

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

GLORIA J. BROWDY, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-4348  
 )  
 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 January 14, 2002, in Brooksville, Florida.

APPEARANCES

For Petitioner: Gloria J. Browdy, pro se  
12042 Villa Road  
Spring Hill, Florida 34609

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

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) and (7), Florida Statutes?

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (Commission) dated February 3, 1999, which was received by the Commission on February 5, 1999. In the Charge of Discrimination, Petitioner alleges that the Department discriminated against her because of her race (African-American) and retaliated against her 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 her Charge of Discrimination, Petitioner alleges that: (a) she was denied an advertised position of Correctional Officer at Sumter Correctional Institution, when several less qualified white officers were hired, and (b) she was retaliated against because of being a member of the United States Class Action Lawsuit against the Department, which Petitioner referred to as the "USA Case." The Charge of Discrimination was assigned FCHR Number 99137 and a Determination: No Cause and a Notice of Determination: No Cause were issued by the Commission on October 5, 2001. On October 23, 2001, Petitioner filed a Petition for Relief with the Commission. In her Petition for Relief, Petitioner alleges that the Department violated the Florida Civil Rights Act of 1992, as amended, by:

1. Refusing to rehire Petitioner due to her complaints of unlawful employment practices;

2. Violating rules, regulations, and laws pertaining to employment of applicants;

3. Treating non-black applicants more favorably than Petitioner;

4. Hiring less qualified non-black officers during this period of time; and

5. Retaliating against Petitioner for participating as a member of the USA Case, a federal lawsuit against the Department.

By a Transmittal of Petition dated November 5, 2001, the Commission referred this matter to the Division for the assignment of an Administrative Law Judge and for the conduct of a hearing.

At the hearing, Petitioner testified in her own behalf and presented the testimony of Barry Flint. Petitioner's Exhibits 1-5 were admitted in evidence. The Department presented the testimony of Mary Lynn Brady, but did not offer any documentary evidence.

At the conclusion of the hearing, the Department advised the undersigned that the Department would not be ordering a transcript of the proceeding. However, Petitioner indicated that she may order a transcript and requested that she be given until January 18, 2002, to make a decision. On January 23, 2002, Petitioner advised the undersigned that she would not be

ordering a transcript. By order dated January 25, 2002, the parties were allowed until February 13, 2002, to file their respective Proposed Recommended Orders. The parties timely filed their respective Proposed Recommended Orders under the extended time frame. Petitioner's Motion to File Additional Evidence was filed at the same time as Petitioner's Proposed Recommended Order, and requested that additional evidence, identified as Exhibits 1-28, be allowed in evidence. Petitioner has failed to establish any grounds that would allow accepting this additional evidence into the record. Therefore, Petitioner's Motion to File Additional Evidence is denied.

#### FINDINGS OF FACT

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

1. Petitioner is a female, African-American.
2. Petitioner was first employed by the Department from June 8, 1990 through October 10, 1990. Petitioner notified the Department by letter dated October 5, 1990, that she was resigning her position with the Department effective October 11, 1990.
3. Subsequently, Petitioner applied for a position as correctional officer with the Department on April 3, 1998, and

again on October 23, 1998, but was not hired on either of these occasions.

4. Petitioner filed a Charge of Discrimination with the Commission on February 3, 1999, alleging that the Department had discriminated against her by denying her employment while hiring less experienced white correctional officers and that the Department had denied her employment in retaliation for her participation in the USA Case against the Department. There is sufficient evidence to show that Petitioner was a member of the class action suit referred to as the USA Case.

5. On September 8, 1999, Petitioner again applied for a position as a correctional officer with the Department and was hired as a correctional officer with the Department on November 15, 1999. However, Petitioner abruptly resigned that position on January 12, 2000, giving unfair treatment as the basis for her resignation.

6. Petitioner's testimony, which is credible, was that sometime in 2000 she applied for a position as a correctional officer with the Department by sending an application to the Tampa Service Center (an administrative branch of the Department) and that the Tampa Service Center requested that she take a pre-employment drug test and physical.

7. Petitioner testified that since the Department requested that she take the pre-employment drug test and

physical it was incumbent upon the Department to offer her the position.

8. Petitioner failed to present sufficient evidence to show that the Department's policies required that she be offered a position once she was asked to submit to a pre-employment physical and drug test. Offers of employment by the Department are conditional only and are contingent upon a satisfactory background check.

9. However, before any job offer was extended to Petitioner, the Tampa Service Center closed down and its records were forwarded to the Orlando Service Center (another administrative branch of the Department). Subsequently, Petitioner contacted the Orlando Service Center concerning her application. The Orlando Service Center was unable to locate any application from Petitioner or any data that could have been electronically stored.

