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

TRACY K. BARKER, *ET AL.*, PLAINTIFF

v.

ALI MOKHTARE, DEFENDANT

CASE NO. 1:07-CV-1231 (LMB/BRP)

United States of America's Response to the Defendant's Petition for Certification

Introduction

Acting through counsel and invoking the *Westfall* Act, 28 U.S.C. § 2679(d)(3), Department of State employee Ali Mokhtare requests this Court certify that he was acting within the scope of his federal employment during his encounter with the plaintiff, an employee of a Halliburton subsidiary, while both were working in Basra, Iraq. The *Westfall* Act authorizes the substitution of the United States as defendant in place of federal employees who have been sued under state tort law insofar as either the Attorney General[1] or the Court[2] determines that the employee was acting

[1] *See* 28 U.S.C. § 2679(d)(2). The Attorney General has delegated the authority to make scope of employment determinations to, *inter alia*, the United States Attorneys. See 28 C.F.R. § 15.4(a). On March 24, 2008 the United States Attorney determined not to certify that Mr. Mokhtare was acting within the scope of his federal employment at times material to this dispute.

[2] *See* 28 U.S.C. §2679(d)(3).

within the scope of their federal employment in the actions or omissions underlying the plaintiffs' claims. Pursuant to this Court's Order of March 14, 2008, the United States Attorney has considered Mr. Mokhtare's request for certification that at all material times he was acting within the scope of his federal employment, and, on March 24, 2008, determined that no such certification should be made. Mr. Mokhtare's now seeks this Court's determination of that question. For the reasons that follow, the Court should determine that Mr. Mokhtare was not acting within the scope of his federal employment at times material to this action, and deny his petition.

Statement of the Case

This action was originally filed in the Eastern District of Texas against Halliburton, some of its subsidiaries, and Mr. Mokhtare, alleging employment discrimination claims arising under Title VII based on sexual harassment and quid-pro-quo sex discrimination as well as claims based on tort theories. The case was transferred by that court to the Southern District of Texas, where the corporate defendants were headquartered. By Order dated December 5, 2007, Judge Miller of the Southern District of Texas severed the claims against Mr. Mokhtare from those against the Halliburton defendants and transferred them to this Court. Jurisdiction of the plaintiff's claims in this Court is based on diversity of citizenship.

Second Amended Complaint, ¶9.[3]

Mr. Mokhtare sought certification under the Westfall Act, 28 U.S.C. §2679(d), that he was acting within the scope of his employment by the Department of State at times material to this case while the case was pending in Texas. The United States Attorney for the Southern District of Texas had not resolved the matter when the case was transferred from that District. After transfer, on February 8, 2008, in a letter to the Office of the Legal Adviser of the Department of State, Mr. Mokhtare again requested certification from the United States Attorney. Prior to receipt of a decision on that request, on March 12, 2008, he filed the present motion seeking this Court's determination of that issue. By Order dated March 14, 2008, the Court directed the United States Attorney to make a "scope" determination under the Westfall Act within eleven days; on March 24 by Notice filed with the Court, the United States Attorney declined to certify that Mr. Mokhtare was acting within the scope of his federal employment at times material to the claims in this case. Mr. Mokhtare now seeks this Court's decision on that question.

Statement of Facts

The following statement of the facts is taken from the statements made by the plaintiff and the defendant to the State Department's Diplomatic Security Service.

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[3] It appears that the plaintiffs are residents of North Carolina and the defendant, Mr. Mokhtare, is a citizen and resident of Virginia. Second Amended Complaint, ¶¶2-3, 6.

The plaintiff was employed by a Halliburton subsidiary, and, at times material to the claim against Mr. Mokhtare, was assigned to Basra, Iraq. Mr. Mokhtare was, and is, an employee of the Department of State. At times material he was assigned as Deputy Regional Coordinator, Regional Embassy Office in Basra. In that capacity, Mr. Mokhtare worked irregular hours, and was "on call" when he was needed for unforeseen and emergency situations. However, he was not "on duty" 24 hours a day.

On June 23, 2005, the plaintiff joined Mr. Mokhtare and other employees in the dining hall at the Basra facility at the end of a work day. After her dinner, the plaintiff and Mr. Mokhtare went to his trailer residence, according to the plaintiff in order for her to select a DVD for her evening's entertainment. While in his trailer, the plaintiff alleges that Mr. Mokhtare gave her a very strong mixture of Jack Daniels and soda, asked her what was behind her vest and shirt, fondled her breast, and attempted to kiss her. She rebuffed his advances, left his trailer and proceeded to another employee's trailer. She asserts claims of assault, battery, sexual assault and reckless conduct against Mr. Mokhtare. Statement of Tracy Barker at p. 2, a copy of which is Exhibit A to this Opposition; *see also* the Second Amended Complaint at pp. 17-18.

