

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

DIANE AUDAS COLLINS,)	
)	
Plaintiff,)	Case No.2:00CV00044
)	
v.)	OPINION
)	
BOBBY FRANKLIN,)	By: James P. Jones
)	United States District Judge
Defendant.)	

Timothy W. McAfee, McAfee Law Firm, Norton, Virginia, for Plaintiff; Edward G. Stout, Bressler, Curcio & Stout, Bristol, Virginia, for Defendant.

In this action under Virginia law claiming sexual harassment by a business associate, I enter summary judgment for the defendant.

I

The plaintiff, Diane Audas Collins, filed this action on March 8, 2000, against six related corporate defendants and Bobby Franklin, an individual.¹ She alleged that she was an employee of the corporate defendants, as was Franklin. She asserted that Franklin had sexually harassed her and other female employees with the knowledge of

¹ The corporations are Southern Residential Care Management, Inc., Duffield Adult Residential Center, Inc., Duffield Nursing Facility, Inc., Woodbridge Nursing and Rehabilitation Center, Inc., Advanced Home Medical, Inc., and BFJ Capital Developments, Inc. They will be collectively referred to as the corporate defendants.

the corporate defendants, and sought damages for herself against all of the defendants, based upon both federal and state law causes of action. Pursuant to a settlement agreement, all defendants except for Franklin were dismissed.

By order dated November 3, 2000, I dismissed the federal causes of action against the sole remaining defendant because he was not the plaintiff's employer and could not be liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to 2000e-17 (West 1994 & Supp. 2000). I also dismissed a cause of action under the Virginia Human Rights Act, Va. Code Ann. §§ 2.1-714 to 725 (Michie 1995 & Supp. 2000), because Franklin was not the plaintiff's employer. However, I did not dismiss the plaintiff's state law claims of common law assault and battery and intentional infliction of emotional distress. *See Collins v. Franklin*, No. 2:00CV00044, 2000 WL 33281, at *2 (W.D. Va. Nov. 3, 2000).

The defendant has now moved for summary judgment on the remaining causes of action. The motion has been argued and is ripe for decision.

II

The essential facts of the case, either undisputed or, where disputed, recited in the light most favorable to the nonmovant on the summary judgment record, are as follows.

In May 1997, the plaintiff began employment as a comptroller by the corporate defendants. Franklin was an employee and shareholder of these corporations. In the course of the plaintiff's employment, Franklin contacted the plaintiff by telephone several times a week and visited her office about once a week. The plaintiff testified that while Franklin's calls were initiated for legitimate business purposes, "he would stoop to harass [her]." (Collins Dep. at 19.) His inappropriate comments included the following: "Hey good looking"; "Hello gorgeous"; "Hello pretty lady"; "Hello sexy lady"; "I was hoping you needed a hot wet kiss"; "All you need is a long hot weekend"; "Did you not get any last night?"; "Are you sure you don't need me to give you a hot wet kiss?"; "How about you and me going away this weekend for a long hot weekend?"; "Did you get you some this weekend?"; "I thought you might want some from a real man"; and "I thought you might need a hot wet kiss." (Pl.'s Answers to Interrog.)

The plaintiff complained of Franklin's behavior to corporate board members, who assured her that he had been reprimanded. In May 2000, the plaintiff quit her job

because Franklin had become president of the corporate defendants, and she feared future harassment by him. Franklin had not acted in an inappropriate manner towards Collins since August of 1999. Collins claims that the defendant's actions caused her physical and emotional harm, manifested by nightmares, sleeplessness, nervousness, inability to concentrate, fear, and anxiety.

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Rule 56 “mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is not “a disfavored procedural shortcut,” but an important mechanism for weeding out “claims and defenses [that] have no factual basis.” *Id.* at 327.

