STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANITA KING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4169
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 4, 2001, in Perry, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Anita King, pro se
108 Alice Street
Perry, Florida 32347

For Respondent: Gary L. Grant, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Respondent was the subject of an unlawful discrimination action as defined in Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

On January 26, 1998, Petitioner Anita King, filed a Charge of Discrimination against Respondent Department of Corrections. The Charge of Discrimination alleges that the Department discriminated against her when it terminated her employment because of her race, color, sex, and in retaliation for previously filed complaints. Specifically, Petitioner alleged that the Department had unlawfully terminated her employment on February 7, 1997, and had unlawfully provided poor job references to prospective employers after the termination.

The allegations of discrimination were investigated by the Florida Commission on Human Relations (FCHR). On July 18, 2000, FCHR issued its Determination, finding "no cause." On August 22, 2000, FCHR granted an extension of time to Petitioner, allowing until September 29, 2000, for her to file a petition for relief.

Petitioner filed a Petition for Relief on September 26, 2000. The petition reiterated the allegations contained in her Charge of Discrimination filed with FCHR. On October 26, 2000, Respondent filed its Answer and Affirmative Defenses to the Petition for Relief. The Department denied all allegations and asserted that Petitioner was collaterally estopped from re-litigating the issues of whether the Department had cause to terminate her employment effective February 7, 1997, and whether

the termination represented disparate treatment. These issues had previously been litigated by Petitioner at the Public Employees Relations Commission (PERC). On October 8, 1997, PERC issued a final order upholding the termination and finding no disparate treatment.

On November 2, 2000, Respondent filed a motion in limine requesting that Petitioner be prevented from re-litigating the issues set forth above that were previously decided by PERC. In accord with Wright v. Department of Highway Safety and Motor Vehicles, DOAH Case No. 92-5565, Recommended Order entered October 27, 1993, and Final Order entered June 3, 1994 (adopts Recommended Order in toto), the motion was granted by order dated December 6, 2000.

At the hearing Petitioner testified in her own behalf and offered five exhibits into evidence. Respondent called three witnesses but did not offer any exhibits into evidence. After the hearing Respondent and Petitioner filed Proposed Recommended Orders on May 3, 2001, and May 4, 2001, respectively.

FINDINGS OF FACT

1. Petitioner is an African-American female. She was certified as a corrections officer in March 1991.

2. In November 1995, Petitioner was employed by Respondent, Department of Corrections, at Taylor Corrections Institution in Perry, Florida, as a correctional officer with

the rank of sergeant. Prior to her employment at Taylor Corrections Institution she had been a corrections officer at a correctional facility in Jefferson County. Petitioner did not have employment problems while working at the Jefferson County facility.

3. Petitioner's first year at the Taylor County correctional facility was "O.K." However, Petitioner was not well liked among her fellow officers. Between June through October 1996, Petitioner was the subject of several complaints from her fellow officers. These separate complaints were:

> On June 12 or 13, 1996, King cursed at an entire dormitory of inmates. On June 19 King was assigned to assist another officer in conducting a recount of inmates. She failed to assist the officer in conducting the recount. On July 24, 1996, King was assigned to escort the swill truck (a food truck) by the control room sergeant. She refused to accept the assignment and cursed at the control room sergeant. A few days later, she confronted another officer in a hostile and threatening manner because the officer had submitted an incident report concerning King's conduct in cursing at the control room sergeant. On October 9, another sergeant asked King to sign a typed incident report regarding King's loss of her state-issued handcuff case. King initially refused to sign the report. Shortly thereafter, she tore up the report in the presence of an inmate because she was displeased with certain comments in the report. On October 28, King cursed at a coworker. Id. PERC Final Order dated October 8, 1997.

4. In October 1996, Petitioner filed several internal discrimination complaints against the agency generally opposing unfair employment practices. The exact nature of these complaints was not established by the evidence.

