

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN O. GREENE : CIVIL ACTION
 :
 v. :
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 :
 ROBERT E. RUBIN, Secretary of the :
 Treasury, in his official capacity, :
 GERALD WOODRUFF and FRANK RUSH : NO. 95-2415

MEMORANDUM AND ORDER

HUTTON, J.

July 29, 1997

Presently before this Court are the Motion of Defendants Gerald Woodruff and Frank Rush to Substitute the United States in their Place as Defendants (Docket No. 29), and the Plaintiff's Response thereto.

I. BACKGROUND

In May, 1988, the plaintiff, John O. Greene, began working as a federal police officer at the United States Mint in Philadelphia, Pennsylvania. The plaintiff alleges that during his employment, defendants Gerald Woodruff and Frank Rush have made false and defamatory statements. He also maintains that the defendants' conduct was not within the scope of their employment nor part of any personnel action taken against the plaintiff. (Am. Compl. at ¶¶ 33-34.)

On April 24, 1995, the plaintiff filed suit in this Court seeking redress for race-based discrimination and retaliation for activity protected by the First Amendment and the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, as

amended, 42 U.S.C. § 2000e, et seq., and violations of state law. Rather than answer the complaint, however, defendants Woodruff and Rush have filed the instant motion, urging the Court to substitute the United States as the defendant.

II. DISCUSSION

A. Legal Standard

Under the Federal Employees Liability Reform and Tort Compensation Act of 1988, 28 U.S.C. §§ 1346, 2671-2680, a court may substitute the United States as the defendant in a case where federal employees are sued.¹ 28 U.S.C. § 2679(d)(1) (1994). To effectuate substitution, the Attorney General of the United States must certify that the defendant employee was acting within the scope of his employment at the time of the incident, which gave rise to the claim. Id. In this certification, the Attorney General should state the basis for her conclusion. Melo v. Hafer, 13 F.3d 736, 747 (3d Cir. 1994).

The certification, however, is not conclusive, and thus, the Attorney General's request is subject to judicial review. Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227 (1995).

¹/ This statute provides in relevant part as follows:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

28 U.S.C. § 2679(d)(1) (1994).

Recently, the United States Court of Appeals for the Third Circuit explained how the Court should review the certification:

If the Attorney General's certification is based on a different understanding of the facts than is reflected in the complaint, the plaintiff should be permitted reasonable discovery and should then be called upon to come forward, as if responding to a motion for summary judgment, with competent evidence supporting the facts upon which he would predicate liability, as well as any other facts necessary to support a conclusion that the defendant acted beyond the scope of his employment. If the plaintiff fails to tender such evidence, the statute requires that substitution be ordered.

If the plaintiff does come forward with competent evidence that would permit a conclusion contrary to that found in the certification, the defendant and the government, after discovery if desired, are entitled to an evidentiary hearing at which both sides will tender their evidence on all disputes material to the scope of employment issue. Thereafter, the district court will resolve all issues of fact or law relevant to that issue and will find that the defendant did or did not act within the scope of his or her employment. If the court's finding favors the defendant, substitution must be granted. If the court determines that the defendant did not act within the scope of his or her employment, the case will proceed against the defendant employee.

Melo, 13 F.3d at 747 (footnote omitted).

Under the Act, a court must apply the law of the state where the incident occurred. Whytosek v. Rademan, 903 F. Supp. 842, 843 (E.D. Pa. 1995) (citing 28 U.S.C. § 1346(b)). In this case, because the actions alleged occurred at the United States Mint in Philadelphia, Pennsylvania law applies. Under Pennsylvania law, a court determining whether an employee acted within the scope

of his employment must apply Restatement (Second) of Agency § 228. Whytosek, 903 F. Supp. at 845; see Aliota v. Graham, 984 F.2d 1350, 1358 (3d Cir.) (predicting that Pennsylvania Supreme Court would adopt Restatement (Second) of Agency § 228), cert. denied, 114 S. Ct. 68 (1993). This portion of the Restatement defines conduct within and outside the scope of employment as follows:

(1) Conduct of a servant is within the scope of employment if, but only if:

(a) it is of the kind he is employed to perform;

(b) it only occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master, and

(d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.

