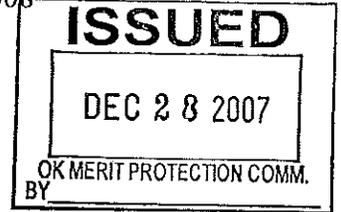


**BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA**

STEVEN K. TALLEY)
Appellant,)
)
v.)
)
DEPARTMENT OF HUMAN SERVICES,)
Appellee.)

Case No. MPC 08-008



FINAL ORDER

This matter comes on for hearing on December 5, 2007 before the duly appointed, undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Steven K. Talley, appears personally, and by and through his attorney, Philip L. Watson. The Appellee, Department of Human Services, appears by and through counsel, John Douglas. Also present for Appellee was Table Representative, Gary Dart.

Appellant Steven Talley was a permanent, classified employee of the Department of Human Services. He is appealing an adverse disciplinary action of discharge. Whereupon the hearing began and the sworn testimony of witnesses was presented, along with exhibits. Regarding the exhibits, the Appellant offered Appellant's Exhibits 1 through 10 with no objection and they were admitted and the Appellee offered Appellee's Exhibits 1 through 30 with no objection and they were admitted. Accordingly, all exhibits presented and admitted are incorporated herein and made a part hereof. Following the close of the evidentiary hearing, the Appellee requested additional time to file information regarding rebuttal of Appellant's testimony. Appellee filed its Suggestion of Location of Previous Testimony on December 7, 2007. Appellant filed no response. The record was closed on December 12, 2007.

After careful consideration of the record, including all relevant evidence, testimony, and exhibits, the undersigned Administrative Law Judge issues the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

Background of Case

Appellant Steven K. Talley (hereinafter "Talley") was a classified employee of the Appellee Department of Human Services (hereinafter "DHS"). Talley was an Investigative Agent II, employed at the Child Support Enforcement Division in Canadian County, Oklahoma. In February, 2007, Talley was accused of grabbing the right buttock of a female employee, as well as touching and rubbing the backs and shoulders of female employees. In addition, Talley was alleged to have engaged in various name-calling and use of derogative language toward other employees and supervisors, including sexually and racially offensive comments and names. Following an investigation, the civil rights division concluded that the alleged conduct did occur. Talley was placed on suspension with pay during the investigation and subsequent disciplinary process.

On or around May 16, 2007, DHS provided Talley with notice of the proposed disciplinary action, advising him that he was being considered for termination of his employment as a result of his behavior. (Appellant's Exhibit 2). A pre-termination hearing was scheduled for June 8, 2007, but continued to June 13, 2007. Talley was given an opportunity to respond to the charges and to present evidence. The hearing was conducted by Gail Wettstein, an administrative law judge assigned to hear the matter. She issued her report, concluding that the facts support the charges and support the proposed discipline of discharge. (Appellee's Exhibit 17). On June 26, 2007, DHS provided Talley with notice of final discipline, discharging him from his position effective that date. (Appellee's Exhibit 21). In the notice, DHS finds that Talley's behavior and actions constitute misconduct, insubordination, discourtesy, conduct unbecoming a state employee, and sexual harassment, in violation of DHS policies. The notice contained a reference to a prior disciplinary action for inappropriate touching of a female employee.

The Testimony

DHS offered the testimony of six witnesses in support of its disciplinary action. The first witness is Kym Taylor, a Child Support Specialist II employed at the Child Support Enforcement Division in Canadian County, Oklahoma. Taylor testified that Talley was very negative and belligerent, that he frequently used foul language in a loud voice in the office. She stated that

