

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA A & M UNIVERSITY and)
BOARD OF REGENTS,)
)
Petitioners,)
)
vs.) Case No. 00-0664
)
CALVIN C. MILES, JR.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on May 31 and June 1, 2000, in Tallahassee, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: Bishop C. Holifield, General Counsel
Avery D. McKnight, Esquire
Ruth N. Selfridge, Esquire
Florida A & M University
Suite 300, Lee Hall
Tallahassee, Florida 32307-3100

For Respondent: Calvin C. Miles, Jr., pro se
501 Blairstone Road, Apartment 123
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Respondent should be dismissed from his employment with Florida A & M University, as proposed in a termination letter dated August 19, 1999.

PRELIMINARY STATEMENT

This matter began on August 19, 1999, when Petitioner, Florida A & M University, a state university under the supervision and control of Petitioner, Board of Regents, issued a "Final Decision" in the form of a letter advising Respondent, Calvin C. Miles, Jr., that he was being dismissed from his position with Florida A & M University "for violating University Rule 6C3-10.103, Florida Administrative Code." Even though the letter failed to offer Respondent a point of entry to contest that decision, through counsel, Respondent later requested a hearing on January 18, 2000. The matter was referred by Florida A & M University to the Division of Administrative Hearings on February 8, 2000, with a request that an Administrative Law Judge conduct a formal hearing.

By Notice of Hearing dated March 16, 2000, a final hearing was scheduled on May 31 through June 2, 2000, in Tallahassee, Florida. On May 1, 2000, the case was transferred from Administrative Law Judge Larry J. Sartin to the undersigned.

Two Motions to Dismiss filed by Respondent just prior to the hearing were denied by Orders dated May 25 and 26, 2000. At the final hearing, Petitioners presented the testimony of Deanna McKinley, Jackeline Pou, Symphony Parson, Crystal Jones, and Charles Slaton, present or former students at Florida A & M University; Carrie Gavin, Director of the Office of Equal Opportunity Programs; Robert M. Ruggles, Dean of the School of

Journalism, Media, and Graphic Arts; Dr. James Hawkins, Director of the Division of Journalism; and Cynthia Fields, a radio station employee. Also, it offered Petitioner's Exhibits 1-12, which were received in evidence. Respondent testified on his own behalf and offered Respondent's Exhibits 1-5. All exhibits were received in evidence except Exhibit 1.

The Transcript of the hearing (three volumes) was filed on June 15, 2000. By agreement of the parties, the time for filing proposed findings of fact and conclusions of law was extended to forty days after the filing of the Transcript. Timely filings were made by the parties on July 25, 2000, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, including the stipulation of the parties, the following findings of fact are determined:

1. In this employee termination case, Petitioner, Florida A & M University (FAMU), seeks to terminate the employment of Respondent, Calvin C. Miles, Jr., on the ground that he sexually harassed three female students and retaliated against two students in violation of Rule 6C3-10.103, Florida Administrative Code. Because FAMU is a part of the State University System, the Board of Regents was also identified as a Petitioner. Respondent has denied all allegations.

2. FAMU has a non-discrimination policy and harassment complaint procedure codified in Rule 6C3-10.103, Florida Administrative Code. Paragraph (6)(b) of the rule prohibits sexual harassment while paragraph (11)(a) prohibits retaliation. Respondent was subject to this policy and procedure, and on August 26, 1998, he signed a paper indicating that he had read and understood the same.

3. On August 22, 1997, Respondent was hired as General Manager of WAMF, a radio station owned and operated by FAMU and which employed a number of FAMU students. Whether he was considered a non-instructional or instructional employee is not clear. In any event, the station had been without a full-time manager "for a while," and Respondent was told to come in and "put in place some policies and format . . . and move the station in the direction that [FAMU] thought it should go." He was also told that the station should be operated as a teaching facility. FAMU agrees that some of Respondent's decisions in implementing these directives "caused some people to bristle."

