

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY ANN WINTERS,)
)
 Petitioner,)
)
 vs.) Case No. 01-0786
)
 BOARD OF REGENTS AND UNIVERSITY)
 OF SOUTH FLORIDA,)
)
 Respondents.)
)
 _____)

RECOMMENDED ORDER

On April 23-25, 2001, a formal administrative hearing in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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And

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STATEMENT OF THE ISSUE

The issue in the case is whether there is cause for the University of South Florida to terminate the employment of women's basketball coach Jerry Ann Winters.

PRELIMINARY STATEMENT

By letter dated February 5, 2001, Albert C. Hartley, University of South Florida Vice President for Administrative Services, notified Jerry Ann Winters that her employment as head coach for the women's basketball team was terminated. By Petition for Formal Hearing dated January [sic] 16, 2001, Ms. Winters challenged the termination. The University forwarded the Petition to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

The University proposes to terminate Ms. Winters' employment for two reasons. First, the University alleges that Ms. Winters retaliated against a team member who filed a complaint of racial discrimination against the coach with University officials and that such alleged retaliation is a violation of the school's policy. Second, the University alleges that Ms. Winters made dishonest statements regarding the player's dismissal in a written response provided to a University employee investigating the complaint of retaliation and that such alleged dishonest statements are contrary to the terms of her employment contract.

During the hearing, the University presented the testimony of Ms. Winters, Wendy Camille Blake, and Dr. Laurey Striker, and the videotaped deposition testimony of Dr. Judy Lynn Genshaft.

Ms. Winters testified on her own behalf and presented the testimony of Paul Griffin, Meagan Elizabeth Smith, Sarah Marie Wilson, Abigail K. Wilson, Shannon Layne, Ashley Elizabeth Teets, Sonya Swick, Lindsey Smith, Melissa Jane Tape, and Wanda Guyton.

Joint exhibits numbered 1-9 and 11-24 were admitted into evidence. A Transcript of the hearing was filed on May 2, 2001. Both parties filed Proposed Recommended Orders on June 4, 2001, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, Jerry Ann Winters (Winters) was the head coach for the University of South Florida (USF) women's basketball team. Winters is a Caucasian female.

2. Winters has coached collegiate women's basketball for 24 years. There have been players from different racial backgrounds on almost all of the teams she has coached. Prior to the complaints of racial discrimination referenced in this Recommended Order, there have been no allegations of discrimination made against her in any previous employment.

3. At all times material to this case, Melikki Dione Smith (Smith) was a member of the USF women's basketball team. Smith is an African-American female.

4. In April of 1999, Smith filed a complaint with the USF Office of Equal Opportunity Affairs (EOA) against Winters alleging discrimination against players because of race. Based on the complaint, USF officials began an inquiry into the situation.

5. Traditionally, Winters meets with individual team members at the conclusion of each basketball season to discuss the team's performance and to assess whether improvements can be made.

6. Winters met with the individual members of the 1998-99 USF team in April 1999. The 1999 meetings were generally discussions of individual player performance and of issues affecting the team.

7. The April 1999 individual meetings occurred after Smith's discrimination complaint had been filed and before the USF investigation of the complaint was completed. For some reason, Winters tape-recorded the meetings she held with each player in April 1999, with each player's consent. She had not previously recorded player meetings.

8. Most of the meetings between Winters and a player concluded within an hour or so. The meeting between Winters and

Smith lasted several hours. Hiram Green, an employee of the USF athletic department who investigated Smith's complaint of discrimination, attended the Winters-Smith meeting. An assistant coach was also present during the meeting.

9. In addition to Winters' tape recorder, Smith also brought a recorder and taped the meeting.

10. Winters' tape recordings were admitted into evidence during the hearing. The general quality of the recordings is very poor. Many of the remarks made by the coach, the player, or other attendees are unintelligible.

11. Smith did not testify at the hearing and her recording was not offered into evidence.

12. Review of the taped meetings establishes that Winters was aware during the April 1999 meetings that some of the African-American players were alleging discrimination because of race. She was also aware that Smith had written a letter to USF officials about the situation, although it is unclear whether Winters knew Smith had officially filed a discrimination complaint.

