

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BENNY CHESTNUT,)	
)	
Petitioner,)	
)	
vs.)	Case No. 01-0604
)	
DEPARTMENT OF CORRECTIONS,)	
)	
Respondent.)	
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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 10 and November 28, 2001, in Chipley, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Ben R. Patterson, Esquire
Patterson and Traynham
Post Office Box 4289
Tallahassee, Florida 32802

For Respondent: R. Beth Atchison, Esquire
Department of Corrections
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STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding is whether Petitioner's name should be cleared.

PRELIMINARY STATEMENT

On July 2, 1999, Petitioner was terminated from his select-exempt employment position as assistant warden at the Washington County Correctional Institution. Because Petitioner's employment was in the select-exempt class, Petitioner was not told the underlying reasons for his termination nor afforded an opportunity to contest the termination.

In October 2000, Petitioner learned Respondent had reported to the Criminal Justice Standards and Training Commission (CJSTC) that the reason for his termination was substantiated charges of harassment.

On January 24, 2001, based on this information, Petitioner filed a Petition for Hearing in order to clear his name of the charges. The Petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in his own behalf and presented the testimony of 15 witnesses. Petitioner also offered 13 exhibits into evidence. Respondent presented the testimony of 6 witnesses and offered 8 exhibits into evidence.

FINDINGS OF FACT

1. Petitioner, Benny Chestnut, was employed as a correctional officer in 1985 by the Department of Corrections (Department) in the Career Service System. He subsequently obtained permanent status in the classes of Correctional

Officer I, Correctional Officer II, Correctional Officer Supervisor, Correctional Officer Supervisor I - Lieutenant, Correctional Officer Supervisor II, Correctional Officer Major, Correctional Officer Colonel, and Correctional Officer Superintendent II.

2. Throughout his career, Petitioner was considered a satisfactory employee. During his career, his employment record reflects only two disciplinary actions which occurred in 1988 and 1989. The 1989 disciplinary action resulted in a 10-day suspension.

3. From June 25, 1997 to July 2, 1999, Petitioner served as assistant warden at the Washington County Correctional Institution. At that time, he served in the classified Career Service System in the class of Correctional Officer Superintendent II. Most of Petitioner's career was on the security side of the institution.

4. In August 1998, Officer Tonya Miller filed a sexual harassment discrimination complaint against Petitioner. The complaint alleged that Petitioner had subjected her to unfair treatment by directing her immediate supervisor to keep her first on call to help with feeding the inmates at 5:00 am. The complaint was based on double hearsay of what Petitioner allegedly said to or instructed another Captain to do regarding

calling correctional officers who lived in institutional housing.

5. Because of the Miller complaint, an investigation, No. 98-12315, was begun. From September 1998 through March 1999, various people at the institution, including Miller and Petitioner, were interviewed by the investigator for the Office of Inspector General of the Department. The investigation expanded from the initial Miller complaint to include other alleged incidents involving four other women. A written report of the investigation was completed on April 8, 1999.

6. In 1999, CS/SB 1742, as enacted by the Florida Legislature, amended Section 110.205(2)(1), Florida Statutes. The bill transferred the position of Assistant Superintendent II from career service to select exempt service (SES) and changed the position title from assistant superintendent to assistant warden.

7. In general, employees in SES serve at the pleasure of the agency head and, as such, are subject to dismissal at the discretion of the agency head. Section 110.604, Florida Statutes.

8. In the first half of 1999, Petitioner was employed by Respondent as an Assistant Superintendent II.

9. At some point between April and May 27, 1999, the Department's civil rights review committee met and reviewed the

investigative report. The committee found cause to believe that Petitioner had sexually harassed the above-referenced women.

10. By letter dated May 27, 1999, Petitioner was formally notified that disciplinary charges were being brought against him based on the allegations of sexual harassment made by Tonya Miller, Jareetha French, Lori Whitfield, Tracy Barnes and Pamela Jackson. Because Petitioner was still employed under career service, the letter advised Respondent that he had a right to request a predetermination conference.