Restatement (Second) of Agency § 228(1) (1958). On the other hand, an employee's conduct "is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master." Restatement (Second) of Agency § 228(2) (1958).

B. Analysis of Defendants' Motion

In this case, Michael R. Stiles, United States Attorney for the Eastern District of Pennsylvania, certified that the defendants' conduct was within the scope of their employment. (Certification of Scope of Employment of 10/30/95.) The plaintiff,

however, challenges this certification and offers evidence that the defendants' actions are outside the scope of their employment. Specifically, the plaintiff maintains that the developing record clearly indicates that the defendants acted for reasons unrelated to their duties at the Mint. Thus, to determine whether the Court may substitute the United States for defendants Woodruff and Rush, it is necessary to analyze the claims against each defendant.

1. Statements of Defendant Gerald Woodruff

In his complaint, the plaintiff alleges that defendant Woodruff, a Mint police sergeant, "made false accusations to other U.S. Mint employees that [the] plaintiff threatened defendant Woodruff's child, made crank telephone calls to his wife, put a rat carcass on his porch, and stalked him at home" (Am. Compl. at ¶ 32(a).) He supports his allegations by arguing that defendant Woodruff has admitted that the rat carcass behind his house are not work related. (Pl.'s Resp. at 3-5.) Furthermore, the plaintiff asserts that defendant Woodruff sought the advice of Robert W. Morris, the Chief of the United States Mint Police, not for a Mint related reason, but because he was a former Philadelphia Police Officer. (Id. at 5.) Defendant Woodruff, on the other hand, asserts that his conduct was related to his employment, because his comments were motivated by an Equal Employment Opportunity ("EEO") investigation. (Defs.' Reply at 2, 6.) Because he is required by law to comply with EEO requirements, defendant Woodruff asserts that his conduct is work

related, and thus falls within the scope of his employment. (Id.) Therefore, he request that the Court substitute the United States in his place as a defendant in this suit. (Id.)

After reviewing the evidence in the record, this Court finds that the actions of defendant Woodruff are not work related. Specifically, defendant Woodruff admitted at his deposition that the incident involving the rat carcass was not work related:

QUESTION: What does a rat carcass behind your house got to do with your job?

ANSWER: I don't know.

QUESTION: Why would you discuss the rat carcass behind your house with anyone at your job?

ANSWER: I discussed it with the chief to ask his advice on what to do with it.

QUESTION: To ask his advice on what to do with a rat carcass behind your house?

ANSWER: Yes.

QUESTION: Is the rat carcass behind your house job related?

ANSWER: No, sir.

(Dep. of Gerald Woodruff at 50-51) (emphasis added). He also that he bypassed his lieutenant, and spoke with Chief Morris, because the head of the Mint police was formerly a Philadelphia police officer:

QUESTION: You said you went to Chief Morris?

ANSWER: Yes.

QUESTION: For an advice. Was that your direct chain of command, Chief Morris?

ANSWER: No, sir.

QUESTION: Your direct chain of command would have been an inspector or lieutenant?

ANSWER: Lieutenant, yes.

QUESTION: And between you and Chief Morris there was a lieutenant and inspector?

ANSWER: Yes, sir.

QUESTION: Is that right?

ANSWER: Yes, sir.

QUESTION: In the chain of command?

ANSWER: Yes, sir.

QUESTION: So, when you went to Chief Morris, was Chief Morris also a personal friend of yours?

ANSWER: Not a personal friend, no.

QUESTION: Not a personal friend. Would you have considered him a friend?

ANSWER: No, sir.

QUESTION: Was there any reason why you would have gone over the chain of command to Chief Morris to discuss a rat carcass found on your house property?

ANSWER: Because it wasn't a work related issue.

QUESTION: It was not a work-related issue?

ANSWER: No, sir.

