

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EUGENE HICKS,)
)
 Petitioner,)
)
 vs.) Case No. 02-1410
)
 TREASURE SERVICE/METRO DADE)
 TRANSIT¹ AND RON JONES,)
)
 Respondents.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 24 and 25, 2003, by video teleconference, with the parties appearing in Miami, Florida, before Patricia Hart Malono, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Eugene Hicks, pro se
11846 Northwest 13th Street
Pembroke Pines, Florida 33026

For Respondent: Eric Rodriguez, Esquire
Office of Dade County Attorney
111 Northwest First Street
Suite 2810
Miami, Florida 33128-1930

STATEMENT OF THE ISSUE

Whether the Respondent discriminated against the Petitioner in his employment on the basis of race and disability and/or retaliated against the Petitioner for exercising his rights under Sections 760.01-760.011, Florida Statutes (1999), and, if so, the appropriate remedy.

PRELIMINARY STATEMENT

In a Charge of Discrimination dated May 7, 1999, and filed with the Florida Commission on Human Relations ("FCHR") on May 17, 1999, Eugene Hicks alleged that his employer, "Treasury [sic] Services/Metro Date Transit" ("Metro Dade Transit") had discriminated against him on the basis of race and disability and that he had been the subject of retaliation. The Charge of Discrimination contains the following allegations:

I. Personal Harm:

Since working for Respondent, I have been constantly harassed, along with other Black and non-Hispanic employees under the supervision of Yfrahin Rodriguez. In addition I have been denied reasonable accommodation for my disability.

II. Respondent's Reasons for Personal Harm:

No reason was given for the harassment. Mr. Rodriguez suspended me for "insubordination."

III. Discrimination Statement:

I believe I have been discriminated against because of my Gender-Female [sic],

Disability, and Retaliation which is in violation of the Americans with Disabilities Act, and Florida Statutes 760.10 as amended for the following reasons:

1. Mr. Rodriguez, Supervisor, has continually harassed me and other Black and non-Hispanic employees. He regularly refers to the black employees as "boy", swears and curses at them, berates and humiliates them in front of other employees, causing a hostile work environment.

2. Additionally, Mr. Rodriguez had me followed and under surveillance by a private investigator from June 20, 1997 through August 4, 1997, solely for the purpose of harassing me.

3. He has on numerous occasions instituted discipline against me for the same things other employees do, yet he did not at any time discipline them. Further, he issued a disciplinary action report against me for an alleged incident which occurred while I was on annual leave and not working.

4. I have reported the harassment and hostile work conditions to Mr. Rodriguez' [sic] managers. No action has been taken against him to date. However, after each report I made, Mr. Rodriguez would intensify his actions against me.

5. In addition, his actions towards me have affected my health, which caused a severe stress-related condition which partially disabled me from on or about July 1997 through January 1998. During that time, Mr. Rodriguez failed to make sufficient accommodation for my disability and suspended me for "insubordination". Mr. Othen [sic] Gilbert and Mr. Terry Simmerson [sic] are fully aware of the ongoing harassment and abuses of Mr. Rodriguez, yet have failed to take any action to rectify the situation.

The FCHR issued a Determination: No Cause on February 19, 2002,² in which the FCHR held that "the timeliness and all jurisdictional requirements have been met" and that "there is no reasonable cause to believe that an unlawful employment practice has occurred." A Notice of Determination: No Cause was mailed to Mr. Hicks on February 19, 2002, in which Mr. Hicks was advised that he could "request an administrative hearing by filing a PETITION FOR RELIEF within 35 days of the date of this NOTICE OF DETERMINATION: NO CAUSE."

Mr. Hicks submitted to the FCHR a completed form Petition for Relief that was not dated but that was filed with the FCHR on April 2, 2002. In the Petition for Relief, Mr. Hicks named "Treasury [sic] Service/Metro Dade Transit, Mr. Ron Jones, Human Resources Manager," as the Respondent. Each section of the form Petition for Relief contained only a reference to an attachment. It is difficult to discern from the assertions in the attachment the precise nature of Mr. Hicks's complaints. Among the intelligible allegations are the following:

. . . [T]he Petitioner was single [sic] out and continuously harassed regarding work habits and performances that was [sic] over and above that of other employees during this time period. Supervisory and/or Management records will not reveal were [sic] other employees [sic] work habits and performance was observed and documented to the extend [sic] that Mr. Hicks was observed during this time period. . . .

* * *

Records will reveal that Complainant did make his supervisor or management aware that he had a disability and needed an accommodation verbally or in writing.

Records will show that Mr. Hicks had chronic and repeated Doctor visits that will reveal that his condition will [sic] manifest in observable and at times questionable behavior patterns. Based on the numerous complaints filed by both Complainant and Employer, there was lack of due process in that the Respondent e.g. Supervisor and Management failed to provide and [sic] employee assistance program to assist Mr. Hicks and/or to validate his illness.