13. The University suggests that because meetings with some African-American players were longer than meetings with other players, players were being treated differently because of race.

14. There is no evidence that any player was unable to leave the room and terminate the meeting at any time.

15. The issues raised by some African-American players centered on game decisions made by coaches which affected playing time, on team practice situations, and on team travel accommodations. It was logical that the complaints were discussed during the player meetings and reasonable that Winters' meetings with some African-American players lasted longer than the meetings with some Caucasian players.

16. USF also asserts that the "tone" of Winters' meeting with Smith suggests some type of disparate treatment. A review of the recorded meeting (to the extent permitted by the poor quality of the tapes) indicates that the meeting was a frank discussion between the coach and the player about the problems perceived by each.

17. During the meeting, Winters questioned Smith about the allegations and asked Smith to provide specific examples of the coach's behavior that Smith viewed as discriminatory. The player discussed situations that she believed indicated disparate treatment of players based on race. Winters responded to each example.

18. There was also a discussion related to team discipline and to Smith's behavior on the court. A specific incident was discussed where Smith, presumably unhappy with a coach who

shouted at her during a game, shouted back at the coach. Winters explained that players are subordinate to coaches and that such behavior on the player's part was, and would continue to be, unacceptable. Winters also advised Smith that the coaches would continue to shout at under-performing team members and suggested that if Smith could not tolerate being "yelled at," she might consider finding another basketball program.

19. There was no credible evidence presented during the hearing that any of Winters' statements during the April 1999 meeting with Smith were unreasonable. None of Winters' remarks suggested that there was any plan to retaliate against Smith for alleging that there was discrimination by the coaches against African-American players.

20. There is no evidence that Winters ever received a copy of Smith's complaint or received a copy of any report from Hiram Green's investigation.

21. Hiram Green did not testify during the hearing, but based on the results of his investigation, USF eventually conducted a "diversity training" session for basketball team coaches and players.

22. Although the 1999-2000 women's basketball season passed without major incident material to this proceeding, it was difficult for Winters to establish a working relationship with Smith during pre-season activities.

23. During the hearing, Smith was described as distant and "standoffish." There was little communication between the coach and the player. During practice, Smith was inattentive, sometimes responded to direction from Winters by rolling her eyes or ignoring the instruction, and was non-compliant with team dress requirements.

24. Winters, apparently concerned about appearing to be insensitive, permitted Smith's behavioral problems to continue with little correction.

25. USF asserts that at some point during the season, Winters made a statement to a team member about team operations being "better" when Smith was gone. Based on the evidence presented during the hearing, it is not surprising that Winters would have believed that the team would have been "better" without Smith, but there is no credible evidence that prior to April 2000 Winters had any plan to discipline the player.

26. In March 2000, a number of team members rode a shuttle bus from Tampa International Airport to the USF campus after flying back from the final "away" game of the season. Because some players made other travel plans, not all team members were on the bus.

27. While riding the bus, Smith sang a song and other team members joined in on the chorus. Apparently creating lyrics as she sang, Smith eventually sang a lyric about the coach.

28. Although there is disagreement about the actual lyric Smith sang, Winters and a number of players who testified at the hearing heard Smith sing a lyric to the effect of "we ain't gonna have no coach no more." USF presented no credible evidence to the contrary.

29. Prior to the coach lyric being sung, the mood on the bus was friendly and good-humored, but Smith's song caused the mood to change rapidly. Winters was humiliated and felt that the lyric was an insult. Some players believed it was a statement of disrespect by Smith towards the coach.

30. Winters eventually discussed the situation with USF Athletic Director Paul Griffin. Winters told Griffin she believed Smith owed her an explanation and suggested that if Smith were unwilling to provide a reasonable explanation, Winters would terminate her from the team.

31. Griffin told Winters that if Smith were dismissed from the team, Griffin wanted Smith to retain her scholarship so that her studies could continue. Winters agreed to allow Smith to remain on scholarship.

