STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EMORY L. MOSLEY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-0137
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on April 9, 2003, in Tallahassee, Florida, before the Division of Administrative Hearings by its Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Emory L. Mosely, pro se
Post Office Box 8
Monticello, Florida 32345

For Respondent: Gary L. Grant, Esquire
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

Whether Petitioner was discriminated against by the Department of Corrections based on race, religion, disability, age, or in retaliation for participation in an activity protected under Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

In July 1999, Petitioner, Emory Mosley, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), alleging that Respondent, Department of Corrections, discriminated against him on the basis of race, religion, disability, age, or in retaliation for his participation in an activity protected under Chapter 760, Florida Statutes. Petitioner alleged that he suffered an adverse employment action in that he was transferred to a work camp in retaliation for filing his complaint against discrimination. The allegations of discrimination were investigated by FCHR, and on December 9, 2002, FCHR issued its Determination, finding "No Cause."

On January 8, 2003, Petitioner filed his Petition for Relief. In his petition, he reiterated the charges set forth in his original complaint filed with FCHR and appears to add a charge of sexual harassment. The petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in his own behalf and called two witnesses to testify. Petitioner also offered 17 exhibits into evidence. Respondent called two witnesses to testify but did not offer any exhibits into evidence. After the hearing, Respondent filed a Proposed Recommended Order on April 21, 2003. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Petitioner, Emory Mosley, is an African-American male (Petitioner).

2. In 1989, Petitioner was hired as a correctional officer by Respondent, the Department of Corrections (Department). Initially, he was assigned to the main unit at Madison Correctional Institution in Madison, Florida.

3. By all accounts, during his first nine years with the Department, Petitioner was well liked by the institution's administration and his fellow officers. He was thought of as a hardworking professional officer and as one of the best officers at Madison Correctional Institution. New officers were routinely sent to Petitioner for him to train.

4. In general and during Petitioner's employment, officers are assigned to different shifts and work assignments at Madison Correctional Institution so that officers can become familiar with all aspects of the Madison Correctional system. However, Petitioner was allowed to remain at the same post and shift for his first nine years. Over nine years, such permanence in Petitioner's assignment caused some resentment among other staff because of the perceived favoritism exhibited by the administration toward Petitioner.

5. At some point in his ninth year with the Department, Petitioner began to perceive problems with other staff members.

He concluded that certain rules were not being followed and began to believe that co-workers were in some manner conspiring against him, abusing inmates, and/or committing crimes related to their duties at the institution. His relationships with co-workers became strained. Staff and inmates began to complain about Petitioner's behavior toward them. During this time, Petitioner also complained to the warden about rule violations by staff. However, the details of these complaints were not revealed at the hearing. Petitioner's complaints did appear to be in the nature of "whistle-blowing." The evidence did not demonstrate that any of Petitioner's complaints involved any activity protected under Chapter 760, Florida Statutes.

6. In July 1999, Colonel David McCallum transferred Petitioner to the Madison Correctional Institution work camp. The work camp was located a few hundred yards away from the main unit. The duties of a correctional officer at the work camp are primarily the same as those at the main unit with the difference that there are significantly fewer inmates at the work camp. As a result, many officers feel that the work camp is somewhat more relaxed and an "easier" assignment than an assignment at the main unit. To some officers, it is a desirable assignment. To other officers, it is not a desirable assignment. Opportunities for promotion are not diminished at the work camp; pay and benefits remain the same. The evidence did not show that

transfer to the work camp was an adverse employment action on the part of the Department.

7. Colonel McCallum, who thinks highly of Petitioner, transferred Petitioner to the work camp because he believed that Petitioner needed a change of scenery because of the problems he was having with staff and inmates at the main unit. He believed that he was doing Petitioner a favor by transferring him because of the more relaxed atmosphere at the work camp. The transfer was also made due to complaints from staff that Petitioner was receiving preferential treatment in that he was allowed to maintain the same post and shift for such a long period of time. Colonel McCallum was not aware of any complaints by Petitioner to the warden of alleged rule violations at the time that Petitioner was transferred. The evidence did not show that Petitioner was transferred in retaliation for any activity protected under Chapter 760, Florida Statutes.

8. Petitioner's supervisor at the work camp was Lieutenant Patricia Herring, an African-American female. Herring emphatically denied at the hearing that the work camp was in any manner run as a type of concentration camp as opined by Petitioner and did not relate any race relation problems at the camp. The camp was run in a less strict manner than the main unit, especially in relation to the procedure used during the counting of inmates. These more relaxed methods greatly

disturbed Petitioner, and he constantly agitated the work environment about such relaxed methods that he perceived as "rule violations."

9. Herring testified that Petitioner was insubordinate and disrespectful to her during his time at the work camp. She believed that his disrespect came from his unhappiness with having a female supervisor. Petitioner received a written reprimand as a result of his insubordination and disrespect toward Herring.

10. Unquestionably, Petitioner and Herring had a serious conflict between their personalities. There was no evidence that any conflict was based on discrimination or retaliation.