On April 5, 2002, the FCHR transmitted Mr. Hicks's Petition for Relief to the Division of Administrative Hearings for assignment of an administrative law judge. On April 25, 2002, before the case had been scheduled for hearing, Metro Dade Transit filed Respondent Miami-Dade County's Motion to Dismiss Petition.³ In the motion, Metro Dade Transit pointed out that Mr. Hicks's Petition for Relief had been filed 42 days after the date of the Notice of Determination: No Cause, rather than the statutorily-mandated 35 days and requested that Mr. Hicks's Petition for Relief be dismissed as untimely under Section 760.11(7), Florida Statutes (1999).⁴ Mr. Hicks did not respond to the motion within the time specified in Rule 28-106.204(1), Florida Statutes; Metro Dade Transit's motion was granted, and a Recommended Order of Dismissal was entered on

May 15, 2003, on the ground that Mr. Hicks's Petition for Relief was not filed within 35 days of the date of the Notice of Determination: No Cause.⁵

In an Order Remanding Petition for Relief from an Unlawful Employment Practice entered November 5, 2002, the FCHR determined that Mr. Hicks's Petition for Relief was timely filed pursuant to its Rule 60Y-4.004(1), Florida Administrative Code, ("When a document is received by mail, the date of the filing shall relate back to the date of the postmark."). The FCHR stated in its order of remand that it had found in its file an envelope, a copy of which it attached to the order, which presumably was the envelope in which Mr. Hicks's Petition for Relief was received by the FCHR; the envelope was postmarked March 23, 2002. Upon receiving this order of remand, the file in this case was re-opened, and the final hearing was scheduled for February 24 and 25, 2003.

After the final hearing was convened, Mr. Hicks confirmed that he was claiming discrimination on the basis of race and disability pursuant to Section 760.10(1)(a), Florida Statutes (1999), and retaliation pursuant to Section 760.10(7), Florida Statutes (1999). Metro Dade Transit also referred to the argument it made in the Respondent's [sic] Response to Initial Order that Mr. Hicks's Petition for Relief should be dismissed because his original Charge of Discrimination was not filed

within 365 days of the date of the violations alleged in the Charge of Discrimination, as required by Section 760.11(1), Florida Statutes (1999). Metro Dade Transit argued that Mr. Hicks's Petition for Relief should be dismissed because Mr. Hicks referred in the Charge of Discrimination filed with the FCHR on May 17, 1999, to specific incidents that took place between June 1997 and January 1998.

Mr. Hicks also referred in the Charge of Discrimination to ongoing harassment and disciplinary actions taken against him at unspecified times. Because of the vague allegations in both the Charge of Discrimination and in the Petition for Relief, it could not be determined without receiving evidence whether the Charge of Discrimination was filed within 365 days of one or more of the alleged violations, and a ruling on the request in the Response to Initial Order that the Petition for Relief be dismissed was withheld until the conclusion of the hearing. This issue is discussed in the Conclusions of Law, below.

At the hearing, Mr. Hicks testified in his own behalf and presented the testimony of Frantz Benoit, Douglas Fahie, and Greg West. Petitioner's Exhibits 1 through 8 were offered and received into evidence. Metro Dade Transit objected to Petitioner's Exhibits 3, 6, 7, and 8 on the ground that these exhibits related to incidents that occurred more than 365 days prior to the date on which Mr. Hicks filed his Charge of

Discrimination; these exhibits were received into evidence for purposes of establishing the dates on which the subject incidents occurred.

Metro Dade Transit presented the testimony of Frantz Benoit, Douglas Fahie, Antomic Augustin, Darryl Clodfelter, Yfrahin Rodriguez, Omar Yoda, Terry Simonson, and Othan Gilbert. Respondents' Exhibits 1 through 11 were offered and received into evidence.

The two-volume transcript of the proceedings was filed with the Division of Administrative Hearings on April 3, 2003. Mr. Hicks did not file proposed findings of fact and conclusions of law, but, on March 17, 2003, he filed documents entitled Recap of Claim and Detained [sic] Account of Request for Compensation of Relief in which he requested an award of damages in the amount of \$11,073,000.00. Metro Dade Transit filed on April 23, 2003, the Respondent's Request for Extension of Time to File Proposed Findings of Fact and Conclusions of Law, in which it asserted that it had not, as of April 23, 2003, received a copy of the transcript filed with the Division of Administrative Hearings on April 3, 2003; Mr. Hicks objected to the requested extension. An order was entered extending the time for filing the proposed findings of fact and conclusions of law for a period of ten days; two additional extensions of time were granted, over Mr. Hicks's objections, and Metro Dade

Transit timely filed its proposed findings of fact and conclusions of law. Both Mr. Hicks's and Metro Dade Transit's post-hearing submissions have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Mr. Hicks is an African-American. He was employed by Metro Dade Transit from approximately 1993 until May 13, 1999. During his employment, he worked in the Revenue Department as a Transit Revenue Collector.

2. When Mr. Hicks first began working for Metro Dade Transit, he was assigned to work the night shift as a truck driver. He was responsible for going to different bus yards and either pulling cash boxes from the buses or reading the numbers on the bus's turnstiles and comparing those to the numbers on the cash boxes.

3. In or around 1995, Mr. Hicks was assigned to the bus yard identified as Northeast 2. His job was to remove the cash boxes from the buses that came into the yard and to replace the full boxes with empty ones. He would then empty the cash boxes through a machine that would drop the money into the safe.

4. In or around 1997, Mr. Hicks returned to his former assignment driving a truck to different bus yards. He worked the second shift and visited three different bus yards, where he would give each revenue collector assigned to the bus yards a 30-minute break during the rush hours.

5. Terry Simonson, a Transit Revenue Collections Supervisor 2, hired Mr. Hicks as a revenue collector for Miami Dade Transit in 1993.

6. Yfrahin Rodriguez was a Transit Revenue Collections Supervisor 1 from 1993 until May 1998, when he left his position to become a code enforcement officer for Miami-Dade County Team Metro.

7. Mr. Hicks's employment with Metro Dade Transit terminated on May 13, 1999, for reasons that will be discussed below.

8. Mr. Hicks received satisfactory employment evaluations for 1995, 1996, and 1997, and he was given merit salary increases in 1996, 1997, and 1998.⁶

9. In his evaluations for 1995 and 1996, which were completed by his then-supervisor Curtis Fullington in January 1996 and January 1997, respectively, Mr. Hicks was described as an employee who "cooperates reluctantly at times" and who "disregards some rules and procedures."

