STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CAROLYN LAWHORN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 06-4818
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

In accordance with duly promulgated notice this cause came on for formal proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings in Brooksville, Florida, on March 29, 2007. The appearances were as follows:

APPEARANCES

Petitioner: Carolyn Lawhorn, pro se
13141 Lola Drive
Spring Hill, Florida 34609

Respondent: Joshua E. Laws, Esquire
Florida Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concerns whether the Department of Corrections, the employer and Respondent herein (Department, Respondent) engaged in a

discriminatory employment action against the Petitioner by terminating her allegedly on account of her age.[1/]

PRELIMINARY STATEMENT

This cause arose from the filing of a charge of discrimination on May 10, 2006, date by the Petitioner, Carolyn Lawhorn. Upon investigation and consideration of the Petitioner's claim, the Florida Commission on Human Relations ultimately entered a determination of "No Cause." Thereafter, the Petitioner filed a Petition for Relief and availed herself of the right to a hearing concerning that determination before the Division of Administrative Hearings. The cause was ultimately transferred to the undersigned for conduct of a formal proceeding and hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

The cause came on for hearing as noticed. At the hearing the Petitioner presented her own testimony and the testimony of two other witnesses. Additionally, the Petitioner had Exhibits one through four admitted into evidence. The Respondent presented the testimony of one witness and had Composite Exhibit one admitted into evidence.

Upon concluding the proceeding, the parties elected to take the opportunity to submit proposed recommended orders or briefs but declined to order a transcript. The Proposed Recommended

Orders submitted have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner was hired as a Correctional Officer at the Hernando Correctional Institution (HCI) on or about December 20, 1996. HCI houses youthful and adult female inmates.

Inmate Gaspar Incident

2. Lieutenant Laura Reed was the dayshift officer in charge at HCI on March 22, 2005. At that time, at approximately 12:09 p.m., she ordered Officer Donald Langdon to perform a security inspection of a holding cell area. Lt. Langdon entered through the building's exterior door which opens to a vestibule in a holding cell area. The vestibule has two other solid doors; the steel door leading to the holding cell area is located a few feet from the exterior door, and there is a door at the far end of the vestibule that leads to administrative offices. There is an officer's desk and storage lockers in the vestibule. The three holding cells are typically used at HCI to house disruptive inmates. Each is a 12-by-12 square with a 10-foot ceiling. The side walls are of cement and the front and back walls are constructed of bars that are covered by a clear wall of lexan, a material similar to Plexiglas.

3. Officer Langdon checked to make sure that nothing in the cells was broken and he searched the cells for contraband. He filled out a form indicating nothing was broken in the first and third cells and that he had not found any contraband and notified Lt. Reed of his findings. He then left the holding cell area.

4. At about 12:10 p.m. Lt. Reed asked Officer Donna Jaje to help escort inmate Anita Gaspar to the holding cell because she was being disorderly and "acting out." Thereafter, Lt. Reed and Office Jaje arrived at the holding cell area where they strip searched the inmate but found no contraband. During the strip search the inmate commented that she "was not going to stay on this earth." The inmate's comment concerned the two officers because it indicated that she might be considering injuring herself.

5. The inmate was placed in the first holding cell and Reed ordered Officer Jaje to remain with the inmate until relieved. Officer Jaje maintained a constant vigil observation of the inmate, and Lt. Reed left to advise a psychological specialist concerning inmate Gaspar and her comment.

6. The psychological specialist determined a few minutes later that the inmate might have the potential to injure herself and put her on a "one-to-one observation," which requires constant visual observation based upon a fear of suicide.

7. Suicidal inmates are not common at HCI, thus when an inmate is determined to be suicidal, since the institution does not have appropriate facilities, the procedure is to maintain a constant visual observation of the inmate until the inmate can be transferred to Lowell Correctional Institution (Lowell CI). Lowell CI does have appropriate facilities for such inmates.

