2012 IL App (1st) 102254-U

FIRST DIVISION
February 6, 2012

No. 1-10-2254

**NOTICE**: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| MICHAEL DAVIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 CH 34183 |
| | ) | |
| SHERIFF THOMAS DART and THE COOK COUNTY | ) | |
| SHERIFF'S MERIT BOARD, | ) | The Honorable |
| | ) | James R. Epstein, |
| Defendants-Appellees. | ) | Judge Presiding. |

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JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

**O R D E R**

¶ 1 ***Held:*** Discharge of plaintiff correctional officer by Cook County Sheriff's Merit Board affirmed where findings of sexual harassment and violation of other general orders were not against the manifest weight of the evidence, and discharge was not an overly harsh sanction, arbitrary or unreasonable; trial court did not abuse its discretion in denying plaintiff's request to remand the cause for a further administrative hearing.

¶ 2 Plaintiff Michael Davis appeals from an order of the circuit court of Cook County affirming the decision of the Cook County Sheriff's Merit Board (Board) to terminate his employment as a correctional officer. On appeal, plaintiff contends the Board's decision was against the manifest

weight of the evidence, and, in the alternative, that suspension was a more appropriate punishment, or that the administrative hearing should be reopened.

¶ 3 The record shows plaintiff began working for the Cook County Sheriff's Office as a correctional officer in 1995, and in 2007, he was promoted to acting chief of the Sheriff's Training Institute (Institute), where he was in charge of the Institute's recruits and instructors. In February 2009, the Cook County Sheriff (Sheriff) filed a complaint with the Board seeking plaintiff's discharge, alleging, in relevant part, that from November 2007 to February 2008, he engaged in a pattern of prohibited conduct toward female recruits by having sexual physical contact with them. The Sheriff specifically alleged, on February 5 and 6, 2008, plaintiff made unwelcome sexual contact with recruit Christina Pavon when he hugged and attempted to kiss her, and became angry and threatening toward her when she failed to call him after he gave her his phone number. The Sheriff further alleged, on February 14, 2008, during a class with Ms. Pavon present, he "addressed defamation of character" and "for cause *** in a manner designed to influence the reporting of misconduct."

¶ 4 In the same complaint, the Sheriff alleged, on December 27, 2007, plaintiff made unwelcome sexual contact with recruit Summer Anderson during firearms training, when he put his arm around her waist, ran his finger along a tattoo on her neck, and asked for her phone number and to meet him at a restaurant. In addition, the Sheriff alleged plaintiff falsely reported he did not have physical contact with or make comments of a sexual nature to female recruits. The Sheriff alleged plaintiff's conduct violated Cook County Department of Corrections General Orders (G.O.), ch. 3.7A, §§IIB1, IIIA1, A4; ch. 3.8, §§IIIA1, A4, D1; ch. 4.1, §§IIIA5, A17, A18, and, also, the Rules and Regulations

of the Cook County Department of Corrections, Art. X, ¶¶1, 3, which prohibit violation of the G.O. and all state, local, and federal laws.

¶ 5 At the June 2009 hearing, plaintiff was represented by an attorney provided by his union. The complete investigative file in the matter, which was created by Investigator Singletary, was entered as a joint exhibit. The parties, "[s]tipulated as to the investigative file," but noted, the truth of the matter was subject to cross-examination of the witnesses.

¶ 6 Christina Pavon testified she trained at the Institute to become a correctional officer from November 2007 to February 2008, describing this period as a stressful time during which she could be discharged for any reason. She testified that during the five-week, self-defense training course, plaintiff was very "touchy-feely" and flirtatious with her and another recruit, Tiffany Jackson. Ms. Pavon explained plaintiff kept using her as an example. On one occasion, plaintiff held her under her chest and in another he was basically on top of her. She testified his actions made her uncomfortable, but she did not tell plaintiff of her discomfort because she was afraid of him, and afraid she would lose her job.

¶ 7 Ms. Pavon testified plaintiff would try to get physically close to her more than once a day. He would pull her out of class frequently and take her to an empty classroom to flirt with her. When Ms. Pavon exercised, plaintiff would stand above her making gestures and inappropriate sounds. Plaintiff made her nervous to the point where she would become "shaky." Ms. Pavon told recruit Juan Licea she felt uncomfortable with plaintiff, but did not report it to any supervisors because she did not know who to trust and was afraid of losing her job.

