STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRUCE ST. HILLAIRE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-1741
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Notice was provided, and a formal hearing was held on August 27, 2003, in Daytona Beach, Florida, and conducted by Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gayle S. Graziano, Esquire
244 North Ridgewood Avenue
Daytona Beach, Florida 32114

For Respondent: Ernest L. Reddick, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

Whether Petitioner suffered retaliation and reverse discrimination committed by the Department of Corrections in violation of Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

In an Amended Charge of Discrimination dated February 22, 2002, Petitioner, Bruce St. Hillaire (Mr. St. Hillaire), claimed he suffered unlawful employment practices in the nature of discrimination based on race by the Florida Department of Corrections (Department). On March 11, 2003, the Florida Commission on Human Relations (Commission) entered a "Determination: No Cause," which found that there was no reasonable cause to believe that an unlawful employment practice had occurred.

In a "Notice of Determination: No Cause," also filed by the Commission on March 11, 2003, Mr. St. Hillaire was informed that he had 35 days from the date of the Notice to request an administrative hearing. In a Notice of Dismissal entered May 6, 2003, the Commission noted that Mr. St. Hillaire had not filed a request for hearing within the allotted time and that his petition must be dismissed. However, the record revealed that the Commission had received a Petition for Relief from Mr. St. Hillaire on April 10, 2003, which is less than 35 days from March 11, 2003. This Petition alleged racial discrimination and retaliation, and while it did not specifically request a hearing, the fact that there is within the document a category entitled, "The disputed issues of

material fact, if any, are as listed below," indicates that an administrative hearing was requested.

The matter was forwarded to the Division of Administrative Hearings on May 15, 2003. It was set for hearing on August 27, 2003, in Daytona Beach, Florida, and heard as scheduled. At the conclusion of the hearing the parties agreed that depositions and other evidence could be filed at any time before the close of business on September 30, 2003. Pursuant to an order subsequent to a motion filed by Petitioner on September 19, 2003, the time for filing supplemental matters was enlarged until November 10, 2003, and proposed recommended orders were required by November 21, 2003.

Petitioner filed the depositions of Harry Ivey, Velma Yvette Brown, and Michael L. Chambers; a letter dated February 12, 2002; and a sworn statement of Robert Gordon, on November 20, 2003, ten days past the deadline for filing supplemental matters. Respondent filed a Motion titled Objection to Supplemental Pleadings asking that the supplemental matter be ignored as not timely. Respondent's Motion is granted because the matters were filed beyond the final deadline. Accordingly, the aforementioned matters will not be considered.

At the inception of the hearing Respondent moved to dismiss the Petition because the last act of discrimination alleged occurred more than 365 days before the Amended Charge of

Discrimination was filed. See § 760.11(1), Fla. Stat. In the block of the Amended Charge of Discrimination which Petitioner entitled, "Date Most Recent or Continuing Discrimination Took Place," Petitioner inserted February 8, 2001. He signed the Amended Charge of Discrimination on February 22, 2002, and it was stamped as filed with the Commission on February 28, 2002.

The Motion was not ruled upon at the time made because it was not timely filed; because Petitioner did not have time to prepare a response; and because the ruling depended on facts, which had not yet been elucidated. See Fla. Admin. Code R. 28-106.204.

Section 760.11(1), Florida Statutes, states that, "Any person aggrieved by a violation of 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation . . . ." The Amended Charge of Discrimination that was forwarded to the Division of Administrative Hearings demonstrates on its face that it was filed too late.

It is alleged by Petitioner, however, that he filed his first Charge of Discrimination on June 25, 2001, alleging a last act of discrimination or retaliation of February 8, 2001. This could be a timely filing. A June 25, 2001 Charge of Discrimination is not part of the record. Petitioner states he was advised by Commission staff to file an amended charge of discrimination and it was in response to that advice that

resulted in the untimely Amended Charge of Discrimination that is in the record. Because the Charge of Discrimination is denominated "amended," credence is given to Petitioner's claim. Additionally, a Charge of Discrimination executed June 25, 2001, that does not bear the stamp contemplated by Section 760.11, Florida Statutes, was included in the material accompanying the transmittal to the Division of Administrative Hearings. Nevertheless, the Administrative Law Judge is required to make findings only from the evidence of record. Accordingly, the Commission should dismiss the Petition as untimely, unless its records support the contention that a June 25, 2001, Charge of Discrimination was in fact timely filed.

