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LARRY W. PROPES, CLERK
COLUMBIA, S.C.

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IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

AIKEN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, vs. GRAVES ENVIRONMENTAL & GEOTECHNICAL SERVICES, INC. Defendant.	Civil Action No. 1:00-373-22BC
Bette J. Kane, Intervenor, v. Graves Environmental & Geotechnical Services, Inc., James K. Branch, Graves Construction Services, Inc., Graves Water Services, Inc., Graves Drilling Services, Inc., and Graves Engineering Services, Inc., Defendants.	**MAGISTRATE JUDGE'S** **<u>ORDER AND RECOMMENDATION</u>**

The Equal Employment Opportunity Commission ("EEOC") filed this case on behalf of Betty J. Kane ("Kane") and "a class of similarly situated female current and former employees" alleging employment discrimination based on sex on January 31, 2000. The original defendant was Kane's employer, Graves Environmental and Geotechnical Services, Inc. Kane's motion to

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intervene, to add alleged related corporations[1] as party defendants, and to add a claim under the Age Discrimination in Employment Act ("ADEA")[2] was granted. Kane's motion to add James Branch ("Branch") as a defendant was denied.

Graves filed a motion for summary judgment on the Title VII claim and ADEA claim on July 11, 2001. The EEOC and Kane filed opposition memoranda. Also on that date, the EEOC filed a motion for partial summary judgment seeking a ruling that the aforementioned Graves corporations "are an integrated enterprise and constitute a single employer under Title VII...." Kane filed a motion adopting the EEOC's arguments on this issue. In response, Graves filed a motion to dismiss, or in the alternative for summary judgment, asserting that Graves Environmental Services, Inc. did not meet the Title VII definition of "employer." The EEOC moved to dismiss Graves' motion as untimely.

Standard for Summary Judgment

When no genuine issue of any material fact exists, summary judgment is appropriate. Shealy v. Winston, 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. Id. Courts take special care when considering summary judgment in employment discrimination cases because states of mind and motives are often crucial issues. Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1005 (4th Cir.), cert. denied, 484 U.S. 897 (1987). This does not mean that

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[1]These entities are: Graves Construction Services, Inc.("Graves Construction"), Graves Water Services, Inc. ("Graves Water"), Graves Drilling Services, Inc. ("Graves Drilling"), and Graves Engineering Services, Inc. ("Graves Engineering"). These five corporations will be collectively referred to as "Graves" unless otherwise specified.

[2]Kane's ADEA claim has been withdrawn.

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summary judgment is never appropriate in these cases. To the contrary, "'the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985).

In this case, defendant "bears the initial burden of pointing to the absence of a genuine issue of material fact." Temkin v. Frederick County Comm'rs, 945 F.2d 716, 718 (4th Cir. 1991) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If defendant carries this burden, "the burden then shifts to the non-moving party to come forward with facts sufficient to create a triable issue of fact." Id. at 718-19 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

Moreover, "once the moving party has met his burden, the nonmoving party must come forward with some evidence beyond the mere allegations contained in the pleadings to show there is a genuine issue for trial." Baber v. Hosp. Corp. of Am., 977 F.2d 872, 874-75 (4th Cir. 1992). The non-moving party may not rely on beliefs, conjecture, speculation, or conclusory allegations to defeat a motion for summary judgment. Id. and Doyle v. Sentry Inc., 877 F. Supp. 1002, 1005 (E.D.Va. 1995). Rather, the non-moving party is required to submit evidence of specific facts by way of affidavits [see Fed. R. Civ. P. 56(e)], depositions, interrogatories, or admissions to demonstrate the existence of a genuine and material factual issue for trial. Baber, citing Celotex Corp., supra. Moreover, the non-movant's proof must meet "the substantive evidentiary standard of proof that would apply at a trial on the merits." Mitchell v. Data General Corporation, 12 F.3d