8. The Petitioner was assigned to work as a medical officer on the day in question. Lt. Reed instructed the Petitioner to relive Officer Jaje at inmate Gaspar's holding cell and told her to stay with that inmate.

9. Prior to the Petitioner's arrival, Officer Jaje had maintained constant visual contact with the inmate. When Petitioner Lawhorn arrived at the holding cell to relieve Officer Jaje, around 12:45 p.m., Lawhorn sat in a chair directly in front of the inmate's holding cell. Jaje told Lawhorn that the inmate was on SOS and gave Lawhorn the keys to the holding cell. Petitioner Lawhorn asked for the "observation form" and Officer Jaje went to the medical unit and returned with the observation form. When an inmate is on SOS status, an observation form must be completed at 15 minute intervals. The officer observing the inmate must document on the form all the inmates activities such as sitting, lying down, talking, eating, etc.

10. Constant visual observation is a different procedure than that used for typical inmates being incarcerated in a holding cell for disciplinary reasons. In that instance the correctional officer is only required to check on the inmate and observe every 15 minutes. Because constant visual observations are not required between those 15-minute, checks the officer may then perform other duties. The Petitioner had been trained to know the difference between these two procedures.

11. About 1:30 p.m. Officer Langdon escorted a different inmate to the holding cell area. He knocked on the exterior door and received no answer and tried the door which was unlocked, although it should have been locked. When he entered the vestibule, Petitioner Lawhorn opened the door to the holding cell area as if answering Langdon's knock, but then returned to the holding cell area.

12. Langdon is a male officer and therefore cannot strip search a female prisoner. He requested assistance in carrying out the required strip search of the inmate he had escorted to the holding cell area, but received no response to his radio request. After waiting some ten minutes he apparently discussed the matter with Petitioner, not knowing that the Petitioner was assigned to maintain constant visual observation of Inmate Gaspar. The Petitioner volunteered to strip search the other inmate for him. Langdon suggested that she strip search that

inmate in cell three while he kept an eye on the inmate in cell one. The Petitioner refused that request, apparently because the other inmate was not dressed. She closed the door between the vestibule where Langdon was and the holding cell area where she carried out the strip search. Several minutes later Lawhorn opened the door to the holding cell area and placed the inmate's property in a locker and then returned to the holding cell area. Officer Langdon then reported to the control room that the inmate he was charged with had been placed in the third holding cell and he left the area.

13. At about 2:30 p.m. Lt. Moffitt was in his office located in the same building as the holding cell area. He heard yelling, screaming, and a commotion emanating from the holding cell area. He and Officer Holley went to the holding cell area to determine the cause of the disturbance.

14. When Lt. Moffitt entered the vestibule area he observed the Petitioner sitting at the officer's desk. The solid steel door to the holding cell area was closed. As he passed the Petitioner he told her he thought that she was supposed to be watching inmate Gaspar. The Petitioner replied that she was watching the inmate.

15. Lt. Moffitt opened the door to the holding cell area and talked to Inmate Gaspar. She told him that she did not want to be transported to Lowell CI and that she would resist being

transported. As Moffitt left the holding cell area he directed the Petitioner to watch the inmate and the Petitioner placed a chair in front of the holding cell of Inmate Gaspar in order to watch her constantly.

16. About 2:35 p.m. the Petitioner needed a restroom break. There was no telephone at the officer's desk in the vestibule. She therefore went to the laundry area and informed a Sergeant there that she needed a restroom break. A few minutes later Officer Black came and relieved the Petitioner. Officer Black maintained a constant visual observation of Inmate Gaspar until the Petitioner returned, about 20 minutes later.

17. About 3:45 p.m., Lt. Moffitt returned to the holding cell area. The Petitioner was then complying with his instructions by sitting in the chair and watching Inmate Gaspar.

