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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WALTER MIKULAN,
Plaintiff
vs.
ALLEGHENY COUNTY,
Defendant.

Civil Action No.
2:15-CV-01007CRE

- - -

Transcript of proceedings on June 7, 2017
United States District Court, Pittsburgh, PA,
before Judge Cynthia Reed Eddy.

APPEARANCES:

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transcript produced by computer-aided transcription.

1 plaintiff's counsel, as I mentioned for another witness, as if
2 on direct, so the warden is considered a hostile witness,
3 because he is represented by the county in this case, and I
4 think I made that explanation before, so you may call him.

5 MR. O'BRIEN: Your Honor said I was calling him as if
6 on direct.

7 THE COURT: I'm sorry. He'll be calling him as part
8 of his case, but he will conduct his examination as if on
9 cross-examination.

10 Then when he's turned over to defendants, he will be
11 their witness and will begin giving testimony as to
12 defendant's case. Thank you for correcting that mistake.

13 Does the jury understand that? Okay. Thank you.

14 (Witness sworn.)

15 THE DEPUTY: Please take the witness stand.

16 ORLANDO HARPER, a witness herein, having been first
17 duly sworn, was examined and testified as follows:

18 DIRECT EXAMINATION

19 BY MR. O'BRIEN:

20 Q. Good afternoon, Warden Harper.

21 A. Good afternoon.

22 Q. You and I have never met before; is that correct?

23 A. No.

24 Q. You are currently the warden at the Allegheny County Jail;
25 is that correct?

1 any type of leave, not just FMLA.

2 Q. Which included FMLA, isn't that right?

3 A. Yes, sir.

4 Q. Isn't it a fact also, Warden Harper, that you fired
5 Mr. Mikulan without conducting any investigation into the
6 three disciplinary actions taken against him that you claimed
7 formed the basis for his termination? Isn't that true?

8 A. That is not true. I made the determination to fire or
9 terminate Mr. Mikulan after reviewing his disciplinary file
10 and seeing that he was insubordinate on three different
11 occasions, and when I saw that he was insubordinate on three
12 different occasions, I had no choice but to terminate him for
13 his insubordinate behavior.

14 Q. And your contention that he was insubordinate was based
15 exclusively upon what was in that disciplinary file; isn't
16 that true?

17 A. As I reviewed his file and I saw the three insubordinate
18 behaviors is when I made that determination.

19 Q. Is it correct that the only items that you looked at that
20 formed the basis of firing Mr. Mikulan after 30 years of
21 service were what was ever in that disciplinary file when you
22 looked at it? That was it?

23 A. I made the determine --

24 MR. O'BRIEN: May I have an answer yes or no?

25 THE COURT: Sir, this calls for a yes or no answer.

1 A. What was the question again?

2 Q. Isn't it true that the only information that you had that
3 formed the basis for firing Mr. Mikulan were the documents
4 that were in the disciplinary file?

5 A. Yes.

6 Q. And isn't it true that before you fired Mr. Mikulan, you
7 didn't consult with Deputy Warden Emerick for his opinion as
8 to whether or not Mr. Mikulan should be fired; isn't that
9 true?

10 A. I did not.

11 Q. And isn't it also true that it was Deputy Warden Emerick
12 who had the responsibility for assessing whether Mr. Mikulan
13 was doing his job or not? Wasn't that his job?

14 A. Major Mikulan reported to Deputy Emerick, yes.

15 Q. And isn't it a fact -- and by the way, you have been
16 reported to be very strict about policies that are in effect.

17 Is that a fair assessment of your view of things? If
18 there's a policy, it should be strictly enforced?

19 A. Yes.

20 Q. And isn't it the policy at the Allegheny County Jail that,
21 with respect to majors, the person responsible for assessing
22 the majors' performance is the deputy warden?

23 A. Yes.

24 Q. And isn't the deputy warden the person on a day-to-day
25 basis that observes the major do his job and would be in a

1 better position to assess that performance than you?

2 A. No, I don't agree with that.

3 Q. We can agree that when Major Mikulan was working at the
4 jail between January of 2013 and August of 2013, he was on the
5 3:00 to 11:00 shift, true?

