

August 15, 2005

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820 N. French Street, 7th floor
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Re: *State of Delaware v. Ibrahim Candir*
Case No.: 0412022015

Date Submitted: August 9, 2005
Date Decided: August 15, 2005

LETTER OPINION

Dear Counsel:

Trial in the above captioned matter took place Tuesday, August 9, 2005. Following the receipt of evidence and testimony the Court reserved decision. This is the Court's final Order and Opinion.

THE FACTS

Prior to trial Deputy Attorney General Chernev dismissed the previous Informations filed with the Clerk of the Court and submitted a new amended Information which read as follows:

“M. Jane Brady, Attorney General of the State of Delaware by the undersigned Deputy Attorney General by INFORMATION alleges that IBRAHIM CANDIR, did commit the following offense:

SEXUAL HARASSMENT, in violation of Title 11, Section 763 of the Delaware Code as amended.

IBRAHIM CANDIR, on or about the 14th day of June, 2004 and the 20th day of December, 2004, in the County of New Castle, State of Delaware, did suggest, solicit, command, importune or otherwise attempt to induce Paula Boulden to have sexual contact or sexual intercourse or unlawful sexual penetration with the actor knowing that the actor was thereby likely to cause annoyance, offense, or alarm to that person.”

Mr. Lyons did not object to the amended Information and the Court proceeded to trial and receipt of evidence and sworn testimony.

Corporal Truman Bolden (“Corporal Bolden”) of the Newark Police Department was sworn and testified. He has been employed by the Newark Police Department for five (5) years and handles general calls to the Police Troop, accidents, traffic investigations and other misdemeanor criminal matters. In December of 2004 he spoke to Paula Boulden, the complainant (“Boulden”). Boulden came into the police station to file a complaint and alleged her employer from June 2004 to October 2004 continued to make improper and inappropriate sexual remarks and repeatedly harassed her. Specifically Boulden reiterated that the Defendant, Ibrahim Candir (“Candir”) told her repeatedly, “I want to f--- you.”

According to Boulden, the conduct by defendant occurred on a daily basis at work. On one occasion the defendant made sexual requests for her in lieu of handing her a paycheck and then demanded sexual favors as a condition that she be paid and/or receive her paycheck. The defendant works at First State Diner. Corporal Bolden, of no relation to the alleged victim, wrote a report as a result of the interview with the complainant. Boulden told him her only source of income was as a waitress. Therefore Boulden did not report the advances and/or sexual harassment to the police even though her best friend requested her to do so on many occasions. Boulden, the complainant, did tell Corporal Bolden that she spoke with the co-owner Jack

Asenyan (“Asenyan”) and made formal complaints with him. Boulden also told Asenyan that during a religious Turkish holiday, Ramadan, the harassment temporarily stopped.

Corporal Bolden stated he never received the defendant’s side of the story before issuing an arrest warrant before the defendant turned himself in at Police headquarters.

Diane Marie Coco (“Coco”) presented testimony at trial. She is Boulden’s brother’s girlfriend for the past two and a half to three years and a confidential friend of Boulden. She assisted Boulden in her intake appointment with the Newark Police Department in order to file charges against the defendant. Boulden had previously called her in a “very upset state of mind” and told her on numerous occasions that her boss had asked for a ride home and that when she went into her residence the defendant followed her in and accosted her. According to Coco, Boulden went inside her house in September 2004 and the defendant then followed her in. He then accosted her by grabbing her and putting her arms around her and forcing himself upon her, including but not limited to “kissing her and grabbing her person.” When she refused to go upstairs, defendant told her “I want to f--- you.” When Boulden told the defendant to go downstairs he physically accosted her, grabbed her while on the couch and fondled her person with his hands and repeatedly told her “I want to f--- you.” Boulden told Coco that she did not report the incident because she needed her employment and paycheck. Boulden reiterated these statements to CoCo because the Defendant’s sexual harassment was becoming “increasingly forceful.”

According to Coco, several months after the incident when Boulden was trying to get her paycheck the defendant requested she come up the stairs to obtain the same and grabbed her and told her “I want to f--- you.”

On cross-examination Coco testified the first call was from Boulden on her cell phone. Coco believes the first incident occurred in September 2004 in Boulden's house. Coco also stated that Boulden told her and reaffirmed that during the two months of Ramadan defendant temporarily stopped sexually harassing her. Coco also reiterated that she repeatedly told Boulden to report the incidents to the Police because when Boulden called her she was "extremely upset and crying."

