



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

February 17, 1989

The Honorable John H. Pratt
Judge, United States District Court
for the District of Columbia
3rd Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Re: Broderick v. Ruder, No. 86-1834

Dear Judge Pratt:

On June 16, 1988, this Court approved the joint order negotiated by the parties in settlement of this case. That order established the procedure to be used by the Commission in considering whether and what disciplinary actions should be taken with respect to Herbert Brooks, John L. Hunter, and James C. Kennedy (pp. 5-6):

"The parties agree that the Commission should have an opportunity to determine what disciplinary action(s), if any, should be taken with respect to Messrs. Kennedy, Hunter and Brooks. The Commission has represented to plaintiff's counsel and hereby represents to the Court that the Commission will investigate these employees' actions during the time period involved in the Court suit, including the trial. The Commission furthermore represents that it will retain the services of an impartial third party to conduct its investigation into these employees' conduct. The Commission, acting through its Chairman, will evaluate the results of the investigation and take appropriate disciplinary action. The Commission will make a report of the Commission's actions to the Court and to plaintiff's counsel at the conclusion of the investigation."

On June 30, 1988, the Commission selected Joseph Onek of the Washington, D.C. law firm Onek, Klein and Farr as Special Counsel to conduct the inquiry. The inquiry was conducted by Mr. Onek and Ms. Laurel Malson, an associate of the firm. On January 27, 1989, Mr. Onek delivered to me his 117 page "Report of the Special Counsel" (the Special Counsel's Report). This letter, together with the attached "Introduction and Summary" to the

Special Counsel's Report, constitute my report to the Court required by the joint order of June 16, 1988.

The scope of the Special Counsel's investigation is set forth in his report (pp. 1-2):

"Our mandate from the Chairman was to investigate the conduct of the above-named employees in three specific areas: 1) any violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 16, or failures to remedy such violations; 2) the candor of their testimony in the proceedings conducted by the Commission's Equal Employment Opportunity ("EEO") office, and in the pretrial and trial proceedings; and 3) any violations of the Commission's conduct regulations by these individuals. (footnotes omitted)"

The "Introduction and Summary" to the Special Counsel's Report concludes (pp. 3-5):

"A. There is insufficient evidence to support a finding that Messrs. Brooks, Hunter and Kennedy either themselves engaged in any employment practices prohibited by Title VII, or failed to remedy any violations of Title VII by others under their supervision.

* * *

B. There is insufficient evidence that Messrs. Brooks, Hunter and Kennedy were deliberately misleading or untruthful in their testimony on this matter.

* * *

C. There were no violations of the Code of Conduct by Messrs. Brooks, Hunter or Kennedy."

After reviewing the Special Counsel's Report, I met with Mr. Onek and Ms. Malson to discuss with them its scope, methodology, and findings. As is explained in the Special Counsel's Report, they interviewed several critical witnesses who were not available to the Court, conducted interviews at great length, and

The Honorable John H. Pratt
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engaged in follow-up interviews in several instances. I am satisfied that the Special Counsel's Report is thorough and impartial. I believe its findings and conclusions must guide my decisions in this very difficult and delicate matter. Based on those findings and conclusions, I have determined that no discipline or adverse personnel action will be taken by the Commission against Mr. Brooks, Mr. Kennedy, or Mr. Hunter.

The Special Counsel's Report, in its entirety, will be filed with the Court with the request that it be received under seal. With respect to its subsequent dissemination, the Commission is filing a motion seeking authorization to release the Special Counsel's Report to various persons, including Ms. Broderick and her counsel, and Messrs. Brooks, Kennedy, and Hunter, but subject to a protective order precluding its public disclosure in order to protect the privacy of persons mentioned in it. The protective order is also being sought because public dissemination of the Special Counsel's Report could compromise the Commission's ability to obtain the voluntary cooperation of its staff in future investigations or in the ongoing EEO review.

I am sending a similar letter today to: counsel for the plaintiff; Messrs. Brooks, Hunter, Kennedy; David S. Tatel, who is conducting an inquiry into the Commission's EEO program; Ms. Ruth Robinson, who is conducting an investigation on behalf of the Office of Special Counsel of the Merit Systems Protection Board into the conduct of Messrs. Brooks, Kennedy and Hunter; and counsel for the Department of Justice who have appeared in this case.