11. The next day, Petitioner was notified by letter dated May 28, 1999, that his position would be transferred from career service to SES.

12. On June 3, 1999, Petitioner requested a predetermination conference on the disciplinary charges being proposed against him.

13. By letter dated June 16, 1999, Petitioner was officially appointed by the Department to the position of assistant warden under the SES system. Also by a separate letter dated June 16, 1999, Petitioner was advised that the requested predetermination conference was scheduled for July 1, 1999. The letter advised Petitioner that he could present relevant information and or affidavits at the predetermination conference. The letter states that a final decision on the

disciplinary charges would not be made until after "all the facts are carefully considered."

14. By letter dated June 21, 1999, Petitioner was advised that the date for the predetermination conference had been changed from July 1 to July 9, 1999. The letter indicates that the change in dates was made at the request of Petitioner's attorney.

15. On or about July 2, 1999, the Department notified Petitioner that his services as assistant warden were terminated as of 5:00 p.m., on July 2, 1999. No reason was stated in the letter.

16. Because Petitioner had been dismissed under the SES, Petitioner was not afforded any administrative or evidentiary hearing on the loss of employment or the charges of sexual harassment. The predetermination conference was never held and no facts were ever finally determined by the Department.

17. On July 23, 1999, the Department completed a Corrective Action/Disposition Report on Case No. 98-12315. The report reflects that the Department believed there was cause to believe the alleged sexual harassment/misconduct occurred. Even though no facts were ever determined by the Department, the disposition report finds the allegations of sexual harassment substantiated and indicates that Petitioner was terminated on July 2, 1999.

18. The CJSTC grants to individuals law enforcement certification and, as such, takes action to revoke an individual's certification for cause as defined by statute. At the time of Petitioner's dismissal, he held an auxiliary law enforcement certification which is equivalent to inactive certification. Petitioner's certification was auxiliary because active certification is not necessary in the position of assistant superintendent or assistant warden.

19. Pursuant to Section 943.139(1) and (2), Florida Statutes, the Department is required to notify the Public Employees Relations Commission when an officer has separated from employment and the reason for that separation. Petitioner's license was listed on an annual audit of the Department's employees' CJSTC licensure status. Because of the audit, Respondent notified CJSTC that Petitioner had been dismissed for sexual harassment.

20. By letter dated October 25, 2000, from the Criminal Justice Professionalism Program of the Florida Department of Law Enforcement (FDLE), Petitioner was notified that Respondent reported to the CJSTC that it had disciplined Petitioner by terminating his employment for the offense of sexual harassment. Since such misconduct is not the type of conduct for which CJSTC disciplines a licensee, no action, other than noting the dismissal and the reason for the dismissal in Petitioner's

record, was taken by CJSTC. These records are reviewed by potential law enforcement employers. Thus, Petitioner is subject to harm from this information, if it is incorrect.

21. As indicated, a total of five women "complained" that Petitioner had sexually harassed them. However, it is unclear from the evidence or the investigative file whether the four women, other than Tonya Miller, filed any formal complaints against Petitioner.

22. Many of the complaints centered around invitations to lunch and parties at a landing close to where Petitioner's houseboat was docked. The evidence showed that Petitioner extended these types of invitations to male and female co-workers and subordinates. There was no evidence that Petitioner asked for any sexual favors at any luncheon or lakeside/houseboat party or that these invitations were extended for such a purpose. Indeed, when the invitations are put into context, they were not extended for any reason other than an attempt by Petitioner to include most of the people he worked with in going to lunch or cookouts he was putting on for the institution's staff. There was no evidence that Petitioner made any offensive remarks at any such luncheon or party.

23. The alleged parties/cookouts at the landing were family affairs. Children were present, spouses attended together. All the witnesses testified that Petitioner conducted

himself appropriately at these parties. Occasionally, some vulgarities occurred at these parties, but these activities were not attributed to Petitioner. Moreover, these cookouts were not work-related.