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1310, 1316 (4th Cir. 1993) and DeLeon v. St. Joseph Hospital, Inc., 871 F.2d 1229, 1233 (4th Cir. 1989), n.7. Unsupported hearsay evidence is insufficient to overcome a motion for summary judgment. Martin v. John W. Stone Oil Distrib., Inc., 819 F.2d 547 (5th Cir. 1987) and Evans v. Technologies Applications & Services Co., *875 F. Supp. 1115 (D.Md. 1995).*

Discussion

I. Is Graves Environmental an Employer as Defined by Title VII?

The motions of the parties are based primarily on the deposition testimony and/or affidavits of Branch and Ken Jacobson ("Jacobson"), Graves' Secretary-Treasurer. Thus, the facts upon which these arguments are based are largely undisputed:

1. Branch and a partner purchased the assets of Graves Well Drilling in 1990 and formed Graves Environmental by incorporation.
2. Graves Construction was incorporated in 1991.
3. Graves Water and Graves Drilling were incorporated in 1994.
4. Graves Engineering was incorporated in 1995.
5. All of the corporations were incorporated under the laws of the State of Georgia.
6. Branch bought out his partner in 1995.
7. Branch is sole stockholder of Graves Engineering, Graves Construction, Graves Water, and Graves Drilling.
8. Branch owns eighty percent of the stock of Graves Engineering. Rick Swanson ("Swanson") and Scott Nichols ("Nichols") each owns ten percent of Graves Engineering.

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9. Branch is president and Jackson is secretary-treasurer of each Graves corporation. Swanson is executive vice-president of Graves Engineering.

10. Graves Environmental owns and operates an office on Atomic Drive in Jackson, South Carolina. This location serves as the corporate office for Graves Environmental, Graves Construction, Graves Water, and Graves Drilling.

11. Graves Engineering leases office space in Augusta, Georgia.

12. From 1995 through 1999, Graves Environmental had from seven to fourteen employees.

13. The personnel files for all the corporations are maintained at the Atomic Drive office in alphabetical order without regard to corporation (Jacobson Dep. 103-104).

14. Some employees "float" between the different corporations (Jacobson Dep. 104-105, 108).

15. All employees are paid through the Graves Environmental computerized payroll account. (Jacobson Dep. 106, 112).

16. Each corporation maintains a separate bank account, and Branch has authority to sign all checks. (Jacobson Dep. 101-102).

17. All employees share the same health plan and all eligible employees share the same retirement plan (Jacobson Dep. 115-16).

18. Although Jacobson (Graves Environmental), Tim Miles ("Miles) (Graves Water), and Swanson (Graves Engineering), share some managerial functions, Branch is ultimately responsible for personnel and management decisions.

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19. Graves Environmental serves as a management company for the other corporations and is paid a fee for administrative services.

As a jurisdictional prerequisite, a Title VII plaintiff must prove that the defendant is an "employer" as defined by 42 U.S.C. § 2000e(b). Woodward v. Virginia Board of Bar Examiners, 598 F.2d 1345 (4th Cir. 1979). Under that definition, an "employer" is "a person engaged in an industry affecting commerce who has fifteen or more employees...." Although not precisely argued, the parties appear to argue that Graves Environmental does not meet the statutory definition of employer unless the employees of one or more of the other Graves corporations are included. The EEOC urges this court to employ an "integrated enterprise" doctrine used by some courts. Under this test, "several companies may be considered so interrelated that they constitute a single employer." Hukill v. Auto Care, Inc., 192 F.3d 437, 442 (4th Cir. 1999), *cert. denied,* 529 U.S. 1116 (2000). Graves argues that the integrated enterprise test is not the law of this circuit and should be rejected.

The genesis of the integrated employer standard was in the labor related context and it was later adopted to Title VII. Hukill, 192 F.3d at 442. Courts weigh four factors in applying this test: (1) interrelation of operation; (2) common management; (3) centralized control of labor relations, and (4) common ownership or financial control. The last factor is the least important. Thomas v. Bet Sound-Stage Restaurant/Brettco, Inc., 61 F. Supp. 448, 4546 (D.Md. 1999).

