

11-15-02

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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ADMINISTRATIVE
HEARINGS
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CHARLES ROGERS,

EEOC Case No. 15DA200336

Petitioner,

FCHR Case No. 22-00718

v.

DOAH Case No. 02-2625

FLORIDA DEPARTMENT OF CORRECTIONS,

FCHR Order No. 03-018

Respondent.

SFD-105

**AMENDED FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

On December 10, 2001, Petitioner filed a complaint of discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes (2001), alleging that the Respondent committed an unlawful employment practice by engaging in disparate treatment based on his race and created a hostile work environment. The allegations set forth in the complaint were investigated and on May 14, 2002, the Executive Director issued his determination that there was reasonable cause due to an adverse inference against the Respondent to believe that a discriminatory act occurred. The Petitioner filed a Petition for Relief and was granted a formal evidentiary hearing that was held in Starke, Florida, on September 12, 2002, before Administrative Law Judge Stephen F. Dean.

Judge Dean issued a Recommended Order of Dismissal dated November 15, 2002.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

The Commission's file contains a transcript of the proceeding before the Administrative Law Judge. The ALJ found that the Petitioner is a white male, employed by the Florida Department of Corrections and supervised by a white female. In late August 2001, Petitioner had a person he supervised come into his office to discuss pending warrants for the person's arrest. When advised of these warrants, the person ran causing the Petitioner to pursue. On September 6, 2001, Petitioner received a written reprimand for violation of office policies (failing to inform others in office about pending arrest) and improper use of force. Upon review by the circuit administrator, the use of force was determined appropriate. Nevertheless, the reprimand by his supervisor contained reference to improper use of force. Petitioner filed an internal grievance contesting that portion of the reprimand which, upon hearing, the reprimand was reduced to a record of counseling and deleted any reference to an improper use of force.

The ALJ further found that Petitioner's pay, benefits, ability to be promoted, as well as all other aspects of his employment were not affected either by the original reprimand or the

subsequent record of counseling. The ALJ did find, however, that the adverse actions of caseload reassignment, being chastised for an overdue investigation, and not being allowed to start work before 8 a.m., did constitute material and substantial changes in the terms and conditions of his employment. See, Recommended Order, ¶ 21-26. The ALJ did note that this treatment preceded the grievance in great part; although, he found that it materially worsened after the grievance. See, Recommended Order, ¶ 26.

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

With regard to the steps necessary for establishing that an unlawful employment practice has occurred, it has been stated, "The initial burden is upon Petitioner to establish a prima facie case of discrimination. Once Petitioner establishes a prima facie case, a presumption of unlawful discrimination is created. The burden then shifts to Respondent to show a legitimate, nondiscriminatory reason for its action. If Respondent carries this burden, Petitioner then must prove by a preponderance of the evidence that the reason offered by the Respondent is not its true reason, but only a pretext for discrimination." See conclusions of law adopted by a Commission panel in Spratlin vs. Washington Mutual Bank, d/b/a Great Western. 23 F.A.L.R. 3359, at 3364, 3365 (FCHR 2001), citations from the quoted statement omitted.

In the instant case, the ALJ found that the Petitioner has alleged discrimination based on race, a hostile work environment and in retaliation for his filing a grievance pursuant to agency personnel rules. The ALJ correctly interpreted the legal requirements for all three allegations and found that the Petitioner failed to make a prima facie case for either the racial or hostile work environment allegations. See, Recommended Order, ¶ 19 and 27.

The ALJ did find, however, that the Petitioner did present evidence of retaliation by Respondent after Petitioner filed his grievance and after he filed his FCHR complaint. He specifically found that "filing of a grievance pursuant to agency personnel rules ... is protected by the state's career service statutes. Petitioner was engaged in a statutorily protected act in filing a grievance." See, Recommended Order, ¶ 29. Of the five items listed by the ALJ, four of them occurred, in part, prior to the filing of his complaint with the Commission and after filing his grievance. See, Recommended Order, ¶ 20 and Transcript pages 67, 71, 88, 103 et seq., 161 and 192. The only item that occurred after the filing of his complaint involved "tampering with his locker" that was explained as having occurred by mistakes made by fellow officers and in which his supervisor had no knowledge and immediately counseled the involved officers. See, Transcript pages 170 et seq. Although the ALJ found certain of the other allegations as providing possible adverse employment actions, the ALJ made no finding that the tampering item was an adverse action. See, Recommended Order, ¶ 30.