Sincerely,



David S. Ruder
Chairman

Enclosure

I. INTRODUCTION AND SUMMARY

This Report provides the results of our investigation into the alleged misconduct of three individuals who are currently employed by the Securities and Exchange Commission ("SEC"), Messrs. Herbert L. Brooks, John L. Hunter and James ("Cliff") Kennedy. This investigation arose out of the settlement of Broderick v. Ruder, 685 F. Supp. 1269 (D.D.C. 1988), ("App. B") whereby the SEC agreed to retain the services of an impartial third party, to "investigate the [above-named] employees' actions during the time period involved in the Court suit, including the trial[,] and, based on the results of that investigation, to take disciplinary action against Messrs. Brooks, Hunter and/or Kennedy, if warranted. Joint Order (June 16, 1988) at 5. ("App. C")

Our mandate from the Chairman was to investigate the conduct of the above-named employees in three specific areas: 1) any violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 16, or failures to remedy such violations;¹ 2) the candor of their testimony in the proceedings conducted by the Commission's Equal Employment Opportunity ("EEO") office, and in

¹ Title VII of the Civil Rights Act of 1964, inter alia, makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Section 2000e-16(a) makes these provisions applicable to executive departments and independent agencies of the federal government.

the pretrial and trial proceedings; and 3) any violations of the Commission's conduct regulations by these individuals.²

As will be discussed in greater detail below, the difficulties of investigating incidents such as those alleged in this case, some of which are based on subjective and highly personal perceptions, are not insubstantial. It is impossible to recreate the Washington Regional Office ("WRO") of the SEC as it existed from 1979 when Catherine Broderick was hired until it closed in 1986. But to obtain as clear a view as possible of the WRO and to permit as objective an evaluation as possible of the conduct of Messrs. Brooks, Hunter and Kennedy, we interviewed most of the individuals who were employed at the WRO during the relevant time period. In addition, we spoke with several attorneys who worked with Catherine Broderick at the United States Attorney's Office of the District of Columbia during her four-month internship there in 1983. From these individual accounts, we were able to distill as accurate a picture as possible of the working environment of the WRO, including the conduct of the subjects of this investigation.

Many of our conclusions differ from those of the District Court. This in no way implies that we believe the District Court decision was incorrect based on the record before it. But, as described below, we were able to compile a far more extensive

² See 37 C.F.R. §§ 200.735-1, et seq.

record and had the opportunity to recall witnesses and clarify crucial points.

In brief, our conclusions are as follows:

- A. There is insufficient evidence to support a finding that Messrs. Brooks, Hunter and Kennedy either themselves engaged in any employment practices prohibited by Title VII, or failed to remedy any violations of Title VII by others under their supervision.

We examined the allegations against Messrs. Hunter and Brooks³ of "quid pro quo" sexual harassment, i.e., the conditioning of benefits or other terms of employment upon the submission to, or acquiescence in, unwelcome sexual conduct, and found the evidence in support of such allegations to be, at best, inconclusive. Nor is there sufficient evidence to conclude that any of the three individuals investigated engaged in "reverse" sexual harassment, i.e., the preferential treatment of selected employees for unlawful sex-based reasons over other qualified employees. Similarly, although there is substantial evidence that the working environment at the WRO was at times hostile and that morale of some employees was low, we conclude that the hostility was not sex-based. In addition, we conclude that what sexually offensive conduct there was at the WRO was not sufficiently pervasive to constitute a "hostile working

3 As we read the record in this case, there were no allegations against Mr. Kennedy by Ms. Broderick, or by any other female employee in the WRO, of "quid pro quo" sexual harassment.

environment" within the meaning of Title VII. See generally Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1988) ("EEOC Guidelines"); EEOC, "Policy Guidance on Current Issues of Sexual Harassment" (Oct. 25, 1988) ("EEOC Policy Guidance"). Finally, while it seems clear that at some point a decision was made by Messrs. Kennedy and Hunter, as well as by other supervisory personnel, that Ms. Broderick was not performing at an acceptable professional level and was unlikely to do so in the future, and steps were taken by her supervisors to remove her from the WRO, there is no evidence of unlawful "retaliation" under Title VII against Ms. Broderick.

B. There is insufficient evidence that Messrs. Brooks, Hunter and Kennedy were deliberately misleading or untruthful in their testimony on this matter.

We identified several areas where the testimony of Messrs. Brooks, Hunter and Kennedy conflicted with the testimony of other credible witnesses or with their own prior testimony. In some instances, this testimony was clearly inaccurate. It was, however, extraordinarily difficult to determine whether this testimony, even when clearly inaccurate, was deliberately misleading or untruthful. On balance, we conclude that none of the three individuals' testimony on this matter was deliberately misleading or untruthful.

