STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THAISE A. HAMPTON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-3354
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Don W. Davis, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in this case on March 26, 2002, in Marianna, Florida. The following appearances were entered:

For Petitioner: Marva A. Davis, Esquire
121 South Madison Street
Post Office Box 551
Quincy, Florida 32353-0551

For Respondent: Gary L. Grant, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner was subjected to discrimination in the work environment by the Department of Corrections (DOC) due to Petitioner's race, sex, and handicap in violation of Section 760.10(1)(a), Florida Statutes.

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination against DOC with the Florida Commission on Human Relations (FCHR) on December 3, 1996, alleging that her job had been terminated by DOC on the basis of Petitioner's race, sex, and handicap.

On or about June 26, 2000, the FCHR issued its Determination: No Cause.

On or about August 17, 2001, Petitioner filed a Petition for Relief with the FCHR. Subsequently, on or about August 24, 2001, the case was forwarded to the Division of Administrative Hearings (DOAH) for formal proceedings. Initially assigned to Administrative Law Judge Ella Jane P. Davis, the case was transferred to Administrative Law Judge Don W. Davis on March 8, 2002, for conduct of all further proceedings.

During the hearing, Petitioner testified on her own behalf and also presented the testimony of three other witnesses and two composite exhibits. DOC presented the testimony of four witnesses along with five exhibits. Both parties presented four joint exhibits. No transcript of the proceeding was provided.

Both parties filed Proposed Recommended Orders which have been reviewed and considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Thaise Hampton, is a female African-American.

2. On January 20, 1995, Hampton was hired by the Correctional Educational School Authority (CESA) to work as a teacher at DOC's Apalachee Correctional Institution (ACI). Hampton had not worked before that time.

3. During the 1995 legislative session, CESA was abolished by the State of Florida Legislature. CESA's education and job training program functions were transferred to DOC along with most positions, inclusive of Hampton's. Hampton was placed on probationary status as a DOC employee, effective July 1, 1996.

4. On April 12, 1996, Hampton had an on-the-job injury when she slipped and fell in the cafeteria of the institution. The State of Florida's Division of Risk Management (Risk Management) administered the workers' compensation case for the State of Florida. Hampton was treated by a physician and excused from work because of the injury.

5. Hampton was evaluated by Michael W. Reed, M.D., an authorized treating physician for Hampton's work-related injury, on July 15, 1996. By correspondence dated July 22, 1996, Dr. Reed reported his evaluation of Hampton. Dr. Reed found that Hampton suffered from lumbar degenerative disc disease. He

recommended physical therapy and light duty work restrictions on lifting objects greater than 20 pounds.

6. On August 29, 1996, DOC received further correspondence forwarded by Risk Management from Dr. Reed. In that correspondence dated August 28, 1996, Dr. Reed stated that Hampton could return to work full duty and that she had reached Maximum Medical Improvement, with a 0 percent permanent impairment rating. He did not indicate that there were any work restrictions.

7. Hampton reported to work on September 3, 1996. At that time, she was utilizing a walker to ambulate around the compound. Joseph Thompson, the Warden at ACI, and the hiring/firing authority over Hampton at that time, expressed security concerns that Hampton was utilizing a walker. He asked the personnel manager, Derida McMillian, to inquire into the situation.

8. As a result, McMillian contacted Paul Bohac, Hampton's supervisor, and requested that both he and Hampton come to her office. She then informed Hampton that she was not authorized to utilize a walker unless a physician had prescribed one for her use. She told Hampton that she was in receipt of a letter from Dr. Reed that indicated she could return to work on regular duty with no restrictions and that a walker represents such a restriction.

9. McMillian then told Hampton that she could not use a walker at work until she produced a medical report indicating a need for same. She also told Hampton that a physician's statement would be needed or her leave would not be authorized. Hampton stated that she understood and would provide the appropriate medical reports on September 5, 1996.

10. McMillian relayed Hampton's statements that she would provide documentation by September 5, 1996, to Margaret Forehand, a personnel technician who was a liaison with the Division of Risk Management at that time. Because no such documentation was received by September 5, 1996, Forehand called Hampton at home on September 9, 1996. Hampton advised her that she would get her attorney to obtain a doctor's statement.

11. On September 10, 1996, Hampton called Forehand and said that her lawyer would obtain a doctor's statement and send it to DOC.