32. Winters met with Smith on April 10, 2000, and asked for an explanation of what Smith meant by the song lyric. According to Winters' testimony at hearing, Smith asserted that Winters could not have heard the song because of the bus seating

arrangements, denied singing the lyric, and then offered a nonsensical explanation for the lyric.

33. During the meeting, Smith also challenged Winters' authority as head coach and criticized Winters for not calling a team meeting to discuss a matter regarding the coaching staff.

34. Winters was unsatisfied with Smith's response and displeased by the criticism. She advised Smith that if she were unable to offer a rational explanation for the bus incident, Winters would remove Smith from the team. The player offered no additional explanation.

35. Winters and Smith were the only participants in the meeting of April 10, 2000. Because Smith did not testify at the hearing, there is no evidence contrary to the testimony of Winters, and her testimony is credited.

36. On April 11, 2000, Winters encountered Smith on the USF basketball court and after inquiring into the player's presence, restated her decision to dismiss Smith from the team. Smith thereafter met with several other players and told them that she had been dismissed from the team for her behavior on the bus.

37. On April 26, 2000, Smith filed an "allegation" complaint of retaliation against Winters with the USF EOA. An "allegation" is apparently different than the "formal complaint" which was filed on August 28, 2000.

38. USF Policy #0-007 sets forth the University's commitment to equal educational opportunities and provides in Section II.B. as follows:

It is prohibited for any administrator, supervisor or other employee to discriminate or to take any retaliatory action against an individual who, in good faith, has opposed an alleged unlawful practice or has made a charge, testified assisted or participated in any manner in an investigation or proceeding, under provisions of applicable law.

39. Section 8.c. of the Head Coaching Agreement between USF and Winters provides that USF may terminate the agreement for "[c]ause at any time. . . ." Section 8.c.(8) defines "cause" as follows:

any conduct of the Coach which violates any Law or University Rules, or . . . any other conduct of the coach which in the sole judgment of the University reflects adversely on the University or its educational mission. . . .

40. The evidence fails to establish that Winters dismissed Smith from the team as an act of retaliation against the player for filing the complaint of discrimination.

41. As head coach, Winters was responsible for player discipline. There was no credible evidence presented that Smith's removal from the team was not warranted by her behavior on the bus trip and during the related meeting with the player.

42. The only evidence presented during the hearing as to the content or conduct of the meeting between Winters and Smith was Winters' testimony, which is credited.

43. After the USF EOA completed an investigation of the retaliation complaint, a "Final Investigative Report" was issued. The Final Investigative Report identifies Smith as the Complainant and Winters as the Respondent. The report admitted into evidence is dated October 25, 2000, but indicates that it was "corrected for typographical error" on that date. The date upon which the report was initially released is unclear.

44. By memo from Edouard L. Piou, USF Assistant Vice President/EOA, dated August 28, 2000, Winters was asked to "provide an appropriate response to the allegations contained in the complaint." The allegations were referenced in an attachment to the memo, and were set forth as follows:

1. The Complainant participated in the investigation conducted by Hiram Green in 1999 regarding alleged race discrimination by the Respondent.
2. The Respondent had knowledge that the Complainant had participated in the investigation conducted by Hiram Green.
3. The Complainant was dismissed from the Women's Basketball Team on April 10, 2000.
4. The Complainant was dismissed from the Women's Basketball Team because of the participation in the 1999 investigation conducted by Green.

45. In her' affidavit of response dated November 16, 2000, Winters stated that she did not know whether Smith participated

in the investigation, that she did not know which team members participated in the investigation, that Smith was dismissed from the team for the reasons previously identified herein, and that the dismissal had nothing to do with any participation in an investigation.

46. USF asserts that Winters response was "dishonest" because she was aware that Smith was one of the players who filed a complaint against her in April 1999.