6 A. Yes.

7 Q. And at that same period of time, you were on the 7:00 to
8 3:00 shift, for the most part?

9 A. I was.

10 Q. So in terms of your ability to observe what Mr. Mikulan
11 was doing, you wouldn't be there to see it in the first place,
12 true?

13 A. No, because there was some times that I did work the 3:00
14 to 11:00 and the 11:00 to 7:00 shift to observe the operations
15 of those shifts, so that's not necessarily true.

16 Q. Do you know how many times you did that between January
17 2013 and August of 2013?

18 A. No.

19 Q. Did you see anything in any of those observations that you
20 recorded that indicated that Mr. Mikulan was not doing his job
21 appropriately as a major?

22 A. I seen a lot of violations while making my security
23 inspections of the jail when I first came on and from January
24 2013 to August 2013, many violations.

25 Q. Did you instruct Deputy Emerick -- strike that.

1 Did you put anything that you say you saw when you were
2 there on 3:00 to 11:00 shift into Mr. Mikulan's disciplinary
3 file?

4 A. I did not.

5 Q. Did you send a memo or an e-mail to his direct supervisor
6 telling him to do that based upon what you observed?

7 A. I did not.

8 Q. Did you discipline the deputy warden for not disciplining
9 Mr. Mikulan for these things that you say were not done right?
10 That was his responsibility, wasn't it?

11 A. I did not.

12 Q. It was the deputy warden's responsibility to discipline
13 Mr. Mikulan if there was something that Mr. Mikulan didn't do
14 that should have been done, correct?

15 A. Violations of the policy on the 3:00 to 11:00 and the
16 11:00 to 7:00 shift should have -- discipline should have
17 taken place. Discipline can also be -- discipline should have
18 taken place.

19 Q. And in accordance with the policy that you put into place,
20 if Deputy Warden Emerick didn't discipline Mr. Mikulan, you
21 should have disciplined Deputy Warden Emerick? Wasn't that
22 your policy?

23 A. Deputy Warden Emerick was not disciplined because I did
24 not feel that there was a need to discipline Deputy Warden
25 Emerick for the small infractions that I did find.

1 Q. Okay. So it turns out that these infractions that you
2 claim you saw while you were on the 3:00 to 11:00 shift, they
3 were just small infractions; is that it?

4 A. Yes, sir.

5 Q. And certainly small infractions wouldn't reflect
6 negatively on Major Mikulan if they weren't sufficient enough
7 to warrant discipline of Deputy Warden Emerick, correct?

8 A. Repeat the question.

9 MR. O'BRIEN: Could you read that back?

10 (Record read.)

11 A. Yes.

12 Q. Back to my original point. It was Deputy Warden Emerick,
13 in accordance with the policy that you set up, to do the
14 assessment of Mr. Mikulan's work performance; is that true or
15 not?

16 A. It was deputy warden's responsibility to discipline the
17 majors.

18 Q. My question is: In accordance with your policy and a
19 policy which, according to what we've heard in this courtroom,
20 you insist upon strict adherence, isn't it true that it was
21 Deputy Warden Emerick's responsibility to assess Mr. Mikulan's
22 performance, not just discipline, but assess it?

23 A. Yes.

24 Q. And despite the fact that it was the deputy warden's
25 responsibility to make that assessment, prior to firing

1 Mr. Mikulan, you never consulted with that person who did that
2 assessment; isn't that right?

3 A. I did not.

4 Q. So it's fair for us to conclude, is it not, that you
5 didn't comply with your own policies by not consulting with
6 the very person who was to do the assessment? You did the
7 assessment in his place, didn't you?

8 A. I disagree, because in accordance to the Allegheny County
9 handbook, it is the director's discretion to discipline when
10 needed, so I was perfectly within my right, in accordance to
11 the Allegheny County handbook, to do the discipline that I
12 did.

13 Q. Well, the Allegheny County handbook does not address the
14 specific policy that you set up for the jail, right?

15 Your policy was the one you set up yourself. You're the
16 one who said deputy wardens do the assessment.

17 My question isn't whether you violated the Allegheny
18 County policy. My question was didn't you violate your own
19 policy?

20 A. I don't think that I did.

21 Q. If somebody were to look at the objective facts that we
22 just stated, you would agree with me that a lot of people
23 would conclude that you didn't comply with your own policy?