4. Respondent's immediate supervisor was Dr. Hawkins, Director of FAMU's Division of Journalism. As such, Dr. Hawkins was required to prepare Respondent's annual evaluations. The first evaluation was prepared on September 29, 1998, and was transmitted to Respondent with a letter of the same date. In his letter, Dr. Hawkins concluded that Respondent's "first year here has been a mixed bag." While he acknowledged that Respondent had

"turned up the level of professionalism at the station substantially and in rather quick fashion," he noted other matters of concern. Among these was a concern that

at least three female students said that you had made inappropriate remarks to them. While none of these students have filed a complaint, I believe I have a responsibility to mention them now. In addition to the comments of these students, other female students have said that they just plan to stay away from the station so they do not have to be bothered. This is not the climate we want.

This letter placed him on official notice that some female students perceived his conduct towards them as offensive and having an improper sexual connotation.

5. In response to his evaluation, Respondent wrote Dr. Bryant a lengthy letter dated October 22, 1998. As to the allegations of sexual misconduct, Respondent "strongly suggest[ed] that the University conduct a thorough investigation of all complaints of this nature."

6. During his tenure with FAMU, Respondent had two or three meetings with the Dean of the School of Journalism, Media, and Graphic Arts, Dean Ruggles, and his immediate supervisor, Dr. Bryant, regarding the foregoing complaints of sexual misconduct. Respondent was urged to use "extreme caution," to reassess his behavior with female students, and warned that "if these allegations were taken to the complaint stage" by a student and found to be substantiated, there would be severe consequences. In addition, on at least one occasion, Respondent met with the

Director of FAMU's Office of Equal Opportunity Programs regarding a complaint by another student. Therefore, it is fair to infer that Respondent was well aware of on-going accusations being made against him, and that he should be extremely cautious in his behavior around female students.

7. After formal complaints of sexual harassment were filed by three female students in February 1999, FAMU's Office of Equal Opportunity Programs conducted an investigation. On May 11, 1999, the President of FAMU notified Respondent that the findings of the investigation revealed that Respondent had violated Rule 6C3-10.103, Florida Administrative Code, and that FAMU intended to terminate his employment. Respondent then availed himself of the right to have an "investigatory interview" by a University Personnel Committee on July 13, 1999. When the committee determined that no new facts had been presented, Respondent was dismissed from employment effective August 26, 1999. This appeal ensued.

8. Although the termination letter does not identify the specific allegations which form the basis for the termination, in a Joint Prehearing Stipulation filed by the parties, FAMU has alleged that Respondent "engaged in conduct and actions toward[s] [Symphony] Parson, [Deanna] McKinley[,], and [Jackeline] Pou that rose to the level of sexual harassment in violation of Rule 6C3-10.103(6)(b), Florida Administrative Code." FAMU further alleged that Respondent "exhibited behavior towards Ms. Parson and Ms.

Maria Williams, a witness in this matter, that rose to the level of retaliation as set forth in [Rule] 6C3-10.103(11)(a), F.A.C." However, there was no evidence regarding retaliation against Maria Williams, who was not a witness in this case, and that portion of the charges has been disregarded. Parson, McKinley, and Pou testified at the final hearing, and although Respondent disputed the accuracy of their allegations, their testimony has been accepted as being the most persuasive on these issues. Findings with respect to those allegations are set forth below.

a. Deanna McKinley

9. Deanna McKinley (McKinley) enrolled at FAMU in the fall of 1996 and was a senior at the time of hearing. On September 1, 1998, McKinley began working at WAMF and hosted an Inspirational Gospel Morning Show using the on-air name of "Deanna Devine." Respondent was her supervisor.

