

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
AT LOUISVILLE

MARK FRIEDMAN

PLAINTIFF

v.

CIVIL ACTION NO. 3:96CV-584-S

RONALD BISHOP, et al.

DEFENDANTS

**MEMORANDUM OPINION**

This matter is before the court for consideration of the Findings of Fact, Conclusions of Law, and Recommendation of United States Magistrate Judge C. Cleveland Gambill and the objections thereto. The plaintiff, Mark Friedman, filed a motion for partial summary judgment against defendant, Jefferson County Judge-Executive David Armstrong, in his individual capacity on Counts 7, 8, and 9 of the amended complaint. The defendants filed a motion for summary judgment on all claims. The Magistrate Judge recommended that summary judgment be granted in favor of the defendants and that the plaintiff's federal claims for violation of procedural due process be dismissed with prejudice and his remaining state claims be dismissed without prejudice. Friedman has filed objections to two of the Magistrate Judge's conclusions of law, as well as his recommended disposition of the motion. In accordance with 28 U.S.C. § 636(b)(1)(C), this court must conduct a *de novo* review of the record and those portions of the report of the Magistrate Judge to which Friedman has filed objections.

**FACTS**

The plaintiff, Mark Friedman, was discharged from his employment at the Jefferson County Corrections Department following an investigation into charges of sexual harassment made by three female corrections employees. The County Judge-Executive and County Fiscal Court approved Friedman's termination. Friedman appealed the termination to the County Merit

Board. Seventeen months later, the Merit Board held a hearing and recommended that Friedman be reinstated at the Department of Corrections. The County Judge-Executive rejected this recommendation and refused to permit Friedman's reinstatement.

Friedman then filed this civil rights suit against the Chief of Corrections, Investigator Angela McDonald-Hackett, the Legal Affairs Coordinator for the Jefferson County Personnel Department and investigator of Friedman's case, the County Judge-Executive, and the Fiscal Court of Jefferson County. Friedman alleged that the defendants deprived him of his Fifth and Fourteenth Amendment rights in violation of 42 U.S.C. § 1983. The defendants have brought a motion for summary judgment on all of Friedman's claims. Friedman has filed a motion for partial summary judgment against the County Judge-Executive, based upon the allegedly unlawful decision of the Judge-Executive to reverse the recommendation of the Merit Board.

### **DISCUSSION**

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A party's failure to establish an element of proof essential to his case and upon which he will bear the burden of proof at trial constitutes a failure to establish a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d. 265 (1986). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

Friedman alleges that the County Judge-Executive deprived him of due process when he reversed the decision of the Merit Board. The Sixth Circuit has held that "a public official is entitled to qualified immunity for conduct in performing discretionary functions so long as that conduct does not violate clearly established statutory or constitutional rights of which a

reasonable officer would have known.” *Wegener v. Covington*, 933 F.2d 390, 392 (6<sup>th</sup> Cir. 1991). Friedman objects to the Magistrate Judge’s definition of what constitutes “clearly established” law. The Magistrate Judge, however, correctly stated the Sixth Circuit’s holding that, for a right to be clearly established, the unlawfulness of the official’s conduct must be apparent from existing law. *Id.* The trial court can find that a right is clearly established if there is binding precedent by the Supreme Court, the Sixth Circuit, the highest court in the state in which the action arose, or the trial court’s own holding. *Id.* An unpublished Kentucky Court of Appeals ruling in a separate case held that the Judge-Executive had no authority to override a decision of the Merit Board. This decision, however, is not binding authority on a federal court sitting in Kentucky. Accordingly, we adopt the Magistrate Judge’s conclusion that the Judge-Executive’s conduct did not violate a clearly established law.

Friedman also asserts that the seventeen month delay between his termination and the Merit Board’s post-termination hearing constituted a constitutional violation. The Sixth Circuit has held that a nine month delay was not a constitutional violation where no evidence was presented that the delay stemmed from anything other than the thoroughness of the proceedings. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Whether a delay is unreasonable must be viewed in light of the reason for the delay. The Merit Board’s stated reasons for the delay were difficulty in obtaining a quorum and refusal of the complaining witnesses to testify. Like *Loudermill*, Friedman has presented no evidence that the delay was unreasonably prolonged other than the fact that it took seventeen months.

During his two day hearing, the Department of Corrections called eleven witnesses and Friedman testified on his own behalf and called one other witness. The Merit Board ultimately recommended that Friedman be reinstated with the Department of Corrections. Friedman, however, argues that this hearing was an “exercise in futility.” Friedman appears to base this characterization on the County Judge-Executive’s rejection of the findings and recommendation

of the Merit Board. Simply because the result was unfavorable to Friedman, however, does not mean that the hearing was futile. Accordingly, we adopt the conclusion of the Magistrate Judge that the post-termination hearing did not deprive Friedman of his due process rights.

**CONCLUSION**

After a *de novo* review of the Magistrate Judge's Findings of Fact, Conclusions of Law, and Recommendation, we adopt the Magistrate Judge's Findings, Conclusions, and Recommendation in their entirety.

This \_\_\_\_ day of \_\_\_\_\_, 1998.

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CHARLES R. SIMPSON III, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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**ORDER**

This matter comes before the court for a *de novo* determination of those portions of the United States Magistrate Judge C. Cleveland Gambill's proposed Findings of Fact, Conclusions of Law, and Recommendation to which objections have been made.

The court accepts the Findings of Fact, Conclusions of Law, and Recommendation of the Magistrate Judge, and **IT IS HEREBY ORDERED AND ADJUDGED** that the plaintiff's motion for summary judgment be **DENIED** and that the defendants' motion for summary judgment be **GRANTED** and that the plaintiff's federal claims for violation of procedural due process be **DISMISSED** with prejudice and his remaining state claims be **DISMISSED** without prejudice.

This \_\_\_\_ day of \_\_\_\_\_, 1998.

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CHARLES R. SIMPSON III, CHIEF JUDGE  
UNITED STATES DISTRICT COURT

cc: Counsel of Record