10. Nevertheless, sometime during the latter part of 2000, Petitioner was allowed to resubmit her application to the Orlando Service Center and was considered for a position. The Orlando Service Center determined that Petitioner failed the required background check based on Petitioner's short tenures on two previous employment occasions followed by abrupt resignations. Petitioner's application for employment was rejected on this basis.

11. Petitioner presented evidence that an employee of the Department, Scott MacMeeken had resigned on at least two occasions and had been rehired. However, Petitioner failed to present any evidence as to MacMeeken's race or whether MacMeeken was equally or less qualified than Petitioner.

12. Likewise, Petitioner failed to present sufficient evidence to show that white applicants for the positions which Petitioner had applied for but was not hired, were equally or less qualified than Petitioner.

13. Petitioner failed to present sufficient evidence to show that, during the period of time in question, the Department hired less experienced white correctional officers over equally qualified or more qualified non-white correctional officers, or that the Department, in its hiring process, during this period of time, gave preference to white applicants for correctional officer positions over non-white applicants for correctional officer positions.

14. Petitioner failed to present sufficient evidence to show that either her race, African-American, or her participation in any prior law suits, specifically the USA Case, or the filing of the Complaint with the Commission formed the basis for the Department's rejection of her applications in 1998 or 2000.

CONCLUSIONS OF LAW

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

16. Subsection 760.10(1)(a) and (7), 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.

\* \* \*

(7) It is an unlawful employment practice for an employer, . . . 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 an investigation, proceeding, or hearing under this section.

17. 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).



18. 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).

19. 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.

20. 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.

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

(a) She was qualified and applied for the position;

(b) She was rejected despite her qualifications

(c) other equally or less qualified applicants who are not members of her race were hired.

Bass v. Board of County Commissioners, 256 F.3rd 1095, 1104 (11th Cir. 2001); Taylor v. Runyon, 175 F.3rd 861, 866 (11th Cir. 1999).

22. There is no dispute that Petitioner was:

(a) Qualified and applied for the position of correctional officer; and

(b) Rejected despite her qualifications.

However, Petitioner failed to present sufficient evidence to show that other equally or less qualified applicants who were not members of Petitioner's race were hired. For this reason, Petitioner has failed to establish a prima facie case.

23. However, had Petitioner established a prima facie case, the Department offered a legitimate nondiscriminatory reason for its refusal to hire Petitioner, namely that Petitioner had been previously hired on two separate occasions and on each occasion, Petitioner abruptly resigned after a short

tenure. There was no evidence establishing this explanation as being pretextual.

24. Petitioner also alleges that the Department discriminated against her by refusing to hire her because of her opposition to alleged unlawful employment actions by the Department, filing a complaint with the Commission, and her involvement with the USA Case. The elements of a prima facie case for this "retaliation" aspect of Petitioner's claim are different from those for her racial discrimination claim. A prima facie case requires a showing of (1) participation in actions protected by statute; (2) an adverse employment action; and (3) a causal link between the protected actions and the adverse employment decision. Bonham v. Regions Mortgage, 129 F. Supp. 2d 1315, 1326 (M.D. Ala 2001).

25. Here, Petitioner engaged in a protected activity when she became involved in the USA Case and when she filed her Complaint with the Commission in 1999 for the Department's failure to hire her in 1998. As such, Petitioner has satisfied the first element of the prima facie case. The second element of the prima facie case was satisfied when the Department declined to hire Petitioner after she made application for employment with the Department through the Orlando Service Center in November 2000.

26. However, Petitioner's prima facie case fails upon application of the third element, whether there is a causal link between the Petitioner's protected actions and the adverse employment decisions. The Eleventh Circuit has rejected an interpretation of the "causal link" prong as "the sort of logical connections that would justify a prescription that the protected participation in fact prompted the adverse action." Simmons v. Camden County Bd. Of Education, 757 F.2d 1187, 1189 (11th Cir), cert. denied, 474 U.S. 981, 106 S. Ct. 385, 88 L. Ed.2d 338 (1985). Instead, the Court construed "the 'causal link' element to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated." 757 F.2d at 1189. It is recognized that employer knowledge of the prior protected activities could in some circumstances satisfy this element; however, in the instant case, the Department hired Petitioner in 1999 after her participation in the USA Case and after the filing of her Complaint with the Commission. Therefore, it stretches the bounds of credulity that the Department would retaliate by failing to hire Petitioner in 2000, yet not in 1999, when both occasions were well after Petitioner's participation in the protected activities. This, coupled with the lack of any other evidence establishing a causal link between the Department's refusal to hire Petitioner and her participation in protected

activities, requires a conclusion that Petitioner has failed to establish the third element (retaliation) of the prima facie case.

27. Petitioner's allegations that she suffered adverse employment actions as a result of discrimination or retaliation 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 11th day of March, 2002, in Tallahassee, Leon County, Florida.

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WILLIAM R. CAVE  
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Filed with the Clerk of the  
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this 11th day of March, 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.