10. Throughout her employment at the radio station, McKinley felt "uncomfortable" around Respondent. This was because he would stare at her breasts, always place his hands on her shoulders when speaking to her, squeeze her shoulders, touch her hand in the Disc Jockey (DJ) booth, and stand extremely close to her while the two spoke. She was especially uncomfortable "being in the same studio with him, because the studio was in a different part of the building, it was locked, it was dark, [and] usually [she] was the only one there." Although she disliked Respondent's conduct and on occasion had told him that she

disapproved of it, McKinley was under the impression that unless she tolerated Respondent's actions, she would not be allowed to continue as a DJ or "make progress" at the station.

11. Besides the foregoing conduct, Respondent made personal remarks of a sexual nature to McKinley. For example, when she would bend over, he would say something like "Don't bend over like that, you will get someone excited." He also made a comment about how "adorable" and "kissable" she was, and that if he were her man, he "would just kiss [her] all the time." Once, when McKinley remarked ". . . little old me?", Respondent stared at her breasts and replied "Nothing on you is little, Deanna. But that's all right. It's all good."

12. In January 1999, McKinley accidentally dropped something on the floor in the studio and bent over to pick it up. Respondent again stated "You should not bend over like that, Deanna, you may get someone excited." This latest incident triggered a decision by McKinley to leave the radio station.

13. It is fair to infer from the evidence that McKinley perceived the radio station to have a hostile working environment, and that Respondent's conduct unreasonably interfered with her educational performance and ability to work at the station.

14. On February 1, 1999, McKinley submitted her letter of resignation to the radio station. On February 11, 1999, she

filed a complaint with FAMU's Office of Equal Opportunity Programs.

b. Symphony Parson

15. Symphony Parson enrolled at FAMU in the fall of 1997 with a major in broadcast journalism. She began working at WAMF that same year as a music director and on-air personality. Respondent was her supervisor.

16. In April 1998, and while on duty at the station, Parson was taking a telephone message for the station secretary late one afternoon when Respondent came up behind her and began rubbing her shoulders and then moved his hand onto her breast. She told him to stop, "cursed him," and then left the station.

17. In November 1998, Parson was in the station "writing on the file cabinet" when Respondent came up behind her and "brushed up against her" rubbing his shoulders against her. She again "cursed him out." A month later, he repeated the same conduct. According to Parson, she felt "violated" and "horrible" whenever this conduct occurred.

18. Respondent also engaged in inappropriate conversations with Parson when she was on duty at the station. For example, he asked her if she was having sex with her boyfriend, and he told her how "cute" and "sexy" she was. These conversations made her feel extremely uncomfortable and led Parson to try to avoid Respondent whenever possible. At the same time, however, Parson felt that she had to tolerate this conduct to keep her position

at the station. It is fair to infer from the evidence that Parson found the station to have a hostile working environment, and that Respondent's conduct unreasonably interfered with her educational performance and ability to work at the station.

19. On February 8, 1999, Parson filed a charge of sexual harassment against Respondent with the Equal Opportunity Office. A few days later, Respondent was placed on administrative leave. When he returned to his office to clean out his personal items, he passed by Parson and said "You're dead." Parson reported this to the police, was forced to get a cell phone out of fear for her personal being, and asked her parents to temporarily move into her apartment.

c. Jackeline Pou

20. Jackeline Pou (Pou) enrolled in FAMU's journalism program in August 1996. She began working at WANF in September 1997. Respondent was her supervisor.

21. While working at the station, Respondent would sometimes brush his body against Pou or touch her shoulders, which made her feel uncomfortable. Almost on a daily basis, he would make comments about how pretty she was or make comments about her "eyes". When he spoke to her, he would stare at her breasts. Once, she observed him staring at her "behind when [she] was walking away."

22. In the summer of 1998, and just after Pou finished speaking on the telephone with a friend, Respondent asked who she

was speaking with. When Pou responded "It's none of your business," Respondent said, "It couldn't have been a guy or the seat would have been wet."

23. Respondent's conduct made Pou feel intimidated and uncomfortable, and she disliked being alone in the radio station with Respondent during the evening hours. Besides creating a hostile work environment, such conduct also unreasonably interfered with Pou's educational performance and ability to work at the station.