¶ 8 Ms. Pavon also stated that during her "gender responsive" class, plaintiff stared at her through

the classroom window. When she changed her seat so she could not see him, plaintiff entered the room and sat next to her, making her nervous.

¶ 9 On February 5, 2008, she was told that the Institute's director, Carmelita Wagner, was placing her on a no-carry weapon status. Plaintiff called her into his office, and sat with her for an hour while he filled out a memorandum explaining why she was placed on no-carry status. Ms. Pavon was upset about the no-carry status, and began to cry. Plaintiff hugged her, and when he tried to kiss her, she became afraid, told him to stop, pushed him away, and left his office. Ms. Pavon confided in recruit Licea, who told her to "stick" it out because they were graduating soon.

¶ 10 The next day, plaintiff gave Ms. Pavon his telephone number and told her to call him. She became nervous, and in order to get him to leave her alone, she told him she was having problems at home. Ms. Pavon started to cry, and plaintiff tried to hug and kiss her again. Ms. Pavon pushed him away, left, and told recruit Licea about it. Recruit Licea told her to hang in there because they were almost done.

¶ 11 On February 7, 2008, plaintiff pulled Ms. Pavon out of class and asked her why she did not call him. When she told him she threw his number away, plaintiff became angry, and asked for his number back. Ms. Pavon repeated she had thrown his number away, and was afraid when she returned to her classroom. Twenty minutes later, plaintiff pulled her out again, and when he asked her if she said anything to her instructor, Officer Ribaldo, she said no.

¶ 12 A week later, plaintiff "stormed into" Ms. Pavon's class, wrote on the blackboard "defamation of character" and "for cause," circled the words, then looked directly at her and said, "after you get fired, [I will] be sure to smile *** after I bite your ass on the way out." He then left.

¶ 13 On the last day of class, Ms. Pavon reported the incidents to Officer Ribaldo. She testified she was "traumatized" by the incidents, and later filed a sexual harassment complaint against plaintiff.

¶ 14 Summer Anderson testified she trained at the Institute, and on December 27, 2007, plaintiff came directly behind her at the firing range to show her how to align her weapon. She felt his body was too close to her back, and while he was there, he placed his hand on her waist, then ran his finger up and down the back of her neck, and made some inappropriate sounds. He made her feel uncomfortable and nervous, and interfered with her ability to concentrate.

¶ 15 After this incident, plaintiff called Ms. Anderson into a small hallway, and asked if she was "ready for [him]" and gave her "a look." Someone then came into the hallway, and she left. Later that day, plaintiff called her out of class, and asked her for her telephone number and to meet him at a restaurant. She told him she "can't do that."

¶ 16 Ms. Anderson testified the incident "messed up" her whole weekend, and she reported it to the director the next week. She was concerned plaintiff might retaliate against her. Ms. Anderson did not file a sexual harassment complaint because the incident made her uncomfortable, and she was "trying to put it out of [her] mind." She was also embarrassed and nervous, and "just basically wanted to get through" the training. Additionally, Ms. Anderson felt the situation had been rectified after she spoke to the director because plaintiff did not approach her again.

¶ 17 Officer Daniel Ribaldo testified that on February 14, 2008, plaintiff "stormed" into one of the classrooms, wrote on the blackboard "for cause" and "defamation," and asked the class if they knew what those words meant. When no one responded, he stared at Ms. Pavon, and said "[b]e

careful what you say because I will smile before I bite your ass." Plaintiff then left.

¶ 18 Juan Licea testified that during one of the defensive tactics training classes, he was paired with Ms. Pavon, but plaintiff then assigned Ms. Pavon to recruit Jackson, and worked with them for the rest of the day. Plaintiff was flirting with them, but the women were not flirting back.

¶ 19 Plaintiff testified that during self-defense training, he told Ms. Pavon to slow down her handcuffing, and she seductively replied, "[y]ou mean slow down like [the singer Usher], take it nice and slow," and "[l]et me lick you up and down." He later wrote a memorandum about the sexual harassment by Ms. Pavon. Ms. Pavon, in her testimony, denied making these statements.

¶ 20 Plaintiff denied all the accusations brought against him by Ms. Pavon and Ms. Anderson. Plaintiff further testified that during defensive tactics training, recruit Licea was paired with Ms. Pavon, but was doing an open hand search of her which can be construed as sexual harassment. He explained this to recruit Licea, but recruit Licea continued to do the improper search, so plaintiff separated them.