C. There were no violations of the Code of Conduct by Messrs. Brooks, Hunter or Kennedy.

We have reviewed the Conduct Regulation applicable to all members and employees of the Securities and Exchange Commission, 17 C.F.R. §§ 200.735-1, et seq., and conclude that no provision of this Regulation was violated by Messrs. Brooks, Hunter or Kennedy unless it is determined that they made false statements.⁴

⁴ Such statements would violate § 200.735-10(j) of the Regulation, which prohibits "false statements in a Government matter," and the parallel provisions of the Model Code of Professional Responsibility and the Model Rules of Professional Conduct for lawyers, which are incorporated by the Regulation. See DR 1-102(A)(4); Rule 3.3 Model Rules of Professional Conduct; 17 C.F.R. § 200.735-2(b).

and Brooks. The Commission has represented to plaintiff's counsel and hereby represents to the Court that the Commission will investigate these employees' actions during the time period involved in the Court suit, including the trial. The Commission furthermore represents that it will retain the services of an impartial third party to conduct its investigation into these employees' conduct. The Commission, acting through its Chairman, will evaluate the results of the investigation and take appropriate disciplinary action. The Commission will make a report of the Commission's actions to the Court and to plaintiff's counsel at the conclusion of the investigation."

2. On June 30, 1988, the Commission selected Joseph Onek of the Washington, D.C. law firm Onek, Klein and Farr as Special Counsel to conduct the inquiry. On January 27, 1989, Mr. Onek delivered to Chairman David S. Ruder his 117 page "Report of the Special Counsel."

3. The scope of the Special Counsel's investigation is set forth in his report (pp. 1-2):

"Our mandate from the Chairman was to investigate the conduct of the above-named employees in three specific areas: 1) any violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2, 16, or failures to remedy such violations; 2) the candor of their testimony in the proceedings conducted by the Commission's Equal Employment Opportunity ("EEO") office, and in the pretrial and trial proceedings; and 3) any violations of the Commission's conduct regulations by these individuals.
(footnotes omitted)"

4. In the "Introduction and Summary" to the Special Counsel's report, Mr. Onek concluded, in brief (pp. 3-5):

"A. There is insufficient evidence to support a finding that Messrs. Brooks, Hunter and Kennedy either themselves engaged in any employment practices prohibited by Title VII, or failed to remedy any violations of Title VII by others under their supervision.

* * *

B. There is insufficient evidence that Messrs. Brooks, Hunter and Kennedy were deliberately misleading or untruthful in their testimony on this matter.

* * *

C. There were no violations of the Code of Conduct by Messrs. Brooks, Hunter or Kennedy."

5. As required by the Court's order of June 16, 1988, Chairman Ruder reported to this Court on February 17, 1989, his decision regarding the possible discipline of Messrs. Brooks, Hunter and Kennedy. Based on the findings and conclusions in the Special Master's Report, Chairman Ruder has determined that the Commission will not discipline or impose adverse personnel actions on them. Attached to the Chairman's report was a copy of the "Introduction and Summary" from the Special Counsel's report which summarized the basis for the Chairman's decision.

6. In order to seek the Court's guidance in determining the extent of public disclosure that may appropriately be afforded the Special Counsel's report, the Commission has appended to this Motion a copy of the report for the Court's review. The Commission anticipates that it may receive requests for the entire report from several sources: the plaintiff;

plaintiff's counsel; Messrs. Brooks, Kennedy, and Hunter (and the bar disciplinary authorities currently investigating their conduct in connection with this matter); Congressional committees; David S. Tatel, who is conducting an inquiry into the Commission's EEO program; the Office of the Special Counsel of the Merit Systems Protection Board, which is making an investigation into the conduct of Messrs. Brooks, Hunter and Kennedy; and counsel for the Department of Justice, who have recently appeared as additional counsel for the Commission. The Commission has no objection to disclosure of the report to any or all of the above-named potential requesters, so long as in their use of the report they are required by court order to keep its contents confidential. In addition, Joseph Onek has informed the Commission that he will voluntarily submit to the protective order and enter into a Stipulation and Confidentiality Agreement. There may be further requests for the report from other persons, and the Commission will advise the Court and make recommendations thereon as they arise.

7. The Commission's reluctance to support full public disclosure of the report stems from its concern for the privacy of the individuals specifically mentioned in the report. 51 persons were interviewed during the course of the investigation, and the report includes comments on the credibility of many witnesses, all of whom are identified by name. A number of such persons are still employed by the Commission. While all such individuals spoke with Mr. Onek voluntarily, they expected that

their statements would be given as much confidential treatment as the circumstances could allow.

8. In light of the broad media attention focused on this case, public disclosure of the report will likely result in further publicity. The privacy of all the persons who voluntarily participated in the investigation, and who spoke candidly with the investigators, should not be infringed. In addition, unrestricted public dissemination of the Onek Report could compromise the Commission's ability to obtain the voluntary cooperation of its staff in future investigations or in the ongoing EEO review.

9. The Commission respectfully suggests that an appropriate balance between the legitimate interests of certain persons to obtain the report and the protection of legitimate privacy interests of persons mentioned in the report might be reached whereby the potential requesters named above could be given access to the entire report under an express agreement that they will not disclose it to any third parties. These requesters could petition the Court for authority to depart from the terms of the Protective Order in the event they subsequently need to disclose the report or a portion thereof to a third

party, subject to protective provisions. The attached proposed protective order outlines the procedures that would be available to allow such selective disclosure.