> In applying the integrated enterprise test, courts have noted the following to be probative evidence that one company employs the other's employees for purposes of Title VII liability: (1) one company's employees hired and fired the other's employees and/or authorized lay offs, recalls, and promotions of such employees; (2) one company routinely transferred employees between it and the other company, used the same work force, and/or handled the other's payroll; (3) one company exercises more than

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> general oversight of the other's operations by supervising the other's daily operations, such as production, distribution, purchasing, marketing, advertising, and accounts receivable; (4) the companies have common management in the form of interlocking boards of directors and/or common officers and managers; (5) the companies fail to observe basic formalities like keeping separate books and holding separate shareholder and board meetings; (6) the companies fail to maintain separate bank accounts; (7) the companies file joint tax returns.

Id. (Citations omitted).

The Fourth Circuit has not specifically adopted the integrated enterprise theory. In Johnson v. Flowers Industries, Inc., 814 F.2d 978, 981, n. * (4th Cir. 1987),[3] the court noted:

> We need not adopt such a mechanical test in every instance; the factors all point to the ultimate inquiry of parent domination. The four factors simply express relevant evidentiary inquires whose importance will vary with the individual case.

The approach was affirmed in Hukill, 192 F.3d at 442, n.7.

In assessing the evidentiary factors presented, the undersigned concludes that the Graves corporations constitute an integrated enterprise for Title VII purposes. Each of the aforementioned four factors support this conclusion. The operations of the corporations are interrelated, there is a common management, control of labor relations is centralized, and there is common ownership and financial control. It is, thus, recommended that the motions of the EEOC and Kane for partial summary judgment be granted, and Graves' motion to dismiss be denied.[4]

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[3]Johnson was an ADEA case involving a subsidiary corporation.

[4]The motion of the EEOC to strike Graves' motion to dismiss as untimely is **denied**.

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II Sexual Harassment

The complaint alleges sexual harassment by Branch toward Kane and "a class of similarly situated female current and former employees." The "class" consisted of Kane's daughters Misti Kehr ("Kehr") and Sondra Robinson Youngblood ("Youngblood"). The EEOC has withdrawn any claims by Youngblood, and Kane and Kehr remain.

In their memoranda, the parties have outlined a number of disputed and undisputed facts. The undersigned concludes after a review of the record that it is unnecessary to fully recount the events during the employment of Kane and Kehr at Graves. Suffice it to say that in the light most favorable to Kane and Kehr, they were sexually harassed by Branch to include rape, sexual intercourse, oral sex, frequent touching, Branch's exposing himself, and sexual comments. Consequently, Graves argues that Kane's administrative charge filed with the EEOC was untimely, the continuing violation doctrine does not apply, and Kehr, who did not file a charge cannot "piggyback" on the charge filed by Kane.

Kane concedes that the most severe and constant sexual harassment directed at her took place between her initial employment in 1992 and the hiring of Tina Hart ("Hart") in September of 1996.[5] It is clear that Hart's arrival caused turmoil within the Atomic Drive office. At the time, Kane was the office manager, and Hart was hired to implement a computer system. It appears Kane and Kehr felt that Hart was hired to replace them.

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[5]The sexual harassment of Kehr occurred during her tenure from 1994 until she resigned in early 1998.

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A. Timeliness of Charge

Before a federal court can gain subject matter jurisdiction with respect to alleged discrimination under 42 U.S.C. § 2000e (Title VII), the plaintiff must file an administrative charge with the EEOC or an appropriate state agency, if available, Oscar Meyer, et al. v. Evans, 441 U.S. 750, 99 S. Ct. 2066 (1979). South Carolina has such an agency, the State Human Affairs Commission (SHAC). See Section 1-13-10, et seq. of the South Carolina Code of Laws, the "South Carolina Human Affairs Law" and Settles v. Pinkerton, Inc., 482 F. Supp. 461 (1979 D.S.C.). The purpose of the requirement that an administrative charge be filed is to allow the agency to notify potential defendants of the claim of discrimination and to provide the agency with sufficient information to investigate the claim and attempt conciliation. Greene v. Whirlpool Corporation, 708 F.2d 128 (4th Cir. 1983).