10. In his evaluation for 1997, which was completed in January 1998 by Mr. Rodriguez, Mr. Hicks was described as an employee who "reluctantly cooperates with his peers, and has trouble accepting advice and counseling with his supervisors" and who "disregards some departmental rules and policies." In addition, several supervisors reported to Mr. Simonson that Mr. Hicks was "a little difficult" to deal with.

11. Mr. Rodriguez was very professional in carrying out his duties as a supervisor and treated all of the employees he supervised, including African-American employees, fairly and with respect.

12. Frantz Benoit, Douglas Fahie, Antomic Augustin, Darryl Clodfelter, and Greg West are current and former Miami Dade Transit Revenue Collectors who were supervised by Mr. Rodriguez and worked with Mr. Hicks. Mr. Benoit, Mr. Fahie, Mr. Augustin, and Mr. West are African-Americans. Mr. Rodriguez always acted very professionally in his dealings with Mr. Benoit, Mr. Fahie, and Mr. Augustin as their supervisor, and Mr. Rodriguez treated them fairly and with respect.

13. Mr. Benoit, Mr. Fahie, Mr. Augustin, and Mr. Clodfelter did not ever observe Mr. Rodriguez treat Mr. Hicks with disrespect or in a derogatory manner, and none of these individuals ever heard Mr. Rodriguez call Mr. Hicks "boy" or harass him.

14. Mr. Rodriguez and Mr. Hicks were involved in several confrontations over the years. Mr. Benoit observed Mr. Rodriguez and Mr. Hicks in a "heated discussion" at one time. Mr. Augustin observed Mr. Rodriguez and Mr. Hicks get into a "verbal confrontation" in May 1997, when Mr. Rodriguez asked Mr. Hicks a question related to Mr. Hicks's job; Mr. Augustin observed Mr. Hicks use profanity during the confrontation.

15. Mr. Clodfelter observed an "exchange" between Mr. Rodriguez and Mr. Hicks when Mr. Rodriguez introduced Mr. Hicks to a new duty log that he wanted all the revenue collectors working as "UT-2's" to complete. Mr. Rodriguez gave both Mr. Hicks and Mr. Clodfelter a duty-log form that required entry of the time the employee arrived at a particular bus yard and the time the employee left the bus yard.⁷ Mr. Clodfelter discerned from the exchange between Mr. Hicks and Mr. Rodriguez that Mr. Hicks misunderstood the nature of the duty log and believed he was being singled out and was the only revenue collector required to complete the duty log. Mr. Clodfelter described Mr. Hicks as "very upset" and observed Mr. Hicks tell Mr. Rodriguez he would not complete the duty log.

16. Mr. West is an African-American who worked as a Miami Dade Transit Revenue Collector from 1985 until he was terminated in 1997. Mr. West believes that Mr. Rodriguez harassed both him

and Mr. Hicks because they spoke out about things they thought were wrong with Miami Dade Transit.

17. Mr. Simonson was Mr. Rodriguez's supervisor during the time that Mr. Rodriguez was a Transit Revenue Collections Supervisor 1. Mr. Hicks complained to Mr. Simonson several times that he believed Mr. Rodriguez was harassing him, although Mr. Hicks never told Mr. Simonson that Mr. Rodriguez was making remarks to him related to his race.

18. As a result of Mr. Hicks's complaints, Mr. Simonson met several times with Mr. Rodriguez and Mr. Hicks to discuss the difficulties they had working with one another. In Mr. Simonson's opinion, Mr. Rodriguez and Mr. Hicks had problems working together because Mr. Hicks gave Mr. Rodriguez "a hard time." At the end of each of the meetings, however, Mr. Rodriguez and Mr. Hicks shook hands and agreed to try to work together amicably.

19. One of these meetings between Mr. Simonson, Mr. Rodriguez, and Mr. Hicks was also attended by Othan Gilbert, who was at the time the manager of Treasury Services for Miami Dade Transit and Mr. Simonson's supervisor. Neither Mr. Simonson nor Mr. Gilbert recalls Mr. Hicks saying anything about Mr. Rodriguez telling Mr. Hicks that all Blacks do is complain or that he was going to get rid of Mr. Hicks.

Events leading to Mr. Hicks's termination.

20. In 1998 and 1999, Omar Yoda was a Transit Revenue Processing Supervisor 1; Mr. Yoda did not supervise Mr. Hicks because the revenue processing section is distinct from the revenue collections section. In late December 1998 or early January 1999, Mr. Hicks approached Mr. Yoda and told Mr. Yoda that he had a job at the post office lined up and that he wanted to use up his accrued sick leave before he quit his job with Miami Dade Transit. Mr. Yoda told Mr. Hicks that he could not work another job while he was out on sick leave because it was not permitted by Miami Dade Transit's rules. Mr. Hicks protested that other employees were allowed to use their sick leave in this way. Mr. Hicks did not tell Mr. Yoda that he was sick or that he needed to be placed in a light duty assignment.

21. On January 5, 1999, Mr. Hicks sent to Mr. Simonson by facsimile transmittal a Certificate for Return to Work issued by Andover Medical Group and dated January 4, 1999. It stated on the certificate, which was apparently signed by a medical doctor, that Mr. Hicks would be able to return to work on February 11, 1999. No diagnosis was included on the certificate.

