BEFORE THE OKLAHOMA MERIT PROTECTION COMMISSION
STATE OF OKLAHOMA

ISSUED
SEP 12 2013
OK MERIT PROTECTION COMM.
BY

ROBERT GARLINGTON, Appellant,	)	
v.	)	Case No. MPC 13-069
OKLAHOMA DEPARTMENT OF MENTAL HEALTH AND SUBSTANCE ABUSE SERVICES, Appellee.	)	

FINAL ORDER

This matter came on for hearing on August 1 and 19, 2013 before the undersigned Administrative Law Judge at the offices of the Oklahoma Merit Protection Commission, Oklahoma City, Oklahoma. The Appellant, Robert Garlington (hereinafter "Garlington"), appears personally and with his attorney, Cynthia D'Antonio. The Appellee, Oklahoma Department Of Mental Health And Substance Abuse Services, (hereinafter "Dept."), appears by and through counsel, Kimberly Heaton.

Appellant Garlington was a permanent, classified employee of Dept., appealing an adverse disciplinary action of termination. Prior to the start of the hearing, the Appellant had filed a Motion to Amend his Witness and Exhibit List because of a mistake in identification of the cellular phone company. The Motion was granted over the objection of the Appellee. The Appellee filed a Motion to Allow an Affidavit in lieu of Testimony due to the unforeseen illness of a witness as documented by a doctor's note. This Motion was also granted over the objection of the Appellant. The parties came to an agreement for precautions to protect the witness, Lauren Hunter, as a result of the Victim's Protection Order which was currently in effect. The witness was shielded from the Appellant during her testimony and segregated from the Appellant while in the MPC offices and courtroom.

During the administrative hearing, the sworn testimony of witnesses was presented, along with exhibits. Joint Exhibits 1 through 7 were offered and admitted into the record. Appellee's Exhibits 1 through 5 were offered and admitted over Appellant's objections to the admission of Appellee's Exhibit 2. Appellant's Exhibit 1 was offered and admitted over the objection of the

Appellee and Appellant's Exhibit 2 was offered and admitted with no objection. No Exhibits that were offered were denied admission. Accordingly, the exhibits presented and admitted are incorporated herein and made a part hereof. Joint Exhibit 3 and Appellee's Exhibits 1, 2, 3 and 5 are all subject to a Protective Order which was granted and was filed on August 23, 2013. The record is considered closed on that date.

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

Garlington was a classified employee of the Dept., employed as a Recreational Therapist at Griffin Memorial Hospital. From approximately March, 2011 until February, 2012, Garlington had a personal relationship with another Dept. employee, Lauren Hunter. Following the break-up of their relationship, Garlington was alleged to have followed Hunter, called and texted her and waited for her in the parking lot at work. As a result of Hunter's concern, a panic button was installed in her office at Griffin. In August, 2012, Hunter became aware that someone had sent nude pictures of her to other Dept. employees. Upon further investigation, Hunter obtained information that indicated that the photos were sent by Garlington. Hunter filed for a Protective Order in Cleveland County District Court, which was granted.

Following a sexual harassment complaint filed by Hunter, the matter was referred to the Office of the Inspector General for investigation. Following the investigation, on September 12, 2012, Garlington was placed on suspension and was given notice of proposed discharge (Joint Exhibit 4). The notice alleged that Garlington had violated state statutes, rules and policies regarding sexual harassment. The notice alleged that Garlington was guilty of misconduct, inefficiency, willful violation of statute and rule and conduct unbecoming a state employee and provided specific information about these allegations. According to the notice, both aggravating and mitigating circumstances were identified.

A pre-termination hearing was scheduled and held on October 10, 2012. On October 16, 2012, Garlington was given written notice of termination (Joint Exhibit 6). Garlington's employment was terminated effective October 16, 2012. Garlington timely appealed the disciplinary action.

ISSUES

1. Did Dept. have just cause to impose discipline in this matter?
2. If so, was the discipline of termination just and appropriate under the circumstances?

THE TESTIMONY

During the administrative hearing, the testimony of eight (8) witnesses was taken, with each witness sworn and offered under oath.