24 MS. LIEBENGUTH: Objection. Speculation.

25 Q. Isn't that true?

1 THE COURT: Sustained.

2 MR. O'BRIEN: I withdraw the question.

3 Q. Do you agree with me, Warden Harper, do you agree with me
4 that charging someone with insubordination at the rank of a
5 major is as serious a charge that you could make against
6 somebody in that supervisory position short of, you know,
7 abuses and excessive force, but to charge somebody at the rank
8 of major with insubordination is as serious a charge as
9 someone could make? Do you agree?

10 A. Insubordination is a serious charge.

11 Q. And in particular, when you are charging it against a
12 major who has been at the jail for 30 years, true?

13 A. Insubordination of any employee, regardless of whether
14 you're a major or not, is a serious charge.

15 Q. Okay. And if you are going to make that charge, do you
16 agree with me that that allegation should be recorded
17 somewhere?

18 In other words, I, Warden Harper, charge Major Mikulan
19 with insubordination; do you agree?

20 A. No, I do not, because in accordance to our code of ethics,
21 it specifically explains what insubordination is, so
22 insubordination is the three incidents in which he did not
23 complete the task as directed by Deputy Warden Emerick.

24 Q. That's your conclusion. My question was: Don't you
25 think, if you are going to charge somebody with that, they're

1 entitled to be notified of that? Yes or no?

2 A. He was notified of that.

3 Q. Show me -- if you bring up P3, please. Strike that.

4 As you sit in this courtroom, Warden Harper, can you tell
5 anyone in this courtroom, the judge or any member of this
6 jury, that you have seen a single document that you authored
7 that says I accuse Major Mikulan of insubordination.

8 A. I cannot.

9 Q. And the fact of the matter is you can't because there is
10 no such document, is there?

11 A. The disciplines that Major Mikulan was issued indicated
12 that he was given a directive and the directive was not
13 followed, so when a directive is given and not followed, that
14 is clearly insubordination.

15 Q. Well, if that was the case and you believed that, why
16 didn't you write that down on a piece of paper and say I
17 charge you with insubordination?

18 A. First of all, the disciplines that was given to Major
19 Mikulan was done by Deputy Emerick, and I did not do those
20 disciplines on those three insubordinate occasions.

21 Q. Well, first off, you know, do you not, that Deputy Warden
22 Emerick who now you have acknowledged and he has testified in
23 this court that he's the one who claims to have issued the
24 discipline, that he never concluded that any of those acts
25 that form the basis for the write-up and the two disciplines

1 constituted insubordination? Did you know that?

2 A. Say the question again.

3 Q. Did you know before you fired Major Mikulan because you
4 claim he committed insubordination, that the person who
5 disciplined him, as you have just described, did not conclude
6 that there was any insubordination?

7 Did you know that before you fired Mr. Mikulan?

8 A. Of course I knew that, because when I reviewed the
9 disciplinary file and I saw those three insubordinate
10 occasions on there, just because the deputy warden did not see
11 that it was insubordination, I made the determination that he
12 should be terminated for his insubordinate behavior, because I
13 can do that in accordance to the Allegheny County handbook as
14 a director of the agency.

15 Q. To whom was he insubordinate?

16 A. Deputy Emerick and not just Deputy Emerick, and to the
17 warden of the Allegheny County Jail, because those incidents
18 in which he was insubordinate, I gave step by step
19 instructions via e-mail as to what I needed done, and it
20 wasn't done by the deadline.

21 Q. Okay. The first person to whom he was insubordinate was
22 Deputy Warden Emerick, true, in the chain of command?

23 A. Yes.

24 Q. And Deputy Warden Emerick didn't know it apparently?

25 A. I can't say whether or not what he knew.

1 Q. Did you discipline Deputy Warden Emerick for failing to
2 charge Mr. Mikulan with insubordination when it was clear,
3 according to you, that he committed it?

4 Wouldn't that have been an offense for which he should
5 have been disciplined?

6 A. Absolutely not, because Deputy Warden Emerick took
7 disciplinary action against Major Mikulan for his
8 insubordinate behavior, so I would not have to discipline
9 Deputy Emerick because he took action.

