

IN UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JARYL ELLIS, MICHAEL HUNTER,
TIFFANY JOHNSON, and
PAUL ZEIGER,

Plaintiffs)

v.)

ROBERT P. HOUSTON, , Director of
Nebraska Department of Correctional
Services, FRANK HOPKINS, Deputy
Director of Nebraska Department of
Correctional Services, DENNIS
BAKEWELL, Warden of Nebraska State
Penitentiary, CATHY SHEAIR, Associate
Warden of Nebraska State Penitentiary,
JOSEPH STALEY, Associate Warden of
Nebraska State Penitentiary, all in their
individual capacities and official capacities,

Defendants)

Case No:

**COMPLAINT
AND
DEMAND FOR JURY TRIAL**

PRELIMINARY STATEMENT

1. Plaintiffs are African-American employees at the Nebraska State Penitentiary (“NSP”) who, over an extensive period of time, have been subjected to racially offensive comments and racially discriminatory actions that have served to create an intolerable and racially hostile work environment. This claim is brought pursuant to 42 U.S.C. §§ 1981, 1983, and 1988 for the deprivation of the plaintiffs’ rights secured to them by the First, Fifth, and Fourteenth Amendments to the United States Constitution.

PARTIES

2. Plaintiff Jaryl Ellis is a resident of Lincoln, Nebraska and has been employed at NSP as an officer since January 26, 2009. Plaintiff Jaryl Ellis is African-American.
3. Plaintiff Michael Hunter is a resident of Lincoln, Nebraska and has been employed by the Nebraska Department of Correctional Services (“NDCS”) since November 12, 2002. He has been employed as a caseworker at NSP since August 8, 2006. Plaintiff Michael Hunter is African-American.
4. Plaintiff Tiffany Johnson is a resident of Lincoln, Nebraska and has been employed at NSP as an officer since January 7, 2008. Plaintiff Tiffany Johnson is African-American.
5. Plaintiff Paul Zeiger is a resident of Lincoln, Nebraska and has been employed at NSP since November 17, 2008. Plaintiff Paul Zeiger currently holds the rank of corporal at NSP. Corporal Zeiger is African-American.
6. Defendant Robert Houston is the Director of the NDCS. As Director, Defendant Houston is directly responsible for and involved in NDCS’ daily functioning and administration. Defendant Houston is a person within the meaning of 42 U.S.C. §§ 1981 and 1983 and was acting under color of state law with respect to all acts or omissions attributed to Houston.
7. Defendant Frank Hopkins is Deputy Director, Institutions of the NDCS. As Deputy Director, Hopkins is directly responsible for and involved in the daily functioning and administration of both NSP and acts in the place of the Director in many instances. Hopkins is a person within the meaning of 42 U.S.C. §§ 1981

and 1983 and was acting under color of state law with respect to all acts or omissions attributed to Hopkins.

8. Defendant Dennis Bakewell is the Warden of the Nebraska State Penitentiary (“NSP”). As Warden, Defendant Bakewell is directly responsible for and involved in the daily functioning and administration of the NSP. Defendant Bakewell is a person within the meaning of 42 U.S.C. §§ 1981 and 1983 and was acting under color of state law with respect to all acts or omissions attributed to Bakewell.
9. Defendant Cathy Sheair is an Associate Warden of NSP. As Associate Warden, Sheair is directly responsible for and involved in the daily functioning and administration of NSP. Defendant Sheair is a person within the meaning of 42 U.S.C. §§ 1981 and 1983 and was acting under color of state law with respect to all acts or omissions attributed to Sheair.
10. Defendant Joseph Staley is an Associate Warden of NSP. As Associate Warden, Staley is directly responsible for and involved in the daily functioning and administration of NSP. Defendant Staley is a person within the meaning of 42 U.S.C. §§ 1981 and 1983 and was acting under color of state law with respect to all acts or omissions attributed to Staley.
11. At all relevant times, Defendants were “persons” under 42 U.S.C. §§ 1981 and 1983, and acting under color of state law and pursuant to the official and customary statutes, regulations, duties, and/or policies and practices enacted or followed by the governmental entities for which the individual Defendants serve or served as agents, representatives, members, or employees.
12. Defendants are sued in their official capacities insofar as Plaintiff seeks

prospective and permanent injunctive relief. For all other claims seeking money damages, Defendants are sued in their individual capacities.