22. On March 1, 1999, Mr. Hicks sent to Mr. Simonson by facsimile transmittal a Certificate for Return to Work issued by Andover Medical Group and dated March 1, 1999. It stated on the

certificate, which was apparently signed by a medical doctor, that Mr. Hicks would not be able to return to work until April 9, 1999. No diagnosis was included on the certificate.

23. Mr. Hicks submitted Requests for Leave for the periods extending from January 1 through 9, 1999; January 12 through 23, 1999; January 26 through February 6, 1999; February 9 through 21, 1999; February 24 through March 7, 1999, and March 8 through 17, 1999.

24. Mr. Hicks claimed that he went on sick leave because he was under a lot of stress and had an abnormal heartbeat.⁸ Mr. Hicks never told Mr. Simonson that he was disabled, however, nor did Mr. Hicks provide Mr. Simonson with any medical documentation to support the requests for sick leave and the certificates Mr. Hicks submitted from his doctor. Mr. Hicks did, however, ask Mr. Simonson the procedure for requesting a light duty assignment; Mr. Simonson referred him to the Human Resources Department, but heard nothing more about a light duty assignment for Mr. Hicks. Mr. Hicks never told Mr. Rodriguez that he was disabled or requested a light duty assignment or any other accommodation.⁹

25. While he was out on sick leave, Mr. Hicks's supervisors received word that Mr. Hicks was working at another job. An investigation was initiated, and an employment verification inquiry was made to the United States Postal

Service. The United States Postal Service provided Metro Dade Transit with an employment verification form referencing March 26, 1999, as the date of the request; the document confirmed that Mr. Hicks had been employed as a United States Postal Service career employee since January 16, 1999, with a base salary of \$23,893.00 per year.

26. Mr. Hicks worked at the Pembroke Pines Post Office in Broward County, Florida, as a custodian. He swept the floors and cleaned the restroom.

27. Mr. Simonson prepared a formal Disciplinary Action Report dated March 30, 1999, detailing the results of the investigation into allegations that Mr. Hicks was working for the United States Postal Service during the time he was on sick leave from his job with Metro Dade Transit. Mr. Hicks was placed on administrative leave on March 19, 1999.¹⁰

28. The results of the investigation were discussed with Mr. Hicks at a disciplinary hearing that was held on April 23, 1999. In a letter dated April 27, 1999, Othan Gilbert, then the Manager of Treasury Services for Metro Dade Transit and Mr. Simonson's supervisor, advised Mr. Hicks that, after a management review of the circumstances detailed in the Disciplinary Action Report dated March 30, 1999, the decision had been made to recommend that he be terminated as an employee of Metro Dade Transit.

29. Mr. Hicks was terminated from his employment with Miami Dade Transit effective May 13, 1999. Mr. Hicks was also terminated from his position with the United States Postal Service.

30. Mr. Hicks filed his Charge of Discrimination with the FCHR on May 17, 1999, and the date on this document, handwritten next to Mr. Hicks's signature, was May 7, 1999.

31. Mr. Hicks appealed the decision to terminate his employment with Metro Dade Transit, and at the final hearing on the appeal, Mr. Hicks entered into a stipulation with Miami-Dade County whereby he agreed to resign in lieu of being terminated and to withdraw a pending appeal of five-day suspension imposed in January 1998.¹¹

Incidents Mr. Hicks considers discriminatory.

32. Mr. Hicks complained that, when he was placed on administrative leave in late March 1999, Mr. Gilbert ordered him, "with a nasty attitude,"¹² to turn in his badge at the Government Center. This required Mr. Hicks to drive all the way downtown, when, according to Mr. Hicks, he could have turned in his keys at the Northeast Bus Yard, which would have been more convenient for Mr. Hicks.

33. Mr. Hicks also complained that Mr. Gilbert gave him an order to go directly home after he turned in his badge. Mr. Hicks interpreted this to mean that Mr. Gilbert had ordered

him not to stop on the way home. Mr. Hicks complained that, as a result of Mr. Gilbert's order, Mr. Hicks was unable to stop to use the bathroom on the way to his house.

34. Mr. Hicks also testified to a number of incidents that allegedly occurred in 1995, 1996, 1997, and early 1998, that he believes constituted harassment and created a hostile work environment:

a. In January 1995, Mr. Hicks had an accident with a county vehicle and damaged the top of a truck he was driving to collect change machines from buses. Mr. Hicks reported the damage, but he received a record of counseling, which he thinks was a little extreme under the circumstances.

b. On July 18, 1996, a computer technician went to the Northeast Bus Yard where Mr. Hicks was working; the computer technician shut down the computers so he could work on them. As a result, Mr. Hicks could not empty the fare boxes on the buses that came into the yard, so the buses left the yard with full fare boxes. Mr. Hicks feels aggrieved because Mr. Rodriguez wrote a memorandum dated July 19, 1996, to Mr. Simonson complaining of continuous problems at the Northeast Bus Yard and mentioning Mr. Hicks's failure to do his job as one cause of the problems.¹³ Mr. Hicks perceives this accusation as a great injustice because he worked the second shift, which was the

hardest shift; he chose the hardest shift because he was "into the physical thing because I like to work hard."¹⁴

c. On February 19, 1997, Mr. Rodriguez walked over to him at the Northeast Bus Yard with a "silly grin" on his face and called Mr. Hicks "boy"; told Mr. Hicks he was tired of Mr. Hicks questioning him every time he gave him an order; told Mr. Hicks that "all you Black revenue collectors" do is complain, especially Mr. Hicks; and told Mr. Hicks that he was going to do his best to get Mr. Hicks fired. Mr. Rodriguez denied having made any of these statements.

