STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OTIS WARE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-0692
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on April 27, 2001, in Trenton, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Otis Ware, pro se
Post Office Box 2155
Trenton, Florida 32693

For Respondent: William J. Thurber, IV, Esquire
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding are whether Petitioner was terminated from his employment with Respondent because of his race, his alleged disability, and in alleged

retaliation for his attempt to file a workers' compensation claim in violation of Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

On September 16, 1997, Petitioner, Otis Ware, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The Charge of Discrimination alleged that the Florida Department of Corrections had terminated Petitioner based on his race, his alleged disability, and in retaliation for his attempt to file a workers' compensation claim.

On January 12, 2001, FCHR issued a Notice of Determination in response to Petitioner's Charge of Discrimination. FCHR found no reasonable cause to believe that an unlawful employment practice occurred. On February 13, 2001, Petitioner filed a Petition for Relief based on his Charge of Discrimination and elected to proceed with an administrative hearing in accordance with Section 760.11(4)(b)8, Florida Statutes.

At the hearing, Petitioner testified in his own behalf, called no other witnesses, and introduced no exhibits. Respondent called one witness and offered one composite exhibit into evidence consisting of Petitioner's Attendance and Leave Reports.

After the hearing, Petitioner and Respondent filed Proposed Recommended Orders on May 11, 2001.

FINDINGS OF FACT

1. Petitioner is an African-American male. Petitioner also has been diagnosed with obsessive/compulsive disorder and major depression.

2. On March 21, 1997, Petitioner began his employment with Florida Department of Corrections as a substance abuse counselor at Lancaster Correctional Institution. Petitioner's employment status was in career service, probationary status for six months from the date of his employment. A probationary status employee can be terminated without cause. Petitioner's employment as a counselor required him to be present at the institution a reasonable amount of time in order to perform his counseling duties.

3. From March 21, 1997 through September 2, 1997, Petitioner failed to report for work 39 full workdays out of a possible 115 workdays. In addition, Petitioner had five other workdays that he only worked part of the day, with a total of 16 hours of leave used over those days. Sixteen hours is the equivalent of two full workdays missed by Respondent. As a result, Petitioner was absent from work approximately 35 percent of the time. Thirty-five percent absence rate was excessive based on Petitioner's job duties.

4. Most of the leave was without pay because Petitioner had not accumulated enough sick or annual leave to cover his

absences. The leave was taken for various reasons, but a large part of the leave was taken when Petitioner was hospitalized due to his mental condition.

5. Petitioner's doctor released him from his hospitalization on August 8, 1997; however, Petitioner did not return to work until August 20, 1997. The last pay period ran from Friday, August 22, 1997 to Thursday, September 4, 1997. Petitioner only worked 20 hours out of 40 the first week and two hours out of 40 the second week.

6. Around September 1, 1997, Petitioner went to the personnel office to inquire about filing a workers' compensation claim based on his disability. The staff person he spoke to did not know the procedure for filing a workers' compensation claim. She told Petitioner she would find out the procedure and asked him to return the next day. Other than Petitioner's speculation about the events following his initial inquiry about filing a workers' compensation claim, other material evidence regarding the events following his initial inquiry and Respondent's response thereto was submitted into evidence. The evidence is insufficient to draw any conclusions of a factual or legal nature regarding Petitioner's workers' compensation claim and his termination.

7. Petitioner was terminated on September 2, 1997, the day following his initial inquiry about workers' compensation.

Petitioner received his letter of termination on September 2, 1997.

8. Petitioner was a probationary status employee when he was terminated.

9. Eventually, Petitioner filed a workers' compensation claim. The claim was denied by the Florida Department of Labor and Employment Security.

10. In 1997, L.D. "Pete" Turner was the warden at Lancaster Correctional Institution. As warden, Mr. Turner supervised Petitioner. Mr. Turner made the decision to terminate Petitioner due to his excessive absences. Mr. Turner did not terminate Petitioner based on Petitioner's race, his alleged disability, or because of Petitioner's attempt to file a workers' compensation claim. Petitioner was needed at work and he was not there a sufficient amount of time to fulfill his job duties. In fact, there was no competent evidence that there was any connection between Petitioner's termination and/or his race, disability, or desire to file a workers' compensation claim.