Jack Asenyan presented testimony at trial. He has known the defendant for approximately 12 years. They have been business partners for approximately 8 years. They were previously involved in two ventures for 8 years in New Jersey and Delaware and bought First State Diner in Newark. Since 1998 both the defendant and Asenyan supervised the First State Diner employees. He knows two other witnesses, Eric Wallop and Cynthia Greer and recalls an incident when Boulden approached him and reported harassment and sexual advances by defendant while he was his business partner. Specifically, Boulden told Asenyan that the defendant continually "touched her rear" and made "inappropriate comments to her" while she was at work. When the religious holiday of Ramadan was practiced for two months Boulden told Asenyan the sexual harassment and advances had temporarily stopped.

On numerous occasions Boulden appeared at the place of employment and appeared "very sad and down" because of the problems she was having with the defendant. The witness also reiterated that Boulden was "very disturbed and upset" when she reported the sexual harassment complaints by the defendant to Asenyan.

On cross-examination Asenyan testified he and the defendant were "fifty-fifty partners" but at the present time he is not active in the management of the business. He also understood that some of the testimony he presents at trial today could cause civil complaints to be filed

against his business because he is co-owner and he and the business itself may therefore face civil liability.

Paula Marie Boulden (“Boulden”), the complainant, presented testimony at trial. She’s the complainant and currently works at Red Robin as a server and previously worked at First State Diner from June 2004 until December 2004. Boulden has two daughters, one is twenty-eight year old and the other is seventeen years old. She was interviewed initially at First State Diner by Jack Asenyan, the defendant’s co-owner and informed him she could work as an employee and server 7:00 a.m. – 4:00 p.m. Monday through Friday “but no weekends and no holidays.” Her employment conditions were accepted.

In September 2004 defendant asked her for a ride home. She stopped at her house for a moment and “Ibrahim forced his way [behind her] into her house.” She was walking to the front door and he followed her in and came upstairs but initially told her he just wanted to “look around”. She informed him, “Please don’t go into the house.” The defendant grabbed her hand and followed her upstairs to her bedroom. Defendant then “tried to kiss her” and “pull her close to him” and she told him, “please get out of my house.” When they arrived downstairs to the first floor the defendant pulled her onto his lap on the couch; put his hands in her pants and told her, “I want to f--- you.” Defendant “then grabbed her hand” and tried to make her touch him in his private parts. According to Boulden, she told the defendant, “This isn’t right, you’re my boss, you have kids.” The defendant in turn told her “I want to f--- you.” She understood those comments to mean that the defendant wanted to have sex with her.

In the second incident the defendant smacked Boulden’s “ass” at work when she walked by him and he told her “I want to f--- you.” Defendant then kept her paycheck, stuck his hand in

her shorts and smacked her “ass”. Defendant also told her “I want to f--- you.” According to Boulden, the only way she could get her paycheck was to follow him upstairs. She told him “Stop, I am not interested.” Defendant also told her “I want to sleep with you.” and “I want to f--- you.” At this point Boulden testified that she “could not take it anymore.”

On cross-examination Boulden indicated she now works M.R. Docks. Copies of two different documents, Defendant’s Exhibit No.: 3 and Defendant’s Exhibit No.: 4 were marked for identification and moved into evidence with no objection by the State. Defendant’s Exhibit No.: 4 was an original check for \$14.98 which allegedly meals were bought for a family member. Defendant’s Exhibit No.: 3 was a copy of her clock-in card which indicates she clocked in December 20, 2004 at 7:08 a.m. with no clock-out date.

On cross-examination Boulden stated that she did not report her boss to the police because she “needed to keep her job” as well as receive her paycheck. It was her only source of income. Boulden also reiterated her testimony that she told co-partner Jack Asenyan of the ongoing sexual harassment problems with the defendant. On December 20, 2004, her last day of work which was her birthday, she agreed she clocked-in at 7:08 a.m. but left when the defendant told her she had to pay for a bill when patrons walked out without paying the same.

Boulden was shown a copy of her unemployment decision which indicated, in part, she left employment because of a scheduling problem. She admitted she stated at one point to a co-worker, “Boy, I am going to do something about this and let the cops know what is going on.”

On redirect she testified the unemployment decision also provides that the reason she quit her employment with defendant was due to sexual harassment.