5. On December 13, 1996, Petitioner received a notice of disciplinary charges being brought against her based on the earlier-filed employee complaints. The notice lists the charges as follows:

> Multiple charges are being brought against you stemming from several investigations. In the first case, you are being charged with malicious use of profane or abusive language toward inmates, visitors, or persons under supervision, use of verbal abuse of an inmate, conduct unbecoming a public employee, and willful violation of state statute, rule, directive, or policy statement. Specifically on June 25, 1996, an anonymous request was received by the Superintendent's Office alleging that you cursed the entire dormitory of inmates on June 13, 1996. It was also alleged that you had been gambling and would not pay off your debts. This prompted an investigation into these allegations. Several witnesses including an inmate verified the above allegations. The basis for these charges is contained in the Institutional Investigation Report #96-044, a copy attached and made a part hereof. This conduct violates Department of Corrections' Rules 33-4.001(4)(a), 33-4.002(4)(9), and 33-4.003(6)(20)(22)(24), F.A.C., copies attached and made a part hereof.
>
> In the second case, you are being charged with willful violation of state statute, rule, directive, or policy statement, conduct unbecoming a public employee,

unwilling to follow lawful orders or perform officially designated duties, interference with an employee, failure to follow oral or written instructions, witness tampering during an investigation, and retaliation. Specifically on July 24, 1996, Sergeant J. Pickles reported that while assigned as Control Room Supervisor, he advised you via radio that he needed an escort for the swill truck. You responded by telephone and stated "Why are you calling me? I'm not escorting that fucking swill truck. I'm busy in the Caustic Room. Get someone else to do that shit." Officer V. Aman submitted an incident report verifying the telephone conversation since it was the dormitory in which she was assigned to that you came to use the telephone. On August 1, 1996, Officer Aman also stated that you made threats toward her in retaliation for submitting her report, in which you admitted to confronting this officer. The basis for these charges is contained in Institutional Investigation Report #96-052, a copy attached and made a part hereof.

This conduct violates Department of Corrections' Rules 33-4.001(4)(a), 33-4.002(4)(11)(17), 33-4.003(22)(24)(32), F.A.C., and Sections 914.22, 914.23, Florida Statutes, copies attached and made a part hereof.

In the third case, you are being charged with willful violation of state statute, rule, directive, or policy statement, conduct unbecoming, unwillingness to perform officially designated duties, substandard quality of work, negligence, and failure to follow oral or written instructions. Specifically, on June 19, 1996, a recount was ordered and you were informed by the control room that your dormitory officer needed assistance in the recount. The officer stated that he waited approximately ten (10) minutes for your arrival and proceeded to recount without assistance. He

then submitted an report as to the incident. You then submitted an incident report concurring with the officer with the exception that you observed the recount from the Officer's Station. The basis for these charges can be found more specifically contained in the Institutional Investigation #96-058, a copy attached and made a part hereof. This conduct violates Department of Corrections' Rules 33-4.001(4)(a), 33-4.002(4)(11) and 33-4.003(10)(13)(22)(24)(32), F.A.C., Institutional Post Orders 17.02(j), 06.03(B)(1b)(1c)(1f)(lg)(2a), and (D)(4), and Institutional Operating Procedures 3.03.3(C)(5)(11e), copies attached and made a part hereof.

In the fourth case, you are being charged with conduct unbecoming a public employee, willful violation of state statute, rule, directive, or policy statement, and destruction or abuse of DC property or equipment. Specifically on October 9, 1996, you submitted an Incident Report for losing your state issued handcuff case. On October 13, 1996, after being typed, Sergeant Chad Dees gave the Incident Report to you to be signed. Upon receiving the report, you allegedly stated "I will show you what I will do with this," then tore the report up and walked away. You admitted to tearing up the report because of the comments written by Captain Simons, but denied making the comment alleged by Sergeant Dees. Officer Tammy Alvarez witnessed you tear up the report, but denied hearing any statements made by you. The basis for these charges is contained in the Investigative Report #96-23008, a copy attached and made a part hereof. This conduct violates Department of Corrections' Rules 33-4.001(4)(a), 33-4.002(25), and 33-4.003(22)(24)(27), F.A.C., copies attached and made a part hereof.

6. All of these charges pre-date Petitioner's internal complaints. On January 23, 1997, a predetermination conference was held on the above charges. The evidence did not demonstrate that the employee charges or the disciplinary action were retaliatory in nature or based in discrimination. Moreover, the factual basis of the charges was upheld in the PERC Final Order.