d. In May 1997, Mr. Hicks called to report that he was sick. Mr. Hicks spoke with a fellow employee, and asked him to give the message to the supervisor that he was taking a sick day. Mr. Rodriguez caused Mr. Hicks's pay to be docked for eight hours' work and told him that employees were supposed to speak with a supervisor when calling in sick. Mr. Hicks questioned Mr. Rodriguez's action and Mr. Rodriguez "got very, very nasty and we got into a yelling match."¹⁵ Although Mr. Hicks acknowledged that Mr. Rodriguez might be correct about the rule, Mr. Hicks knew of other employees who just gave a co-worker a message and were not docked any pay. Mr. Hicks claims that, before docking his pay, Metro Dade Transit should have sent around a memo stating the rule about reporting sick to a supervisor.¹⁶

e. In May 1997, Mr. Hicks heard rumors that "they" were going to fire him because he, or his attorney, filed a complaint with the Equal Employment Opportunity Commission.¹⁷ When he confronted Mr. Gilbert about the rumors, Mr. Gilbert claimed he did not know anything about it.

f. On June 3, 1997, Mr. Hicks was not able to take a lunch break because it was impossible for him to keep the schedule that Mr. Rodriguez had established.

g. On June 6, 1997, Mr. Hicks forgot to turn in his keys to a county vehicle, and they made a "big statement about it" being against the rules even though they never made a "big statement" when someone else forgot to turn in their keys.¹⁸

h. On June 6, 1997, Mr. Hicks perceived that things had gotten so bad on the job that he went to the Employee Assistance Program for help. He was so stressed that, for about six months, he did not report for work on weekends. Mr. Hicks claims he missed these days of work to avoid Mr. Rodriguez when neither Mr. Simonson nor Mr. Gilbert was working and could not witness what Mr. Rodriguez was doing to him.

i. On June 18, 1997, Mr. Hicks was at the Central Bus Yard, where he was supposed to work from 7:30 p.m. to 9:00 p.m. At around 8:00 p.m., Mr. Rodriguez drove up, and Mr. Hicks asked Mr. Rodriguez if he had to stay at the bus yard until 9:00 p.m. Mr. Rodriguez told him that "all you Blacks do is complain" and

that he would fire all "you people" if it was up to him.

Mr. Rodriguez denied having made these statements.¹⁹

j. On December 31 of every year, Metro Dade Transit forced employees to work emergency overtime. Mr. Hicks, along with a number of other employees, was forced to work a 10-hour shift on December 31, 1997, when he was only supposed to work eight hours. Mr. Hicks always questioned the supervisor about this emergency overtime because he believed that only the county manager could call for emergency overtime and then only for an act of God.

k. On January 20, 1998, Mr. Hicks was forced to "work out of class" when he was told to log buses into the computer. Mr. Hicks claims his job description did not include this type of work.

l. Mr. Rodriguez and "a couple of other guys" prepared written statements attesting that Mr. Hicks threatened to kick Mr. Rodriguez's "posterior" during an altercation between Mr. Rodriguez and Mr. Hicks. Mr. Hicks denies having threatened Mr. Rodriguez on this occasion.²⁰

m. Mr. Hicks called in sick for one day, and he was required to bring a doctor's letter even though the union contract provided that an employee did not need a doctor's letter unless taking three days' sick leave.²¹

n. During the time that he was assigned to Government Center, Mr. Rodriguez harassed him by ordering him to do assignments that no other truck driver would normally do.

35. Mr. Hicks considered Mr. Rodriguez's harassment so serious that he went to the doctor, and he claimed that he was told he had developed ulcers. He also went to the Miami-Dade County Employee Assistance Program for help because he believed that his supervisors did not pay attention to him; Mr. Hicks went to a psychiatrist at the recommendation of a counselor at the Employee Assistance Program.²²

Summary

36. Mr. Hicks failed to present persuasive evidence that Mr. Rodriguez or anyone employed by Metro Dade Transit more likely than not harassed him or created a hostile work environment because Mr. Hicks is an African-American. It is apparent from the evidence presented by both Metro Dade Transit and Mr. Hicks that Mr. Hicks routinely questioned Mr. Rodriguez's authority to direct his activities on the job and that he sometimes responded to Mr. Rodriguez in a belligerent and defiant manner. This behavior by Mr. Hicks, rather than his race, was the cause of the friction between Mr. Rodriguez and Mr. Hicks. Mr. Hicks's attribution of racist remarks to Mr. Rodriguez is rejected as not credible given the testimony of three African-American employees of Metro Dade

Transit that Mr. Rodriguez always treated them fairly and with respect. Even assuming that the various incidents that Mr. Hicks claims were discriminatory and tended to create a hostile work environment happened as Mr. Hicks described, the incidents were unrelated to Mr. Hicks's race; were, for the most part, simply the complaints of a disgruntled employee; and were not so severe or pervasive that the conditions of Mr. Hicks's employment were altered.

37. Mr. Hicks failed to present persuasive evidence to establish that Metro Dade Transit more likely than not discriminated against him on the basis of handicap. Mr. Hicks provided no proof that he was either mentally or physically handicapped. Furthermore, even if Mr. Hicks had established that he was handicapped, the persuasive evidence establishes that the only accommodation he requested was extended sick leave from January through mid-March 1999, during which time he worked for the United States Postal Service. His termination was unrelated to any real or perceived handicap but was, rather, the result of his abuse of Metro Dade Transit's sick leave policy.

