

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

KIMBERLY HOLDEN, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 02-3286  
 )  
 DEPARTMENT OF CORRECTIONS, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this proceeding on August 25, 2003, in Marianna, Florida, before Stephen F. Dean, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Kimberly Holden, pro se  
2103 Vista Road  
Marianna, Florida 32448

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 retaliation for participation in a protected activity in violation of Chapter 760.10(7), Florida Statutes.

PRELIMINARY STATEMENT

On or about August 29, 2001, Petitioner, Kimberly Holden, filed a Charge of Discrimination with the Florida Commission on Human Relations (hereinafter "FCHR") alleging that Respondent, Department of Corrections (hereinafter "Department"), had discriminated against her. Specifically, Holden alleged that the Department discriminated against her based on her race, sex, and in retaliation for complaining about Captain Tullis Scipper.

The Florida Commission on Human Relations failed to address the charge within 180 days of its being filed, and Holden subsequently submitted to FCHR an Election of Rights form indicating that she wished to withdraw her petition and file a Petition for Relief to proceed with an administrative hearing. FCHR treated this Election of Rights as a petition and transmitted Holden's original charging documents to the Division of Administrative Hearings (hereinafter "DOAH").

The Department filed a Motion to Dismiss, noting that Holden had not filed an actual petition. Subsequent to that motion, on or about September 9, 2002, Holden filed a Petition for Relief. In that petition, she reiterated her charge that the Department had discriminated against her based on her race, sex, and in retaliation for complaints she had made about Captain Tullis Scipper. Based on the filing of the petition,

the Department withdrew its Motion to Dismiss and filed a timely answer to the petition, denying the substantive charges.

A hearing on the petition was held in Marianna, Florida on August 25, 2003. At the hearing, Petitioner presented only her own testimony. Respondent presented the testimony of Warden Adro Johnson and Captain Tullis Scipper. All citations are to Florida Statutes (2002) unless otherwise indicated.

#### FINDINGS OF FACT

1. Petitioner (Holden) is an African-American female.
2. At all times relevant to this petition, Holden was employed in a probationary status by the Florida Department of Corrections at Apalachee Correctional Institution (ACI) as a Correctional Officer. Probationary officers are not entitled to progressive discipline, but can be terminated for any reason.
3. At the hearing, Holden withdrew her claims that the Department had discriminated against her based on her race and sex.
4. On or about July 22, 2001, Captain Tullis Scipper responded to a call from the Medical Unit at ACI. Upon his arrival, he observed Officer Holden in front of the Suicide Watch Isolation Cell. She was cussing at the inmate with whom she had a previous confrontation. Scipper explained to her that she was not to argue or verbally abuse the inmate and that she should stay away from the cell. On at least one other occasion

that night, Captain Scipper responded to the Medical Unit and observed similar actions by Holden.

5. The next day, Captain Scipper received a call from Warden Adro Johnson, who inquired as to what had happened in the Medical Unit the night before. Warden Johnson had received a complaint from Nurse Carla Weeks that Officer Holden had been cussing the inmates and he was checking into the complaint. Warden Johnson asked Captain Scipper to bring Officer Holden to his office.

6. The purpose of the meeting was not to ascertain whether Officer Holden had been cussing at inmates. The Warden had two eye-witness, staff accounts of her behavior. When confronted, she advised Warden Johnson that she had become angry and had cussed the inmate. Warden Johnson counseled Holden about her behavior.

7. Warden Johnson testified that he felt that Holden was unreceptive to his counseling and that she was argumentative. He believed that she was not displaying the attitude that a good officer displays when he/she is being counseled by a warden. Holden also was upset and crying, and, as a result, Warden Johnson informed her that she needed to adjust her attitude and come back to see him the next day. Warden Johnson testified that he had not made up his mind as to what action he would take against Holden for her actions with the inmate.

8. After the meeting with Warden Johnson, Captain Scipper observed Officers Holden and Shiver arguing with each other.

9. Holden testified that she had asked Shiver about why her tour was changed, and this led to the incident observed by Scipper.