10 Q. But we've already established by your own testimony that
11 Deputy Warden Emerick did not conclude that whatever
12 discipline he issued was on account of insubordination,
13 correct?

14 A. It was not indicated on the notice to Mikulan, no.

15 Q. And it wasn't indicated in the disciplinary file either,
16 true?

17 MR. O'BRIEN: Let's bring up P3, so there's no
18 question.

19 Q. I think everybody has seen the document. Let me show it
20 to the witness. I want to show you what's been marked as
21 Plaintiff's Exhibit 3, and we're going to do this the old way
22 because the jury has seen this before.

23 Do you recognize this as the first page of the
24 disciplinary file of Major Mikulan?

25 A. Yes.

1 Q. And this is the same document that you saw at or about the
2 time that you decided to fire Mr. Mikulan, true?

3 A. Yes.

4 Q. And can we agree that there's nothing on the face of this
5 page that, if it were read by anybody, that would allow them
6 to conclude that Mr. Mikulan had engaged in the serious
7 offense of insubordination, true?

8 MS. LIEBENGUTH: Objection. Speculation.

9 THE COURT: Overruled.

10 Q. Is there anything on that page that would lead anybody
11 reading it, let's say a competent administrator like yourself,
12 to conclude that Mr. Mikulan had committed the serious offense
13 of insubordination?

14 A. Nothing on this first page.

15 Q. And certainly if on the inner pages there was a basis to
16 conclude that, then it should have appeared on the front page,
17 true?

18 A. I disagree.

19 Q. Why wouldn't you, if you could discern from the inner
20 pages that insubordination had occurred and that would be the
21 most serious offense, why wouldn't you put it right there on
22 the disciplinary log where you're supposed to put all the
23 things somebody did wrong that warranted discipline?

24 A. I can't answer that because you have to ask Deputy Emerick
25 that, because I didn't put this information on the page, so I

1 don't know.

2 Q. Well, did you ask Deputy Emerick? Why should I ask him?

3 Did you ask him?

4 A. I did not.

5 Q. We agree, based on your last answer, that you should have
6 asked him, shouldn't you have?

7 A. No. I'm not going to agree to that, no.

8 Q. Why not?

9 A. Because I'm the warden of the facility. I don't have time
10 to ask who, what, when of everything that's going on inside of
11 a jail, sir.

12 Q. That's exactly what you did with respect to Mr. Mikulan.
13 You didn't ask who. You didn't ask what. You didn't ask
14 where. You didn't ask when.

15 You fired him because he was old and he was taking FMLA;
16 isn't that the truth?

17 A. Absolutely not.

18 Q. As we sit here today in 2017, nearly four years since you
19 fired Major Mikulan for insubordination, have you ever, on
20 an official Allegheny County Jail form, put down in writing
21 that the reason he was fired is because he had been
22 insubordinate?

23 A. I have not put anything like that on a document, on a
24 document, no.

25 Q. So as we sit here today, with that most serious accusation

1 made against this man still hanging over his head, that
2 accusation, if it were true, has yet to be placed on a formal
3 document? Is that your testimony?

4 A. I have not seen insubordination, the word insubordination
5 on a formal document.

6 THE COURT: Are you almost finished, Mr. O'Brien, or
7 can you give me an estimate of how much longer?

8 MR. O'BRIEN: 15 minutes.

9 THE COURT: Is the jury doing okay? Anybody need a
10 break right now? Go right ahead.

11 Q. You mentioned the Allegheny County Jail ethics.

12 MR. O'BRIEN: That's Joint 2. Can you bring that up,
13 please? I think my 15 minutes are going to go pretty fast.

14 THE COURT: If you want to take a stretch while he's
15 looking for his reference, feel free.

16 MR. O'BRIEN: I apologize, Your Honor. Would you
17 bring up J5, please? Go to page 34-35. Go back to 33,
18 please.

19 BY MR. O'BRIEN:

20 Q. Are you familiar with the Allegheny County handbook,
21 employees handbook?

22 A. I am.

23 Q. Have you seen the section that begins on ACWM0033?

24 A. Yes, I've seen this.

25 Q. Could you go to the next page, please? Do you see, after