The defense presented its case-in-chief.

Erica Walcup (“Walcup”) presented testimony at trial. She is thirty-one years old and is a server for the past five to six years at the First State Diner. She knows Boulden and testified she never saw the defendant harass or annoy Boulden. She claims also never complained to her about any improper physical contacts with the defendant. She believes she has a good relationship with “Jack and Abe.” She understands Abe’s wife works 9:00 a.m. to 2:00 p.m. at the restaurant. Walcup believes Boulden was “unhappy” with the change in hours, as was all employees, and allegedly heard Paula state, “I could get him [the defendant] in trouble if I like to.”

Cynthia Shive (“Shive”) presented testimony at trial. She was also a waitress First State Diner for the past three years. Shive is head waitress and sets work schedules, including those hours for Boulden. Shive agrees that she has to keep the defendant happy because he is her employer and can assign her different hours or work schedules. She testified she never heard Boulden claim that defendant sexually harassed her. She believed Boulden was upset because of the change in work hours which affected all employees of First State Diner.

On cross-examination, Shive testified the scheduled was changed for the employees. She allegedly heard Boulden state, “they don’t know who they are messing with, I’ll get them in trouble.”

The defendant testified. Ibrahim Candir (“Candir”) affirmed. He indicated that he is forty-three years old, has a high school education and was born in Turkey. He has been present in the United States for eighteen years. He was naturalized as a U.S. Citizen approximately two years ago. He denies all the accusations against made by the defendant. He testified the incident in question in September at her house “never occurred” and he has never been to her house. Although initially he denied ever having an employee drive him home, he agreed that on several

occasions some employees did, in fact, drive him home. He claims he never touched or made advances to Boulden. He testified that his wife works at the restaurant, usually “full time.”

With regards to his relationship with co-owner Jack Asenyan, he testified he is primarily running the business at the present time and that Jack is not sharing in the profits because he is an absentee owner.

On cross-examination he testified his wife leaves at approximately two to two-thirty and there are some occasions during the normal working hours that he is alone with Boulden, usually 2:00 – 4:00 p.m. He testified Ramadan in 2004 was during October – November and is a time, as a Muslim, he fasts, refrains from eating and drinking and must atone for his sins for the past year during this holiday.

THE LAW

The State has a burden of proving each and every element of the offense beyond a reasonable doubt. 11 *Del. C.* §301, *State v. Matushefske*, Del. Supr., 215 A.2d 443 (1965). As established case law indicates “[A] reasonable doubt is not a vague, whimsical or merely possible doubt, but such a doubt as intelligent, reasonable, and impartial men may honestly entertain after a conscience consideration of the evidence or want of evidence in the case.” *Matushefske*, 215 A.2d 445.

A reasonable doubt “means a substantial, well-founded doubt rising from a candid and impartial consideration of all the evidence or want of evidence.” *State v. Wright*, Del. Gen. Sess., 79 A.2d 399 (1911).

The State also has the burden of beyond a reasonable doubt that jurisdiction and venue has been proven as elements of the offense. 11 *Del. C.* §232, See *James v. State*, Del. Supr., 377 A.2d 15 (1977); *Thorton v. State*, Del. Supr., 405 A.2d 126 (1979).

The offense of sexual harassment is set forth in the Delaware Code in subsection 11 *Del.*

C. §763 as follows:

§ 763. Sexual harassment; unclassified misdemeanor

A person is guilty of sexual harassment when:

- (1) The person threatens to engage in conduct likely to result in the commission of a sexual offense against any person; or
- (2) The person suggests, solicits, requests, commands, importunes or otherwise attempts to induce another person to have sexual contact or sexual intercourse or unlawful sexual penetration with the actor, knowing that the actor is thereby likely to cause annoyance, offense or alarm to that person.

Sexual harassment is an unclassified misdemeanor.

The definition of sexual offense is set forth in Delaware Code in subsection 11 *Del. C.*

§761 as follows:

§761. Definitions generally applicable to sexual offenses.

... (d) "Sexual offense" means any offense defined by §§ 763-780 and §§ 1108-1112A of this title.

(e) "Sexual intercourse" means:

- (1) Any act of physical union of the genitalia or anus of 1 person with the mouth, anus or genitalia of another person. It occurs upon any penetration, however slight. Ejaculation is not required. This offense encompasses the crimes commonly known as rape and sodomy; or
- (2) Any act of cunnilingus or fellatio regardless of whether penetration occurs. Ejaculation is not required.