24. On February 11, 1999, Pou filed a complaint of sexual harassment against Respondent with FAMU's Office of Equal Opportunity Programs.

d. Respondent's contentions

25. Respondent has steadfastly denied all allegations of sexual misconduct since they first surfaced in 1997 or 1998. At hearing, Respondent contended that he was an unpopular figure among the students due to his strong disciplinary measures. While this may be true, it does not justify his actions towards McKinley, Parson, and Pou. He suggested that McKinley's complaint was motivated by her displeasure with his disciplinary measures and failure to obtain her a parking pass. Respondent further suggested that Parson bore him ill-will after he demoted her to a different position at the station. He also contended that out of revenge, the three women met and conspired to file false complaints in an effort to have him removed from the

station. Finally, Respondent suggested that each of the complainant's testimony was full of inconsistencies and lacked specificity as to certain dates and times. These contentions have been considered by the undersigned and rejected.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57, Florida Statutes (1999).

27. As the party seeking to terminate Respondent's employment, Petitioners must prove by a preponderance of the evidence that the allegations which form the basis for the termination are true. See, e.g., Allen v. School Bd. of Dade County, 571 So. 2d 568, 569 (Fla. 3d DCA 1990).

28. As clarified in the parties' Joint Prehearing Stipulation, Petitioners have alleged that Respondent sexually harassed three female students (McKinley, Pou, and Parson), and retaliated against two others (Parson and Maria Williams). Because no evidence was presented regarding retaliation against Williams, no discussion on that issue is required. Further, even taking into account Respondent's remark to Parson that "You're dead," the remark, by itself and nothing more, does not constitute retaliation in the workplace as contemplated by the rule. Therefore, that portion of the charges is dismissed.

29. Rule 6C3-10.103(6)(b), Florida Administrative Code, governs this dispute, and it provides in pertinent part as follows:

(b) Harassment shall include:

1. Any slurs, innuendos or other verbal or physical contact reflecting on an individual's . . . gender . . . which has the purpose or effect of creating an intimidating, hostile or offensive educational or work environment; has the purpose or effect of unreasonably interfering with the individual's work or school performance or participation; or otherwise adversely affects an individual's employment or educational opportunities.

2. The denial of or the provision of aid, benefits, grades, rewards, employment, faculty assistance, services, or treatment on the basis of sexual advances or requests for sexual favors.

3. Sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or educational career; submission to or rejection of such conduct is used as a basis for educational or employment decisions affecting the individual; or such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance or creating an intimidating, hostile or offensive working or educational environment.

30. Also pertinent to this dispute are paragraphs (8)(b) and (c) of the same rule which provide the following procedural requirements:

(b) A complaint filed under this rule shall be filed on the Charge of Discrimination/ Harassment Form EOP100 Revised 1994, which is

incorporated herein by this reference, and submitted to the EOP Officer within 60 calendar days after the alleged occurrence of the discrimination/harassment incident. The form may be obtained from the EOP Office.

(c) No formal action, including investigation may be undertaken unless and until a formal complaint is filed. This provision shall not limit the University in any way from initiating its own review of the complaint and taking appropriate action should such be deemed warranted under the circumstances presented.

(Emphasis added)

31. Respondent has repeatedly contended that the foregoing rule calls for dismissal of the matter because at least two of the complaints were filed by the students more than 60 days after the last alleged harassment occurred, and thus FAMU is barred by its own rule from bringing this action. Although this contention was twice rejected, once by order and again by oral ruling during the final hearing, that ruling is reaffirmed a third time. Paragraph (8)(c) clearly allows FAMU to investigate a harassment complaint on its own volition, irrespective of whether or not it was filed within the 60-day time frame described in paragraph (8)(b).