7. As referenced in the letter, Petitioner was the subject of several investigations conducted by the Inspector General's Office of the Department of Corrections. The role of the Inspector General was to gather the facts and evidence involved in a complaint. The Inspector General does not make any recommendations as to discipline or determine if a rule or statutory violation has occurred. Raleigh Sistruck, an Inspector with the Inspector General's office conducted some of the investigations of Petitioner. He did not personally know Petitioner. There was no evidence that he treated Petitioner differently than he did any other investigatory subject. Nor did Inspector Sistruck engage in any conspiracy or act alone to fabricate evidence against Petitioner or elicit false testimony from witnesses. Indeed, the only evidence presented in this case, is that Inspector Sistrunk followed standard investigatory procedures in investigating the complaints against Petitioner.

8. In January, 1998, Petitioner was accused of soliciting an inmate and another correctional officer to cause harm to

another inmate at the facility. The Inspector General's office investigated that accusation. Again there was no evidence that the inspectors engaged in any conspiracy to falsify or fabricate evidence. Normal investigatory procedures were followed.

9. Based on the various complaints and the findings set forth in various Inspector General investigations, Mr. Drake decided to terminate Petitioner.

10. Petitioner received a letter of extraordinary dismissal on February 7, 1997. The dismissal letter dismisses Petitioner for:

> This dismissal is the result of you being charged with willfully engaging in conduct which violates state statutes and Agency rules; conduct unbecoming a public employee; failure to conduct yourself in a manner consistent with the welfare of inmates; soliciting, bartering, dealing, trading with or accepting a gift or other compensation from an inmate(s); willfully treating an inmate in a cruel or inhuman manner; threatening or interfering with other employees while on duty; failure to maintain a professional relationship with inmates; giving false testimony; and interfering with an inmate.
>
> Specifically, on or about January 10, 1997, you solicited the assistance of inmate Tony Jackson, DC#724515 and Correctional Officer Jacqualyn Jackson-Beasley to cause harm to inmate Mike Doty, DC#725094. As a result of your actions and requests, Officer Jackson-Beasley, inmate Jackson, inmate Mark Smith, DC#724887, inmate Alberto Matta, DC#191523 and inmate Thomas Carrillo, DC#195319, conspired and did plant a homemade knife, with an approximate 14 inch blade, in inmate

Doty's cell in an effort to set him up. When inmates Carrillo and Matta entered F-Dorm with the knife, Officer Jackson-Beasley signaled then with her fingers indicating inmate Doty's cell number. She also acted as a cover while the inmates planted the knife in inmate Doty's cell. Once the knife was planted, you and Officer Jackson-Beasley had a telephone discussion during which you instructed her to call Sergeant Gerald Miller and have inmate Doty's cell searched. Once Officer Jackson-Beasley reported the information to Sergeant Miller, a search of Doty's cell was made and the knife was recovered. Sergeant Miller than notified Captain William F. Buchtmann. After questioning by Captain Buchtmann, inmates Carrillo and Mata, both admitted their participation in placing the knife in inmate Doty's pillow and stated they were contacted by inmates Jackson and Smith for assistance. Carrillo was told by Jackson and Smith that it was you who wanted inmate Doty taken care of and they gave inmate Carrillo the impression that if he took care of inmate Doty, he would be paid $50.00 and be given an undisclosed amount of marijuana for his assistance.

The following day, January 11, 1997, you stated to inmate Jackson words to the effect, "They locked up inmate Smith" and "That motherfucker talked" (referring to inmate Matta) You also stated to inmate Jackson words to the effect, "It's not cool for me to be seen talking to you."

On or about January 17, 1997, Officer Beverly Pratt overheard you state to an unidentified inmate, words to the effect, "Something needs to be done with Doty." On that same date, inmate Willie Jackson, DC#041463, overheard you state to an unidentified inmate, words to the effect, "I am going to get Officer Jackson-Beasley and Sergeant Miller."

> When questioned under oath, on January 24, 1997, you gave false testimony when you denied all allegations.

Additionally, the letter dismisses Petitioner for the earlier disciplinary charges discussed at the predetermination conference in December.

11. Mr. Drake, Superintendent of Taylor Correctional Institute at the time, testified that Petitioner's termination was based on his belief that she had in fact committed the aforementioned rule and statutory violations. He stated that the termination was not based on Petitioner's race or sex or any other of her characteristics; rather, the termination was based on rule and statute violations. There was no evidence which demonstrated Mr. Drake engaged in any conspiracy to concoct evidence against Petitioner or to falsely accuse her.