38. Mr. Hicks failed to present any evidence that he was more likely than not the victim of retaliation by Metro Dade Transit. The only discrimination complaint that Mr. Hicks filed against Metro Dade Transit was signed and dated by Mr. Hicks after he learned that Mr. Gilbert was recommending that he be

terminated, and the complaint was filed with the FCHR after Mr. Hicks was terminated from his employment. Mr. Hicks presented no evidence that Miami Dade Transit even had notice that he intended to file a discrimination complaint.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

40. Section 760.10, Florida Statutes (1999), part of the Florida Civil Rights Act of 1992, provided 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 or 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, an employment agency, a joint labor-management committee, or a labor organization 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 in an investigation, proceeding, or hearing under this section.^[23]

41. Florida courts routinely rely on decisions of the federal courts construing Title VII of the Civil Rights Act of 1964, codified at Title 42, Section 2000e et seq., United States Code, ("Title VII"), when construing the Florida Civil Rights Act of 1992, "because the Florida act was patterned after Title VII." Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1387 (11th Cir. 1998), citing, inter alia, Ranger Insurance Co. v. Bal Harbor Club, Inc., 549 So. 2d 1005, 1009 (Fla. 1989), and Florida State University v. Sondel, 685 So. 2d 923, 925, n. 1 (Fla. 1st DCA 1996).

Timeliness

42. The first legal issue that must be addressed is the timeliness of Mr. Hicks's Charge of Discrimination, which was filed with the FCHR on May 17, 1999, and was apparently signed by Mr. Hicks on May 7, 1999. Section 760.11(1), Florida Statutes (1999), provided that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, . . ."

43. The 365-day time limitation on filing a complaint under Title VII is not jurisdictional but, rather, is a statute of limitations. Greene v. Seminole Electric Cooperative, 701 So. 2d 646, 648 (Fla. 5th DCA 1997). And, because it is a statute of limitations, it is subject to waiver, estoppel, and

equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1982); see also National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

44. Metro Dade Transit preserved its claim that the incidents alleged in the Charge of Discrimination and in his Petition for Relief filed April were time-barred. It asserted in the Respondent's Response to Initial Order that Mr. Hicks's Petition for Relief should be dismissed because the incidents of which he complained were time-barred.²⁴ Metro Dade Transit reiterated at the beginning of the final hearing its request that the Petition for Relief be dismissed as time-barred. A ruling on the request was deferred until entry of this Recommended Order because Mr. Hicks complained of ongoing acts of harassment and the failure to accommodate his disability, and it was not clear on the face of the Charge of Discrimination that the incidents Mr. Hicks complained of occurred outside the 365-day time period.

45. Metro Dade Transit also raised throughout Mr. Hicks's testimony its argument that Mr. Hicks was time-barred from raising specific incidents that he considered discriminatory or retaliatory. Mr. Hicks's exhibits and his testimony was, however, received into evidence in order to establish the approximate dates on which the incidents Mr. Hicks claims were discriminatory and retaliatory took place.

46. As set forth in the findings of fact herein, most of Mr. Hicks's complaints relate to incidents that occurred in 1995, 1996, and 1997; Mr. Hicks described in his testimony one incident that he claims occurred in January 1998 and two incidents that occurred in March 1999. The Charge of Discrimination was filed more than 365 days after all but the two March 1999 incidents, and it was, therefore, untimely as to all but the March 1999 incidents.

47. Mr. Hicks also sought to raise the issue of the termination of his employment with Metro Dade Transit on May 13, 1999, apparently claiming that Metro Dade Transit failed to accommodate his purported disability. The evidence establishes, however, that Mr. Hicks was advised on April 27, 1999, that Mr. Gilbert was recommending the termination of his employment, yet Mr. Hicks did not include in either his Charge of Discrimination dated May 7, 1999, or in his Petition for Relief filed April 2, 2002, any reference to this termination.

48. The court in Lieberman v. Miami-Dade County, 2000 WL 1717649 (S.D. Fla. 2000), at page 4, held that a charge of discrimination relating to a specific event must be included in the Charge of Discrimination or the right to raise the claim in judicial proceedings is waived. This rationale applies as well to administrative proceedings before the Division of Administrative Hearings because, in cases where the FCHR finds

no cause to believe that discrimination has occurred, the complainant has recourse only to the Division of Administrative Hearings. See Section 760.11(7), Florida Statutes (1999). Based on the findings of fact herein, Mr. Hicks's claim at the hearing that his termination was discriminatory was not included in his Charge of Discrimination or Petition for Relief, and he is, therefore, barred from claiming for the first time in the final hearing in this case that his termination was discriminatory.

49. Nonetheless, because it was not possible to make a determination of the timeliness of the Charge of Discrimination without receiving Mr. Hicks's testimony and exhibits and in the hope of achieving a full and complete resolution of Mr. Hicks's claims of discrimination and retaliation, Mr. Hicks's claims of discrimination on the basis of race and disability and retaliation will be considered on their merits, without regard to the dates on which the alleged incidents occurred.

50. Mr. Hicks has the burden of proving by a preponderance of the evidence that he was the victim of employment discrimination, and he can establish a prima facie case of discrimination either through direct evidence of discrimination or through circumstantial evidence within the framework of the analysis first articulated in McDonald Douglas Corp. v. Green,

411 U.S. 792, 802-04 (1973). See Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997).

Discrimination based on race: Hostile work environment.

51. In this case, Mr. Hicks has presented no direct evidence that he was discriminated against because of his race, and he must, therefore, rely on the presumption set forth in McDonald Douglas to establish a prima facie case of racial discrimination and show that "(1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job." Holifield, 115 F.3d at 1562.

52. Mr. Hicks is African-American and, therefore, satisfies the first prong of the McDonald Douglas analysis.

53. Although the typical employment discrimination case involves adverse employment action related to hiring, firing, or promoting an employee, Mr. Hicks has claimed that he was subjected to a hostile work environment.