Respectfully submitted,


Benjamin Greenspoon
Associate General Counsel


Faith Ruderfer
Special Trial Counsel

Securities and Exchange
Commission
Office of the General Counsel
450 Fifth Street, N.W., 6-6
Washington, D.C. 20549
(202) 272-2871

DATE: February 17, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CATHERINE A. BRODERICK

Plaintiff,

v.

DAVID S. RUDER, Chairman,
United States Securities and
Exchange Commission,

Defendant.

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: Civil Action
: No. 86-1834
: (Pratt, J.)
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PROTECTIVE ORDER

The Securities and Exchange Commission, having retained the services of an impartial third party, Special Counsel Joseph Onek, to conduct an investigation into the conduct of certain of its employees, having received and evaluated the report issued by said Special Counsel (the "Onek Report"), and having reported to the Court on its actions concerning said employees in compliance with the Joint Order of June 16, 1988, now moves the Court for an order placing the Onek Report under seal. In order to preserve the privacy of individuals who voluntarily participated in Special Counsel Joseph Onek's investigation and the Commission's ability to obtain the voluntary cooperation of its staff in ongoing and future investigations, while at the same time allowing the useful dissemination of the Onek Report, the "Motion of Securities and Exchange Commission For Protective Order To Limit Public Disclosure of Report of Special Counsel Joseph Onek" is hereby:

GRANTED

on the grounds set forth therein.

THEREFORE, under pain of contempt of this Court:

- (1) The Onek Report is hereby placed under seal.
- (2) All future filings with respect to the dissemination of the Onek Report shall be filed under seal.
- (3) All future filings that identify, quote from, describe or otherwise cite to information, sources, opinions or conclusions set forth in the Onek Report shall be filed under seal.
- (4) Copies of the Onek Report shall not be disseminated to persons outside of the Securities and Exchange Commission without leave of this Court. All recipients of the Onek Report:
 - (a) shall be bound by the terms of this Protective Order,
 - (b) shall execute a Stipulation and Confidentiality Agreement in the form set forth in Exhibit A before they receive a copy of the report, and
 - (c) shall not disseminate the Onek Report or divulge its contents to any person except as set forth in said Stipulation and Confidentiality Agreement, or by express prior leave of this Court.
- (5) The following persons are hereby granted leave to receive copies of the Onek Report: Ms. Catherine A. Broderick; S. Beville May, Esq.; Robert Adler, Esq.; Lawrence King, Esq.;

David S. Tatel, Esq.; Joseph Onek, Esq.*;/ Mr. Herbert Brooks; Mr. John L. Hunter; Mr. James C. Kennedy; Office of the Special Counsel of the Merit Systems Protection Board; Congressional Committees; Bar disciplinary authorities investigating the conduct of Messrs. Brooks, Hunter or Kennedy in connection with this matter; and, Counsel for the Department of Justice who have appeared in this case.

SO ORDERED.

Date

JOHN H. PRATT
UNITED STATES DISTRICT JUDGE

*/ Joseph Onek additionally agrees that he shall destroy or deliver to the Securities and Exchange Commission all drafts and copies of the Onek Report. Upon Joseph Onek's execution of the attached Stipulation and Confidentiality Agreement, the Commission shall deliver to him a copy of the Onek Report. Joseph Onek shall thereafter be bound by the terms of this Protective Order and the Stipulation and Confidentiality Agreement.

STIPULATION AND CONFIDENTIALITY AGREEMENT

All persons outside of the Securities and Exchange Commission to whom the Onek Report is disseminated, shall execute a Stipulation and Confidentiality Agreement in the form set out below:

I, _____, do hereby stipulate that I have received a copy of the Protective Order issued by Judge Pratt on February __, 1989, concerning the Onek Report, have read and understood it, and agree to be bound by its terms. I further agree that I will preserve the confidentiality of said report, and will not divulge its contents except as permitted by the terms of the Protective Order and this Stipulation and Confidentiality Agreement.

I further stipulate and agree, that I may disseminate the Onek Report or divulge its contents to my attorneys or employees, and, any such attorney or employee shall be bound by Judge Pratt's Protective Order and shall execute this Stipulation and Confidentiality Agreement. A copy of each said executed Stipulation and Confidentiality Agreement shall be provided to the Securities and Exchange Commission within 10 business days of its execution.

Stipulated and Agreed by: _____
Signature Date

I was first given access to said Onek Report on the _____ day
of _____, 19__.

Signature Date

Civil Action
No. 86-1834
(Pratt, J.)

Faith D. Ruderfer
FAITH D. RUDERFER
Special Trial Counsel