However, in the interest of judicial economy, Findings of Fact and Conclusions of Law are provided should the Commission records reveal that the June 25, 2001, Charge of Discrimination was timely filed.

At the hearing, Petitioner offered two exhibits that were admitted. Another exhibit, a collective bargaining agreement between the State of Florida and the Florida Police Benevolent Association, was, by agreement of the parties, filed late. Petitioner called as witnesses Frances St. Hillaire (formerly known as Frances Fredericks and Frances Anderson, and who will be referred to as Frances Fredericks in this Recommended Order), Arthur P. Fitzpatrick, Edward Charles Seltzer, Michael Gallon,

Linda Brooks, Art Fitzpatrick, Fred North, Adrian Stewart, and John Seiferth. Petitioner testified on his own behalf.

Respondent offered three exhibits that were admitted and called as witnesses Robert Gordon and Linda Nolen.

A transcript was not ordered. Proposed Recommended Orders were timely filed by both parties and were considered in the preparation of this Recommended Order.

Citations to statutes are to Florida Statutes (2000) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner is a white male who was a probation officer at the Department. He worked in the Fourteenth Judicial Circuit for the first ten years of his career and then transferred to the Seventh Judicial Circuit, based in Daytona Beach, Florida, where he had been employed for about eight and one-half years at the time of the hearing.

2. The Department, in accordance with Section 20.315, Florida Statutes, is the state agency charged with protecting the public through the incarceration and supervision of offenders and the rehabilitation of offenders through the application of work, programs, and services.

3. In early July 1999, Petitioner was working in the Department's probation office on Palmetto Avenue, in Daytona Beach, Florida. He was living with a woman named Tanya Folsom

who worked for the Department in its probation program, but not in the same office. He was also romantically involved with a woman named Frances Fredericks, who he later married. At this time, Ms. Fredericks was married to one Mr. Anderson, and was known as Frances Anderson.

4. This triangular relationship became known in the office in which Petitioner worked. Someone in Petitioner's office, who has never been identified, wrote a letter to Ms. Folsom, revealing to Ms. Folsom Petitioner's ongoing relationship with Ms. Frances Fredericks. The letter was written on stationery that was the Department's property, placed in an envelope that was the Department's property, and transmitted to Ms. Folsom via the Department's internal mailing system. Using Department resources for personal business, is contrary to Department policy.

5. When Ms. Folsom received the letter a number of ugly consequences ensued. Ms. Folsom reacted with extreme hostility to the information she received, even though Petitioner claimed that their relationship had devolved into a mere friendship. She evicted Petitioner from the quarters they had been sharing. At a subsequent time, one Mr. Anderson, then Ms. Frederick's husband, confronted Petitioner in the parking lot adjacent to the office in which Petitioner worked, and in the presence of Petitioner's office supervisor, Mr. Seltzer, socked Petitioner

in the jaw. The probation officer community, in which Ms. Folsom and Petitioner worked, suffered disruption. Morale amongst the workers was impaired.

6. Petitioner blamed the occurrence of these unpleasant events, not on himself, but on Officer Michael Gallon, a probation officer who worked directly in the court system, and Ms. Velma Brown, his immediate supervisor. He attributed blame to them because he believed that they had rifled his desk and found gifts destined to be given to Frances Fredericks, and believed that one or both of them were responsible for the letter to Ms. Folsom. Both Officer Gallon and Ms. Brown are black.

7. Petitioner filed a complaint with the Department demanding an investigation into the use of the Department's stationery that was of a value of about a "half cent," according to Petitioner. He also complained that court officers, both black and white, were underemployed, and suggested that black court officers were afforded advantages not given to white officers. He asked his superiors to investigate the complaint regarding both the letter and the court officer matter. He prevailed upon the office manager to take action and when the office manager declined to open an investigation, he brought the matter to the attention of the circuit administrator, Robert

Gordon, and ultimately to the attention of those in the chain-of-command all the way to the Department's Inspector General.

8. Mr. Gordon, in response to the turmoil precipitated by the letter, reassigned Petitioner to DeLand, Florida, a distance of about 30 miles, for 60 days. Petitioner, who referred to his new post in the pejorative, "Dead Land," believed that officers who were moved there, "never came back." Mr. Gordon told Petitioner that he moved him because Petitioner needed a "change of venue." This reassignment occurred the end of July, 1999.