In an interview conducted by the Regional Security Officer in Baghdad on June 25, 2005, Mr. Mokhtare acknowledged that he had pulled at Ms. Barker's vest

and shirt and asked "What do you have behind there?" He also acknowledged that he had acted inappropriately. Exhibit B at p. 2. In a subsequent declaration, Mr. Mokhtare asserted that he did not recall touching the plaintiff, but said that he might have done so. Exhibit C at pp. 2-3, ¶¶ 10-11.

Discussion

The issue that the Court must resolve is whether Mr. Mokhtare was acting within the scope of his State Department employment during the encounter with the plaintiff which forms the basis of this lawsuit. The conduct at issue in this case occurred in Iraq. As the Supreme Court pointed out in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 707 (2004), Congress expressed its intent that foreign law not apply to claims under the FTCA. Recognizing this principle, Mr. Mokhtare, contends that the *respondeat superior* principles of the law of the District of Columbia should provide the body of law controlling the issue whether Mr. Mokhtare was within the scope of his federal employment. Petition for Certification at 3-4 (*citing Kashin v. Kent*, 457 F.3d 1033, 1037 (9th Cir. 2006). *Accord Rasul v. Meyers*, 512 F.3d 644, 655 (D.C. Cir. 2008). Accepting Mr. Mokhtare's choice of law, we will show that, under District of Columbia law Mr. Mokhtare was not within the scope of his State Department employment at times material to this case.

District of Columbia law concerning the scope of employment is rooted in the Restatement (Second) of Agency. *See Schecter v. Merchs. Home Delivery, Inc.,*

892 A.2d 415, 427-28 (D.C.2006). Restatement § 228 states that an employee's conduct is within the scope of employment if (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master." "District of Columbia law ... liberally construes the doctrine of respondeat superior, at least with respect to the first prong of the Restatement...." *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C.Cir.2003).

Although "the determination of scope of employment is dependent upon the facts and circumstances of each case," *Penn Cent. Transp. Co. v. Reddick*, 398 A.2d 27, 29 (D.C.1979), the District of Columbia Court of Appeal has announced a general rule:

> [W]hatever is done by the employee in virtue of his employment and in furtherance of its ends is deemed by the law to be an act done within the scope of his employment, and ... in determining whether the servant's conduct was within the scope of his employment, it is proper to inquire whether he was at the time engaged in serving his master.

Id. (citation omitted). Several factors are indicative of whether an employee's conduct falls within the scope of employment. *District of Columbia v. Davis*, 386 A.2d 1195, 1203 (D.C.1978). The court evaluates "whether the employer at the time had the right to control and direct the employee in the performance of his work." *Id.* The court evaluates also "the employee's state of mind" to determine whether the employee subjectively believed that he was acting within the scope of employment.

Id.

Under these principles, whether one accepts the plaintiff's version or Mr. Mokhtare's, the conduct at issue in this case cannot be considered within the scope of his employment. This case is similar to *District of Columbia v. Coron*, 515 A.2d 435 (D.C.1986), in which the District's Court of Appeal held that although a police regulation states that officers are always on duty, an officer is not acting within the scope of employment when he, after consuming alcohol at a bar, intentionally physically assaults a person. *Id*. at 438. The *Coron* court found two facts dispositive. *First*, "the very nature of [the officer's] behavior makes it irrelevant whether he was 'on duty' at the time of this incident within the meaning of the police regulations." *Id. Second*, "it is of particular importance that at no time was [the officer's] conduct in furtherance of the [employer's] interests." *Id.*

Applying the principles of District of Columbia law enunciated in these cases, it is clear that, whether one accepts Ms. Barker's account, or one of Mr. Mokhtare's, the after-hours, social interaction between the Ms. Barker and Mr. Mokhtare was not in furtherance of the business of the Department of State, and that the very nature of [his] behavior makes it irrelevant" whether Mr. Mokhtare was 'on duty' at the time of this incident.[4] Here, as in *Coron*, it is clear that Mr. Mokhtare was not acting within

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[4] While Mr. Mokhtare contends (and the State Department agrees) that in Basra he worked irregular hours, and was "on call" when he was needed for unforeseen and emergency situations, he was not "on duty" 24 hours a day.