18. The shift changed at 4:00 p.m. and Lt. Moffitt conferred with Lt. Oudshoff, the oncoming shift supervisor. Moffitt told Lt. Oudshoff that an inmate in the holding cell area had stated that she was going to resist being transferred that evening. He and Lt. Oudshoff went to talk with Inmate Gaspar and were able to convince her not to resist the transfer to Lowell CI. During the course of that conversation both Lt.s were surprised when inmate Gaspar offered to give them "her weapon," as she termed it, whereupon she produced a 5-by-7-inch piece of lexan.

19. The inmate was apparently asked how she was able to obtain the piece of lexan while under direct supervision. The inmate purportedly replied that Petitioner Lawhorn had left the cell several times throughout the day, leaving her unsupervised. The inmate did not testify, (although her account is in documentary evidence) but whether or not her version of events concerning the Petitioner leaving the cell several times a day, giving her the opportunity to break off a piece of lexan, is true, it was demonstrated to have been the motivation for the disciplinary action taken against the Petitioner.

20. The appropriate supervisors were informed of the details of this incident as Lt. Moffitt knew them and an investigation ensued. Ultimately, disciplinary action was determined to be appropriate and the Petitioner was terminated from employment with the Department based on this incident, as the culmination of other disciplinary incidents on the Petitioner's employment record.

21. Officer Langdon was also disciplined concerning the incident. His discipline was lesser as he was accorded a reprimand and was not terminated. Officer Langdon is younger than the Petitioner but Officer Langdon also had no disciplinary incidents or entries on his employment record whatever until the subject incident. That was the reason he was accorded lesser discipline than that meted out to the Petitioner. Thus,

although the discipline imposed upon the Petitioner and Langdon was disparate, Officer Langdon was not proven to be a similarly-situated employee because his discipline related to a previously unblemished disciplinary record and the Petitioner had had at least four other disciplinary incidents and disciplines imposed on her employment record, from 2003 forward.

22. On December 23, 2004, the Petitioner was working in the medical department at HCI. She was the medical officer and responsible for ensuring that inmates arrived for their appointments on time and for monitoring inmates awaiting medication in the "pill line." She was issued keys when she arrived at work that day and on December 23 was issued key ring number 219.

23. The Petitioner left her observation post at the pill line on that occasion in order to allow other inmates into a gate to the adult canteen. While the Petitioner was unlocking that gate, key ring 219 broke off her keychain which was attached to her belt and remained in the adult canteen gate lock. The Petitioner let those inmates through the gate and went back to her post. She was in a hurry because Nurse Barras, who was working in the medical department, was screaming at her. She became distracted and did not notice that the key ring remained hanging in the canteen gate lock. A few minutes later another correctional officer saw an inmate pulling the key ring

out of the canteen gate lock. The Petitioner was not aware the key ring was missing until that officer confronted her with the keys that he confiscated from the inmate.

24. In any event, the Petitioner was not paying sufficient attention to her duties in opening the lock to the adult canteen and allowed herself to become distracted by the nurse's behavior and thus negligently left her key ring in the lock. If she had been paying due care to her surroundings and to her duties, she would have been aware that the key ring had broken off the key chain on her belt and would have observed the inmate pulling the key ring out of the lock. The Petitioner was accorded a five-day suspension for this commission of negligence, an infraction of the Department's rules. That suspension was upheld by the Public Employees Relations Commission.

25. An incident also occurred on March 28, 2005, which was taken into account in the decision to terminate the Petitioner. That incident involved an inmate who yelled at the Petitioner and who was therefore being counseled by the Petitioner. During the course of their conversation, the inmate "declared a psychological emergency," whereupon the Petitioner called on her radio for assistance. She then wrongfully allowed the inmate to leave her custody and control in the immediately area instead of handcuffing the inmate. She then failed to assist the other officer or officers who responded to her call for help in

calming the inmate. This was a violation of Department rules and was a factor in her termination.