9. Article 9, Section 3, of the Agreement between the State of Florida and Florida Police Benevolent Association (Agreement) states that a transfer should be affected only when dictated by the needs of the agency and only after taking into consideration the needs of the employee, prior to any transfer. Mr. Gordon complied with that requirement, and in any event, did not transfer Petitioner. The Agreement states at Article 9, Section 1 (C), that a move is not a "transfer" unless an employee is moved, " . . . in excess of fifty (50) miles."

10. Petitioner was "reassigned" as that term is defined in Article 9, Section 1 (C), of the Agreement. In any event, Mr. Gordon did not move Petitioner because he was white. He moved him to a different post because Petitioner had created turmoil in the probation officer community in Daytona Beach. In

any event, as will be discussed below, whether or not Mr. Gordon complied with the Agreement is immaterial to this case.

11. Notwithstanding Petitioner's beliefs with regard to the outcome of his move to DeLand, he was reassigned back to the Daytona Beach area at the end of 60 days and resumed his regular duties. This occurred around early October, 1999.

12. Petitioner continued to press for an investigation into his allegations. He brought the matter to the attention to Harry Ivey, the regional administrator for the Department and above Mr. Gordon in the chain-of-command. He discussed the matter with a Mr. Jefferson, Mr. Ivey's deputy and believed subsequent to that conversation, that an investigation would occur. In fact, no one in the Department displayed any interest in Petitioner's allegations about the de minimis use of the Department's time and property in the preparation and transfer of the letter, or in his beliefs about the workload problems of the court officers, or his claims of favorable treatment in the case of Officer Gallon and Ms. Brown.

13. In December 2000, Petitioner was assigned to the Ormond Beach Office, which was about six miles from the Palmetto Avenue Office. The Ormond Beach Office had lost a supervisor position due to reorganization and it was determined that

Petitioner possessed the skill and experience to replace that senior leadership. The decision to relocate Petitioner was made by Mr. Gordon.

14. In February 2001, Petitioner was transferred back to his old office. A few months later he was promoted to Correctional Probation Senior Officer and moved to another office.

15. Between February 2000 and February 2001, the operative period, over 30 Correctional Probation Officers, Correctional Probation Supervisor Officers, and Correctional Probation Supervisors in the Seventh Circuit, were reassigned. Of these, six were black, four were Hispanic, and 20 were white.

16. Although the four reassignments experienced by Petitioner may have inconvenienced him, Petitioner presented no evidence of any damages. The facts reveal that Petitioner's misfortunes were precipitated by his unwise amorous activities within his workplace. They were not the result of any effort by the Department to retaliate against him or to discriminate against him because he was white.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Section 120.57(1), and Sections 760.11(4)(b),(6), and (8).

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

> (1)(a) . . . to discharge or to fail or refuse to hire an 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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> * * *
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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.

19. This language was patterned after Title VII of the Civil Rights Act of 1964. Therefore, case law construing Title VII is persuasive when construing Section 760.10. See Gray v. Russell Corp., 681 So. 2d 310 (Fla. 1st DCA 1996); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

20. As noted above, Section 760.11(1), states that, "Any person aggrieved by a violation of 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation . . . ." If Petitioner is found by the Commission to have filed a Charge of Discrimination immediately subsequent to Petitioner having completed it, the reassignment to DeLand in

July 1999, and the return to Daytona Beach, were not brought to the attention of the Commission in a timely manner and should not be considered by the Commission. If the reassignment from Daytona Beach to Ormond Beach and then back to Daytona Beach are found to be as a result of racial discrimination or retaliation, and if the Commission finds that a Charge of Discrimination was filed immediately subsequent to June 25, 2001, then this allegation is not barred by Section 760.11(1).

Discrimination

21. The United States Supreme Court set forth the procedure essential for establishing claims of discrimination in McDonnell Douglas Corp. v. Green, 411 U.S. 792 93 S. Ct. 1817, 36 L. Ed 2d 668 (1973), which was then revisited in detail in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). Pursuant to the Burdine formula, the employee has the initial burden of establishing a prima facie case of intentional discrimination, which, once established, raises a presumption that the employer discriminated against the employee. The pre-eminent case in Florida remains Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991).

22. A plaintiff establishes a prima facie case of discrimination under Title VII by showing: (1) he belongs to a minority; (2) he was subjected to an adverse job action; (3) his

employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job. Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997).