12. Angela Ratliff, Personnel Supervisor at the time, testified that she did not have any conversation with Petitioner wherein she told her that the Department, her supervisors or coworkers were "out to get her" or words to similar effect. Additionally, Ms. Ratliff does not recall having any conversations with prospective employers for Petitioner. The Respondent's policy is to recite to a prospective employer information contained in the employee's personnel file. The Department does not offer opinions or recommendations about an employee. Moreover, most of the information in the personnel

file is considered a public record and must be released to any person or entity requesting the information. In any event, other than broad general statements about seeking employment and what she was told by others who did not testify at the hearing, there was no evidence regarding any specific prospective employer or the information, if any, the prospective employer received from the Department.

13. There is no doubt that Petitioner feels very strongly she was discriminated against. The problem with Petitioner's case is a total lack of evidence to support her allegations. Throughout the hearing she made allegations of discrimination. However, no evidence apart from her allegations of which she had no personal knowledge, was offered. For instance, the alleged paper trail created against her or documents she claimed were changed were not introduced into evidence. No witness was called who wrote or filed such document or statement was called to testify about any such document or statement or any alleged change made to the document or statement. The paper noises or pauses of tape-recorded interviews of witnesses taken during the Inspector General's investigation did not support Petitioner's claim that the witnesses were prompted or told what to say. Such noises or pauses sounded exactly like pages being turned in a notebook when one page is full and a new page is needed to continue taking notes. The pauses sounded like a note taker

pausing the witnesses' statement in order to catch up the notes to the witnesses' statement. Given these critical lapses in evidence and the earlier PERC Final Order, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of the proceeding. Section 120.57(1), Florida Statutes.

15. Under the provisions of Section 760.10, Florida Statutes, it is an unlawful employment practice for an employer:

> (1)(a) [t]o discharge or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status. . . .
>
> * * *
>
> (7) . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section. . . .

16. FCHR and the Florida courts have determined that federal discrimination law school be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA

1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

17. The Supreme Court of the United States established in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII and which are persuasive in cases such as the one at bar. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

18. Pursuant to this analysis, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for its employment action. If the employer articulates such a reason, the burden of proof then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

19. In Hicks, the Court stressed that even if the fact finder does not believe the proffered reason given by the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id.

20. In order to establish a prima facie case, Petitioner must establish that:

> (a) She is a member of a protected group;
> (b) She is qualified for the position;
> (c) She was subject to an adverse employment decision;
> (d) She was treated less favorably than similarly-situated persons outside the protected class; and
> (e) There is a causal connection between (a) and (c).

Canino v. EEOC, 707 F.2d 468, 32 FEP Cases 139 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729, 29 FEP Cases 1134 (11th Cir. 1982); Lee v. Russell County Board of Education, 684 F.2d 769, 29 FEP Cases 1508 (11th Cir. 1982), appeal after remand, 744 F.2d 768, 36 FEP Cases 22 (11th Cir. 1984).

21. Here, there is no dispute that Petitioner is a member of a protected class, that she was qualified for her position, and that she was subjected to an adverse employment action. Petitioner has, however, failed to provide any evidence whatsoever that she was treated differently from similarly situated persons outside her protected class. Moreover, there is an absolute dearth of evidence indicating any causal connection between Petitioner's protected status and her termination or alleged poor job references. Merely alleging such a connection in the petition for relief is not sufficient; there must be evidence of such discrimination in order to

establish a prima facie case. Thus Petitioner has failed to establish a prima facie case for relief, and her case should be dismissed.

22. In any event, even had Petitioner established a prima facie case, the Department offered legitimate nondiscriminatory reasons for its adverse employment action. Petitioner failed to establish that the explanations were pretextual in nature. To wit, Petitioner claims that she was discriminated against because she was terminated. Respondent, however, offered credible evidence that the termination was based on serious rule and statutory violations. There was no evidence, direct or otherwise, establishing that this explanation was pretextual or even false. The termination and the violations had already been upheld by PERC.

23. Additionally, although Petitioner alleges that Respondent issued poor job references, she provided no evidence of those instances. On the other hand, Respondent wholly denies making any poor recommendations. Petitioner did not call any witnesses with whom she had applied for employment. There was no witness, with personal knowledge, who knew if any information regarding Petitioner, adverse or otherwise, was obtained by any prospective employer or what that information was. This lack of evidence requires dismissal of the petition in this case.

RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 16th day of May, 2001, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of May, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.