(Id. at 71-72) (emphasis added). This fact is instructive, because the Mint police force is structured like the military, and thus, officers must respect the hierarchial chain of command. (Position

Description for Supervisory Police Officer at 1.) Therefore, by speaking with Chief Morris and bypassing the rigid chain of command of the federal police force, defendant Woodruff demonstrated that his concerns about the rat carcass were not work related.

This Court also recognizes that a Mint employee must comply with EEO guidelines and cooperate with EEO personnel as part of their employment. 29 C.F.R. § 1614.102 (1997). Nevertheless, even though the Mint employee must comply with these regulations, his compliance is limited to those areas over which the Mint has jurisdiction.² (Position Description for Supervisory Police Officer at 1.) The Mint's jurisdiction is limited to the premises of the Mint, "the physical/geographical area within which police power may be exercised and outside of which police power may not be exercised by officers of the Mint Police." (United States Mint Security Manual at 2.) Therefore, any statements unrelated to a Mint police officer's duties do not fall within the Mint's jurisdiction, merely because the officer made the statements during a meeting with an EEO representative.³

^{2/} The Mint Security manual describes this jurisdiction as follows:

Under the provisions of 40 U.S.C. § 318, officers of the Mint Police may exercise their police law enforcement and arrest powers in exclusive and concurrent jurisdiction areas under the charge and control of the U.S. Mint. The Facility Chief, Mint Police will identify the proper jurisdiction of each facility.

(United States Mint Security Manual at 5.)

^{3/} The U.S. Mint Security Manual describes a Mint police officer's authority in other jurisdictions:

In areas not under the charge and control of the U.S.

(continued...)

In this case, defendant Woodruff argues that his statements are related to his employment of the Mint, because of the timing of the rat carcasses corresponded with the dates of his meetings with the EEO representative. (Defs.' Reply. at 2.) Nonetheless, defendant Woodruff has not provided evidence which demonstrates that the plaintiff knew when defendant Woodruff would meet with the EEO representative. In fact, the record suggests that the opposite is true:

QUESTION: When did you tell Chief Morris that Mr. Greene could have put the rat carcass on your porch?

ANSWER: After that Thursday.

QUESTION: After that Thursday. What is it that made you believe Mr. Greene would have done that?

ANSWER; Because I believe because of the timing of the rat carcasses on the porch.

QUESTION: Because you believed what?

ANSWER: Because on Monday and Thursday I was scheduled to meet with a[n] EEO representative regarding John Greene's case.

(...continued)

Mint, officers of the Mint Police have no more police authority than a private citizen, although the officer may in fact be on duty, in transit between Mint locations, and in uniform. The powers of arrest of a private citizen are generally severely limited and vary greatly from state to state. If an officer of the Mint Police makes an arrest or uses deadly force on property not under the charge and control of the U.S. Mint for a crime committed on property not under the charge and control of the U.S. Mint, the officer does so at the officer's peril, unless the officer has been deputized by the jurisdiction in which the crime occurred.

(United States Mint Security Manual at 4-5.)

QUESTION: Okay. On Monday and Thursday you were supposed to meet with Mr. -- with an EEO officer?

ANSWER: Yes.

QUESTION: And what about that meeting made you believe Mr. Greene would put a rat carcass on your property?

ANSWER: I don't quite understand. Nothing about the meeting.

QUESTION: Right. So my question is what fact led you to believe Mr. Greene would have put a rat carcass on your property?

ANSWER: The fact that on Monday I had the meeting scheduled and the rat carcass was found by my wife. I rescheduled that meeting. I canceled that for that Monday. I rescheduled it for that Thursday. And the only people that knew that I had rescheduled it for Thursday was me, the chief, to my knowledge, and the EEO counselor or a representative and rescheduled it for Thursday.

(Id. at 56-57) (emphasis added). Therefore, the Court cannot find a nexus between the scope of defendant Woodruff's employment at the Mint and his statements about the rat carcasses.