12. On September 17, 1996, Hampton contacted Forehand with questions regarding her paycheck received on September 13, 1996. Forehand advised that DOC had not received the physician's statement that was to have been provided on September 5, 1996. Forehand reiterated at that time that Hampton needed to provide a doctor's note as to her status. Hampton told Forehand that her attorney would be taking care of the matter.

13. On September 18, 1996, Forehand spoke with Alice Taylor at the Division of Risk Management and was advised that Risk Management had received a letter from a Dr. Ayala regarding Hampton's condition. Taylor told Forehand that Ayala's letter did not change anything--Hampton had not been removed from work or prescribed a walker.

14. Neither McMillian nor Forehand was aware of any prescription for a walker by a Dr. Randall dated June 3, 1996, until March 11, 1997, when they were shown the prescription. Additionally, Forehand had no record indicating that Dr. Randall was approved by the Division of Risk Management as a treating physician.

15. On September 19, 1996, Hampton appeared at the personnel office. She did not have a prescription for a walker at that time. Thus, Hampton was considered to be on unauthorized leave status since September 5, 1996.

16. Warden Thompson terminated Hampton's employment on September 19, 2001, for excessive unauthorized absences.

17. Hampton alleged that several white male employees and an inmate were allowed accommodations: Mr. Ammons; Paul Bohac; and inmate John Peavy. Warden Thompson testified that he approved a request for Mr. Ammons to use a wheelchair after receiving a request from the CESA Personnel Office. He was

informed that Mr. Ammons would be retiring in 30 days. Mr. Ammons was not a DOC employee.

18. Warden Thompson stated that he was not aware that Paul Bohac had worn a back brace into the office or that he had brought an ergonomic chair into the office. If he had known that he was using special medical equipment, he would have requested a prescription for the devices. Paul Bohac was not utilizing a walker.

19. Warden Thompson was not aware that inmate John Peavy was issued a walking stick; however, inmates were allowed to utilize assistive walking devices if the medical department authorized it.

20. Warden Thompson approved Hampton's termination because of her unauthorized absences. She refused to work at full duty or provide a physician's statement documenting any work restrictions.

CONCLUSIONS OF LAW

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

22. The authority of the FCHR is derived from Chapter 760, Florida Statutes. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10 of the Florida Civil

Rights Act. 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). Consequently, an examination of federal case law analyzing issues similar to the ones presented in the instant case has been made.

23. The Florida Civil Rights Act provides, in pertinent part, that 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.

Section 760.10, Florida Statutes.

24. Moreover, although Section 760.10, Florida Statutes, does not define handicap, Section 760.22(7)(a), Florida Statutes, part of the Fair Housing Act, defines a handicapped person as one who "has a physical . . . impairment which substantially limits one or more major life activities . . . or is regarded as having, such physical or mental impairment . . . ." This definition is virtually identical to the one set forth in the federal Rehabilitation Act, 29 U.S.C. Section 701, et seq., and related regulations. To wit, pursuant to Section 504 of the Rehabilitation Act, an individual

with a handicap is one "who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. Section 706(8)(B). The Americans with Disabilities Act (ADA) also contains a virtually identical definition for "disability." 42 U.S.C. Section 12102(2).

25. Here, an initial analysis of the case requires a proper understanding of the burden of proof allocations. As Hampton has set forth several theories or allegations of discrimination, each will be examined in turn. First, Hampton claims discrimination based on handicap. In handicap discrimination cases where the employment decision is shown to have been made solely on the basis of the Petitioner's handicap, the criteria for burden of proof allocations are those set forth under Section 504 of the Rehabilitation Act, 29 U.S.C. Section 794.

26. In the present instance, however, Hampton also contends that the employment decision was made for reasons unrelated to her alleged handicap. The framework for analysis is that set forth by the Supreme Court of the United States in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

27. Pursuant to the McDonnell-Douglas/Burdine cases, the 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 Respondent must then articulate some legitimate, non-discriminatory reason for the action taken against the Petitioner. Once this non-discriminatory reason is offered by the Respondent, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination.

28. In applying the McDonnell-Douglas/Burdine test within the unique context of Hampton's accompanying handicap discrimination claims, the test must be modified to a certain degree. Thus, while the allocation of burden-shifting is retained, the elements of a prima facie case are as follows: Hampton must establish that she:

> (1) has a disability;
> (2) is qualified, with or without reasonable accommodations, to perform the essential functions of her job;
> (3) identified for the employer a reasonable accommodation; and
> (4) was unlawfully discriminated against because of her disability.