JURISDICTION AND VENUE

13. This action arises under 42 U.S.C. §§ 1981, 1983 and 1988 to redress the deprivation under color of state law of rights, privileges and immunities secured by the First, Fifth, and Fourteenth Amendments to the United States Constitution. This Court has federal question jurisdiction over this controversy under 28 U.S.C. §§ 1331 and the Court has jurisdiction over the request for declaratory relief pursuant to 28 U.S.C. §§ 2201 and 2202.
14. Venue is proper in the District of Nebraska under 28 U.S.C. § 1391. The Plaintiffs are residents of this District, the events giving rise to this action occurred in this District, and the Defendants work in this District.

FACTUAL ALLEGATIONS

15. NSP is a minimum, medium, and maximum security facility. NSP employees work in three 8 hour shifts. There are approximately 90 NSP staff on first shift (6:00 a.m. to 2:00 p.m.), including the Plaintiffs.
16. For safety and security purposes, it is required of staff to congregate and enter the facility together through what is known as the turnkey entrance. Plaintiffs arrive for work and with the non-African-American employees of NSP proceed through master control, then through the turnkey area, to the staff dining area for roll call. Over the last year, it became common practice for a significant number of the non-African-American staff and NSP supervisors to make comments when Plaintiffs arrive to the effect of: "Looks like the back of the bus is here;" "Smells

like fried chicken;” “The gang has arrived;” “The ‘hood has arrived;” “If the lights went out, all you would see were white teeth;” and other racially charged comments that are offensive, degrading, and humiliating to the Plaintiffs.

17. Once the NSP employees pass through the front entrance, a sergeant is stationed nearby handling a drug-sniffing dog. As non-African-American employees walk by the canine handler, he generally stands back and lets them pass without incident. When the Plaintiffs walk through, the canine handler either moves forward or positions himself to have the canine drug-sniff the Plaintiffs. This, too, is offensive, degrading, and humiliating to the Plaintiffs.
18. During their workday, Plaintiffs are singled out for treatment that differs from their non-African-American counterparts. For example, the Plaintiffs were told that they should not fraternize with the African-American inmates or spend too much time with each other on duty because “it looks bad.” Non-African-American employees receive no such caution. In addition, the Plaintiffs are routinely singled out for additional duties at NSP that non-African-American employees are not called upon to perform as often. When Plaintiffs have raised concerns about the disparate treatment they have endured they have been labeled by co-workers and supervisors as “lazy” or “sandbaggers.”
19. The Plaintiffs have been subjected to racially offensive words and comments from NSP staff and supervisors that, while directed at inmates, serve to humiliate and embarrass Plaintiffs as African-Americans. NSP staff have used the word “nigger” and “niggers” in referencing inmates, as well as the term “black mother fuckers,” and other racially derogatory terms. When observing African-American

inmate behavior, the Plaintiffs have been asked by non-African-American staff:

“Why do you blacks act that way?”

20. In the summer of 2010, an NSP corporal stated to one of the Plaintiffs that he hates “how blacks act” and that if they were in a group he would “shoot them all.” The corporal professed to having been a member of a white supremacist group. When these comments were reported by one of the Plaintiffs to an NSP sergeant, the Plaintiff was told to “Stay away from him; he’s a racist.”
21. When Plaintiffs advised their co-workers that such terms and comments were inappropriate, they were told that they were “throwing out the black card” or were being “old school militant.”
22. In late August 2010, the Plaintiffs, following the chain of command, verbally reported their concerns to a lieutenant and a sergeant. Plaintiffs observed no change in their conditions. At that time, no investigation was undertaken by NSP management, including the Defendants, even though they knew or should have known of the racially hostile work environment that existed at NSP.
23. In early September 2010, the Plaintiffs put their complaints into an Incident Report and submitted them to NSP management. Again, weeks passed and the Plaintiffs received no response from NSP management, including the Defendants.
24. NDCS has a policy against workplace harassment at NSP. Administrative Regulation (A.R.) 112.07 provides that the Department and the State of Nebraska subscribe to “a policy of non-discrimination in all elements of the working environment within Corrections.”
25. For purposes of A.R. 112.07, workplace harassment is defined as any verbal or

physical conduct of a discriminatory nature (inflammatory comments, jokes, printed material and/or innuendo) based in whole, or in part, on race, color, sex, religion, age, disability or national origin when: (1) such conduct has the purpose or effect of creating an intimidating, hostile or offensive working environment; OR (2) such conduct interferes unreasonably with a person's work or employment opportunities or has the purpose of or effect of creating an intimidating, hostile or offensive working environment.