Talley used derogatory names for almost everyone in the office, including “ignorant bitch”, “lesbian”, and “stupid”. She further stated that he frequently referred to a black, male supervisor in the office as “Kunta Kinte”, “brother” or “nigger”. Taylor testified that Talley began a flirting relationship with another new female employee in the office and he also began to get more forward with Taylor. On several occasions, Talley would touch her, rubbing her back and shoulders. Taylor testified that Talley made comments about standing outside her bedroom window at night watching her. During a conversation between Taylor and a co-worker about Taylor’s doctor appointment, Talley asked Taylor to give her doctor his phone number so that he could have her body to take home and stuff. According to Taylor, when she asked him why he would do that, Talley responded with obscene gestures. Taylor testified that she never verbalized to Talley her discomfort with his comments or his touching, but she tried to use other forms of communication, such as pulling away and stern looks. She attempted to avoid him but the office layout made that very difficult. On or about February 2, 2007, Talley grabbed Taylor’s buttock. Taylor filed a complaint about Talley’s behavior on February 8, 2007. (Appellee’s Exhibit 2).

Taylor testified that the morale in the office was very different when Talley was there. She stated that his behavior of unwelcome touching and verbal attacks were a daily occurrence. He was a very “close-talker” and invaded others personal space. Taylor testified that Talley was very intimidating and she had a fear of retaliation if she complained. She also testified that Talley frequently sat with his feet up on his desk, arms crossed and eyes shut, as if sleeping. Taylor’s written witness statement (Appellee’s Exhibit 5) is consistent with her testimony at the hearing.

Angela Hubbard Sanchez testified that she was an Administrative Assistant employed at the Child Support Enforcement Division in Canadian County, Oklahoma. She stated that she did a variety of tasks for the office and was officed near Talley for a period of time. She testified that Talley was verbally aggressive and used degrading names for other employees in the office. She stated that Talley was a “friendly conversationalist” meaning that he constantly touched the female employees when he talked to them. She stated that she always faced Talley and kept her distance when she dealt with him because he had previously touched her lower back in a very sensual manner which made her feel very uncomfortable. Sanchez referred to Talley as a “predator” and she stated that she tried to warn all of the new female employees about Talley and

to keep their distance from him. Sanchez also testified that Talley frequently sat with his feet up on his desk and his arms crossed. She stated that the morale in the office was very low, and that it was partly due to Talley and partly due to other issues. She responded that the management of the office was inconsistent with discipline and failed to properly supervise the employees. Sanchez felt that complaints were not filed because of the general attitude in the agency that nothing would come of it except retaliation. Sanchez's testimony was consistent with her written interview statement. (Appellee's Exhibit 12).

Taryn Wade testified that she was a Child Support Specialist II in the Child Support Enforcement Division in the El Reno office. She stated that Talley frequently rubbed her back and shoulders while standing very close on almost a daily basis. She stated that she would attempt to discourage Talley's unwelcome touching, rolling her shoulders or stepping away from him. Wade also testified about the racial and sexual derogatory names.

Wade testified that Sanchez had warned her about Talley when she came to work at the El Reno office. She said that Talley's pattern of behavior is very intimidating, with him yelling and cursing. She said that there was generally no confidence in the process and that was the reason employees were fearful of filing complaints. She said that there was a common attitude among the female employees of a fear of retaliation if they complained. For example, Wade said that copies of previous complaints were given directly to Talley with directions to "fix it". Wade stated that it was a very stressful work environment and there was low morale in the office. She testified that she had personally witnessed Talley verbally attacking employees with no consequences. Wade also described Talley as a "predator" and a "bully" and she stated that she personally witnessed Talley's unwelcome touching of several of the female employees. She said that Talley had told her that he had a previous sexual harassment charge against him, in order to gauge her reaction. She said that the previous complaint against Talley created a hostile work environment when Talley was returned to the same office, while continuing with the same behavior. She frequently saw Talley at his desk, with his feet propped up, arms crossed and apparently napping. Wade confirmed Taylor's testimony regarding the remark Talley made about stuffing Taylor's body, testifying that she was present when Talley made the remark. Her testimony was consistent with her written witness statement. (Appellee's Exhibit 16).

