December 7, 1997, the day he abducted Gantt. Dominique Gantt continues to work as a GSA security officer, and is completing her college education at night. Gantt has been married since 1997. Her husband adopted her oldest son and they have a second son together. Dominique Gantt is not "belatedly" looking for "deep pockets" to compensate for an "incarcerated ex-boyfriend." She took all appropriate steps available to her at each interval of this case to protect herself from Sheppard and to hold Claggett and Security, USA accountable for their actions. Neither her legitimate efforts to right a wrong, nor the serious harm done to her, should be trivialized or "cheapened" by the totally inappropriate personal insults hurled at her by Security, USA's attorneys in their Brief.

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of August, 2003, a copy of the foregoing Appellant's *Reply Brief* was mailed, first class, postage prepaid, to the following persons:

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