The first witness offered by Dept. was Lauren Hunter. Hunter testified about her relationship with Garlington. She stated that they dated from March, 2011 to February, 2012. She stated that she broke up with him because he became abusive and controlling and she became scared of him because of his statements about hurting people. Hunter stated that she never contacted Garlington after their break-up, but he repeatedly called and texted her until she finally changed her number. She said that Garlington worked in a separate building at Griffin but he went out of his way to walk past her office. She also testified that he parked on the other side of the facility but would stand in her parking lot. Hunter stated that one of Garlington's girlfriends contacted her, they met and discussed that he had been dating both of them at the same time. Shortly afterwards, in June, 2012, during his work hours, Garlington approached her in a Wal-Mart store to confront her about the "panic button" that had been installed in her office. She stated that he was very angry. Hunter testified that she repeatedly told Garlington to stay away from her and to quit contacting her. In August, 2012, she became aware that a nude photo of her had been sent to another employee. The photo was sent from a prepaid cell phone and attempts were made to make it appear that Hunter was sending them. Hunter testified that Garlington was the only person who had the photo that was sent and she began to suspect that he was responsible. She said that she sent the photo to Garlington with the understanding that it was private and would not be shared. She made a report of sexual harassment to the Inspector General's office. Hunter testified that she had previously worked for AT&T and was able to research prepaid cell providers and ultimately identified the phone number as being a Virgin Mobile number. She contacted Virgin Mobile who confirmed that the account had been set up

using her Dept. e-mail address and the name of her pet as a password. Virgin Mobile provided Hunter with a new PIN, which she used to access the online records. Hunter identified the photo (Protected Exhibit 1), her written statement to the Inspector General (Protected Exhibit 2), the Petition and Order for the Victim's Protective Order (Joint Exhibits 1 and 2) and the pre-paid phone records she was able to locate on the internet (Protected Exhibit 3). Hunter denied that she was "getting back" at Garlington after she discovered he had cheated on her. She admitted that another employee had commented on her appearance but denied that she acted or dressed inappropriately. Hunter stated that she did not file her complaints immediately or seek the VPO until August because she hoped that Garlington would stop harassing her. She testified that Garlington's cell number showed up on the phone records she obtained and that she believed it showed that he was the person who sent the picture from his cell phone to the prepaid phone. Hunter emphatically denied that she obtained the phone account or sent the photos. She also denied that she altered the records she provided to the Investigator.

Michael DeLong is an investigator in the Dept.'s Office of Inspector General. He received a complaint from Hunter and completed a full investigation. He identified his report (Protected Exhibit 4). DeLong testified that Garlington's Dept. computer was in his locked office and was restricted by the use of password protection. He stated that he reviewed Garlington's internet history for the past year and discovered that the computer had not searched for or visited websites for Virgin Mobile prior to July 24, 2012. He said that there were numerous visits or "hits" on that site from July 24 to August 18 on his Dept. computer. He stated that he interviewed Garlington, who could offer no explanation about these hits on his computer. He said that Garlington merely stated that he goes to a lot of different sites. He also denied any knowledge of the prepaid phone or how his cell number showed up on the records. DeLong said that Garlington was not cooperative or forthcoming in his interview. He stated that Garlington was told that he had the right to be represented in the interview and he signed the notice acknowledging his rights. DeLong admitted that he did not subpoena the official records from Virgin, but relied upon the copies he was given by Hunter. He said that he met with Garlington two different times and he never provided any real information or explanation. He admitted that he did not verify that Garlington was at work or his whereabouts at the times noted as Virgin Mobile hits on his computer. DeLong also testified that he only included the activity log for one day in his report for illustration, but that similar logs existed for each referenced day.

Hew Jefferson is another employee at Griffin. He is married to Lindsey Dyer[1]. He testified that late one night in August of 2012, Lindsey got a text with a photo of a nude woman. She recognized it as being Lauren Hunter but did not recognize the number. Jefferson tried to call the number but no one answered. Jefferson noted that Lindsey had dated Garlington briefly before they were married. He identified his number and his wife's number in the Virgin Mobile records. Jefferson stated that he knew Hunter but that they were just acquaintances.