47. Section 8.c. of the Head Coaching Agreement between USF and Winters provides that USF may terminate the agreement "for [c]ause at any time" Section 8.c.(5) defines "cause" as follows:

Any fraud or dishonesty of Coach while performing the duties required by this Agreement, including, but not limited to, falsifying, altering or otherwise fraudulently preparing any document(s) or record(s) of, or required by, the University. . . .

48. Winters testified that because she never received a copy of the April 1999 complaint or the subsequent report, she was not certain that Smith participated in the actual investigation. The weight of the evidence establishes that Winters was aware in April 1999 that Smith had written a letter to USF officials regarding the alleged discrimination. It is reasonable to infer that Winters suspected that Smith participated in the investigation.

49. Winters also testified that she responded to the USF inquiry as directed by legal counsel (not the counsel representing her in this proceeding). There is no evidence to the contrary.

50. There is no evidence that Winters' written response to the allegations was an attempt to mislead USF officials. Prior to submitting the written statement, Winters was interviewed by the USF employee who reviewed the retaliation complaint. During the interview, Winters acknowledged knowing that Smith was one of the players who raised concerns in 1999 regarding alleged discrimination. Based on Winters' verbal acknowledgement during the interview, it is illogical to assume that Winters' written response, prepared as directed by legal counsel, was an attempt to conceal information from or otherwise deceive USF officials.

51. Although the President of the University expressed concern about the issue of Winters' written response to the allegations, there is no evidence that the written response, without evidence of other cause, is sufficient to warrant termination of the head coaching agreement between Winters and USF.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

53. The issue in this case is whether there is cause under the terms of Winters' contract of employment with USF to permit USF's termination of the contract. USF has the burden of establishing that cause exists to terminate the employment of Jerry Ann Winters. Florida Department of Transportation v. JWC Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In this case, the burden has not been met.

54. USF asserts that Winters' employment contract can be terminated for two reasons. First, USF states that Winters' dismissal of Smith from the team was in retaliation for Smith's filing of the discrimination complaint against Winters, that such retaliation is a violation of USF policy, and that Winters' contract as head coach requires that she comply with USF policy. Second, USF says that in her written response to the charges of alleged retaliation, Winters was dishonest and that such dishonesty is contrary to the requirements of the employment contract. The University failed to present evidence at the hearing to establish facts sufficient to support the termination for either reason.

55. USF presented the testimony of the University employee who spoke to team players and coaches about the alleged retaliation, the testimony of the administrator who reviewed the employee's report, and the deposition testimony of the University president who reviewed the administrator's review.

56. The issue in the case is not whether USF's inquiry into Smith's dismissal was proper or whether the in-house review of the inquiry was adequate. This administrative hearing is a de novo proceeding designed to find facts based on evidence presented during the hearing and to assist an agency head in formulating the final action to be taken. McDonald v. Dept. of Banking & Finance, 346 So. 2d 569 (Fla. 1st DCA 1977)

57. USF alleges that in dismissing Smith from the team, Winters retaliated against Smith for the earlier filing of the complaint alleging racial discrimination. The evidence presented at the hearing fails to establish that Smith's dismissal was an act of retaliation by Winters.

58. As to the retaliation complaint, USF presented the testimony of Camille Blake, an employee in the USF Office of Equal Opportunity Affairs (EOA) to whom the complaint of retaliation was assigned.

59. Ms. Blake's inquiry consisted of numerous telephone calls and a few personal conversations, from which she made notes. Blake took no sworn statements from any of the parties to whom she spoke. The only records of the telephone calls are notes Blake prepared at some point after her conversations.

60. At the hearing, Blake testified as to how she processed her assignment. There is no evidence that Blake failed to follow USF procedures, such as they are, for

completing her work. Those procedures apparently do not require collection of sworn statements. Unsworn testimony is not competent evidence. Section 90.605(1), Florida Statutes. See also Stadler v. Ford Werke AG, 581 So. 2d 632 (Fla 4th DCA 1991); Houck v. State, 421 So. 2d 1113 (Fla 1st DCA 1982).

