STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES ROGERS,

Petitioner,

vs. Case No. 02-2625

DEPARTMENT OF CORRECTIONS,

Respondent.

RECOMMENDED ORDER

A formal hearing was held pursuant to notice in the above-styled case by Stephen F. Dean, assigned Administrative Law Judge of the Division of Administrative Hearings, on September 12, 2002, in Starke, Florida.

APPEARANCES

For Petitioner: Charles Rogers, pro se
Post Office Box 331
Worthington Springs, Florida 32597

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

STATEMENT OF THE ISSUE

Whether Petitioner was discriminated against based on his race or in retaliation for participation in a protected activity in violation of Chapters 760.10(1)(a) and (7), Florida Statutes.

PRELIMINARY STATEMENT

On or about December 10, 2001, Petitioner Charles Rogers (Petitioner) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) alleging that Respondent Department of Corrections (Department) had discriminated against him. Petitioner specifically alleged that the Department engaged in disparate treatment based on his race and created a hostile work environment. Petitioner did not specifically allege retaliation for participation in a protected activity.

Because of the Department's failure to timely respond to FCHR's inquiries, FCHR issued a "cause" determination on May 14, 2002, citing adverse inference. Thereafter, Petitioner filed a Petition for Relief on or about June 12, 2002, reiterating the charges contained in his original complaint. The Petition was forwarded to the Division of Administrative Hearings and a hearing on the Petition was held in Starke, Florida, on September 12, 2002.

At the hearing, the Petitioner presented evidence in support of his two specified claims and, in addition, evidence on retaliation for engaging in a protected activity. Petitioner's Exhibits numbered 1 through 18 were admitted.

The Department presented a Proposed Recommended Order that was read and considered. Petitioner did not file a post hearing brief.

FINDINGS OF FACT

1. Petitioner, Charles Rogers, is a Caucasian male.

2. At all times relevant to this Petition, Petitioner was employed by the Florida Department of Corrections as a correctional probation officer. He was supervised by Susan Bissett-Dotson, a Caucasian female.

3. In late August, 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 probationer ran, causing Petitioner to have to pursue him through the office.

4. On September 6, 2001, as a result of the foregoing incident, Petitioner received a written reprimand for violation of office policies and improper use of force. Petitioner failed to follow a policy requiring notice to others in the office when an offender might be arrested in the office. Adam Thomas, the circuit administrator, reviewed the use of force and determined Petitioner had used force appropriately. Nevertheless, the reprimand from Susan Bissett-Dotson contained reference to improper use of force in addition to failure to follow office procedures.

5. Petitioner filed an internal grievance contesting that portion of the reprimand referencing improper use of force. His grievance was heard and the reprimand was reduced to a record of

counseling, deleting any reference to an improper use of force. 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.

6. Petitioner's caseload was reassigned four times within a 14-month period. These reassignments occurred between August 29, 2000, and October 2, 2001. Only one of them took place after his grievance. The reassignments did not involve a physical move to a different office; rather, Petitioner received a new set of offenders to supervise whose files were in various stages of development.

7. The reassignments did not involve any material changes in his duties or responsibilities. There was no amount of greater or less prestige associated with any of the caseloads he received. The reassignments did require him to become familiar with a new area and a new group of persons. Petitioner was required to do extensive work to re-develop these files, which task was onerous.

8. The decision to reassign Petitioner's caseloads was taken in relation to the reassignment of other personnel based upon several factors, including but not limited to: assignments from the judiciary; the geographic location of the various officers vis-à-vis supervised offenders; the officers' expressed willingness to accept a new caseload; the officers'

qualifications to handle specialized caseloads; and the equitable distribution of the cases. One of the reassignments was caused when Petitioner was out for more than two weeks, which requires a mandatory reassignment of cases. The desires of Petitioner were not considered, although Ms. Bissett-Dotson gave full consideration to the wants and desires of the others who were moved.

9. Petitioner alleges that he was yelled at in a meeting for having an overdue assignment; he produced an e-mail berating him for a late case; and records were introduced that showed the case was not overdue. Records were introduced about the redistribution of another officer's caseload. Of the 31 cases reassigned, 20 were assigned to Petitioner. This occurred on November 14, 2001.

10. Petitioner complained that he was not allowed to work before 8:00 a.m. Ms. Bissett-Dotson was questioned as to whether she allowed Petitioner to work prior to 8:00 a.m. She stated that she had denied his request to work before 8:00 a.m. because 8:00 a.m. to 5:00 p.m. was the standard work day for the office, and it was necessary to have coverage during those hours. Because of various requirements, such as working during court, some officers had to be off during normal hours. Other officers had to be out of the office more than others. All of

this affected when and whether one could deviate from standard office hours.

11. On three occasions, Petitioner's firearms locker was accidentally used by other officers. On at least one of these occasions, a camera was locked in the locker along with Petitioner's lock. Petitioner was not subject to any discipline as a result of these incidents and Susan Bissett-Dotson was approached by other probation officers on each of the occasions and informed that each had been a mistake. Ms. Bissett-Dotson was satisfied with these explanations.

12. While only one of the reassignments took place after the grievance, clearly Ms. Susan Bissett-Dotson was not fair and equitable in her treatment of Petitioner.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this case.

14. Under the provisions of Section 760.10, Florida Statutes, it is an unlawful employment practice for an employer:

> (1)(a) [T]o discharge or to fail to 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) [T]o 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.

15. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10. 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).