Jeff Smith is the Director of the Children's Crisis Center and also briefly supervised Griffin Hospital in 2012. As a result, he conducted the pretermination hearing and imposed discipline in this matter, but he stated that he did not know Garlington personally. He stated that he reviewed all of the evidence and concluded that discharge was the only appropriate option given the seriousness of the misconduct. Smith testified that Garlington spoke about an hour and a half during the pretermination hearing, but never really addressed the allegations. He said that the Dept. has a no-tolerance policy on sexual harassment and that this was one of the worst cases he had seen. Smith stated that he is a licensed therapist and that Garlington was difficult to track during the pretermination hearing. He stated that he did not recall if Garlington ever actually denied these acts, although Garlington was told it was his opportunity to tell his side of the story. He admitted that Garlington had no prior disciplinary actions, but that did not mitigate his decision because of the seriousness of the misconduct.

Carla Kinnaird is Garlington's former girlfriend. She testified that she and Garlington lived together until May, 2011 and continued to date periodically until December, 2012. She learned about Lauren Hunter and sent her a message on Facebook. She and Hunter met two times, once for coffee and once for dinner. She said that they were both hurt because Garlington's had dating them both at the same time. She said that Hunter talked about being very vindictive and Hunter mentioned that she had gotten back at a previous boyfriend but gave no specifics. She identified Appellant's Exhibit 2 as a letter she provided for Garlington to use in his pretermination hearing. Kinnaird also mentioned that Hunter expressed concern that Garlington had several nude photos of her and she was afraid he would send them to others. She stated that Garlington had never threatened her but that she knew Hunter was afraid of him.

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[1] Dyer was unavailable to testify at the hearing due to a confirmed medical condition. Her testimony is offered by Affidavit (Appellee's Exhibit 5).

Robert Garlington testified that he had been employed by the Dept. since September of 1985. He was a Recreational Therapist, teaching clients how to use other avenues instead of drugs or alcohol, how to apply for jobs, and other like skills. He said that he had no prior discipline and had received all "perfect" evaluations. He said that he met Lauren Hunter in February, 2011 at Griffin. He said that he had a lot of respect for her because of her sense of adventure and that she was strong willed and independent. He testified that Hunter was a very seductive – that she liked to get attention. He said that Hunter was fascinated by his collection of ceremonial knives and swords. Garlington stated that Hunter was able to hack into computers because she had gotten into her father's computer to entrap him. He testified that Hunter broke up with him in May, 2011 because she wanted to date Hew Jefferson. He said that they began dating again until January, 2012 when she again told him she wanted to date another man, Eric Mozan. He said that he was never angry or upset about the break-up or her wanting to date other men. He admitted that he went out with Lindsey Dyer two times but that it was not a relationship as she claimed in her affidavit (Appellee's Exhibit 5). He also denied ever using the term "waddle in your sty" as she alleged. Garlington stated that Hunter sent him several nude photos, although he never asked her to. He said that they were sent to his cell phone, at times while he was at work at Griffin. He stated that the first time he learned of these accusations, he was served the VPO Petition by a Cleveland County Deputy. He denied that he ever harassed Hunter and denied waiting for her in the parking lot. He specifically denied that he ever sent the nude photos of Hunter to anyone and could not identify the photo as being the same one that Hunter had sent him. He admitted that he went to the VPO hearing without an attorney and regrets that decision. He said he thought it was all just a misunderstanding and he was unprepared. He also stated that the VPO was being appealed[2]. Garlington stated that he had two meetings with DeLong. He said that he felt that DeLong had already made up his mind and that it was a witch hunt. He said that all of the therapists have access to his office, as well as the Fire and Safety officers. Garlington testified that from 11:30 to 12:30, he was on the ward and could not have been in his office on the computer as alleged in the investigator's report. He discussed his military background in the Special Forces. He denied that Hunter had any reason to be afraid of him. When questioned, Garlington stated that he felt that everyone else was lying or out to

[2] Counsel for both parties agreed that the court records show that the Order of Protection was entered on August 20, 2012 and that a Motion to Reconsider was filed 3 days prior to Garlington's testimony on August 16, 2013.

get him. He denied ever being controlling or ever getting mad or upset with Hunter, even when she wanted to date other men. He felt that Hunter's sole motivation for lying was for vengeance due to him cheating on her. He said he was confused by her actions but not angry.

Jeff Strohm is the custodian of the records with Sprint. He identified the authentic records from Sprint as Appellant's Exhibit 1. He could not authenticate the Virgin documents because he was not familiar with them. He stated that Sprint bought Virgin Mobile several years ago and that Sprint was Virgin Mobile's parent company. He testified that the Sprint records and Virgin's billing records may be in different formats. He also stated that the records he provided did not contain any records of texts with pictures attached. Strohm explained the records. He stated that if there was a "short code" of three digits listed as the calling number, a blank listing under dialed digits or a repoll # of 291-298 or 506-533, it reflected a text being sent or received (except for picture texts, which are not reflected in these records). The texts also show 0 in the duration column.