Connie Oltermann testified that she was employed as a temporary employee in the El Reno Child Support office. She is a retired DHS employee who has returned to work part-time.

Oltermann testified that she did not personally witness Talley touch Taylor on the buttock, but she heard a commotion and heard Taylor say “stop” or “leave me alone” in a very serious tone of voice. She further testified that she heard Talley make the statements to Taylor about standing outside her bedroom window watching her and about wanting to take her body home and stuff it. She confirmed that Talley was very aggressive and forward with the female employees, but did not personally witness the touching. She said that the female employees generally avoided Talley. Oltermann confirmed that she frequently heard Talley use foul language and derogatory names. She said Talley’s language and behavior was “offensive”, hostile and inappropriate in a business atmosphere. Her testimony was consistent with her written interview statement. (Appellee’s Exhibit 15).

Barbara Hatfield is the managing attorney for the El Reno Child Support Division office. She testified that both she and Talley had worked there since the office opened in 1999, and that she was Talley’s direct supervisor. Hatfield stated that she became aware of Talley’s behavior in early February, 2007, when Taylor told her about Talley touching her buttock. Taylor was very upset and Hatfield gave her the complaint form and then personally took the completed form to Oklahoma City. After the investigation, Hatfield agreed that discharge was the appropriate discipline for Talley’s behavior due primarily to DHS zero-tolerance policy of sexual harassment. She stated that she had never seen Talley’s touching and never heard him use the foul language or derogatory names, however, she admitted that she was out of the office frequently in court. Hatfield said that although it was not ideal, it was unavoidable due to her caseload.

Hatfield testified that Talley did his job very well and had a high rate of success in serving process. She said that she had given Talley satisfactory evaluations, but that was without knowledge of his behavior. After the complaint was filed in February, 2007, many employees came forward and told her about Talley’s conduct. She testified that a prior female employee confided that she had transferred out of the office to get away from Talley. Hatfield admitted that she was very disappointed that these employees did not feel comfortable coming to her earlier. She testified that although she never saw the behavior, she was not surprised as she was Talley’s supervisor and he wouldn’t have done it in front of her. She said that several employees had mentioned that Talley was intimidating, but she thought that was related to the fact that he

carried a gun. Due to the employees' discomfort, Talley was directed to keep the gun in a locked gun safe while in the office.

Hatfield admitted that it was a very uncomfortable situation when Talley was returned to the office after the previous sexual harassment complaint, but he and the complaining employee kept their distance from each other. She stated that there had been several sexual harassment training sessions in the office which Talley had attended. Hatfield further testified that Talley was quite upset when the complaint was made known to him and he was suspended pending the investigation. She stated that he began throwing things, yelling and made an inappropriate gesture. Hatfield's testimony is consistent with her written interview statement. (Appellee's Exhibit 11).

DHS Table Representative, Gary Dart, was the final witness for the Appellee. He is the Director of Child Support Enforcement Division for DHS. He stated that he became aware of the allegations when he received the investigative report admitted as Appellee's Exhibit 3. After he received it, he forwarded it to Hatfield and Dart's supervisors. After consulting them, Dart made the decision to pursue termination of Talley's employment. He testified that this higher level of discipline was warranted because of the serious nature of the complaint, as well as the numerous incidents involved. He felt that Talley displayed a pattern of improper and predatory behavior which caused a hostile work environment. He testified that he reviewed the *Cox*¹ case before deciding on the proposed level of discipline.

Appellant offered the testimony of one witness in addition to himself. The first witness was Gena Menhusen. Menhusen recently retired from DHS in November, 2007 after working for the previous 7 years in the El Reno DHS office as a Child Support Specialist II. Prior to her retirement, she sat in the cubicle next to Talley. She testified that she had never observed Talley touching any female employee and had never heard him use profanity, curse or make racial remarks. She denied that Talley had ever called the other employees derogatory names. Menhusen testified that she had never heard any employee complain about Talley's behavior.