16. The Supreme Court of the United States established in McDonnell-Douglass Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII and which are persuasive in cases such as the one at bar. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

17. 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, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against

Petitioner. Once this non-discriminatory reason is offered by Respondent, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

18. 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. Id.

19. Here, Petitioner has alleged race discrimination based on both disparate treatment and hostile work environment. In order to establish a prima facie case of disparate treatment based upon race, Petitioner must establish: 1) That he is a member of a protected class; 2) That he was qualified for his position; 3) That he suffered an adverse employment action; and 4) That he was treated less favorably than similarly situated employees who were not members of his protected class. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

20. Section 760.10, Florida Statutes, provides that race is a protected class. There is no dispute as to Petitioner's qualifications for the position he holds. Thus, the first issue to be analyzed is whether Petitioner suffered from adverse

employment actions. Petitioner introduced records and testimony showing that the following adverse actions were taken against him:

(a) That he received a written reprimand for improper use of force.
(b) That he was chastised for having an overdue investigation.
(c) That he was not allowed to start work before 8:00 a.m., although others were.
(d) That his locker was tampered with on at last three occasions.
(e) That his caseload was reassigned on a least four occasions within a 14-month span.

However, Petitioner did not show he was treated differently from co-workers who were not in his class. That is, Petitioner did not show that members of other races were treated differently. The person who was responsible for his "disparate" treatment was a white female.

21. "[A] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 760-61, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998). There must be a serious and material change in the terms, conditions, or privileges of employment. See Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001).

22. A written reprimand for failure to follow procedures is a serious job action. It is the step taken in corrective action before dismissal. It is not a trifle and falls within the scope of a "tangible employment action."

23. Petitioner presented evidence that his caseload was reassigned on at last four occasions in 14 months. Respondent asserts the reassignments did not constitute adverse employment actions because none of the reassignments resulted in a physical transfer to a different office, and none of the caseloads had any more or less prestige associated with them. However, there was considerable additional work involved in establishing a new caseload. It is noted that one of the changes was the result of Petitioner's being out for more than two weeks and only one change occurred after Petitioner filed his grievance. The reassignments resulted in a material and substantial change in the terms and conditions of employment because of the added work required and constituted adverse employment actions.

24. Although the Department presented some legitimate reasons for the reassignments, it was clear that Ms. Susan Bissett-Dotson did not consider Petitioner's desires and concerns in making these reassignments or in assigning him added work.

25. Petitioner also complained of being chastised for late work when it was not late. This constituted a "counseling."

This, together with the original reprimand, reflect a strained relationship between Petitioner and Ms. Bissett-Dotson. This is reflected in her disapproval of Petitioner's request to start work before 8:00 a.m.

26. Taken as a whole, Ms. Bissett-Doxson's actions constitute material and substantial changes in the terms and conditions of Petitioner's employment and, accordingly, constitute adverse employment actions. It is, however, noted that this treatment preceded the grievance; although it materially worsened after Petitioner grieved the written reprimand she gave him.

27. Petitioner complains of a hostile work environment. A hostile work environment claim is established upon proof that "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." Harris v. Forklift Systems. Inc., 501 U.S. 17, 21, 114 S. Ct. 367, 126 L.Ed.2d 295 (1993). In order to establish a prima facie case of a hostile work environment based on race, Petitioner must show that (1) he belongs to a protected group; (2) he has been subject to unwelcome harassment; (3) the harassment was based on a protected characteristic of his; (4) the harassment was sufficiently severe or pervasive to alter the terms and

conditions of employment and create a discriminatorily abusive working environment; and (5) the employer is responsible for such environment under either a theory of vicarious or of direct liability. Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002). Here, Petitioner has failed to provide evidence that the alleged harassment was based on race. None of the instances cited by Petitioner and set forth above have even an indirect correlation or connection to race.

28. Petitioner next presented evidences of retaliation by Respondent after Petitioner filed his grievance contesting his written reprimand and after he filed his FCHR complaint. This was not alleged in Petitioner's Complaint. In order to establish a prima facie case of retaliation, Petitioner must show that (1) he engaged in statutorily protected activity; (2) an adverse employment action occurred; and (3) the adverse action was causally related to his protected activities. Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997).

29. With regard to retaliation for the filing of Petitioner's grievance, Section 760.10, Florida Statutes, provides that it is unlawful 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." I find that filing of a grievance pursuant to agency personnel rules to oppose a written reprimand improperly given is protected by the state's career service statutes. Petitioner was engaged in a statutorily protected act in filing a grievance.

30. It appears that some of the actions taken against Petitioner were in the retaliation to the grievance which he filed on the written reprimand. It is noted that not all of the events about which Petitioner complained occurred after his grievance. While not all of the actions raised occurred after the grievance, the reprimand, the e-mail, the last reassignment all occurred after his grievance. The tempo of adverse actions increased after that date.

31. It is noted that there is a procedural problem with this aspect of Petitioner's evidence. He did not claim, directly or otherwise, retaliation in his original complaint filed with FCHR or in his Petition that is the subject of the September 12, 2002, hearing. For that reason alone, this claim must fail; however, it is noted that personnel changes instituted by the Department have changed Petitioner's supervisor and that the Department indicated at hearing a sensitivity to Petitioner's claims.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order indicating clearly that exercise of career service and other employment rights guaranteed by statute are subject to Section 760.10, Florida Statutes, protection, and that the Petition herein is dismissed not because it was not proved, but because it was not properly pled.

DONE AND ENTERED this 15th day of November, 2002, in Tallahassee, Leon County, Florida.

____

STEPHEN F. DEAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of November, 2002.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.