24. The principal complainant was Tonya Miller. Ms. Miller is not known to be a credible person. Both, at the hearing and in her statements to the investigator, Ms. Miller seemed more interested in airing the alleged complaints of others, especially those of Jareetha French. Ms. French did not testify at the hearing, and a review of her statement to the investigator does not contain any facts which would demonstrate that Petitioner ever sexually harassed Ms. French either on or off the job.

25. The complaints, as best as could be discerned from the investigative file, referred to a Christmas party that must have been held around Christmas of 1995, and an allegedly unsolicited appearance of Petitioner at a lake where Ms. Miller, Ms. Barnes, and Ms. Whitfield were boating or jet skiing. In all instances the dates of these incidents' occurrences were unclear but seemed to be old. None of these alleged incidents were job-related or had any impact on the complainants' employment. Moreover, like Ms. Miller, neither Whitfield nor Barnes is considered to be a truthful person.

26. Ms. Miller's initial complaint regarding feeding inmates was not established by any evidence then or now.

27. The Christmas party incident allegedly occurred when Petitioner attended a Christmas party that Miller, Whitfield, and Barnes were having at their home on the institution's grounds. Petitioner had been invited to join them for a drink. All participants at the party were drinking alcohol. Allegedly, Petitioner arrived intoxicated and with an allegedly obvious erection. At some point, Petitioner asked one of the three women to "come sit on Santa's lap and tell him what she wanted for Christmas," or words to that effect. Everyone was laughing and joking with each other and Petitioner left the party. Afterwards, Miller, Whitfield, and Barnes engaged in a mock fight on the floor which involved sexually suggestive acts.

28. At the hearing, Ms. Barnes recanted her earlier statement regarding Petitioner's Santa comment and testified that Petitioner did not make the statement. Ms. Miller maintained that Petitioner did make the Santa statement. Petitioner denied he made the statement. The more convincing evidence is that the statement was not made.

29. Miller and several of her friends and, at times roommates, Lori Whitfield and Tracy Barnes, frequently used vulgarities such as "MF" and referred to each other as "my bitch, whore dog, etc." These vulgarities were used in front of

others while they were at work in the institution. At home, in the presence of other co-workers, Miller, Whitfield, and Barnes engaged in play fights involving pretend sexually suggestive acts. All three women drank alcohol and were known to drink alcohol in front of others and, themselves, become intoxicated. All three, both to Petitioner and in referencing Petitioner to others, referred to Petitioner as Uncle Benny. Whitfield and Barnes borrowed Petitioner's truck and camping equipment. Petitioner had no sexual interest in either Miller, Whitfield or Barnes. In fact, Whitfield and Barnes maintained a romantic relationship with each other which Petitioner respected.

30. However, even if Petitioner had made such a statement, the statement was not work-related and had no impact on any of these women's employment. Clearly none of these women had been sexually harassed by or even remotely offended by any comments Petitioner may or may not have said at their party.

31. Mr. Chestnut's appearance at the lake occurred because he was asked to attend and provide directions to the lake by Paul Steverson, a correctional officer who had been invited to the lake. At the time of the lake visit, Petitioner was recovering from an operation on his heel. Petitioner came with Mr. Steverson and sat on the bank while the others played. Unlike the others, he had no beer to drink. Mr. Steverson heard no complaint from any of the women about Petitioner's

appearance. Again, as with all the complaints, the evidence did not demonstrate any conduct on the part of Petitioner which constituted sexual harassment.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this action. Section 120.57(1), Florida Statutes, and Amendment 5 and 14 of the U.S. Constitution. See Sickon v. School Board of Alachua County, 719 So. 2d 360 (Fla. 1st DCA 1998).

33. Petitioner, after learning that the Department had disseminated information regarding his dismissal, requested this due process name-clearing hearing. Petitioner denies that he sexually harassed the complainants.