Accordingly, this Court concludes that defendant Woodruff's statements pertain to activities unrelated to his job as a Mint Police officer, and involve matters outside the jurisdiction of the United States Mint.

2. Statements of Defendant Frank Rush

In his complaint, the plaintiff alleges that defendant Rush, the Mint's Chief Plant Engineer, placed a message on a

computer at the Mint, in which he "claimed that [the] plaintiff received insurance money from a previous girlfriend who died; that he had received psychiatric treatment; that [the] plaintiff stalked his daughter; and, that he was terminated from his teaching position because of complaints from the parents." (Am. Compl. at ¶ 32(b).) The plaintiff asserts that defendant Rush's statements concern his personal life and thus are unrelated to the business of the Mint. (Pl.'s Resp. at 6.) Therefore, the plaintiff urges this Court to deny the defendants' motion. (Id.) Defendant Rush, on the other hand, maintains that his comments pertain to his work, because there were motivated by a concern for his personal safety. (Defs.' Reply at 6.)

After reviewing the record, this Court finds that defendant Rush's alleged statements are not related to his job at the Mint. As Chief Plant Engineer, defendant Rush did not have supervisory control over the plaintiff.⁴ While his

⁴/ Defendant Rush's duties as Chief Plant Engineer are as follows:

The incumbent assigned to this position serves as Division Chief for Plant Engineering Division with the overall responsibility for insuring the continuous operating capability of production facilities and equipment thus making it possible to achieve and sustain a planned production schedule.

Administers the controls necessary for the maintenance and repair of all building facilities, preventative maintenance programs, the installation of mechanical and electrical equipment and the manufacture of parts for equipment.

Supervises, plans, schedules, and sets priorities for division objectives. Assigns projects to subordinate supervisors.

Provides the necessary technical and engineering knowledge to resolve unique problems and coordinate the

(continued...)

responsibilities included plant safety, those responsibilities are limited to the jurisdiction of the Mint. (See Position Description of Supervisory General Engineer.) As with other Mint employees, that jurisdiction is limited to the premises of the Mint. (See id.) Furthermore, the record does not indicate that defendant Rush was concerned about his safety at the Mint, but rather his family's safety at home in New Jersey. Like, defendant Woodruff, defendant Rush relayed his concerns to officers at the Mint, in this case, to Inspector John D. Cassidy. (Dep. of John D. Cassidy at 58-59.) At his deposition, Inspector Cassidy stated that defendant Rush approached him because he was concerned about activities occurring at home:

QUESTION: What was the nature of that discussion?

ANSWER: Basically his concern that something was going on between John Greene and apparently his daughter that he

(...continued)

overall efforts of the engineering, maintenance, and manufacturing operations.

Provides the administrative direction and controls necessary for divisional operation.

- a) Provides advice, counsel, and instruction on administrative matters
- b) Evaluates performance of subordinates
- c) Identifies training and developmental needs for the division, and makes provision for training
- d) Hears and resolves complaints
- e) Effects disciplinary measures
- f) Interviews candidates for positions and promotions, recommends appointment, and in disciplinary cases-suspensions or removal if warranted
- g) Establishes internal divisional guidelines
- h) Develops staffing plans
- i) Administers division budget.

(Position Description of Supervisory General Engineer at 1.)

wasn't comfortable with and he was concerned about.

QUESTION: Something was going on between John Greene and his daughter and he wasn't comfortable about it?

ANSWER: Some things had been said or done that he believed had been said or done by John Greene.

QUESTION: Some things had been said or done that he believe was said by John Greene?

ANSWER: Correct.

QUESTION: What was this something he told you that was said or done that he believed was John Greene?

ANSWER: Cars being parked out in front of his house, phone calls.

QUESTION: What else?

ANSWER: That's all I recall.

(Id. at 67.) Inspector Cassidy reports that he met with Chief Morris to discuss defendant Rush's problem and determined that the problem was outside the Mint's jurisdiction and was best handled by local law enforcement:

QUESTION: Now, concerning this first meeting, what actions did you take?

