STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PERRY A. FOSTER, Petitioner, vs. DEPARTMENT OF CORRECTIONS, Respondent.	)	Case No. 02-0957

RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings on May 2, 2002, in Pensacola, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Perry A. Foster, pro se
1882 Gary Circle
Pensacola, Florida 32761

For Respondent: Mark J. Henderson, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

Whether the Petitioner' termination from employment was in violation of Section 760.10, Florida Statutes.

PRELIMINARY STATEMENT

This cause arose on March 9, 1998, when the Petitioner was dismissed from his position as a probationary employee of the Florida Department of Corrections, pursuant to Rule 60K-4.003(4), Florida Administrative Code. The Petitioner filed a Charge of Discrimination based upon alleged "Racial Profiling" and the charges were investigated by the Florida Commission on Human Relations (Commission). The Commission entered a determination of "No Cause" and the Petitioner requested a hearing in order to pursue the dispute in a formal proceeding. The cause was ultimately assigned to the undersigned Administrative Law Judge.

The cause came on for hearing as noticed at which the Petitioner presented his own testimony and that of Superintendent (Warden) Ardro Johnson, of the Department of Corrections. The Petitioner presented six exhibits. Petitioner's Exhibits 1, 2, 4, 5, and 6, were admitted into evidence. Petitioner's Exhibit 6 was admitted as corroborative hearsay only and Petitioner's Exhibit 3 was not admitted, being excluded on grounds of irrelevance. The Respondent presented the testimony of Warden Ardro Johnson in its case as well, and presented two exhibits which were admitted into evidence. Upon concluding the hearing the parties elected to avail themselves of the right to file Proposed Recommended Orders which were

timely filed and have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. On March 9, 1999, the Petitioner was an employee of the State of Florida, Department of Corrections (Department) working as a correctional officer at the Santa Rosa County Correctional Institution in Milton, Florida. The Petitioner was employed as a Correctional Officer, on probationary status.

2. On February 25, 1999, the Petitioner was arrested for a purported traffic violation by a law enforcement officer in Escambia county. An officer of the Escambia County Sheriff's Department, at approximately 1:08 a.m., on that day, observed the Petitioner's blue Toyota Tercel run a stop sign. The officer pulled in behind the vehicle and the vehicle made a quick turn off the road behind a closed business establishment and turned off its lights. The officer stopped near the vehicle and approached the driver's side and asked the driver for identification. The driver was later identified as the Petitioner, Perry Foster. Mr. Foster told the officer that his one-year-old son had torn up his driver's license. While the officer was talking with the Petitioner the officer detected a strong odor of marijuana emanating from inside the vehicle. Believing a narcotic violation was taking place the officer summoned another officer with a drug-detecting dog. The dog

detected marijuana in the vehicle. Both the Petitioner and his passenger, Eric Adams, were placed outside the vehicle while the investigation was continuing. Officer Price, who brought the dog to the scene, detected the odor of marijuana on the person of Eric Adams. Ultimately, Eric Adams allowed a search and Officer Price retrieved a small package of marijuana from Mr. Adams shirt pocket. Mr. Adams was arrested for "possession of marijuana under 20 grams." The officer found no marijuana or drugs inside the vehicle although the dog strongly alerted on the driver's seat where the Petitioner had been sitting. There was the odor of marijuana along with signs of blunt cigar usage. Blunt cigars are typically used, hollowed out and packed with marijuana to smoke marijuana, without revealing its presence and use.

3. In any event, the Petitioner was not arrested for possession or use of marijuana, none was found on his person, and he was given a traffic citation and released. The friend or family member who was his passenger was arrested for possession of marijuana. The evidence is unrefuted that the Petitioner was driving the vehicle with a passenger, knowing that that passenger possessed and was using marijuana in his presence.

4. The Petitioner's employer, specifically Warden Ardro Johnson, was made aware of the Escambia County Sheriff's Office offense report that detailed the above facts and circumstances

concerning the Petitioner's arrest and the arrest of his companion on the night in question. While the Petitioner remonstrated that he only was charged with running a stop sign and had not been using drugs and that he later passed a drug-related urinalysis, that position misses the point that his termination was not because of drug use. Rather, the Petitioner was dismissed by Warden Johnson from his position as a probationary employee pursuant to Rule 60K-4.003(4), Florida Administrative Code, because his employer believes that he committed conduct unbecoming a correctional officer.

5. The true reason the Petitioner was terminated was because, as delineated by Warden Johnson in his letter to the Petitioner of March 23, 1999 (in evidence as Petitioner's Exhibit 1), the Petitioner made a personal choice to overlook, ignore, or fail to report a criminal violation occurring in his immediate presence. Warden Johnson thus explained that this leaves a clear question as to whether the Petitioner had, or would in the future, perform his correctional officer duties in the same manner by ignoring, overlooking or failing to report infractions. Because of this and because he was a probationary employee and thus had not yet established his full job qualifications, the Petitioner was terminated. There is no evidence that he was terminated based upon any considerations of his race. There is also no evidence that he was replaced in his

position. Moreover, there is no evidence that if he was replaced he was replaced by a new employee who is not a member of the Petitioner's protected class. The evidence that the Petitioner was in the car at approximately 1:00 a.m., on the morning in question with a passenger who was possessed of and using marijuana is unrefuted and is accepted as credible.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Sections 120.569 and 120.57(1), Florida Statutes (2001).

7. It is an unlawful employment practice to discharge an employee on the basis of his race. Section 760.10, Florida Statutes. In this regard, Florida law is guided by federal law under Title VII in construing the provisions of the State's civil rights laws, because Chapter 760, Florida Statutes, was patterned on the federal model. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); and Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (1st DCA 1991).