10. In Scipper's opinion, Holden was the "aggressor" because she continued to advance on Shiver, even though Shiver had his hands in the air and was stating words to the effect that he did not have anything to do with whatever they were arguing about.

11. Knowing that Holden had just had a counseling session with the Warden, Scipper was surprised that Holden would almost immediately be involved in an altercation with a staff member. He relieved Holden of her duties for the rest of her scheduled shift.

12. The next day Holden met as scheduled with Warden Johnson. Captain Scipper did not attend this meeting. Johnson had been informed of the previous day's incident between Officers Holden and Shiver. He asked Holden if she was willing to change her attitude. He had not determined prior to the meeting if he would take any action at all against Holden. Johnson felt that Holden's response to him was disrespectful, and that she did not have the right attitude. Johnson terminated Holden based on what he perceived to be her poor

attitude. He knew that Holden was approaching the end of her probationary status and that if he wanted to terminate her before she attained career service status with its attendant protections, he needed to do so at that time.

13. Petitioner complained in an incident report filed before the Warden the first time that Captain Scipper refused to listen to her when he counseled her about a prior staff altercation.

#### CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Section 120.57(1).

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

(7) . . . 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.

16. In this case, although the petition states that Holden is claiming race and sex discrimination, at hearing, Holden specifically and unequivocally withdrew those particular charges. An examination of the petition reveals that the only remaining charge is one of retaliation. Specifically, Holden's

original charging document alleges that she was retaliated against because she reported an incident to Colonel C. Halley, and she felt that this incident report aggravated Captain Scipper as he stated that he did not like her "going over his head." A review of the petition filed also indicates that the retaliation claimed involves Scipper and his treatment of her.

17. The Florida Commission on Human Relations 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).

18. 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).

19. Pursuant to this analysis, the Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, the Respondent must articulate some

legitimate, non-discriminatory reason for the action taken against the Petitioner. Once this non-discriminatory reason is offered by the 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, "[the] fact finder must believe the plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

20. In Hicks, the Court stressed that even if the fact finder does not believe the proffered reason given by the employer, the burden remains with the Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id.

21. In order to establish a prima facie case of retaliation, Holden must show that (1) she engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) the adverse action was casually related to her protected activities. Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997).

22. Section 760.10 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." Assuming for an

instance that Scipper retaliated against Holden because she "went over his head" when she reported an incident to Colonel Halley, there is no evidence that her reporting the incident was a statutorily protected right. Further, there is no evidence that Holden's "going over Scipper's head" was in any manner related to her discharge.

23. The evidence was principally that Petitioner complained in an incident report that Captain Scipper refused to listen to her when he counseled her about a prior staff altercation. There is no implication of a Chapter 760 right being impinged by her report, or her discharge. With regard to Captain Scipper's alleged retaliation against Holden because she went over his head to file a complaint against Nurse Weeks, Holden has failed to establish a cause of action legally and factually.

24. Even if Holden had demonstrated a prima facie case of retaliation, the Department offered a legitimate non-discriminatory reason for Holden's termination. Warden Johnson stated that he terminated Holden because of the poor attitude demonstrated by Holden when he counseled with her for cussing an inmate.

25. Holden presented no evidence demonstrating that this explanation was pretextual.

26. In summary, Holden's position that she suffered discrimination based on retaliation for engaging in an activity protected by Chapter 760 is not supported by a preponderance of the evidence.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That a Final Order be entered dismissing the Petition for Relief.

DONE AND ENTERED this 24th day of September, 2003, in Tallahassee, Leon County, Florida.



---

STEPHEN F. DEAN  
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 the Clerk of the  
Division of Administrative Hearings  
this 24th day of September, 2003.

COPIES FURNISHED:

Kimberly Holden  
2103 Vista Road  
Marianna, Florida 32448

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

Cecil Howard, General Counsel  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

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

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.