III

The plaintiff has not shown facts sufficient to support her claims of common law assault and battery. Under Virginia law, a battery is the “touching of another. . . in a rude, insolent or angry manner.” *Pugsley v. Privette*, 263 S.E.2d 69, 74 (Va. 1980) (quoting *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924)). An assault is the threat of bodily harm. *See Simmons v. Norfolk & Western Ry.*, 734 F.Supp. 230, 232 (W.D. Va. 1990).

The plaintiff has not shown that Franklin touched or threatened to touch her in an offensive way. In her deposition, when asked if Franklin had ever touched her in an offensive way, Collins answered, “For a deliberate, reach out to make a pass, no.” (Collins Dep. at 18.) Because there was never a touching, the claim for battery cannot stand. As for the assault claim, “[t]he rule in Virginia is clear that mere words alone, however insulting and abusive, cannot constitute an actionable assault.” *Simmons*, 734 F.Supp. at 232, n.2. Therefore, I will grant the defendant summary judgment as to the state law claims of assault and battery.

The plaintiff’s claim of intentional infliction of emotional distress also fails. Under Virginia law, the standard for establishing a claim of intentional infliction of emotional distress is very high. First, the plaintiff bears the burden of proof by clear and convincing evidence. *See Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991).

Moreover, the plaintiff must establish (1) that the wrongdoer's conduct was intentional or reckless; (2) that the conduct was outrageous and intolerable, and against the generally accepted standards of decency and morality; (3) that the wrongdoer's conduct and the emotional distress were causally connected; and (4) that the emotional distress was severe. *See Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974).

While doubtless the defendant's alleged comments were insensitive and caused the plaintiff some degree of emotional distress, I cannot find that the facts rise to the level of tortious conduct under Virginia law. The defendant's statements, while boorish, cannot be considered "beyond all possible bounds of decency, . . . atrocious, and utterly intolerable in a civilized community." *Russo*, 400 S.E.2d at 162 (quoting Restatement (Second) of Torts § 46 cmt. d (1965)).

Additionally, the plaintiff's emotional distress was not "so severe that no reasonable person could be expected to endure it." *Id.* at 163. The plaintiff stated that she experienced nightmares, sleeplessness, nervousness, inability to concentrate, fear, and anxiety. The Virginia Supreme Court has held that sleeplessness, stress, withdrawal, and an inability to concentrate are not sufficient to establish severe emotional harm under the law. *See id.* Therefore, as to the plaintiff's claim of intentional infliction of emotional distress, I will grant summary judgment in favor of the defendant.

Finally, the plaintiff urges this court to recognize a common law cause of action for sexual harassment, presumably with a lesser burden of proof than the tort of intentional infliction of emotional distress. The plaintiff bases her argument on Virginia cases that have recognized a cause of action against an employer for wrongful termination of employment in violation of public policy. *See, e.g., Mitchem v. Counts*, 523 S.E.2d 246, 250 (Va. 2000) (upholding cause of action for wrongful termination based on the statutory public policies against fornication and lewd and lascivious behavior).

This precedent is not applicable here since the defendant was not the plaintiff's employer. There is no support in Virginia law for a free-standing tort of sexual harassment, not involving a claim against an employer for wrongful discharge or for a hostile or abusive workplace imputable to the employer. Therefore, the plaintiff has no cause of action in this regard.

The plaintiff suggests that the defendant's remarks to her might be interpreted as solicitation of the crimes of fornication or adultery, *see* Va. Code Ann. §§ 18.2-344, -365 (Michie 1996), and thus justify a civil cause of action. However, solicitation of a misdemeanor such as fornication or adultery is not a crime. *See* Va. Code Ann. § 18.2-29 (Michie 1996); *Weatherford v. Commonwealth*, No. 1489-90-1, 1992 WL 877506 (Ct. App. Va. Mar. 3, 1992). More importantly, under Virginia law a private

right of action cannot be implied from a criminal statute. *See Vansant & Guster, Inc. v. Washington*, 429 S.E.2d 31, 33 (Va. 1993).

IV

For the foregoing reasons, I will enter judgment in favor of the defendant.

DATED: May 29, 2001

United States District Judge