26. In addition to the above disciplinary actions the Petitioner received a written reprimand for negligence on June 30, 2004. On May 7, and August 20, 2003, she received written reprimands for failure to follow oral or written instructions. On June 10, 2003, she received a written reprimand for failure to truthfully answer questions.

27. In her charge of discrimination, and at hearing, the Petitioner contended that she was subjected to discrimination based upon her age. She did not adduce preponderant evidence, however, which would show that any person outside her protected group, as for instance, persons under 40, or persons younger than she, were treated any differently, discipline-wise or otherwise, while being similarly-situated, comparative employees. The only evidence in this regard that she adduced was to the effect that Officer Langdon, who is younger than the Petitioner, was subjected to lighter discipline. Officer Langdon, however, was not a similarly-situated employee because, although younger, his employment and disciplinary record was unblemished until the incident involving the processing of Inmate Gaspar in the holding cell area. He had been employed substantially longer than the Petitioner's nine years. Thus, although he was disciplined less severely, he was not shown to

be a similarly-situated employee because of the disparate nature of his, versus the Petitioner's, employment disciplinary records. Aside from this incident involving Officer Langdon, no other preponderant evidenced was adduced that any other employees were treated differently or better based upon their age or that the Petitioner was treated in a worse manner because of her age.

28. The Petitioner contends that she was subjected to disparate treatment and harassment based upon her age (and, at hearing, based upon her gender, although that was not plead in the Petition or in the Charge of Discrimination). This amounted to vague testimony to the effect that she was constantly harassed by her superiors, and subjected to unwarranted discipline, particularly by Lt. Moffitt after he became her supervisor. She attempted to advance this claim by testimony that her medical problems involving anxiety and chest pain began after Lt. Moffitt arrived at the facility in 2003. This is belied by the fact, however, that other evidence in the record shows that these medical complaints actually began in 1999, some years before Lt. Moffitt became employed at the facility and became the Petitioner's supervisor.

29. There is no preponderant proof that the Petitioner was subjected to altered terms or conditions of employment based upon her gender, or due to any comments or conduct of a sexual

nature. For instance, there is absolutely no evidence that any demands for sexual favors were made upon her and that her terms and conditions of employment were conditioned upon compliance therewith. Moreover, there was no preponderant evidence that she was treated in a different way, such as being exposed to more disciplinary actions or more severe disciplinary measures than were her male counter-parts. Her testimony that male employees were subjected to less severe discipline or no discipline was not persuasive. This is because, for the most part, they were not identified, and no evidence was adduced to show that they were truly similarly-situated male employees in terms of the positions they held, the circumstances of their employment and more particularly the circumstances surrounding their disciplinary actions, in terms of being disciplined based upon similar facts and circumstances. Moreover, the discipline meted out to them was not shown to be disparate in relation to that given the Petitioner because there was not showing by the Petitioner that their employment records and disciplinary records were otherwise similar to her. Rather, the only evidence concerning this is that Officer Langdale's employment disciplinary record was unblemished and therefore substantially different from the Petitioner's, when he was accorded less severe discipline than the Petitioner arising out of the same

incident. His better record was the reason for the less severe discipline.

30. Additionally, there is the Petitioner's uncorroborated testimony concerning an incident involving preparing an inmate for transport to another facility in the prison van. She firmly demanded that the inmate be re-buckled in a seat belt. A verbal altercation inferentially ensued with Sergeant Moynihan. The Petitioner claims he cussed at her and was not disciplined, while she was "written up" for allegedly calling him a liar. There was insufficient credible evidence to show enough facts concerning this event so that a judgment could be made if it occurred; whether the two employees were similarly-situated in terms of their conduct and their disciplinary records; and whether there was disparate treatment of one versus the other.