(f) "Sexual contact" means:

- (1) Any intentional touching by the defendant of the anus, breast, buttocks or genitalia of another person; or
- (2) Any intentional touching of another person with the defendant's anus, breast, buttocks or genitalia which touching, under the circumstances as viewed by a reasonable person, is intended to be sexual in nature. Sexual contact shall also include touching when covered by clothing.

(g) "Sexual penetration" means:

- (1) The unlawful placement of an object, as defined in subsection (c) of this section, inside the anus or vagina of another person; or

- (2) The unlawful placement of the genitalia or any sexual device inside the mouth of another person.
- (h) "Without consent" means:
 - (1) The defendant compelled the victim to submit by any act of coercion as defined in §§ 791 and 792 of this title, or by force, by gesture, or by threat of death, physical injury, pain or kidnapping to be inflicted upon the victim or a third party, or by any other means which would compel a reasonable person under the circumstances to submit. It is not required that the victim resist such force or threat to the utmost, or to resist if resistance would be futile or foolhardy, but the victim need resist only to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant;
or
 - (2) The defendant knew that the victim was unconscious, asleep or otherwise unaware that a sexual act was being performed;
or

In determining whether the State has met its burden of proving each and every element of defense beyond a reasonable doubt, the Court may consider all direct and circumstantial evidence.

The Court notes as a trier of fact it is the sole judge of the credibility of each fact witness. If the Court finds the evidence to be presented in conflict, as in the instant record, it is the Court's duty to reconcile these conflicts, if reasonably possible to make one harmonious story. If the Court cannot do this, the Court must give credit to the portion of the testimony which, in the Court's judgment, is most worthy of credit and disregard any portion of the testimony in which in the Court's judgment is unworthy of credit. In performing this task, the Court takes into consideration the demeanor of each fact witness, the apparent fairness in giving their testimony, the opportunities in hearing and knowing the facts about which each fact witness testified, and any bias or interest each fact witness may have concerning the case.

OPINION AND ORDER

After scrutinizing the evidence presented and the credibility of the witnesses, the Court's only conclusion based upon the testimony at trial and the credibility balancing test set forth in the law section of this opinion is that the State has proven the instant charge beyond a reasonable doubt. 11 *Del. C.* §301. The Attorney General provided a factual specific detailed record of the chain of events clearly constituting sexual harassment by the defendant which led up to the filing of the Information, including, but not limited to, the interview by the complainant Boulden with the Newark Police Department. Scrutinizing the credibility of all fact witnesses, including any bias or interest they may have in the case, the Court concludes the State proved each and every element of 11 *Del. C.* §763 beyond a reasonable doubt. 11 *Del. C.* §301. The complainant Boulden was a very credible witness who made contemporaneous statements with her friend Coco as well as contemporaneous complaints to the co-owner of the business when the sexual harassment acts persisted by the defendant on the dates charged in the Information.

Throughout the trial this trier of fact was convinced that the defendant engaged in such a pattern of conduct, including the September incident when he grabbed and fondled the complainant in her own residence; withheld her paycheck; and placed his body and hands on her private parts and continued this course of sexual harassment at complainant's place of employment on a weekly basis. This conduct included, but was not limited to, by making inappropriate statements and slapping Boulden on parts of her body with his hands while she was employed under his direction and employ. Finally, looking at the factually specific record outlined in the trial record of the contemporaneous continuous complaints by Boulden to Coco and her co-owner of First State Diner, Jack Asenyan, the Court simply does not believe the defendant's testimony that none of these inappropriate statements and sexual harassment conduct

didn't occur. To the extent an inference exists in the trial record that the subject complaints by Boulden and charging documents being filed by the Attorney General were a retaliatory act because of an allegedly unlawful termination of Boulden's employment with the defendant, the overwhelming evidence at trial completely contradicts such a conclusion by the Court. The evidence of defendant's improper illegal acts constituting sexual harassment on the dates set forth in the charging document is simply overwhelming. 11 *Del. C.* §301.

The Court must therefore as a matter of law enter a finding of **GUILTY**. The Clerk of the Court is to set this matter for sentencing at the earliest convenience of counsel and the Court.

IT IS SO ORDERED this 15th day of August, 2005.

John K. Welch
Associate Judge

Cc: Theresa Bleakly, Scheduling Supervisor
CCP, Criminal Division