Menhusen admitted that she had filed complaints about supervisors Carl Moaning in the past and that nothing came of them. She admitted that she was somewhat disgruntled about that. She also admitted that she had been friends with Talley for many years, and had been involved in a romantic relationship with him and lived with him in Oklahoma City for a brief period of time.

¹ *Cox v. State ex rel. Oklahoma Department of Human Services*, 87 P3d 607, 2004 OK 17.

She stated that the relationship had ended 11 years ago, although they remained friends. Menhusen also admitted that most of the employees in the office knew of her previous relationship with Talley and that could possibly be the reason none of them had complained to her about Talley's behavior. She denied that Talley was hostile or angry and stated that she had never heard him curse or use profanity. Menhusen's testimony is consistent with her written interview statements. (Appellee's Exhibits 6 and 7).

The Appellant, Steven Talley, testified that he had worked in the El Reno office since 1999. He stated that he was very unhappy there and had requested transfers many times. He stated that this was primarily due to being returned to the office to work along side of the employee, Anna Moore, who had filed the previous sexual harassment charge against him. He said that it was a very dysfunctional office, primarily due to the micromanagement of Hatfield. Talley stated that he tried to distance himself from the other employees to avoid further problems and that as a result, he was viewed as "offish". Talley testified that he has a degree in law enforcement and he is CLEET certified. He also stated that he was employed for several years as a municipal police officer and deputy sheriff, before starting with DHS in 1988.

Talley stated that his previous discipline for sexual harassment was unfounded, that he merely tapped Anna Moore on the shoulder and asked if she was going to White Water. He denied rubbing her back or shoulders.

Talley denied all of the allegations of name-calling, racially derogatory or sexual comments. He denied ever using profanity in the office, ever touching any of the female employees, and denied making the comments to Taylor about being outside her window watching her and wanting to stuff her body. He denied that he ever used racially offensive names and specifically denied calling Carl Moaning a "nigger" or "Kunta Kinte", but stated that he may have referred to him as "brother". He admitted that he may have referred to one female as a lesbian after she was seen kissing another female in the parking lot, but it was more of a statement than name-calling. He specifically denied calling females "bitches". He testified that Wade was a very manipulative person and was lying to hurt him. He felt that Wade convinced the others to lie about him because she was very controlling. He also suggested that perhaps Taylor was jealous of his attention to other females and that was part of her motivation to lie. Talley was unable to state a motive for Oltermann and Sanchez to lie about him. Essentially,

Talley stated that everyone was lying but him. Talley was hostile at times during his testimony, stating that he knew this day was coming as they were out to get him.

As rebuttal, DHS offered the testimony of office manager Anna Moore. She stated that she is the employee who was improperly touched by Talley which formed the basis for the complaint against him in 2001. She stated that the complaint arose from an incident where Talley confronted her in a doorway to an office and began to rub her back from her neck to her pant leg. The incident was witnessed by another employee who filed the complaint. She said that the complaint and subsequent discipline were not as Talley had indicated in his testimony when he said he merely tapped her shoulder. She said that Talley was cold and hostile towards her when he returned to the office after the discipline, but had not touched her since that time.

As further rebuttal, DHS filed a Suggestion of Location of Previous Testimony on December 7, 2007. DHS points out the location on the pre-termination hearing tape (Appellant's Exhibit 30) where Talley admitted calling Carl Moaning "Kunta Kinte", indicating that Talley was not truthful in his testimony when he denied ever calling Moaning that name. Appellant did not file a response or dispute the accuracy of DHS' version of the testimony.

ISSUES

1. Was the discipline imposed upon the Appellant justified?
2. If so, was the discipline imposed just, appropriate under the circumstances?
3. Did DHS follow its progressive discipline policy?