ANSWER: Joe [Kedziora] and I went up and saw the chief and we discussed it with the chief.

QUESTION: Exactly what was it that you told the chief?

ANSWER: I just said Frank [Rush] had some concerns and basically what he said.

QUESTION: What concerns did you have?

ANSWER: I didn't have any at the time.

QUESTION: When you went to the chief, did you have any concerns?

ANSWER: Just to make sure I passed it on to him.

QUESTION: At this point what did the chief tell you?

ANSWER: I think basically we discussed the course that Frank needed to take, had everything to do with the jurisdiction that it was occurring in , and that's about it.

QUESTION: Straight after the meeting with Frank you went to the chief, you told the chief what Frank had told you?

ANSWER: Uh-huh.

QUESTION: Did Frank go with you to the chief?

ANSWER: No.

QUESTION: So then the chief advised you or told you to tell Frank the course of action he should take?

ANSWER: We discussed it. I think we related to Frank that was an issue that was outside and that he should contact the jurisdiction where he lived.

* * *

QUESTION: At that time you and the detective advised Frank Rush to do what?

ANSWER: He should contact his local jurisdiction; in this case I believe it was Mt. Holly.

QUESTION: Contact his local jurisdiction. What do you mean? I don't understand that.

ANSWER: The police in the jurisdiction that he lived.

QUESTION: You advised him to contact the police where he lived?

ANSWER: Correct.

QUESTION: Why did you advise him to do that?

ANSWER: Because if he had concerns, they were the jurisdiction that could handle any situation that he perceived was arriving.

QUESTION: Was there any reason you, as inspector of police at the U.S. Mint didn't handle it? Why did you tell him to go to the local police?

ANSWER: It didn't concern Treasury business.

QUESTION: It didn't concern Treasury business?

ANSWER: What he was alleging was occurring. Told him to get ahold of Bell Telephone.

QUESTION: At that point you said it didn't concern Treasury business, you told him to go to the local telephone and to the local police[,] right?

ANSWER: Correct.

QUESTION: Even though you told Frank Rush it was not a concern of the Treasury, that's a local thing, you still went to the chief and you told the chief?

ANSWER: Well, basically what I told Frank was what he perceived was occurring on the outside was something that had to be handled by another jurisdiction. He said he was concerned about his safety and health and welfare there. So with that in mind, we conveyed it to the chief.

QUESTION: How did he describe to you his concern for himself, Frank Rush? What was his concern that he gave you for himself?

ANSWER: I didn't remember. He just said, "I got to come to work here every day and I got to see this guy."

QUESTION: He had to see the guy?

ANSWER: Yes.

QUESTION: So his concern was about seeing John Greene?

ANSWER: Words to that effect.

(Cassidy Dep. at 71-76) (emphasis added). Even though Inspector Cassidy testified that defendant Rush was concerned about seeing the plaintiff at work, the Court cannot find evidence to support the assertion that defendant Rush was concerned for his personal safety, while he was within the jurisdiction of the Mint.

This Court also rejects defendant Rush's assertion that because he was preparing notes for an EEO hearing, the statements are work related. As with defendant Woodruff, defendant Rush's concerns involved business unrelated to the Mint. Therefore, the Court cannot find a nexus between the scope of defendant Rush's employment at the Mint and his statements.

Accordingly, this Court concludes that defendant Rush's statements pertain to activities unrelated to his job as a Mint Police officer, and involve matters outside the jurisdiction of the United States Mint.

III. CONCLUSION

This Court finds that defendants Woodruff and Rush have not demonstrated that their statements were related to their work at the Mint. Therefore, this Court will not substitute the United States in place of the defendants in this suit.

An appropriate Order follows.

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O R D E R

AND NOW, this 29th day of July, 1997, upon consideration of Motion of Defendants Gerald Woodruff and Frank Rush to Substitute the United States in their Place as Defendants (Docket No. 29), IT IS HEREBY ORDERED that the Defendants' Motion is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.