As a rebuttal witness for the Appellee, Charla Young testified over the objection of the Appellant. She testified that she was Garlington's supervisor in 2011 and completed his performance evaluations. She stated that during his last evaluation meeting, he became agitated and angry that he did not receive an "exceeds standards" rating. Young told her supervisor that she would not meet with Garlington alone again. Her testimony directly refutes Garlington's testimony that he received "perfect" ratings in the past and to show that he could be intimidating.

Lauren Hunter was recalled to testify as rebuttal to explain the records she provided. She compared the "authentic" Sprint records to the records that she obtained from the Virgin Mobile website. She indicated that the records matched with no inconsistencies. She also rebutted Garlington's testimony that their break-up was amicable. She said that he repeatedly contacted her and harassed her about the break-up. He had recounted to her various instances of violence while in the military and indicated that he had a skill for torturing people and that he was a sociopath. She stated that he often stated that the world needed people like him who could kill without remorse. She said that her concern about his propensity for violence led to her to end their relationship. Hunter reiterated that no one but Garlington had the photos in question.

DISCUSSION

There was a considerable amount of testimony and evidence concerning the telephone records. After careful comparison, the Virgin Mobile records appear to be consistent with the authenticated records provided by Sprint. The time of the texts/calls appear to be exactly 2 hours to the minute different, which was accounted for as being different time zones for Virgin Mobile and Sprint. They do not appear to be altered. Although Garlington stated that his number did not appear in the Sprint records, there are two entries on July 29 that reflect his personal cell number being texted.

Hunter was a credible and consistent witness. Garlington was not. His testimony was calculated and evasive. It is a stretch at best to believe that Hunter would go to such great lengths to move her residence, change her phone number, and seek protection at work and an Order of Protection in District Court, all to avenge Garlington's infidelity. It is also difficult to believe that Hunter would have listed her Dept. email address on the prepaid phone registry if she was trying to set him up. It should also be noted that the District Court Judge also believed Hunter's version over Garlington's denial.

The standard of proof in this hearing is not beyond a reasonable doubt – it is preponderance of the evidence. The preponderance of the evidence and the reasonable inference from that evidence indicates that the allegations against Garlington concerning the sexual harassment of Lauren Hunter, another Dept. employee, are true as presented.

Based upon the above, it is determined that Dept. did have just cause to impose discipline in this matter. Therefore, it remains to be determined if the discipline of termination was just and appropriate under the circumstances. Sexual harassment in the workplace is a very serious situation, and not to be tolerated. Upholding the imposition of discipline as serious and far-reaching as termination is very difficult, however, after considering the entire record in this matter, the preponderance of the evidence supports that Garlington's misconduct justified the severity of the discipline of termination.

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 OAC 455:10-9-2 states that the Appellee 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. OAC 455:10-11-14 indicates that an employee in the classified service may be discharged for misconduct and/or conduct unbecoming a public employee.

5. The preponderance of the evidence shows that Garlington's conduct constituted sexual harassment of a co-worker, which is misconduct and conduct unbecoming a state employee.

6. Appellee has met its burden to prove, by a preponderance of the evidence, that just cause exists to discipline Garlington for his misconduct and his appeal on that ground is denied.

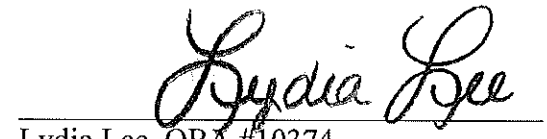
7. Appellee has also met its burden to prove, by a preponderance of the evidence, that the discipline of termination was just and appropriate under the circumstances given the seriousness of the misconduct.

8. In accordance with OAC 455:10-9-2 (f) (1) (A), upon the finding that just cause existed for the adverse action and the discipline imposed was just, the undersigned is affirming the decision of the appointing authority.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the undersigned Administrative Law Judge that the petition of Appellant Robert Garlington, MPC 13-069 be DENIED.

This Order entered this ~~3rd~~ 12th day of September, 2013.



Lydia Lee, OBA #10374
Administrative Law Judge