the scope of his employment. Thus, under District of Columbia *respondeat superior* law, certification under 28 U.S.C. §2679(d)(3) is not appropriate.[5]

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[5] In the event that the Court were to look to Virginia law, rather than District of Columbia law, still the result would be the same. Under Virginia law,

> an act is deemed to be within the scope of employment if (1) it be something fairly and naturally incident to the business and (2) if it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interest, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

Sayles v. Piccadilly Cafeterias, Inc., 242 Va. 328, 410 S.E.2d 632, 634 (1991) (*quoting Tri-State Coach Corp. v. Walsh*, 188 Va. 299, 49 S.E.2d 363, 367 (1948)); *see also Kensington Assocs. v. West*, 234 Va. 430, 362 S.E.2d 900, 901 (1987) and *Broaddus v. Standard Drug Co.*, 211 Va. 645, 179 S.E.2d 497, 503-04 (1971)). Whether an act was within the scope of employment is analyzed as of the time of the injury that gave rise to the claim. *Sayles,* supra.

Virginia courts have broadly interpreted "scope of employment" to mean that "an employer is liable for [even] the tortious acts of its employee if the employee was performing his employer's business and acting within the scope of his employment when the tortious acts were committed." *Giant of Maryland, Inc. v. Enger*, 257 Va. 513, 516, 515 S.E.2d 111, 112 (1999). *See also, Plummer v. Center Psychiatrists*, Ltd., 252 Va. 233, 235, 476 S.E.2d 172, 173 (1996) (counselor engaging in unethical sexual relationship with patient was potentially acting within scope of employment); *Commercial Business Systems v. BellSouth Services, Inc.*, 249 Va. 39, 46, 453 S.E.2d 261, 266 (1995) (employee violating company rule against self-dealing and accepting illegal bribes to award contracts was potentially acting within the scope of employment); and *Brittingham v. Green*, 972 F.Supp 1014 (E.D. Va. 1997) (supervisor was acting with the scope of his employment where his alleged tortious conduct occurred during an altercation at work with a subordinate pertaining to the subordinate's performance).

There are, however, limits. Where an employee commits a tort during the time that he has temporarily abandoned the business of his employer and undertaken a mission of his own, the employer is not responsible for a negligent or wrongful act of the employee. This is true, although the employee was using the employer's

Conclusion

For all the foregoing reasons, the Court should conclude that Mr. Mokhtare was not within the scope of his federal employment at times material to this action, and deny his petition for certification.

Dated: April 7, 2008

RESPECTFULLY SUBMITTED

CHUCK ROSENBERG
UNITED STATES ATTORNEY

BY /S/
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R. JOSEPH SHER
ASSISTANT UNITED STATES ATTORNEY
OFFICE OF THE UNITED STATES ATTORNEY
JUSTIN W. WILLIAMS UNITED STATES

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property and the injury would not have been caused without the facilities afforded the employee by reason of his relation to his employer. *See Kensington Assoc*, 362 S.E.2d at 903; *McNeill v. Spindler*, 191 Va. 685, 695, 62 S.E.2d 13, 18 (Va. 1950); *Bryant v. Bare*, 192 Va. 238, 244, 64 S.E.2d 741, 745 (Va. 1951); *Master Auto Serv. Corp. v. Bowden*, 179 Va. 507, 511, 19 S.E.2d 679, 680-81 (1942); *Kavanaugh v. Wheeling*, 175 Va. 105, 117, 7 S.E.2d 125, 130 (1940); *Western Union Tel. Co. v. Phelps*, 160 Va. 674, 682, 169 S.E. 574, 577 (1933). For example, in *Kensington Assocs*., 362 S.E.2d at 903-04, the court concluded that a security guard acted outside the scope of his employment when he accidentally shot a co-worker during "horseplay." The court found it significant that the employee "engaged in horseplay in an attempt to scare [a co-worker] when he injured [the plaintiff]. In addition, [the employee] had been drinking at the time, which [the employer] strictly prohibited." *Id*. at 903.

Applying Virginia scope-of-employment law, whether one accepts Ms. Barker's account, or one of Mr. Mokhtare's, the after-hours, social interaction between the Ms. Barker and Mr. Mokhtare was not in furtherance of the business of the Department of State, and therefore not within the cope of Mr. Mokhtare's employment.

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Certificate of Service

I certify that I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record:

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Dated: April 7, 2008 /s/

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