The Commission finds that the ALJ committed an error of law when he recommends that "the Florida Commission on Human Relations enter a final order indicating clearly that exercise of career service and other employment rights guaranteed by statutes are subject to Section 760.10, Florida Statutes, protection..." albeit a harmless error in this case. The Commission concludes that the clear language of Section 760.10, FS, limits its provisions to unlawful employment practices under that section; that is, practices prohibited based upon discrimination founded in race, color, religion, sex, national origin, age, handicap or marital status.

In modifying the conclusions of law of the Administrative Law Judge as explained, *supra*, we find: (1) that the conclusion of law being modified is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion of law that the exercise of career service and other employment rights guaranteed by statute, but not within those enumerated in Chapter 760, Florida Statutes (2001), are subject to Section 760.10 protection under the Florida Civil Rights Act of 1992; (2) that the reason the modification is being made by the Commission is that the conclusion of law as stated runs contrary to previous Commission decisions on the issue; and (3) that in making this modification the conclusion of law we are substituting is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(l), Florida Statutes (2001).

The ALJ went on to state that he found the Petitioner failed to claim, directly or otherwise, retaliation in his original complaint or in his Petition for Relief that was the subject of the September 12, 2002 hearing. He notes that this alone would cause that claim to fail. See, Section 760.35(3)(a), Florida Statutes (2001) and Downer v. Department of Corrections, 23 FALR 4364, at 4267 (FCHR 2001); Williams v. Department of Corrections, 23 FALR 2576, at 2579 (FCHR 2000).

As modified above, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Exceptions to Recommended Order."

Although the Respondent noted that the majority of the DOAH ALJ's findings were clearly supported by evidence and law and supported the dismissal of the complaint, the Respondent excepted to the ALJ's conclusion of law that the filing of a written grievance pursuant to agency personnel rules is protected by Section 760.10, Florida Statutes (2001). The Respondent points out the clear language of Section 760.10, *supra*, limiting its provisions to unlawful employment practices under that section; that is, practices prohibited based upon discrimination founded on race, color, religion, sex, national origin, age, handicap or marital status. The conclusion of law found in ¶ 29 of the Recommended Order and the further suggested language in his recommendation that the Commission indicate "clearly that exercise of career service and other employment rights guaranteed by statute are subject to Section 760.10, Florida Statutes (2001)," is overbroad and should not be adopted.

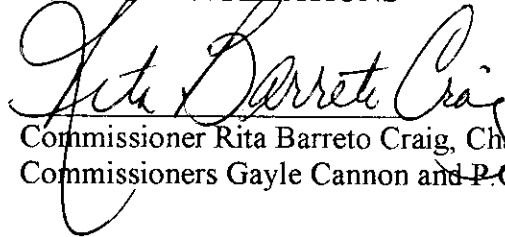
Based on the foregoing, we adopt Respondent's exceptions to the extent that they challenge the ALJ's conclusion of law that the exercise of career service and other employment rights guaranteed by statute, but not within those enumerated in Chapter 760, Florida Statutes (2001), are subject to Section 760.10 protection.

Dismissal

The Request for Relief and Complaint of Discrimination are DISMISSED with prejudice. The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this

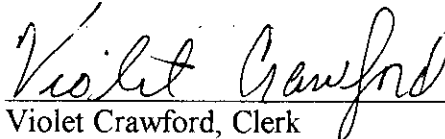
Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure, Rule 9.110.

DONE AND ORDERED this 31st day of March, 2003.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS



Commissioner Rita Barreto Craig, Chairperson and
Commissioners Gayle Cannon and P.C. Wu

Filed this 31st day of March, 2003
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301
(850) 488-7082

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NOTICE TO COMPLAINANT/PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request the EEOC review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131

Copies furnished to:

Charles Rogers
Post Office Box 331
Worthington Springs, Florida 32697

Gary L. Grant, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, FL 32399

Stephen F. Dean, Administrative Law Judge (DOAH)

Jim Tait, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 31st day of MARCH, 2003.

BY: Violet Crawford
Clerk of the Commission
Florida Commission on Human Relations