A plaintiff, in a deferral state such as South Carolina, must file an administrative charge of discrimination “within three hundred days after the alleged unlawful employment practice occurred....” 42 U.S.C. § 2000e-5(e)(1). Kane filed her charge on October 6, 1997. Thus, the parties agree that Kane must show an act of sexual harassment on or after December 10, 1996.

Kane alleges two incidents of sexual harassment within the time period–her discharge on January 21, 1997, and a sexually harassing conversation she had with Branch.

1. Discharge

Graves separates Kane’s discharge from her claim of sexual harassment and argues that she “cannot establish a prima facie case of discrimination...because she was not performing her job at the level legitimately expected by her employer” and she cannot show that “the legitimate, non-discriminatory reasons given for her discharge are a pretext for...sex

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discrimination." (Def. Mem., 16). Graves' argument relies on principles of discriminatory discharge outside the context of sexual harassment.

The EEOC cites Ellis v. Director, Central Intelligence Agency, 191 F.3d 447, 1999 WL 704692 (4th Cir. 1999) (Table) to support its argument that Kane's termination was the conclusion of her resistance to Branch's sexual advances. Although this opinion is unpublished, it states the general rule.

> In order to establish a claim for quid pro quo sexual harassment, an employee must establish that she was subjected to unwelcome sexual harassment based upon sex and that the "employee's reaction to the harassment affected tangible aspects of the employee's compensation, terms, conditions, or privileges of employment." Spencer v. General Elec. Co., 894 F.2d 651, 658 (4th Cir.1990), overruled on other grounds, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). "When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257, 2265, 141 L.Ed.2d 633 (1998).

The EEOC specifically alleges in the complaint that Kane was terminated for refusing to continue to submit to Branch. Kane testified at her deposition that it was her belief that she was terminated for this reason (Kane Dep. 87). Based on the record, there is reasonable inference that Kane's termination was related to Branch's sexual harassment.

2. December 1996 Incident

At her deposition, Kane opined that she was terminated for refusal to accede to Branch's sexual overtures. She was asked when the last incident took place. Kane states, "about the last six weeks" of her employment, Branch commented about her anatomy and stated that he was considering transferring Hart and Jacobson to Augusta so that they (Branch and Kane)

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could "have some play time." Kane responded they "don't have time for play time." (Kane Dep. 87-88).

As noted above, Kane was terminated on January 21, 1997. Six weeks prior to the date of termination is December 10, 1996, precisely 300 days prior to the filing of the charge.[6]

It is, therefore, recommended that Graves' motion for summary judgment be denied.

III Sanctions

A. Discovery Abuse

Graves has moved that the complaint be dismissed as a sanction because Kane has been untruthful during the discovery process. Specifically, Graves argues that Kane lied during her deposition and in interrogatory answers concerning prior employers, prior allegations of sexual harassment, and treatment by physicians. Specifically, Graves has produced evidence that Kane, then known as Bette Jean Robinson, was not forthcoming about her employment with the South Carolina Energy Task Force, Inc., a state court law suit she filed in connection with that employment, and treatment she received for emotional problems stemming from that experience. The record shows that after initially denying, or failing to remember, the issues raised at deposition, Kane admitted or remembered, at least partially, those matters when confronted with documentation.

Graves cites Martin v. Daimlerchrysler Corp., 251 F.3d 691 (8th Cir. 2001), Liva v. County of Lexington, 972 F.2d 340, 1992 WL 187299 (4th Cir. 1992) (Table), and Rodriguez v. M&M/Mars, 1997 WL 349989 (N.D.Ill. 1997)(unpublished) to support its position. These cases

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[6]Since the undersigned concludes that two incidents of sexual harassment took place within the statutory period, the undersigned does not address the continuing violation arguments.

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dismissed or affirmed dismissal of actions based upon wilful misconduct or untruthfulness of a party during discovery as a Fed. R. Civ. P. 37 sanction and/or the inherent authority of the court. However, in Liva quoting Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118, the Fourth Circuit stated "(d)ismissal is an extreme remedy and therefore must be used only 'where the defaulting party's misconduct is correspondingly egregious.'" The undersigned finds that Kane's misconduct does not rise to this level.