8. In employment discrimination cases a court reviews allegations of discrimination in accordance with the burden shifting standard of McDonald Douglas Corporation v. Green, 411

U.S. 792 (1973); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); and related cases.

9. Pursuant to the McDonald Douglas case, a plaintiff or petitioner bears the initial burden of establishing a prima facie case of racially discriminatory conduct. If this is done, the defendant, in this case the Respondent, must articulate some legitimate, non-discriminatory reason for the adverse employment action taken. If the Respondent carries this burden to go forward with evidence of some non-discriminatory reason, then the Petitioner must show that the proffered reason was merely a pretext for the Respondent's actions which were truly discriminatory. In this regard, the Petitioner must produce sufficient evidence to support an inference that the Respondent employer based its decision on discriminatory criteria. The ultimate burden of persuasion to convince a trier of fact that there was intentional discrimination remains with the Petitioner, however. See McDonald Douglas, supra, at 802-804; Burdine, supra, at 253. See also Jones v. Bessemer Carraway Medical Center, 137 F.3d 1306, 1310 (11th Cir. 1998).

10. In order to establish a prima facie case of discrimination based upon race, the Petitioner must prove by a preponderance of evidence that he (1) belongs to a racial minority; (2) was subjected to an adverse employment action; (3) that he was qualified to perform the job he held; and (4)

that his employer treated similarly situated employees of other races more favorably in his employment decisions concerning discipline or that upon the Petitioner's termination he was replaced by an employee of another race.

11. The Petitioner herein has not established a prima facie case. He has shown that he belongs to a racial minority and that he was subjected to an adverse employment action, his termination. He has not demonstrated, however, that similarly situated employees of other races were treated differently and more favorably under similar factual circumstances surrounding the event of his termination. He also did not show that upon his termination he was replaced by another employee of a non-protected status or different race. Moreover, the record demonstrates that he was not qualified for his job. Correctional officers, like other law enforcement officers, are held to a higher standard of conduct because of their positions serving the public trust, much as school teachers and other professional employees occupying a position of public trust are held, in terms of the conduct and ethical standards they must adhere to, when compared to other employees not occupying positions of public trust. Consequently, for a law enforcement officer to allow, condone, ignore, or fail to report a clear criminal violation occurring in his immediate presence, in his vehicle, is a clear violation of the public trust and the higher

ethical standard imposed upon law enforcement officers including correctional officers. This factual circumstance shows that he is not qualified to be a correctional officer. Moreover, he is not qualified as well because he was still on probationary status and under the Department's rules, codified in Chapter 60K-4, Florida Administrative Code, he cannot be deemed to be a qualified correctional officer until he has completed his probationary status and has been accepted as a full-fledged, career service correctional employee. Accordingly, for these reasons the Petitioner has not proven a prima facie case and therefore his claim must fail for this reason.

12. Assuming arguendo that he had established a prima facie case, the Respondent Department articulated a legitimate, non-discriminatory reason for the termination action. The evidence showed that indeed the Petitioner had engaged in conduct which is not becoming a law enforcement officer, including a correctional officer by his condoning, ignoring, and failing to report the criminal activity referenced in the above Findings of Fact. He allowed it to occur in his presence and did nothing about it. It is within the Department's province and discretion, particularly with a probationary employee, to deem such conduct as conduct unbecoming a correctional officer, which justifies dismissal under the above-cited rules. In fact, under the provisions of Rule 60K-4.003, Florida Administrative

Code, in the case of a probationary status employee, his termination can be without cause. Here in fact, the preponderant evidence proves that the Department had good cause justifying the Petitioner's termination, given the above-described facts.

13. The Petitioner adduced no evidence sufficient to establish that the employer's purported non-discriminatory reason for the termination was pretextual and in fact was done for discriminatory reasons. The fact that an employee disagrees with an employer's judgment or evaluation of him does not prove pretext. Webb v. R & B Holding Company, 992 F.Supp 1382 (SD Fla. 1998). Indeed a Petitioner's subjective opinion that the Respondent/Employer's action was discriminatory, without supporting evidence is insufficient to establish pretext or create an inference of discrimination. See St. Hilaire v. Pep Boys, 73 F.Supp 2nd 1366 (SD Fla. 1999). There is absolutely no evidence to show that any ill will or racial animus toward the Petitioner was harbored by the employer, especially in the person of Warden Johnson, nor that any other employees of different races were given more favorable treatment than the Petitioner. Therefore, there is no evidence to show that the proffered reason for the termination, established by the Respondent's evidence, was merely a pretext for a discriminatory termination.

14. In summary, the ultimate question in such an employment discrimination case concerns whether the complaining party has carried his ultimate burden of persuasion that he is a victim of intentional discrimination. Mr. Foster produced no evidence or testimony to establish that intentional discrimination occurred. The Petitioner has not established a prima facie case, in terms of showing that he was treated in a disparate way or for any of the other reasons delineated above. Moreover, he has not advanced any persuasive evidence that the Respondent's articulated reason for the job termination was a pretext for discrimination. In fact, no persuasive evidence has been presented to show that there was any intentional or invidious discrimination on the part of the Respondent and the Petition must therefore fail.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the subject Petition in its entirety.

DONE AND ENTERED this 2nd day of August, 2002, in Tallahassee, Leon County, Florida.

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P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675   SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with Clerk of the
Division of Administrative Hearings
this 2nd day of August, 2002.

COPIES FURNISHED:

Mark J. Henderson
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500

Perry A. Foster
1882 Gary Circle
Pensacola, Florida 32505

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Cecil Howard, General Counsel
Florida Commission on Human Relations
325 John Knox Road
Building F, Suite 240
Tallahassee, Florida 32303-4149

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.