11. Ms. Herring also testified that Petitioner received the same treatment as all other officers, vis-à-vis, shift and post assignments. There was no substantive evidence that Petitioner was treated differently in the assignments he was given at the work camp. There was no evidence that Petitioner sought accommodation for his diabetes or high blood pressure.

12. Petitioner retired from the Department, effective December 1, 1999. He admitted at hearing that his retirement date had nothing to do with any actions allegedly taken against him by the Department; rather, he planned to retire on December 1, 1999, well before any problems with the Department began because that date ensured that he would receive retirement

benefits based on ten years of service. There was no substantive evidence presented at the hearing that Petitioner was discriminated or retaliated against. Therefore, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

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

14. Under the provisions of Section 760.10(1), Florida Statutes, it is 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 of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
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> * * *
>
> (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.

15. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand vs. Florida Power Corporation, 633 So. 2d 504, 509 (Fla.

1st DCA 1994); Florida Department of Community Affairs vs. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

16. The Supreme Court of the United States established in McDonnell-Douglass Corporation vs. 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 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." Hicks, 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, age, and religious discrimination based on both disparate treatment and hostile work environment. In order to establish a prima facie case of disparate treatment based upon race, age, or religion, 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 vs. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

20. Section 760.10, Florida Statutes, provides that race, age, and religion are protected classes. There is no dispute as to Petitioner's qualifications. Thus, the first issue to be analyzed is whether Petitioner suffered from adverse employment actions. Petitioner appears to have two primary complaints: (1) that he was transferred to Madison Correctional Institution work camp; and (2) that he received a written reprimand for insubordination.

21. In this case, neither action was shown to be an adverse employment action since no pay benefits or other significant conditions of employment were affected by either

action. Moreover, even if these actions constituted adverse employment actions, Petitioner failed to show that he was treated less favorably than similarly situated employees who were not members of his protected classes. In fact, vis-à-vis the transfer, the evidence showed that it was highly unusual for an officer to remain in the same position, as Petitioner had, without a transfer for over nine years. In any event, no evidence was presented indicating that disparate treatment existed in the issuance of the written reprimand or the transfer. Thus, a prima facie case has not been established.

22. Moreover, even if a prima facie case had been established, the Department articulated legitimate non-discriminatory reasons for the alleged adverse employment actions. Petitioner was transferred because he was having problems with staff and inmates at the main institution. Colonel McCallum believed that Petitioner could benefit from a fresh start, particularly given that he had not been transferred in over nine years. Colonel McCallum also testified that staff had begun to complain that Petitioner was receiving preferential treatment in that he had not been transferred in such a long period of time. The reprimand was issued because Petitioner was insubordinate and disrespectful toward his superior officer. Petitioner presented no evidence indicating that these explanations were pretextual in nature.

23. Petitioner also complains of discrimination based on 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., 510 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, 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 discrimatorily abusive working environment; and (5) the employer is responsible for such environment under either a theory of vicarious or of direct liability. Miller v. Kensworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

24. Again, Petitioner has failed to provide evidence that any alleged harassment was based on race, age, disability, religion or retaliation. None of the instances cited by Petitioner have even an indirect correlation or connection to anything protected under Chapter 760, Florida Statutes.

25. Petitioner next complains of retaliation by Respondent after he complained to the warden about unspecified rule violations. 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 vs. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997).

26. Petitioner has failed to demonstrate that he engaged in statutorily protected activity. 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." Here, there is no evidence that Petitioner's alleged complaints to the warden about rule violations were in any manner related to discrimination charges or participation in any other matter contemplated by Chapter 760, Florida Statutes. Thus, his prima facie case for retaliation necessarily fails.

27. Petitioner also complains that he was discriminated against based on alleged disabilities. He claimed to have several ailments, among them diabetes and high blood pressure.

In order to establish a prima facie case based upon disability or handicap discrimination, Petitioner must show that he:

1. Has a disability;
2. Is qualified, with or without reasonable accommodations, to perform the essential functions of her job;
3. Identified for the employer a reasonable accommodation; and
4. Was unlawfully discriminated against because of her disability.

28. Here, Petitioner failed to identify a disability in that he failed to demonstrate that he was substantially limited in the performance of a major life activity as a result of any of his medical conditions. Indeed, at least vis-à-vis his work, all the medical evidence demonstrated that he could work without restrictions. Moreover, Petitioner never requested a reasonable accommodation for any of his medical conditions. Lastly, there is no evidence whatsoever that any adverse employment actions were taken against Petitioner based on his various medical conditions.

29. In summary, Petitioner's position that he suffered discrimination based on race, religion, age, disability, and retaliation is not supported by a preponderance of the evidence. Moreover, to the extent that Petitioner attempted to demonstrate discrimination based on sex at the hearing, such a theory was not set forth in the original complaint of discrimination and is beyond the scope of the instant petition. In any event, there

was no evidence whatsoever that adverse employment actions were taken against Petitioner based on his sex or that a hostile work environment based on sex existed.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

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

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 24th day of June, 2003.

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.