

STATE OF MICHIGAN
COURT OF APPEALS

ALEXANDER HAMILTON LIFE INSURANCE
COMPANY,

UNPUBLISHED
June 8, 1999

Plaintiff/Counter-Defendant/Appellee,

v

No. 211221
Oakland Circuit Court
LC No. 94-468462 CK

LEE M. ZOHROB,

Defendant/Counter Plaintiff/Third-
Party Plaintiff-Appellant ,

v

HOUSEHOLD INTERNATIONAL, INC., a
foreign corporation, DONALD CLARK,
RICHARD HULL, KENNETH ROBBIN, COLIN
KELLY, JOSEPH SAUNDERS, GARY GILMER,
and RICHARD HEADLEE, Jointly and Severally,

Third-Party Defendants-Appellees.

Before: White, P.J., and Kelly and Hoekstra, JJ.

WHITE, P.J. (concurring).

I agree that there was no error in the denial of defendant's motion to disqualify the circuit judge, and that defendant's sex discrimination, interference with a business contract, conspiracy, and intentional infliction of emotional distress claims were properly dismissed. I also agree that the circuit court did not abuse its discretion in concluding that defendant's third-party complaint and amended answer and counter-claim did not adequately allege breach of a promise to promote.

Regarding defendant's challenge to the court's appointment of an expert (CAE), I do not agree that the CAE played a limited and appropriate role. Plaintiff's counsel conceded at oral argument

before this Court that he did not view the CAE as an expert, but rather as a master appointed to help a very busy court. The circuit court charged the CAE with making recommendations as to the resolution of discovery disputes, advising the court regarding IS&S' performance under the settlement agreement, recommending whether a constructive trust ought to be established, and recommending to the court which party, and to what extent, "shall pay for his fees and expenses, based on the merits of the parties' position as to the issues being addressed by the expert." The CAE held hearings, took testimony, and in his report to the court set forth factual findings, discussed the law regarding establishment of constructive trusts, and discussed the question whether plaintiff should be required to provide general statistical information regarding gender composition of its work force. The CAE's final report concluded that under any interpretation of the settlement documents, defendants were not in compliance. The CAE's report recommended against providing defendants with the requested statistical information. The CAE indicated to the parties at one of the hearings that if they disagreed with his rulings they could appeal to the circuit court.

The circuit court exceeded its constitutional authority by delegating judicial functions to the CAE, including conducting and regulating proceedings, and examining documents and witnesses. *Carson Fisher Potts v Hyman*, 220 Mich App 116, 121; 559 NW2d 54 (1996) (vacating the orders appointing expert witness and compelling the defendant to pay for the expert's services on the basis that the trial court was without constitutional authority to delegate to the court-appointed expert specific judicial functions that included making findings of fact and conclusions of law, requiring the production of evidence, issuing subpoenas, conducting and regulating miscellaneous proceedings, examining documents and witnesses, and making a final recommendation and proposed judgment by a date certain, notwithstanding that the defendant failed to object to the order appointing the expert); Const 1963, art 6, § 23. I conclude, however, that reversal and remand is not required.

In the instant case, the CAE's investigations and recommendations did not address or have an impact on defendant's substantive claims, the dismissal of which she contests on appeal: breach of promise to promote, sex discrimination,¹ interference with a business relationship, conspiracy, and intentional infliction of emotional distress. The circuit court alone made the rulings defendant is appealing. Plaintiff moved for partial summary disposition in its favor as to liability for defendants' violation of the settlement agreement. The circuit court denied the motion. The circuit court also ordered that plaintiff turn over certain statistical information, the scope of which defendant does not challenge on appeal. Defendant does not dispute that plaintiff did not prevail on any claim as a result of the CAE's involvement. Under these circumstances, I conclude that the appointment of the CAE, although improper, does not require that the case be reversed and remanded for further proceedings.

/s/ Helene N. White

¹ As noted *supra*, although the CAE made a recommendation regarding discovery pertinent to plaintiff's sex discrimination claim, i.e., that plaintiff not be made to turn over statistical information on its gender composition, defendant does not dispute that the circuit court did not follow that recommendation.

Defendant argues that although she eventually obtained the statistics, she had to appeal the CAE's decision to the circuit court, which required time and effort, and that plaintiff's motion for summary disposition of her sex discrimination claim was argued before she obtained those statistics. Defendant does not argue, however, that the statistics supported her claim of discrimination. Nor does defendant dispute plaintiff's argument that the statistics she sought concerned the gender makeup of plaintiff's entire workforce, i.e., employees not similarly situated, and thus had little or no probative value as to the question whether the failure to promote defendant to the position of General Counsel was discriminatory. Finally, as the majority notes, the order dismissing defendant's sex discrimination claim was entered about 1 ½ years after the circuit court's order compelling plaintiff to produce statistical information.