26. A.R. 112.07(I) provides specific procedures for supervisors and managers who become aware of workplace harassment: "Workplace harassment creates a negative work environment which will affect productivity . . . allegations of workplace harassment, which are not appropriately responded to by the agency may place DCS and the State of Nebraska in a position of potential liability to the victim of such workplace harassment. *It is essential that supervisory /management personnel take all workplace harassment complaints seriously.*" (Emphasis added.)
27. A.R. 112.07(I)(A) provides that: "Any supervisor/manager who receives a complaint alleging workplace harassment or who is otherwise aware of a situation involving a potential workplace harassment is required to follow and complete the WPH Supervisor's Checklist and *immediately* report that complaint or situation to the Warden/Program Administrator/Designee" (Emphasis added.)
28. A.R. 112.07(I)(B) provides: "Any failure by a supervisor/manager to report such workplace harassment complaints or situations shall be considered to be a violation of this policy"

29. A.R. 112.07(I)(C) provides: “Any supervisor/manager receiving a complaint alleging workplace harassment *shall immediately* notify and give the complainant and subject of complaint a copy of the agency’s policy concerning workplace harassment and of his/her rights” (Emphasis added.)
30. A.R. 112.07(I)(D) insures a confidential process: “Any supervisor/manager receiving a complaint *shall protect the identity of the complainants* and of the accused parties and *shall hold the allegations of workplace harassment in confidence* pending appropriate action by the agency.” (Emphasis added.)
31. A.R. 112.07(II) encourages NSP employees to report hostile work environment claims: “(A) Right to Report: In the event that any employee of this agency believes that he/she has been or is being subjected to workplace harassment, that person has the right to report such alleged workplace harassment to any supervisor/manager”
32. The provisions of A.R. 112.07 were repeatedly violated or ignored by the Defendants. The violations of A.R. 112.07 indicated to the Plaintiffs that the Defendants were not taking their concerns seriously.
33. For example, in October, 2010, Defendant Associate Warden Cathy Sheair undertook an inquiry into the complaints of the Plaintiffs. Despite the policy’s assurance of confidentiality, word immediately began circulating among NSP staff, as well as the inmate population, that the Plaintiffs had complained of a racially hostile environment.
34. After Plaintiffs’ complaints became generally known, two of the Plaintiffs’ vehicles were vandalized while parked in the NSP parking lot. One vehicle

appeared to have been kicked in the side and another had a side view mirror broken and left hanging.

35. After Plaintiffs' complaints became generally known, one of the Plaintiffs was asked by a non-African-American employee near the front entrance, "What's all this that's going down . . . ? You don't want to be involved and you know what I mean You should watch your back."
36. After Plaintiffs' complaints became generally known, one of the Plaintiffs was told by a non-African-American NSP officer that "the problem around here" is that "hotheads stir up trouble" and they (meaning the plaintiffs) had better "watch their backs."
37. After the Plaintiffs' complaints became generally known, one of the Plaintiffs was told by a non-African-American officer that when he (the Plaintiff) went out into the yard, he had "better pair up" because "you never know what might happen in the yard."
38. Plaintiffs interpreted these remarks as veiled threats that if there would be a physical confrontation with inmates in the yard at NSP, non-African-American staff might not come to the aid of the Plaintiffs.
39. In a prison setting, the most critical component of the working environment is the knowledge that despite their personal differences, staff always has one another's safety at the fore of their minds. It is an absolute necessity that prison staff protect "each other's back." The veiled threat that some NSP staff might not "be there" for the Plaintiffs, has further served to create a hostile work environment for the Plaintiffs.

40. When Plaintiffs reported these comments in late October 2010 to Defendant Sheair and Defendant Bakewell, the Defendants responded that they would have an outside law enforcement agency investigate the matter. An officer with an outside law enforcement agency then interviewed several of the Plaintiffs. At the conclusion of the interviews, he advised the Plaintiffs that the comments did not rise to the level of an illegal threat.
41. In late October 2010, the Plaintiffs were summoned to meet with Defendants Bakewell, Sheair, and Staley. Defendants were late for the meeting and Plaintiffs were made to wait in a room at NSP for approximately two hours for the meeting to begin. Plaintiffs were shocked and degraded when they saw a picture on the wall of the room that featured an African-American man stooped over picking crops. One of the Plaintiffs captured an image of the picture with a cell phone camera.



