

1996 WL 293525

Only the Westlaw citation is currently available.
United States District Court, District of Columbia.

Bessye NEAL, et al., including Lt. James W. Clark,
Plaintiffs.

v.

DIRECTOR, D. C. DEPARTMENT OF
CORRECTIONS, et al., Defendants.

Civ. A. No. 93-2420 (RCL).

|

Claimant No. 24.

|

May 30, 1996.

MEMORANDUM OPINION

LAMBERTH, District Judge.

*1 This matter comes before the court on the motion of Claimant No. 24, Lt. James W. Clark, for a preliminary injunction prohibiting defendants from terminating his employment with the District of Columbia Department of Corrections pursuant to a Notice of Final Decision issued on December 21, 1995. Because the claimant has established a substantial likelihood of success on the merits of his claim that his discharge is retaliatory, and because allowing this termination to proceed would irreparably injure the claimant's right to be treated in a non-discriminatory manner by this proven wrongdoer, no third-party will be harmed, and the public interest lies in protecting the employee in these circumstances, the claimant's motion for a preliminary injunction is GRANTED.

In this court's Final Judgment and Order I of August 9, 1995, this court found that the D.C. Department of Corrections "engaged in a pattern or practice of retaliation against employees who challenged or complained of sexual harassment or who assisted others in challenging sexual harassment." The court also found that retaliation

"against employees who challenged or complained of sexual harassment or who assisted others in challenging sexual harassment was the custom or unwritten policy of the Department" and that the "Director or other high ranking officials of the Department knew of this custom or unwritten policy of retaliation and went along with it by affirmatively supporting it or showing deliberate indifference in failing to take adequate measures to stop it."

In Order IV, also issued on August 9, 1995, this court ruled that claimants, such as Lt. Clark, are entitled at trial "to an inference, deriving from the jury's liability phase verdict, that any unfavorable employment incident arose from the Department's pattern or practice" of retaliation.

Lt. Clark, a supervisor at the D.C. Jail, filed a timely claim of retaliation, naming (among others) Captain Earl Glover and Deputy Departmental Director William Plaut, for reprisal because of Lt. Clark's outspoken public opposition to sexual harassment in the Department. Lt. Clark's claim summary was timely filed, and following discovery, he will have a trial on his claim. He seeks this interim relief now to prevent the termination of his employment pending his trial.

Lt. Clark was hired in 1983, and by 1988 had been promoted to Sergeant after scoring tenth out of over five hundred taking the Sergeant's examination. In 1993, Clark was promoted to Lt., after scoring fourth out of several hundred taking that examination. He received numerous performance ratings throughout his career of "excellent" or "outstanding."

In June 1995, an internal sexual harassment fact-finding committee that investigated Lt. Clark's claim of retaliation found that Lt. Clark "is not afraid to speak up to supervisors about acts of unfairness on the part of management" and that "this practice has put him in a very positive light with front-line officers, who know and support him." The committee also noted, however, that Lt. Clark's peers in the supervisor ranks view him as a "turncoat." Nevertheless, Major John Pendergraph, a ranking supervisor at the Jail, advised the committee that Lt. Clark is a "very good" supervisor.

*2 Lt. Clark has filed with the court numerous affidavits demonstrating that he will be able to establish at the trial of his claim that on numerous occasions during roll calls (of the 100 officers on his shift, and fellow supervisors), he criticized the Department's inadequate enforcement of

its sexual harassment policies. On numerous occasions, he singled out William Plaut, Deputy Director of the Department for Operations, and Captain Earl Glover, for specific criticism in this regard. At one specific roll call on March 6, 1995, Lt. Clark praised this court's actions in this litigation, and urged correctional officers not to rely on the chain of command within the Department to resolve their sexual harassment complaints, but to file their claims with this court. In a statement that is disputed, but which this court finds more likely than not a jury will conclude was made, Captain Earl Glover then said: "That was just Lt. Clark's opinion. You can believe him or you can believe me, but sooner or later one of us in not going to be around in roll call."

Less than a week later, on March 12, 1995, Captain Glover initiated the Chapter 16 charges against Lt. Clark that would result in the Department's current order of termination based on an incident that occurred on March 1, 1995.

Captain Glover in his charges alleged that Lt. Clark had advocated or condoned the use of excessive force by Corporal Thomas Ford against two inmates, and that Lt. Clark both failed to take action against Corporal Ford and lied to conceal the assaults. Corporal Ford was alleged to have slapped the two inmates in question after they doused him with their urine.

Lt. Clark's roll call statements were clearly protected activity, and the causal nexus between the protected activity and an adverse employment action can be established simply by demonstrating that the adverse action was taken in close proximity to the protected activity -- a test that is certainly met here. Moreover, an employer's failure to follow its own rules and procedures in taking the adverse action will also be held to demonstrate the causal nexus, as will more favorable treatment accorded to similarly situated employees.

There is substantial evidence here that Captain Glover coerced an inmate witness to change his account of this incident and to offer a false statement that would implicate Lt. Clark in misconduct. Inmate Anton Williams has now provided a sworn statement that Captain Glover coerced him to change his original account of the incident to implicate Lt. Clark. Although Captain Glover now disputes inmate Williams' account, the court finds it likely that the jury will not believe Captain Glover at trial.

On April 10, 1995, Deputy Director Plaut ordered D.C.