31. There was no showing that the Petitioner was subjected to abusive language or other abuses related to her gender or to any sexually discriminatory motive in her working environment. There was no evidence of any unwelcome sexual harassment or other conduct of a sexual nature which was sufficiently severe or pervasive as to alter the terms and conditions of her employment and create a discriminatorily abusive working environment.[2/]

32. In summary, the above Findings of Fact do not reveal that any of the disciplinary action, including the termination

at issue, was meted out by the Respondent Department for any discriminatory motives regarding the Petitioner's age or that of other employees. Moreover, complaints regarding gender discrimination were not made until the Petitioner's testimony at hearing. Therefore, under generally accepted principles of notice pleading and due process of law they can not be addressed and decided in this proceeding because the Respondent has not had an opportunity to prepare a defense against them. Parenthetically, however, the evidence adduced by the Petitioner does not demonstrate any discriminatory motive or action taken by the Respondent Employer based upon reasons of gender or of any sexual nature.

33. There has been no showing that any comparative employees, male or female, were treated in a disparate way and more favorably than the Petitioner based upon their age. Moreover, even if such had been demonstrated, the Respondent has come forward with preponderant, persuasive evidence that the employment action at issue, the Petitioner's termination, occurred as a result of progressive discipline imposed in accordance with the Respondent's written policies and rules. It was imposed as a result of the Petitioner's deficient performance and her deficient and more extensive record of disciplinary actions imposed against her for her lapses in performance, as compared to other similarly-situated employees.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2006).

35. The Petitioner asserts that she has been the victim of disparate discriminatory treatment in the employment decision at issue because of her gender and her age. As found above she only asserted her gender/sex-based claim at hearing, in her testimony. She did not properly raise the issue of gender or sex-related discrimination in her charge of discrimination nor in any petition for relief, or by amended pleading prior to hearing, such that the Respondent might have been accorded the opportunity to prepare to meet that additional claim. Thus, the Respondent, in a due process context, cannot be determined to have any liability in a legal sense for gender-based discrimination in this proceeding, although the subject will be dealt with herein in an abundance of caution.

36. A petitioner may prove intentional discrimination by using direct, circumstantial, or statistical evidence. Standard v. ABEL Service, Inc., 161 F.3d 1318, 1330 (11th Cir. 1998). In the instant situation, the Petitioner has offered no direct or statistical evidence concerning discrimination and must rely on circumstantial evidence to attempt to prove her case. When using circumstantial evidence a burden shifting frame-work is

employed under the holding in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973).

37. Under this proof scheme the Petitioner in a disparate treatment case must prove a prima facie case by showing (1) that the Petitioner is a member of a protected class under Title VII or Chapter 760, Florida Statutes; (2) that an adverse employment action has occurred; (3) that the Petitioner was treated differently than similarly-situated employees who were not members of the protected class; and (4) that sufficient evidence exists to infer a nexus or causal connection between the Petitioner's gender or age and the disparate treatment alleged to have occurred. See McKeon v. Vaicaitis, 825 F. Supp. 290, 293 (M.D. Fla. 1993).

38. After the Petitioner proves her prima facie case, the burden shifts to the Respondent to offer a legitimate, non-discriminatory reason for any adverse employment action. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981). The Respondent is only required to advance a legitimate non-discriminatory reason. Its burden is production of evidence of such, not of preponderant proof. The defendant/respondent need not convince the court that it was actually motivated by the proffered reason because the burden is one of production and not of proof. Id. Burdine, 450 U.S. at 254-55; Patterson v. WalMart, Inc., 1999 WL 1427751 (M.D. Fla. 1999). If such a

legitimate, non-discriminatory reason is offered by the defense then it is entitled to judgment in its favor, unless the petitioner can persuade the trier of fact that the respondent actually intentionally discriminated against the employee despite the proffered legitimate reason advanced for its employment decision. St. Hillare v. Pep Boys, 73 F. Supp. 1366, 1370 (S.D. Fla. 1999).

39. Once a respondent has rebutted a petitioner's prima facie case; the petitioner must then prove by preponderant evidence that a discriminatory intent motivated the defendant. See Perryman v. Johnson Product Co. Inc., 698 F.2d 1138, 1142 (11th Cir. 1983). The petitioner must prove that the employer proffered reason was pre-textual and that a discriminatory reason more likely than not motivated the employer. Id.