42. When the meeting finally began, Plaintiffs were informed by Defendant Bakewell that this was the first he had heard of any racial problems at NSP. Rather than address the actions of NSP staff who had made racially insulting and offensive remarks, Defendant Bakewell's initial response was to blame the Plaintiffs. Defendant Bakewell was dismissive of the Plaintiffs' racial concerns and said that he did not like getting involved in "this issue." Defendant Bakewell advised the Plaintiffs that he was going to split them up and transfer them out of NSP to different NDCS facilities. Plaintiffs objected because by working at NSP they have the opportunity to earn overtime and receive other benefits that they were not sure were available to them at other NDCS facilities.
43. By placing them in a room for two hours with a picture of an African-American picking crops, making dismissive comments, and threatening an adverse employment action against them, the Plaintiffs felt that the Defendants were not taking the racial concerns of the Plaintiffs seriously and further contributed to the hostile working environment of the Plaintiffs.
44. After the meeting with Defendants Bakewell, Sheair, and Staley, word immediately leaked out to NSP staff not in attendance at the meeting that the Plaintiffs were being transferred. This further served to make the working conditions of the Plaintiffs difficult because it made them to feel that *they*, and not the racially offensive words and actions of the non-African American staff, were the problem.
45. On November 10, 2010 a meeting was held with Plaintiffs and Defendants Houston, Hopkins, Bakewell, and Sheair. Defendants advised Plaintiffs that the

most that could be done to NSP staff who engaged in racially offensive behavior was to put a "B Form" in their employment file noting that their behavior was inappropriate. Defendants advised the Plaintiffs that it would be difficult to take action to stop the racially offensive comments and behavior of NSP staff.

46. Since Plaintiffs have raised their concerns with NSP management, including the Defendants, they believe they have received additional scrutiny from non-African-American employees and supervisors and have been singled out for unequal treatment and Plaintiffs now fear that they will be written up and disciplined for petty or fabricated offenses.
47. During the November 10, 2010 meeting with Defendants, Plaintiffs advised the Defendants of their good faith concern that they were receiving extra scrutiny. Defendant Houston said he agreed and then advised the Plaintiffs that, "that's going to happen" when one complains about co-workers. Defendant Houston's comments further served to make the working conditions of the Plaintiffs intolerable by making them to feel, again, that *they* were the problem, and not the racially offensive words and behavior of the non-African-American employees and supervisors of NSP.
48. During the November 10, 2010 meeting, Plaintiffs advised Defendants that they were concerned about the lack of confidentiality of the investigation (in violation of A.R. 112). Defendants advised the Plaintiffs that they (the Defendants) were powerless to prevent breaches of confidence in the investigation process.
49. Plaintiffs left the November 10, 2010 meeting with the belief that Defendants did not intend to take substantive action to address the racially hostile working

environment that exists at NSP.

DEFENDANTS' LIABILITY
PURSUANT TO 42U.S.C. §§ 1981, 1983, AND 1988

50. Through their negligence, indifference, and reckless disregard, Defendants have allowed a racially hostile environment to develop at NSP. The racially charged environment at NSP is so severe that no reasonable person in Plaintiffs' positions should be expected to endure it.
51. As a direct and proximate result of the Defendants' actions in allowing a racially hostile work environment to develop and fester at NSP, Plaintiffs have incurred medical expenses and have suffered anxiety, humiliation, embarrassment, fear, emotional distress, and damage to their reputations.
52. The Defendants' actions have served to deprive the Plaintiffs' constitutional rights to be free of racial discrimination in their employment at NSP and Defendants' are liable to the Plaintiffs under 42 U.S.C. §§ 1981, 1983, and 1988 for the deprivation of rights secured by the First, Fifth, and Fourteenth Amendments to the United States Constitution.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Issue a judgment declaring that the actions of Defendants described herein are unlawful and violate Plaintiffs' rights under the Constitution of the United States;
2. Issue a preliminary and permanent injunction enjoining Defendants from

subjecting Plaintiffs to a work environment that is racially hostile and intolerable;

3. Declare that Defendants' failure to provide Plaintiffs with a confidential investigation of their complaints as required by the NDCS's "Policies Against Workplace Harassment" (A.R. 112.07) was a violation of their constitutional rights;
4. Preliminarily and permanently enjoin Defendants, their subordinates, agents, employees, and all others acting in concert with them, from retaliating against Plaintiffs for seeking to enforce the rights secured to them by the United States Constitution as set forth in this Complaint;
5. Award special, general, and punitive damages against Defendants, and each of them, in favor of Plaintiffs, in an amount to be determined according to proof and the law;
6. Grant Plaintiffs their reasonable attorney fees and costs pursuant to 42 U.S.C. § 1988 and other applicable laws; and
7. Grant all such other relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL


Plaintiffs request trial by jury in Omaha, Nebraska.

VERIFICATION


I have read the allegations of this Complaint and verify that they are true and correct to the best of my knowledge and belief.




Jaryl Ellis



Michael Hunter



Tiffany Johnson



Paul Zeiger