Based on this record, the undersigned recommends that Graves' motion to dismiss be denied.

B. EEOC Ethical Violations

On September 24, 2001, the EEOC moved that Angela Grant ("Grant") be removed as counsel of record because she left the employment of the EEOC on September 14, 2001. Grant filed an affidavit on September 28, 2001, in which she stated that she began working at the EEOC in the Greenville, South Carolina office on June 4, 2001, and that she served as local counsel in this case because she was admitted to practice in South Carolina and this court. Grant asserted that other EEOC attorneys committed ethical violations by signing her name and placing her Federal Identification Number on pleadings without her permission. The EEOC attorneys named were Lynette Barnes ("Barnes") and Mindy E. Weinstein ("Weinstein"). Grant suggested that this court sanction the EEOC by striking the pleadings to which the EEOC had signed her name without her permission.[7]

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[7]These documents are: (1) Plaintiff EEOC's Memorandum in Opposition to Defendants' Motion for Summary Judgment (Doc. No. 59); (2) Reply Memorandum in Support of Plaitnif's Partial Motion for Summary Judgment (Doc. No. 67); (3) Plaintiff EEOC's Memorandum in Opposition to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc.

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Based on Grant's affidavit, the undersigned issued an order on October 23, 2001, requiring the EEOC to file a response indicating who prepared the aforementioned documents and signed Grant's name. The response was filed on November 7, 2001. The response contains affidavits of Weinstein, Laura Brodeur and Kara Haden. The EEOC concedes that Grant's name was signed without her knowledge on the pleadings in question, but asserts it assumed Grant would have no objection, Grant was unavailable or time constraints required the procedure, and on each occasion the attorney who signed Grant's name placed her initials by the signature indicating the Grant had not actually signed the pleading.

Based on the record, the undersigned concludes that the EEOC violated Local Rule 83.I.04 (D.S.C.). However, striking the pleadings to which Grant's signature was signed would be too severe a sanction as it would punish Kane and not the EEOC.[8]

Several related motions are pending. It is ordered that:

1. The EEOC's motion to file a sur-reply brief to Grant's reply to the EEOC's response to Grant's original affidavit is **denied**;
2. The EEOC's motion for a protective order and to seal portions of the record is **granted**; and

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No. 68); (4) Plaintiff EEOC's Motion to Strike Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment (Doc. No. 69); and (5) EEOC's Memorandum in Opposition to Motion to Dismiss of Graves Construction Services Inc., Graves Water Services, Inc., Graves Drilling Services, Inc., and Graves Engineering Services, Inc. (Doc. No. 72).

[8]In her reply brief, Grant suggests further sanctions, i.e., banning Weinstein and Barnes from practicing in this court, revoking Haden's pro hoc vice admission, and institution of disciplinary hearings against Haden. The undersigned declines to address these suggestions.

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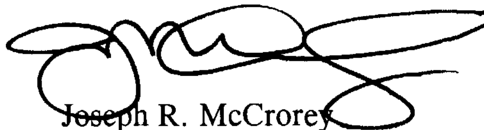
3. The EEOC's motion for leave to refile and substitute pleadings for those which contained Grant's unauthorized signature is **granted**.

Conclusion

Based on a review of the record, it is recommended that:

1. Graves' motion for summary judgment (Doc. No. 50) be denied;
2. The EEOC's motion for partial summary judgment (Doc. No. 52) be granted;
3. Kane's motion for summary judgment (Doc. No. 54) be granted;
4. Graves' motion to dismiss, or in the alternative for summary judgment, (Doc. No. 57) be denied;
5. Graves' motion to dismiss (Doc. No. 66) be denied; and
6. Graves' motion to dismiss based on Kane's dishonesty (Doc. No. 71) be denied.

Respectfully submitted,



Joseph R. McCrorey

March 1, 2002

Columbia, South Carolina

The parties' attention is directed to the important information on the attached notice.

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