54. The court in Terry v. Ashcroft, 2003 WL 21666141 (2d Cir. 2003), at page 14, defined the elements that must be proven to establish a hostile work environment as follows:

In order to prevail on a hostile work environment claim under Title VII, a plaintiff must show that "the harassment was 'sufficiently severe or pervasive to alter the conditions of the victim's employment

and create an abusive working environment.'" Alfano v. Costello, 294 F.3d 365, 373 (2d Cir. 2002) (quoting Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997)); see also Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 78 (1998) (stating that a hostile work environment is created "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."). We have explained that "[t]his test has objective and subjective elements: the misconduct must be 'severe or pervasive enough to create an objectively hostile or abusive work environment,' and the victim must also subjectively perceive that environment to be abusive." Alfano, 294 F.3d at 374 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). Among the factors to consider when determining whether an environment is sufficiently hostile are "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Harris, 510 U.S. at 23. In determining whether a hostile environment exists, we must look at the "totality of the circumstances." Richardson, 180 F.3d at 437-38. "As a general rule, incidents must be more than 'episodic; they must be sufficiently continuous and concerted in order to be deemed pervasive.'" Alfano, 294 F.3d at 374 (quoting Perry, 115 F.3d at 149). . . .

55. Based on the findings of fact herein, Mr. Hicks's proof is not sufficient to establish that he was subjected to a hostile work environment at Metro Dade Transit. Mr. Hicks has, therefore, failed to establish that he suffered an adverse

employment action and, consequently, has failed to establish a prima facie case of employment discrimination based on his race.

Discrimination based on handicap: Failure to accommodate.

56. Although it is not clear from his testimony, Mr. Hicks apparently claims that Metro Dade Transit discriminated against him by terminating his employment rather than accommodating his handicap by assigning him to light duty work.

57. In order to establish a prima facie case of employment discrimination based on disability under the Florida Civil Rights Act, Mr. Hicks must, at a minimum show that he is handicapped, that is, he must show that he "is a person with a disability." Smith v. Avatar Properties, Inc., 714 So. 2d 1103, 1106 (Fla. 5th DCA 1998).

58. The FCHR has defined "handicap" in Rule 60Y-3.001(14), Florida Administrative Code, as follows:

"Handicap" means a condition that prevents normal functioning in some way; a person with a handicap does not enjoy the full and normal use of his or her sensory, mental, or physical faculties.

59. The court in Razner v. Wellington Regional Medical Center, 837 So. 2d 437 (Fla. 4th DCA 2002), relied on the definition of "handicap" found in the Florida Fair Housing Act, Section 760.22(7), Florida Statutes, in a case involving an employment discrimination claim. Section 760.22(7), Florida

Statutes (1999), defined "handicap" in pertinent part as follows:

"Handicap" means:

(a) A person has a physical or mental impairment that substantially limits one or more major life activities, or he or she has a record of having, or is regarded as having, such physical or mental impairment.

60. Based on the findings of fact herein, Mr. Hicks has failed to establish that he is a person with a disability, or "handicap," as that term is defined in Rule 60Y-3.001(14), Florida Administrative Code, or in Section 760.22(7), Florida Statutes (1999). Mr. Hicks has, therefore, failed to establish a prima facie case that Metro Dade Transit discriminated against him on the basis of a handicap.

Retaliation

61. The court in Goldsmith v. City of Atmore, 996 F.2d 1155, 1162-63 (11th Cir. 1993), observed that "[t]he burden of proof in Title VII retaliation cases is governed by the framework established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)." The court described that burden as follows:

In order to prevail, the plaintiff must first establish a prima facie case by showing (1) statutorily protected expression, (2) adverse employment action, and (3) a causal link between the protected expression and the adverse action. . . .

Goldsmith, 996 F.3d at 1162-63 (citations omitted).

62. It is difficult to discern from the Charge of Discrimination, the Petition for Relief, or the evidence he presented during the hearing the basis for Mr. Hicks's claim that Metro Dade Transit retaliated against him in violation of Section 760.10(7), Florida Statutes (1999). Based on the findings of fact herein, Mr. Hicks engaged in "statutorily protected expression" only once, when he filed his Charge of Discrimination against Metro Dade Transit with the FCHR. Mr. Hicks, however, filed this charge with the FCHR after his employment with Metro Dade Transit was terminated, and he signed and dated the Charge of Discrimination form after he was advised that a recommendation that he be terminated would be made. Mr. Hicks presented no evidence that anyone at Metro Dade Transit was aware that he intended to file a discrimination complaint at the time the decision to terminate him was made. Accordingly, Mr. Hicks has failed to establish a prima facie case of retaliation.²⁵

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief filed by Eugene Hicks against Treasure Service/Metro Dade Transit and Ron Jones.

DONE AND ENTERED this 1st day of August, 2003, in
Tallahassee, Leon County, Florida.

Patricia H. Malono

PATRICIA HART MALONO
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of August, 2003.

ENDNOTES

^{1/} Metro Dade Transit is currently known as Miami-Dade Transit Agency.

^{2/} The FCHR's failure to issue its Determination: No Cause within the 180 days specified in Section 760.11(3), Florida Statutes (1999), was rendered moot when Mr. Hicks filed his Petition for Relief with the FCHR rather than filing an action in the circuit court.

^{3/} Metro Dade Transit was represented in this matter by the Miami-Dade County Attorney's office.

^{4/} Section 760.11(7), Florida Statutes (1999), provides in pertinent part:

If the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint. The aggrieved person

may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred.