23. Petitioner's race is white. Whites are not a minority or generally in a protected minority class. However, whites can be a protected group under Title VII of the Federal Civil Rights Act, and Chapter 760. In order to prove discrimination as a white person, Petitioner must prove a prima facie case of intentional disparate treatment when background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority. See Parker v. Baltimore & Ohio R.R. Co., 652 F.2d. 1012 (D.C. Cir. 1981). In accord Notari v. Denver Water Dept., 971 F.2d 585 (10th Cir. 1992). Generally, with regard to "reverse discrimination," see Ehlmann v. Florida A & M University, Case No. 96-2855 (DOAH June 26, 1997).

24. In order for Petitioner to prevail in his charge of discrimination, he must demonstrate that he was victimized by that unusual employer that discriminates against whites. Petitioner's chain-of-command started with his immediate superior, Ms. Brown, a black woman. However, Mr. Seltzer, his

office supervisor, and Mr. Gordon, the circuit administrator were of the white race. There is no evidence that either Mr. Seltzer or Mr. Gordon, or for that matter, Ms. Brown, were prejudiced against white people.

25. Reverse discrimination in the type of setting in which Petitioner worked, could arise should there be a strong policy in favor of affirmative action resulting in discrimination against nonwhites, as was discussed in Parker, above. However, evidence that over-active affirmative action was in play was completely absent in this case.

26. It is found as a fact that no one was prejudiced against Petitioner because he was white. Any actions considered adverse by Petitioner occurred because of his decision to be romantically involved with two different women in the same close-knit work community.

27. As was said in Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984), in the context of employment decisions to discharge, "The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." If an employer can fire an employee for any nondiscriminatory reason, it follows that it is permissible to reassign an employee to DeLand, if the

action is deemed necessary due to turmoil in the workplace caused by the employee's poor judgment.

28. With regard to the second prong of the prima facie case, it is found that a reassignment to a workplace a short distance from his current workplace is not an adverse action. It may have been inconvenient for Petitioner to drive from Daytona Beach to DeLand each workday for a period of 60 days but it was the type of routine inconvenience all workers experience sooner or later. It appears that his reassignment to DeLand, and to Ormond Beach, was predicated on the needs of the Department, and his assignment back to Daytona Beach, was at least in some respects connected to the Department's plan to promote Petitioner, a plan which resulted in Petitioner's promotion soon after the moves.

29. As to the third prong, there is no evidence that Petitioner was treated differently from other employees. As noted above, personnel in Petitioner's circuit were routinely reassigned.

30. Petitioner was qualified to do his job.

31. Accordingly it is found as a fact that Petitioner did not prove a prima facie case.

32. If one assumes arguendo that Petitioner did make out a prima facie case, there were legitimate, nondiscriminatory reasons for reassigning Petitioner. As a result of his

injudicious decision to maintain a relationship with two different women in the same work community, including one who was married, he experienced the natural and probable consequences of his actions. The consequences included turmoil in his office, an attack by an unhappy husband in a parking lot adjacent to his workplace, and reassignments.

33. Petitioner has made no showing that any of the reasons given by the Department for its employment actions, were pretextual. Accordingly, it is found as a fact that the Department did not discriminate against Petitioner.

Retaliation

34. To prove a prima facie case of retaliation, Petitioner must show the following: (a) he engaged in statutorily protected expression; (b) he suffered an adverse employment action; and (c) the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

35. Petitioner's complaint was twofold. He complained about the misuse of state property in the transmission of information about his personal life to Tanya Folsom and he complained that certain probation employees who worked in certain courts were under-employed. These were statutorily protected communications.

36. With regard to the second prong, for the reason discussed above, proof is absent that he suffered an adverse employment action.

37. With regard to the third prong, if one assumes arguendo that an adverse employment action was taken against him by the Department, the causation was the result of Petitioner's actions, not because the Department was retaliating against him.

Summary

38. All of the allegations forwarded in the Amended Charge of Discrimination, standing alone, are barred by the passage of time and should not be considered by the Commission. If the Commission considers the Charge of Discrimination signed June 25, 2001, the Commission should consider only the employment actions in December 2000, and February 2001, involving the reassignment to Ormond Beach and back to Daytona Beach. In the latter instance, if the Commission decides to consider the entire matter as a continuing course of action, it is found that neither reverse discrimination nor retaliation occurred.

RECOMMENDATION

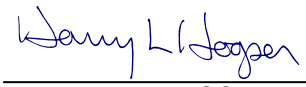
Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that

1. Petitioner's Amended Charge of Discrimination be dismissed because it was not timely filed.

2. Dismissal on its merits if the June 25, 2001, Charge of Discrimination is determined to have been timely filed.

DONE AND ENTERED this 11th day of December, 2003, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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.