34. Discharge from public employment under conditions that put the employee's reputation, honor, or integrity at stake gives rise to a liberty interest under the Fourteenth Amendment to the U.S. Constitution to a procedural opportunity to clear the former employee's name. Board of Regents v. Roth, 408 U.S. 564 (1972); Buxton v. City of Plant City, Florida, 871 F.2d 1037 (11th Cir. 1989); Codd v. Velger, 429 U.S. 624 (1977); and Bishop v. Wood, 426 U.S. 341 (1976).

35. In this case, the evidence showed that Petitioner was discharged for allegedly sexually harassing five women. A charge of sexual harassment is, by definition, one that impugns

a person's reputation, honor, and integrity. The evidence also showed that the Department disseminated information about the dismissal and the charges in a manner that is likely to become public when it notified CJSTC of the reason for Petitioner's dismissal and left the information regarding the charges in Petitioner's file.

36. Thus, the complaints, if any are to be justified on the basis of sexual harassment, must show that Petitioner, through sexually-oriented conduct, created an intimidating, offensive, or hostile working environment for Tonya Miller or others. See Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

37. In Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 106 S. Ct. 2399, 91 L.Ed.2d 49 (1986), the Supreme Court distinguished between two forms of sexual harassment. One is quid pro quo; the other is a hostile environment claim that requires severe or pervasive offensive conduct. The quid pro quo is not at issue here.

38. In Burlington Industries, Inc. v. Ellerth, ____ U.S. ____, 118 S. Ct. 2257 (1998), Ellerth was subjected to repeated boorish and offensive remarks and gestures and, in addition, on three occasions, her supervisor made comments that could be construed as threats to employment benefits. The conduct lasted over a 14-month period of time. Here, there is no such incident

on which the employer buttresses its case. The best that can be said of the testimony of the complainants was that Petitioner's invitations to lunch or a lake side party hosted by Petitioner made them feel uncomfortable. None complained to him about the invitations and all seemed to appreciate him, not only by reference to him as "Uncle", but to use his truck and borrow his camping equipment. This hardly shows severe and pervasive offensive conduct.

39. In Faragher v. City of Boca Raton, ___ U.S. ___, 118 S. Ct. 2275 (1998), the Court considered the issue of what constituted a hostile environment. Ms. Faragher was a lifeguard for the City of Boca Raton who was subjected to repeated touching and offensive sexual remarks that demeaned her and other women. Citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993), the Court said "that in order to be actionable under the statute, a sexually objectionable environment must be both objectionable and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." 118 S. Ct. at 2283.

40. The trier of fact is instructed to look at all the circumstances, including the frequency of the conduct, its severity, whether it is physically threatening or humiliating, whether it interferes with employee work performance, or is a

mere utterance. Id. Simple teasing, off-hand comments, and isolated incidents may not form the basis of a discrimination case.

41. In Oncale v. Sundowner Offshore Services, Inc., ____ U.S. ____, 118 S. Ct. 998, 1003 (1998), the Court said:

The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids behavior so objectively offensive as to alter the "conditions" of the victim's employment. "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview." [Citing Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 370, 126 L.Ed.2d 295 (1993)] We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake socializing in the workplace - such as male-on-male horseplay or intersexual flirtation - for discriminatory "conditions of employment."

42. In this case there is no severe or pervasive sexually tinged conduct on the part of Petitioner to support any finding of sexual harassment. Moreover, the evidence did not show that any of the alleged complainants jobs were affected or were offended by any of Petitioner's conduct.

43. The Department had no cause for the termination of Petitioner and should not have indicated to either the FDLE or to the Florida Commission on Human Relations that he was discharged or, "Terminated for Violation of Chapter 943.13(4),

Florida Statutes, or Violation of Moral Character Standards as defined by 11B-27.0011, Florida Administrative Code."

RECOMMENDATION

Based upon the following findings of fact and conclusions of law, it is

RECOMMENDED that a final order be entered by the Respondent Department of Corrections clearing Petitioner Benny Chestnut's name and notifying the Florida Department of Law Enforcement that any reference to substantial sexual harassment charges as the underlying reason for the termination of Petitioner's employment be removed from his record.

DONE AND ENTERED this 1st day of February, 2002, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
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this 1st day of February, 2002.

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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.