⁵/ Metro Dade Transit also filed Respondent's Response to Initial Order, in which it asserted that, in addition to Mr. Hicks's having filed his Petition for Relief outside the 35-day time period prescribed in Section 760.11(7), Florida Statutes, Mr. Hicks's Petition for Relief related to activities that had occurred more than 365 days prior to the date on which he filed the petition and should, therefore, be dismissed because it is time-barred. No ruling was made on this issue in the Recommended Order of Dismissal.

⁶/ Neither party introduced Mr. Hicks's annual evaluation for 1998, which would have been completed in January 1999.

⁷/ According to Mr. Clodfelter, the main job of the employees working as "UT-2's" was to drive to each of the three bus yards and give the revenue collectors working at the bus yards a break.

⁸/ It is noted that Mr. Hicks introduced into evidence as part of Petitioner's Exhibit 1 a Certificate for Return to Work issued by Andover Medical Group and dated March 9, 1999, in which it was stated that Mr. Hicks would be able to return to work on March 15, 1999. There is no indication in the record that Mr. Hicks ever sent this certificate to Metro Dade Transit.

⁹/ Medical records submitted by Mr. Hicks as part of Petitioner's Exhibit 1 reveal that, on January 13, 1999, Mr. Hicks had a "multistage treadmill exercise tolerance test" for evaluation of Mr. Hicks's reported chest pains. The test results established that there was a "low probability of significant coronary artery disease" and that Mr. Hicks had an "[e]xcellent exercise tolerance" for his age.

¹⁰/ Mr. Hicks apparently returned to work on March 18, 1999.

¹¹/ Mr. Hicks was suspended for five days without pay in January 1998 for incidents that took place in May and June 1997, based on a Disciplinary Action Report completed by Mr. Rodriguez

on October 3, 1997. The discipline was imposed for a number of incidents: On May 30, 1997, Mr. Hicks was away from his post without authorization for one hour and became belligerent and verbally abusive to Mr. Rodriguez when Mr. Rodriguez confronted Mr. Hicks on his return from the unauthorized break; during the confrontation, Mr. Hicks used profanity and threatened to "kick your [Mr. Rodriguez's] ass." On May 17, 1997, Mr. Hicks did not follow procedure when he called in sick one day; rather than speaking directly with his supervisor, Mr. Hicks asked one of his co-workers to deliver the message to Mr. Rodriguez that he was taking a sick day. On June 6, 1997, Mr. Hicks violated procedures by failing to sign in the keys to his Miami Dade Transit vehicle at the end of his shift, and he took the keys home with him.

¹²/ Transcript at page 84.

¹³/ See Petitioner's Exhibit 7.

¹⁴/ Transcript at page 90.

¹⁵/ Transcript at page 85.

¹⁶/ This is Mr. Hicks's version of an incident included in the Disciplinary Action Report of October 17, 1997, that is discussed in endnote 11.

¹⁷/ There is no evidence in the record to indicate that such a complaint was ever filed.

¹⁸/ Transcript at page 99. This is Mr. Hicks's version of an incident included in the Disciplinary Action Report of October 17, 1997, that is discussed in endnote 11.

¹⁹/ This is Mr. Hicks's version of an incident included in the Disciplinary Action Report of October 17, 1997, that is discussed in endnote 11.

²⁰/ This is Mr. Hicks's version of an incident included in the Disciplinary Action Report of October 17, 1997, that is discussed in endnote 11.

²¹/ Mr. Hicks was a member of the Transit Workers Union.

²²/ Mr. Hicks testified that he is still under the care of a psychiatrist for chronic depression and is taking medication,

"due to the incident that happened to me on the job."
Transcript at page 31.

^{23/} In his Petition for Relief filed with the FCHR on April 2, 2002, Mr. Hicks stated as the only basis of his claim for discrimination that Metro Dade Transit had violated Section 760.10(7), Florida Statutes, which, simply stated, relates to retaliation against a person who has opposed an unlawful employment practice. In the narrative attached to the Petition for Relief, however, Mr. Hicks refers to harassment that consisted of his being singled out and treated differently from other employees and to the failure of Metro Dade Transit to accommodate his disability.

In the Charge of Discrimination that he filed with the FCHR on May 17, 1999, Mr. Hicks asserted that he had been discriminated against on account of his race and disability and that he had been the subject of retaliation. Mr. Hicks specifically referred in the Charge of Discrimination to harassment from his supervisor, Mr. Rodriguez, which created a hostile work environment, and he also asserted that Mr. Rodriguez failed to make an accommodation for his disability. Finally, Mr. Hicks asserted that Mr. Gilbert and Mr. Simonson were aware of the ongoing harassment and failed to rectify the situation. For purposes of this Recommended Order, Mr. Hicks's charges of discrimination will be presumed to include discrimination based on race and disability, as well as retaliation.

^{24/} The FCHR's Rule 60Y-5.008(5), Florida Administrative Code, requires that respondents file an answer to a petition for relief from an unlawful employment practice within 20 days after it receives notice that the petition has been filed. Miami Dade Transit did not have the opportunity to present the issue of timeliness to the FCHR in an answer to the Petition for Relief because the Petition for Relief in this case was filed with the FCHR on April 2, 2002, and transferred by the FCHR to the Division of Administrative Hearings on April 5, 2002. The Response to the Initial Order of the Division of Administrative Hearings was Miami Dade Transit's first opportunity to raise this issue.

^{25/} Other than his termination, the only adverse employment action proven by Mr. Hicks was the five-day suspension without pay imposed in January 1998; there is no proof of any causal

connection between this disciplinary action and the exercise of protected expression by Mr. Hicks.

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.