

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HUGH F. BROCKINGTON, II,)
)
Petitioner,)
)
vs.) Case No. 01-3338
)
DEPARTMENT OF CORRECTIONS,)
)
Respondent.)

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on November 8, 2001, in Viera, Florida.

APPEARANCES

For Petitioner: Hugh F. Brockington, II, pro se
19715 Eagles View Circle
Umatilla, Florida 32784

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

STATEMENT OF THE ISSUE

Did Petitioner suffer an adverse employment action as a result of an unlawful discrimination by the Department of Corrections (Department) in violation of Subsection 760.10(1)(a), Florida Statutes?

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (Commission) dated April 24, 1995, which was received by the Commission on April 24, 1995. In the Charge of Discrimination, Petitioner alleges that the Department discriminated against him because of his race (Black) and his gender (male), in violation of the Florida Civil Rights Act of 1992, and Title VII of the U.S. Civil Rights Act of 1964. As grounds for his Charge of Discrimination, Petitioner alleges that on October 24, 1994, he was given a written reprimand for allegedly abusing the Department's sick leave policy on October 21, 1994. Additionally, Petitioner alleged that he had been racially harassed, given different terms and conditions of employment, and retaliated against for having reported violations within the Department. The Charge of Discrimination was assigned FCHR Number 95-G343. The record does not indicate if any action was taken by the Commission on FCHR Number G343 prior to Petitioner's filing a second Charge of Discrimination with the Commission dated June 10, 1997, which was received by the Commission on August 19, 1997, and assigned FCHR Number 97-2558. In the second Charge of Discrimination, Petitioner alleges additional charges of discrimination and states that this Charge of Discrimination is a continuation of the Charge of

Discrimination FCHR Number 95-G343. On March 28, 2001, the Commission issued its Determination: No Cause. On that same date, the Clerk for the Commission (Clerk) issued a Notice Determination: No Cause (Notice), wherein Petitioner was advised that he had 35 days from the date of the Notice to request an administrative hearing by filing a Petition for Relief with the Commission. Apparently, the Clerk mailed a copy of the Determination: No Cause and a copy of the Notice to the wrong address. As a result, Petitioner failed to timely file his Petition for Relief with the Commission, which resulted in the Commission's issuing a Notice of Dismissal on May 18, 2001. However, the Commission, upon being advised that Petitioner had not received a copy of its Determination: No Cause or a copy of the Notice, issued a Rescission of Notice of Dismissal on July 27, 2001. Subsequently, Petitioner filed his Petition for Relief with the Commission. Thereafter, on August 21, 2001, the Commission issued a Notice to Respondent of Filing of Petition for Relief from an Unlawful Employment Practice. By Letter of Transmittal dated August 21, 2001, the Commission referred the matter to the Division of Administrative Hearings (Division) for the assignment of an Administrative Law Judge and for the conduct of a hearing.

At the hearing, Petitioner testified in his own behalf and presented the testimony of Bruce A. Quick, Ron Kyle, and Antonio

Worlds. Petitioner's Exhibits 1 and 2 were admitted in evidence. The Department did not call any witnesses or offer any documentary evidence. Prior to the hearing, Petitioner had made a timely request of the Division for the issuance of subpoenas. However, the Division failed to furnish the requested subpoenas to Petitioner, which resulted in Petitioner being unable to secure the presence of DeLano McCullough at the hearing. Because of the Division's error in not furnishing the subpoena, Petitioner was granted additional time to obtain a subpoena and take McCullough's deposition, which he was too late to file. Petitioner failed to have the subpoena served on McCullough and also failed to take McCullough's deposition. Subsequently, since there was no transcript to be filed with the Division, an order was entered setting the time for proposed findings of fact and conclusions of law to be filed. The Department timely filed its Proposed Findings of Fact and Conclusions of Law. Petitioner elected not to file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made.

1. At times pertinent to this proceeding, Petitioner was employed at Brevard Correctional Institution and was considered

by the Department to be qualified for the position for which he was employed.

2. Petitioner is a male, African-American.

3. On October 24 1994, Petitioner received a Written Reprimand for the abuse of the Department's sick leave policy, which had occurred on October 21, 1994, in that Petitioner, while on authorized sick leave on October 21, 1994, attended the Dorothy Lewis trial, without authorization from the Department.

4. Petitioner presented no evidence to show that the Written Reprimand issued on October 24, 1994, was issued because of Petitioner's race or gender; rather it was issued based on a reasonable belief that Petitioner had abused the Department's sick leave policy by attending the Dorothy Lewis trial while out on official sick leave.

5. Petitioner presented no evidence to support the remaining allegations contained in the Petition for Relief filed by Petitioner in this matter.

CONCLUSIONS OF LAW

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

7. Subsection 760.10(1)(a), Florida Statutes, provides as follows:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail 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.

8. The Commission 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).

9. The United States Supreme Court established in McDonnell-Douglass Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed 2d 207 (1981), the analysis to be used in cases alleging discrimination under Title VII of the U.S. Civil Rights Act of 1964, and which are persuasive in cases such as this one. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

10. 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, the Department must articulate some legitimate non-discriminatory reason for the action taken against Petitioner. Once this non-discriminatory reason is offered by the Department, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As stated in Hicks, before finding discrimination, "[t]he fact finder must believe the plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

11. 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.

12. 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; and
- (d) He was treated less favorably than similarly-situated persons outside the protected class.

Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)

13. There is no dispute that Petitioner: (a) was qualified for the position in which he served; (b) was a member of a protected group (African-American male); and (c) was subjected to an adverse employment action (received a written reprimand for

abuse of sick leave policy). However, Petitioner has failed to produce any evidence to show that similarly situated persons outside his class were treated more favorably. For this reason, Petitioner has failed to establish a prima facie case.

14. However, had Petitioner established a prima facie case, the Department offered a legitimate nondiscriminatory reason for the written reprimand, namely that the reprimand was issued based on a reasonable belief that Petitioner abused the Department's sick leave policy. There was no evidence that this explanation was pretextual.

15. Petitioner's allegations that he suffered adverse employment actions as a result of discrimination are not supported by a preponderance of the evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Commission enter a final order dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 18th day of January, 2002, in
Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of January, 2002.

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 must be filed with the agency that will issue the Final Order in this case.