DISCUSSION

There is substantial evidence that supports the decision of the Appellee that the disciplinary action against the Appellant was justified. Four female employees consistently testified about Talley's behavior. These witnesses corroborated each other. There is simply no plausible motive for all of these employees to lie under oath or to make up these allegations. The weight to be given to Menhusen's testimony is tempered by the intimate relationship she had with the Appellant as well as her attitude concerning her previous unsubstantiated grievances against Moaning. Talley's testimony lacks credibility especially considering the rebuttal evidence offered by DHS. Talley's argument concerning the motive of Wade and Taylor are

not persuasive given the evidence introduced at the hearing. Based upon the entire record, the undersigned finds that DHS has met its burden of proof that Talley engaged in the behavior for which he is accused and that just cause existed for the discipline imposed.

Regarding the proper use of progressive discipline, Talley was disciplined in 2001 for sexual harassment. He received a written reprimand. Clearly, the prior discipline imposed failed to discourage Talley's improper behavior and therefore, a lesser form of discipline would be ineffective. In addition, the cumulative behavior of the Appellant is so offensive that it warrants the imposition of a greater level of discipline. DHS has an obligation to protect the other employees of the office from this type of behavior. It is apparent from the totality of the evidence that there was an environment in the El Reno office where employees did not feel safe or secure enough to complain, however, the lax management and lack of oversight by the supervisory staff does not excuse Appellant's behavior. Pursuant to the rationale discussed in the Cox case and based upon the relevant circumstances of this case, Appellant's behavior justifies a higher level of discipline without proceeding through additional lower steps. DHS has proven, by a preponderance of the evidence, that this disciplinary action was consistent with its progressive disciplinary procedure. Further, it appears that the discipline imposed was just given all of the circumstances and DHS has proven, by a preponderance of the evidence, that the level of disciplinary action imposed was just.

CONCLUSIONS OF LAW

1. The Oklahoma Merit Protection Commission has jurisdiction over the parties and the subject matter in this cause and the filing of the Petition for Appeal was timely.
2. Any finding of fact which is properly a conclusion of law is so incorporated herein as a conclusion of law.
3. Title 74 O.S. §840-6.5 and Merit Rule 455:10-9-2 states that the Appellee DHS has the burden of proof in an adverse action and must prove by a preponderance of the evidence that just cause exists for the adverse action and that the discipline imposed is just.
4. 74 O.S. §840-6.5 and Merit Rule 455:10-11-17 state that a permanent classified employee may be discharged for the reasons of misconduct, insubordination, inefficiency, habitual drunkenness, inability to perform the duties of the position in which employed, willful

violation of the Oklahoma Personnel Act or the Merit Rules, conduct unbecoming a public employee, conviction of a crime involving moral turpitude or any other just cause.

5. The preponderance of the evidence shows that Talley's behavior constituted misconduct, insubordination by showing disrespect or contempt for the agency supervisors and administrators, discourtesy toward the other employees, conduct unbecoming a state employee, and sexual harassment from the unwelcome touching of and sexually motivated comments to female employees of the office. This behavior violated DHS' policies on misconduct (DHS:2-1-7, Appellant's Exhibit 26) and sexual harassment (DHS:2-43-2, Appellant's Exhibit 28).

6. Appellee has met its burden to prove, by a preponderance of the evidence that just cause exists to discipline Talley for his inappropriate behavior of making derogatory racial and sexual comments and engaging in the unwelcome and inappropriate touching of female employees.

7. Appellee has met its burden to prove, by a preponderance of the evidence, that its action does not violate the DHS Progressive Disciplinary Procedure and that Appellant's continuing behavior justifies a higher level of discipline.

8. Appellee has met its burden to prove, by a preponderance of the evidence, that the discipline imposed of discharge was just under the totality of the circumstances.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Steven K. Talley, MPC 08-008 be DENIED.

This Order entered this 20th day of December, 2007.



Lydia Lee
Administrative Law Judge