11. Petitioner alleged that two employees at the institution were excessively absent but were not terminated. The employees were Doris Jones and Victoria Englehart. Both individuals were career service employees with permanent status. They were not probationary status employees. Doris Jones is an African-American female. Victoria Englehart is a white female.

No other evidence was produced at the hearing regarding these two employees, their attendance records, job duties or anything else of a comparative nature. Clearly, the evidence is insufficient to make any comparison between these two employees and Petitioner's employment and termination.

CONCLUSIONS OF LAW

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

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

> (1)(a) To 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) [T]o 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.

14. FCHR and the Florida courts have determined that federal discrimination law should 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).

15. 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 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).

16. 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.

17. 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.

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

> (a) He is a member of a protected group;
> (b) He is qualified for the position;
> (c) He was subject to an adverse employment decision;
> (d) He 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).

19. Petitioner has the burden of establishing a prima facie case of unlawful discrimination by a preponderance of the evidence. As indicated earlier, if a prima facie case is established a presumption of discrimination arises and the burden shifts to Respondent to advance a legitimate, non-discriminatory reason for the action taken against Petitioner. However, Respondent does not have the ultimate burden of persuasion but merely an intermediate burden of production. Once this non-discriminatory reason is offered by Respondent, the burden shifts back to Petitioner. Petitioner

must now demonstrate that the offered reason was merely a pretext for discrimination.

20. In the instant case, Petitioner alleges that he was terminated because of racial discrimination and discrimination based on Petitioner's disability. Thus, Petitioner must prove, by a preponderance of the evidence, that Respondent acted with discriminatory intent. Case law recognizes two ways in which Petitioner can establish intentional discrimination. First, discriminatory intent can be established through the presentation of direct evidence. See Early v. Champion International Corporation, 907 F.2d 1081 (11th Cir. 1990). Second, in the absence of direct evidence of discriminatory intent, intentional discrimination can be proven through the introduction of circumstantial evidence.

21. In this case, Petitioner's race is black; and as such, he belongs to a protected class. Petitioner was terminated from his job with Lancaster Correctional Institution. The termination constitutes an adverse employment action. However, Petitioner's job of counseling required his attendance at work for a reasonable amount of time. Petitioner was not present at work for a reasonable amount of time and, therefore, was not qualified to perform the duties of his job. In addition, Petitioner did not establish that similarly situated non-minority employees were treated more favorably. Petitioner

also failed to establish any causal connection between his race or disability and his termination. Therefore, Petitioner has not established a prima facie case of race or disability discrimination.

22. The burden is on Petitioner and not on Respondent to introduce admissible evidence that his conduct was similar in nature to other employees outside his protected classification and that the other employees were treated more favorably. Jones v. Gerwens, 874 F.2d 1534, 1541 (11th Cir. 1989). In order to establish that employees are similarly situated, Petitioner must show he and comparable employees are similarly situated in all respects, including dealing with the same supervisor, having been subject to the same standards and that Petitioner engaged in approximately the same conduct as the other employees. See Gray v. Russell Corporation, 681 So. 2d 310, 312, 313 (Fla. 1st DCA 1996); Jones 137 F.3d at 1311-13.

23. Petitioner alleges that two other employees, Doris Jones and Victoria Englehart, were similarly situated and not terminated for excessive absenteeism. However, the evidence presented at hearing does not show that either of these employees was similarly situated.

24. Doris Jones and Victoria Englehart were both permanent status employees. In contrast, Petitioner was a probationary employee that did not have permanent status. Additionally,

Petitioner presented no evidence as to why these employees were allegedly absent from work or even the duration and frequency of the absences. Lastly, Doris Jones is a black female and, thus, not outside of Petitioner's protected classification. As a result, Petitioner failed to prove these employees were similarly situated.

25. Petitioner has the burden of proving that he was discriminated against because of his disability. Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1996).