61. Ms. Blake testified as to conversations she had with various persons about the alleged retaliation. Some of the persons Blake talked to also testified at the hearing, but others, significantly including Complainant Dione Smith, USF employees Hiram Green, Lisa Walker and Ron Gathright, and players Aiya Shepard and Avia Lee, were not called to testify.

62. Ms. Blake's recollection of what Smith said about her dismissal from the team is uncorroborated hearsay evidence and is not sufficient to form the basis for Findings of Fact set forth in this Order. Section 120.57(1)(c), Florida Statutes.

63. Likewise, Ms. Blake's recollection of discussions with Hiram Green and Lisa Walker, central to her conclusion that Winters committed a retaliatory act, are also uncorroborated hearsay evidence and insufficient to form the basis for Findings of Fact. Section 120.57(1)(c), Florida Statutes.

64. Winters testified that she dismissed Smith from the team because of Smith's response when questioned about the bus incident. Because Smith did not testify at the hearing, there

is no credible evidence contrary to Winters' sworn recollection of the meeting and of Smith's behavior during the meeting.

65. The evidence presented at the hearing establishes that during the meeting on April 10, 2000, at which time the bus incident was discussed, Smith responded to Winters in a disrespectful manner. As the head coach, Winters had the authority to dismiss Smith from the team. There was no credible evidence presented at the hearing that Winters' dismissal of Smith was unreasonable under the circumstances or was in retaliation for the 1999 discrimination complaint.

66. USF also asserts that termination of Winters' employment is justified based on her "dishonest" written response to the Final Investigative Report written by Ms. Blake.

67. The American Heritage Dictionary defines "dishonest" as "disposed to lie, cheat, defraud, or deceive." The Merriam-Webster Collegiate Dictionary defines "dishonest" as "lack of honesty or integrity: disposition to defraud or deceive."

68. Winters responded to the USF charges as directed by legal counsel. There is no evidence that the written response was prepared in an attempt to defraud or deceive Ms. Blake or other USF officials.

69. Prior to submitting the written statement, Winters admitted to Ms. Blake that she knew Smith was one of the players who voiced concerns regarding alleged discrimination in 1999.

The written response to the University was prepared after Winters obtained legal counsel to represent her during the investigation and was submitted to USF officials as an affidavit attached to supporting documentation. Under the circumstances of the case, Winters' written response was not unreasonable and is insufficient, without further cause, to warrant termination of her contract.

70. In all probability, Winters' written denial of USF's allegations was designed to frame the basis for the challenge to the proposed termination and intended to require the University to produce evidence sufficient to establish factual grounds supporting the termination. The formal administrative hearing was the University's opportunity to offer evidence supporting the termination. The University failed to provide evidence at the hearing sufficient to establish grounds for termination.

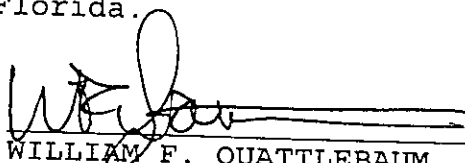
71. This Recommended Order should not be taken to suggest that complaints of racial discrimination or retaliation against any person have been minimized or disregarded. There may have been, and perhaps still are, problems of some type within the University of South Florida women's basketball program. However, determination of whether problems, if they exist, result from the insensitivity of team coaches or university officials, or from the unmet expectations of student athletes, is not relevant to this proceeding. The issue in this case is

simply whether the evidence presented at the hearing establishes that there is cause under the terms of the employment contract between USF and Coach Winters to terminate her employment. As set forth herein, USF failed to meet the burden of establishing such cause.

RECOMMENDATION

Based on the evidence presented at the hearing as discussed in the foregoing Findings of Fact and Conclusions of Law, it is recommended that the University of South Florida issue a Final Order reinstating Jerry Ann Winters' employment contract and providing payment for all unpaid salary to which she is entitled under the contract from the date of her termination through the date of reinstatement.

DONE AND ENTERED this 2nd day of July, 2001, in Tallahassee, Leon County, Florida.


WILLIAM F. QUATTLEBAUM
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Filed with the Clerk of the
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this 2nd day of July, 2001.

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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.