¶ 21 Plaintiff explained that at the end of the recruits' training, he writes "defamation" and "for cause" on the blackboard. He then explains the terms to ensure the recruits follow policy and procedure.

¶ 22 Following the hearing, the Board assessed the credibility of the witnesses and the weight to be given to the evidence, then determined plaintiff violated the G.O. and Rules and Regulations listed in the complaint filed against him. As a result, the Board ordered plaintiff be discharged.

¶ 23 Plaintiff hired new counsel, who, in September 2009, sent the Board a letter requesting the hearing be reopened so plaintiff could present witnesses he had urged his union attorney to call and

who would refute the allegations against him. The Board denied the request.

¶ 24 Plaintiff then filed a complaint for administrative review in the circuit court alleging the Board's decision was against the manifest weight of the evidence and should be reversed. He noted that the G.O. defines sexual harassment as unwelcome sexual advances and other sexual conduct which have the purpose of unreasonably interfering with an individual's performance or creating an intimidating, hostile or offensive work environment. He then analyzed whether there was a hostile work environment as defined by the Supreme Court in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), and concluded there was no hostile environment based on the evidence presented.

¶ 25 Plaintiff further alleged, even if it is assumed he was "guilty," the decision to discharge him was arbitrary and contrary to the requirements of service, and suspension was more appropriate. Plaintiff maintained, his gestures to kiss or hug may have been unwelcome, or, at most, offensive, but were not threatening, and were to console Ms. Pavon. Plaintiff requested, in the alternative, that his cause be remanded to the Board and reopened. He alleged the statements of recruit Jackson and recruit Amy Cooper, which were in the investigative file, corroborated his account that Ms. Pavon sexually harassed him, and it was not his choice they were not called to testify. Plaintiff claimed it was contrary to the interests of justice that he be discharged without the opportunity to present witnesses on his behalf.

¶ 26 In response, the Board maintained its findings of fact were supported by the manifest weight of the evidence, and that plaintiff mistakenly relied on *Harris* for determining whether the work environment was hostile when he should have referred solely to the language in the G.O. The Board also maintained the statements of the witnesses, which plaintiff claimed corroborated his testimony,

were inadmissible. The Board further maintained the matter should not be remanded, noting plaintiff was given ample notice of the hearing date and chose to present no witnesses.

¶ 27 On June 7, 2010, oral arguments were presented on the matter, and the circuit court affirmed the Board's decision. This appeal follows.

¶ 28 Plaintiff first contends the Board's decision that he violated the G.O. and Rules and Regulations in question was against the manifest weight of the evidence. He maintains that even if the recruits testified truthfully, the incidents complained of were not sufficiently pervasive or severe to rise to the level needed to find a hostile work environment and justify the Board's findings.

¶ 29 On appeal from an administrative review action, we review the agency's decision, not that of the circuit court. *McDonald v. Illinois Dept. of Human Services*, 406 Ill. App. 3d 792, 797 (2010). In examining an administrative agency's findings of facts, a reviewing court is limited to determining whether those findings are against the manifest weight of the evidence. *Matos v. Cook County Sheriff's Merit Bd.*, 401 Ill. App. 3d 536, 542 (2010). A decision is against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Magett v. Cook County Sheriff's Merit Bd.*, 282 Ill. App. 3d 282, 287 (1996). The mere fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently will not justify reversal of the administrative findings; if the record contains any evidence to support the agency's decision, it should be affirmed. *Id.*

¶ 30 Here, the Board found plaintiff violated, *inter alia*, its G.O. against sexual harassment (G.O. ch. 3.7A, §§IIB1, IIIA1, A4), and its G.O. and Rules and Regulations which prohibit violation of its G.O. and state and federal laws. G.O. ch. 3.8, §§IIIA1, A4, ch. 4.1, §IIIA5; Rules and Regulations

Art. X, ¶¶1, 3. In his brief, plaintiff appears to equate the state law in question with the Human Rights Act (775 ILCS 5/2-101(E) (West 2010)), and the federal law with Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2 (2010)). Administrative review, however, is confined to the record before the agency (*Kouzoukas v. Retirement Bd. of Policemen's Annuity and Benefit Fund of the City of Chicago* , 234 Ill. 2d 446, 463 (2009) (citing 735 ILCS 5/3-110 (West 2006)), and, here, that record contains no specific reference or findings regarding the legislative enactments referred to by plaintiff on appeal, nor a request for same by plaintiff during the administrative proceedings.