32. Second, Respondent has twice contended, once before hearing and again at hearing, that the charges should be dismissed because he was not offered a point of entry in the termination letter. While it is true that the letter omitted this critical advice, his former counsel nonetheless filed a request for a hearing some four and one-half months after the

letter was issued, and Respondent has not shown how he was prejudiced by this procedural error. Moreover, after it received the request, FAMU promptly forwarded the matter to the Division of Administrative Hearings to be set for hearing. Therefore, the earlier rulings denying this contention are reaffirmed.

33. By a preponderance of the evidence, FAMU has established that Respondent engaged in unwanted physical contact of a sexual nature with McKinley, Parson, and Pou, that is, he touched or squeezed McKinley's and Parson's shoulders, he touched McKinley's hand, he brushed his body up against the bodies of all three, and he placed his hand on Parson's breast; that he engaged in nonverbal conduct of a sexual nature by staring at the breasts of McKinley and Pou whenever he spoke with them; that he made gratuitous, unwelcome, and offensive remarks of a sexual nature to all three; that this conduct created an intimidating, hostile, or offensive working environment; and that it unreasonably interfered with the students' work or educational performance.

34. The foregoing conduct constitutes harassment, as that term is defined by Rule 6C3-10.103(6)(b)1. and 3., Florida Administrative Code. Therefore, the harassment allegations which form the basis for the termination letter have been sustained.

35. Without accompanying argument or explanation, Respondent has attached to his Proposed Recommended Order a copy of the case of Gupta v. Fla. Bd. of Regents, 212 F.3d 571 (11th Cir. 2000), an employment discrimination case brought under Title

VII of the federal Civil Rights Act of 1964, presumably for the purpose of showing that, under the rationale of that decision, the alleged conduct, even if proven, does not equate to sexual harassment. In Gupta, a Florida Atlantic University female professor contended that she had suffered sexual harassment while employed at the university. Briefly, and in the context of an employment discrimination case (as opposed to a termination case for engaging in sexual harassment), the court described sexual harassment as being a hostile environment which is based on bothersome attentions or sexual remarks that are sufficiently severe or pervasive to create a hostile work environment; it also held that in making out a prima facie case of discrimination, among other things, the plaintiff must establish that not only did she subjectively perceive the environment as hostile and abusive, but also that a reasonable person would perceive the environment to be hostile and abusive. Id. at 582-583. Using these standards, the court found that there was insufficient evidence presented to show that the established conduct was frequent, severe, threatening, or humiliating, or that a reasonable person would perceive the conduct as hostile and abusive. Thus, it concluded that the case merely exemplified "the ordinary tribulations of the workplace." Id. at 586.

36. Assuming for the sake of argument only that FAMU must prove that Respondent's conduct meets the definitional standards used in federal employment discrimination cases, FAMU has

nonetheless met its burden. This is because the conduct was not isolated but rather was repeated over an extended period of time; it was severe (in that it included physical touching, staring, and crude remarks of a sexual nature); and it humiliated and embarrassed the women. Put another way, the conduct was not merely intersexual flirtation, ordinary socializing, or the "ordinary tribulations of the workplace." At the same time, not only did the women perceive the conduct as creating an abusive working environment, but a reasonable person would reach the same conclusion as well. Therefore, assuming arguendo that the definitional standards in Gupta apply to a state university employee discharge case, they have been satisfied.

37. Finally, Respondent's post-hearing request by letter dated July 12, 2000, that this case "be classified as confidential" due to "its sensitive and damaging nature" is denied on the ground the undersigned has no statutory authority to do so.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Florida A & M University enter a final order confirming the dismissal of Respondent as an employee.

DONE AND ENTERED this 29th day of August, 2000, in
Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(850) 488-9675, SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of August, 2000.

COPIES FURNISHED:

Bishop C. Holifield, General Counsel
Florida A & M University
Suite 300, Lee Hall
Tallahassee, Florida 32307-3100

Avery D. McKnight, Jr., Esquire
Ruth N. Selfridge, Esquire
Florida A & M University
Suite 300, Lee Hall
Tallahassee, Florida 32307-3100

Calvin C. Miles, Jr.
501 Blainstone Road, Apartment 123
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.