26. "Handicap" is not defined in Section 760.10, Florida Statutes; however, Florida courts have adopted the federal definition at 29 U.S. Code, Section 706(8)(3) for claims alleging handicap discrimination brought under Florida's Human Rights Act. Id. As a result, Petitioner must prove he (1) had a physical or mental impairment which substantially limited one or more of his major life activities, (2) he had a record of such impairment, or (3) he was regarded as having such an impairment. Examples of major life activities include caring for oneself, walking, seeing, speaking, breathing, learning, working, sitting, standing, lifting, and emotional processes such as thinking, concentrating, and interacting with others.

27. Petitioner claims he was terminated because of his alleged disability. Petitioner is disabled because of a psychiatric condition which includes depression, delusions, and

obsessive/compulsive disorder. However, Petitioner failed to establish that he was substantially restricted in any of his major life activities or that the bona fide requirement of reasonable attendance at his counseling job could be accommodated.

28. Indeed, Petitioner failed to establish that he had a record of a disability while working at Lancaster Correctional Institution. See Petitioner's Proposed Recommended Order. No evidence was presented that Petitioner requested any type of accommodation for his alleged disability. Additionally, Petitioner did not present any evidence that when he returned to work after being under a doctor's care that he returned with any type of job restrictions.

29. Petitioner also failed to establish that Respondent regarded him as disabled. No evidence was presented that Respondent erroneously believed that Petitioner could not perform his assigned job duties.

30. Even if Petitioner were deemed to meet the criteria of having a disability, Petitioner failed to establish that he was qualified for his job as a substance abuse counselor despite his disability. No evidence was presented that Petitioner could perform his job duties apart from his disability.

31. Petitioner also failed to establish a causal connection between his alleged disability and his termination.

32. Even if Petitioner provided sufficient proof to establish a prima facie case of race or disability discrimination, Respondent articulated a credible, non-discriminatory basis for Petitioner's termination.

33. Respondent established that Petitioner failed to report to work approximately thirty-five percent of the time in an approximately five and a half-month period. Petitioner's absences began almost immediately upon being hired by the Respondent. Petitioner consistently did not report for work during this entire period. Even if all of Petitioner's absences were for legitimate purposes, the absences still were excessive. The Public Employees Relations Commission has consistently held that legitimate absences can still be deemed excessive. As a result, Respondent articulated a legitimate, non-discriminatory reason for terminating Petitioner.

34. Petitioner theorized that as a result of attempting to file a workers' compensation claim, he was terminated in order that Respondent could avoid workers' compensation liability. Petitioner's theory is not supported by the evidence. As a result, Petitioner has failed to establish a retaliation claim.

35. To establish a prima facie case for retaliation under the Florida Civil Rights Act of 1992, Petitioner must prove that he engaged in a statutorily protected activity, that he was subjected to an adverse employment action, and that the adverse

employment action occurred as a result of Petitioner's protected activities. See EEOC v. Reichold Chems, Inc., 988 F.2d 1564, 1571 (11th Cir. 1993).

36. In the instant case, Respondent assisted Petitioner in filing a workers' compensation claim and the claim was eventually denied by the Division of Workers' Compensation.

37. Even if Petitioner's theory were supported by the evidence, Petitioner's claim is not actionable under the Florida Civil Rights Act of 1992. The purpose of workers' compensation law and employment discrimination law is designed to fulfill separate and distinct goals. Florida Workers' Compensation Act was created to provide injured employees with efficient delivery of disability benefits and medical benefits when an employee is injured on the job, Barry v. Burdines, 675 So. 2d 587 (Fla. 1996), whereas employment discrimination law was created to prevent the prejudicial treatment of disabled persons through the elimination of these possible barriers in the workplace. See 29 C.F.R. Pt. 1630, App (1995). Thus, if Petitioner's claim were supported by the evidence, it may be actionable under Florida workers' compensation law, but is not actionable under the Florida Civil Rights Act of 1992.

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 6th day of June, 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
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this 6th day of June, 2001.

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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.