Schwertfager v. City of Boynton Beach, 42 F. Supp. 2d 1347 (S.D. Fla. 1999); Brand, 633 So. 2d at 509.

29. In addition, Hampton must demonstrate that the employer had knowledge of the disability or considered the

employee to be disabled. LaChance v. Duffy's Draft House, 146 F.3d 832, 835 (11th Cir. 1998); Cook v. Robert G. Waters, Inc., 980 F. Supp. 1463, 1467 (M.D. Fla. 1997).

30. Here, Hampton has not shown that she was handicapped within the meaning of the Florida Civil Rights Act at the time of her termination.

31. In order to demonstrate that she was handicapped within the meaning of Chapter 760.10, Florida Statutes, Hampton needs to prove that she had a physical or mental impairment which substantially limited one or more of her major life activities or was regarded as having such an impairment. She has failed to meet this burden. In sum, neither the objective medical evidence presented nor Hampton's own testimony demonstrated a substantial limitation of the major life activity of walking.

32. Further, there is no evidence that DOC perceived Hampton to have a disability. In fact, based on Dr. Reed's indications that Hampton had no restrictions, DOC required a prescription before it would consider allowing Hampton to use a walker, an indication that DOC believed that Hampton did not have an impairment and an entirely reasonable conclusion based on Dr. Reed's report.

33. The evidence clearly demonstrated that Hampton was terminated because she was on unauthorized leave between

September 5, 2001, and September 19, 2001. Joseph Thompson, the warden who issued the termination letter, stated that the termination was for unauthorized leave, and Hampton has presented no evidence that would tend to undermine the warden's statement.

34. Hampton also avers that DOC's alleged discrimination against her is indicated by DOC permitting white male employees and inmates to utilize assistive devices. This allegation is without merit. No evidence was submitted as to whether these individuals had prescriptions for their assistive devices, the nature of their jobs, whether management had been advised of their use of assistive devices, or whether they were similarly situated to her.

35. Even assuming that Hampton had not failed to establish a prima facie case for her handicap discrimination claim, DOC offered a legitimate non-discriminatory reason for failing to accommodate Hampton, her failure to provide medical evidence of an impairment that substantially interfered with a major life activity.

36. Next, Hampton's claims of race and sex discrimination must be analyzed. As stated above, federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. Thus, the McDonnell-Douglas/Burdine shifting burden of proof standard is properly

utilized for this portion of Hampton's claim as well. The elements of the prima facie case are subtly different, however, than the elements of her handicap claim. Because the claims are based on race and sex rather than disability, to establish a prima facie case Hampton must demonstrate 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; and
> (d) She was treated less favorably than similarly-situated persons outside the protected class.

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).

37. Here, there is no question that Hampton is African-American and female or that she was subjected to an adverse employment action. Thus, the only issues are whether she was qualified for her position; whether she was treated less favorably than similarly-situated persons outside the protected class; and whether there is a causal connection between her termination and her membership in a protected class. Hampton has failed to meet her burden of proof on these issues.

38. First, she has produced no evidence whatsoever that she was qualified for her position. DOC is not required to

disprove Hampton's qualifications; rather, Hampton is required to come forward with affirmative evidence demonstrating her qualifications and she has not done so.

39. Second, she has not presented any evidence that similarly situated persons not in her protected classes were treated more favorably. As stated in the analysis of her handicap claim, there is no evidence that any of the persons whom she claims were treated more favorably than her were similarly situated. The undersigned notes that one of the persons named was an inmate, one did not work for DOC, and none were probationary status, academic teachers such as Hampton. More importantly, there is no evidence that any of the persons were knowingly allowed to utilize a walker or any other assistive device without medical authorization.

40. In sum, there is simply no evidence that Hampton was terminated because of her race or sex. As discussed above, the only credible evidence presented as to the motivation for Hampton's termination was the testimony of Warden Thompson, an African-American male, that the termination was for unauthorized absences. Thus, as with her handicap claims, Hampton has also failed to establish a prima facie case for race or sex discrimination.

41. Even had Hampton been successful in establishing the initial elements of her case discussed above, DOC articulated a

non-discriminatory legitimate reason for the termination--unauthorized absences--and there is no evidence that this explanation was pretextual in nature.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That a Final Order be entered dismissing the Petition for Relief.

DONE AND ENTERED this 24th day of April, 2002, in Tallahassee, Leon County, Florida.

DON W. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of April, 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 should be filed with the agency that will issue the final order in this case.