¶ 31 Rather, plaintiff was charged with and the Board found he violated G.O. ch. 3.7A, §§II.B1,IIIA1, which prohibits sexual harassment, and is defined, therein, as unwelcome sexual advances, or any conduct of a sexual nature, when such conduct has the purpose or effect of unreasonably interfering with an individual's performance or creating an intimidating, hostile or offensive working environment. The testimony presented at the administrative hearing provided ample evidence that plaintiff's conduct constituted sexual harassment under the G.O. as found by the Board.

¶ 32 Plaintiff's conduct clearly created an intimidating, offensive and hostile work environment for recruits Anderson and Pavon, given that he was their instructors' superior, and they were subject to termination from the Institute for any reason. Based on the record before us, we find the Board's decision that plaintiff's conduct violated G.O. ch. 3.7A §§II.B1,IIIA1, was not against the manifest weight of the evidence.

¶ 33 There is also ample evidence that plaintiff violated G.O. ch. 3.7A, §IIIA4 and ch. 4.1, §IIIA18, which prohibit falsely denying and lying about sexual harassment and making a false report.

Plaintiff denied the accusations against him, and reported Ms. Pavon sexually harassed him, however, the Board found his representations false. We defer to the Board's assessment of the testimony and the credibility of the witnesses and conclude its findings were not against the manifest weight of the evidence. *Matos*, 401 Ill. App. 3d at 542.

¶ 34 There is also no question that plaintiff's conduct toward Ms. Pavon was threatening where he stared her down as he stated, "after you get fired, I will be sure to smile *** after I bite your ass on the way out," in violation of G.O. ch. 3.8, §IIID1. His conduct was also unbecoming and reflected discredit on the Institute in violation of G.O. ch. 4.1, §IIIA17. In sum, the findings of the Board comport with the evidence presented on the complaint of sexual harassment filed by the Sheriff, and we affirm that judgment.

¶ 35 Plaintiff next contends the Board's decision to terminate him was arbitrary and contrary to the requirements of service. Plaintiff maintains he should have been suspended instead.

¶ 36 A reviewing court may overturn an agency's sanctions when they are overly harsh in light of mitigating circumstances. *Matos*, 401 Ill. App. 3d at 542. An administrative finding of cause for discharge is not to be overturned unless it is arbitrary and unreasonable or unrelated to the needs of the service. *Cruz v. Cook County Sheriff's Merit Bd.*, 394 Ill. App. 3d 337, 342 (2009).

¶ 37 Plaintiff's discharge was based on the sexual harassment of two recruits, Ms. Pavon and Ms. Anderson, his false reporting of such against Ms. Pavon, his false denying and lying about the sexual harassment, and his retaliation against Ms. Pavon. Plaintiff's conduct was clearly detrimental to the discipline and efficiency of his position as chief acting officer of the training division of the Institute, which, notably, taught sexual harassment and gender responsiveness. Further, we find no mitigating

circumstances showing the Board's decision to discharge plaintiff was overly harsh, excessive, or unrelated to the needs of service, and reject plaintiff's claim to the contrary.

¶ 38 Finally, plaintiff contends this court should remand his cause to the Board to reopen the hearing. He bases his claim on the failure of his prior counsel to call witnesses who would have corroborated his account. Plaintiff maintains it was not his choice they were not called, and it is contrary to the interests of justice for him to be discharged without the opportunity to present witnesses on his behalf.

¶ 39 Section 3-111(a)(7) of Code of Civil Procedure provides, where an administrative hearing has been held, the circuit court has the power to remand to the agency for the purpose of taking additional evidence when from the state of the record of the agency, or, otherwise, it shall appear such action is just. 735 ILCS 5/3-111(a)(7) (West 2010). The trial court's decision whether to remand will not be disturbed absent an abuse of discretion. *Morelli v. Ward*, 315 Ill. App. 3d 492, 499 (2000). Here, we find no abuse of discretion on the part of the trial court. Instead, we find remand would have been inappropriate. Plaintiff was present at the hearing, and was aware of the witnesses in question during the administrative proceedings and could have called those witnesses. See generally *Crabtree v. Illinois Dept. of Agriculture, Div. of Agr. Industry Regulation,* 128 Ill. 2d 510, 517-18 (1989).

¶ 40 We therefore affirm the judgment of the circuit court of Cook County.

¶ 41 Affirmed.