Jail Warden Michelle Elzie to recommend Lt. Clark's removal without conducting an investigation. Warden Elzie then directed Assistant Warden Robert Lytle to follow Mr. Plaut's instructions and propose Lt. Clark's removal. Warden Elzie was removed as the deciding official after Mr. Plaut's April 10, 1995, memorandum was "inadvertently" disclosed to Lt. Clark, and Lt. Clark complained.

*3 Not surprisingly, Assistant Warden Lytle sustained Captain Glover's charges, and recommended Lt. Clark's termination. However, a "Disinterested Designee", Melvin Jones, stated in his report of August 18, 1995, that there was "no evidence to support Management's claim that Lt. Clark either condoned or encouraged Officer Ford's aggressive behavior towards Inmates Boatright and Williams."

In the meantime, on June 8, 1995 the Fact-Finding Committee issued a report regarding Lt. Clark's retaliation complaints against Mr. Plaut, Captain Glover, and others. The Committee found "there is ample evidence of disparate treatment toward Lt. Clark" and that the failure to charge other supervisors who were alleged to have committed "similar acts of prior judgment" raised "serious concerns about the disparate treatment accorded Lt. Clark." The Committee recommended "that an internal investigation be conducted into the disparate treatment of Lt. Clark." The Committee's recommendations were ignored, and no such investigation was ever conducted.

It is clear, then, that Lt. Clark has demonstrated nexus not only by timing, but by proof of failure to follow proper procedures and proof of more favorable treatment accorded to similarly situated employees.

The court also finds it revealing that the subordinate officer, Corporal Thomas Ford, who allegedly used excessive force in Lt. Clark's presence, was exonerated of any wrongdoing in connection with the underlying incident, and the charges against Corporal Ford were dismissed. The Department now claims that the Major who dismissed the charges had no authority to do so, but fails to cite any applicable rule denying the Major that authority.

It should also be noted that the Department's Adjustment Board found the second inmate, Boatright, guilty of setting a fire in his cell and guilty of assaulting Corporal Ford when he responded with a fire extinguisher. Yet the charges here by Captain Glover against Lt. Clark include

the following:

“The evidence will show that Lt. Clark is apparently lying to protect Officer Ford. The evidence will support the inmate’s contention that Officer Ford used a water filled fire extinguisher and wet their cells down, not to put out a fire, but because they were throwing objects at the control booth”

The findings of the Adjustment Board three days after Captain Glover’s March 12, 1995 charge resulted in imposition of a 14 day segregation sentence for inmate Boatright, which apparently was carried out based on Officer Ford’s charges against Boatright.

The court also observes that Mr. Plaut has admitted that he ordered Lt. Clark’s transfer from the D. C. Jail to the Modular Facility on April 13, 1995, as a “result of Clark filing several complaints to the Department and to the Court.” Mr. Plaut also admitted that this transfer order was suspended upon advice of the Corporation Counsel only after Lt. Clark mailed a “letter of complaint to Judge Lamberth.” Mr. Plaut’s admission of this retaliatory action on April 13, 1995, clearly supports a finding that Mr. Plaut’s April 10, 1995, direction to Warden Elzie to recommend Lt. Clark’s termination without any investigation was also motivated by retaliation against Lt. Clark.

*4 Permitting the Department to go forward with a retaliatory discharge would create a chilling effect among Department employees and would clearly constitute irreparable injury, thereby warranting the issuance of a preliminary injunction, especially when the evidence of retaliation is so overwhelming.

The post-hoc rationalization provided to the court in a post-hearing submission by the deciding official, Executive Deputy Director John Thomas, clearly

demonstrates that the Department has learned nothing from this litigation. Mr. Thomas never, even after the fact, discussed the fact-finding committee’s findings of disparate treatment of Lt. Clark. He also ignored the fact-finding committee’s recommendation for an investigation. Further, without even an interview of inmate Williams or any investigation whatsoever of Williams’ charge that Captain Glover coerced Williams to provide a false statement against Lt. Clark, Mr. Thomas concluded that Williams’ sworn statement is false. In addition, Mr. Thomas rejected the disinterested designee’s findings based in part on record discrepancies that he never even asked the disinterested designee to clarify. Mr. Thomas concluded that there was no fire, but never explained why inmate Boatright was disciplined after a Board hearing found there was a fire. Mr. Thomas acted on the basis of conflicting written statements without even the pretext of a proper investigation or any face-to-face interviews other than those conducted by the fact-finding Committee and the disinterested designee. Nevertheless, Mr. Thomas either overturned or ignored their recommendations, and ordered the termination of a career employee. Mr. Thomas made no contemporaneous statement of reasons when he decided the matter, and his post-hoc rationalization cannot be viewed favorably by this court. It just shows business as usual -- ignore the fact-finding committee, overturn the disinterested designee, refuse to conduct a proper investigation, and then fire an employee who has been outspoken in his criticism of sexual harassment at the Department. This court said, long ago, that this harassment and retaliation will stop. And it will. It is most unfortunate that the Executive Deputy Director has now become part of the problem rather than part of the solution.

For the reasons set forth herein, the court granted plaintiff’s preliminary injunction motion on May 20, 1996, the deadline decided upon by defendants to effect their termination of plaintiff.

All Citations

Not Reported in F.Supp., 1996 WL 293525