40. Even if the employer's proffered legitimate business reason is not believed by the trier of fact, rejection of that proffered reason may permit the conclusion that discrimination occurred, but it does not require such conclusion. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993). In other words, it is not enough to disbelieve the defendant or respondent, the plaintiff or petitioner always bears the burden of persuasion that illegal discrimination actually motivated the

defendant in the employment action taken. Reeves, 530 U.S. at 146-47.

41. The Petitioner has not shown that she was treated any differently than similarly-situated employees who are not members of the protected class. The Petitioner was investigated and disciplined because she violated Department rules and polices taking into account her previous history of discipline, imposed through progressive discipline by the Department, as the Department's rules and policies allow, she was ultimately disciplined by termination. That discipline was upheld by the Public Employees Relations Commission in Orders resulting from two de novo proceedings.

42. The Petitioner did not provide any evidence that anyone similarly-situated, outside of the protected class, i.e. a different age, or someone under 40 years of age, was treated more favorably than she. She was not treated differently than other similarly-situated employees outside her protected age class (i.e. younger or under 40).

43. Further, to the extent that it needs to be treated in this proceeding, the Petitioner was not treated differently than any similarly-situated males. The one male involved in the Plexiglas incident involving the inmate, was disciplined less severely than the Petitioner. However, he was not similarly situated. That male employee had been employed by the

Department for substantially longer than the Petitioner and despite his longer term of service had had no previous disciplinary blemishes on his employment record, contrary to the record of the Petitioner who had three written reprimands and one suspension already.

44. Neither that employee nor any other male employee was shown to be involved in the incident where the Petitioner let her co-worker chase down counsel, and manage an errant inmate which the Petitioner had let escape from her custody, without helping her co-worker. Further, the Petitioner made only generalized, vague allegations that male employees were not subjected to discipline for matters for which she was disciplined. She contends that that Sgt. Moynihan, cursed at her during the incident concerning her insistence on re-buckleing an inmate with a seat belt before being transported to another facility in the prison van, but that only she was "written up," for allegedly calling him a liar. Such does not prove that she was treated disparately and worse than male counter-parts. Her testimony concerning this simply did not provide enough facts and circumstances to show, in a preponderant way, that Sgt. Moynihan on any other male employee, in connection with any incident wherein the Petitioner was disciplined, was similarly-situated by committing similar conduct or by having similar disciplinary/employment records and

yet were treated more favorably than the Petitioner. The Petitioner's mere subjective opinion that she was subjected to adverse disparate treatment is insufficient standing alone to establish such. Earley v. Champion International Corporation, 907 F.2d 1077 (11th Cir. 1990); William v. Hager Hinge, Co., 916 F. Supp. 1163 (M.D. Ala. 1995).

45. Further, there is insufficient evidence to establish or infer any causal connection between the Petitioner's gender or age and any disparate treatment. The Petitioner pointed to no comments made by any of the Respondent's employees or supervisors that disparaged her in a sexual way, related to her gender or related to her age. She did not establish that any action by any employees or supervisors of the defendant suggested any animus toward women, to the Petitioner in particular, or to any person over 40 years of age. The Petitioner established no preponderant evidence to suggest that she was treated differently than any other similarly-situated employees at the facility. There is no evidence of any disparate treatment because of gender or age in this case nor any causal connection between disparate treatment and gender or age.

46. The Respondent has met its burden of production in this case by offering as a legitimate, non-discriminatory reason for the Petitioner's termination her repeated violation of

Department rules as evidenced by her three written reprimands, and her five day suspension.

47. In each such instance the Respondent took the allegations against the Petitioner seriously and launched a good faith investigation, interviewed witnesses, gathered evidence, prepared reports and sent the reports to its central office where it was reviewed by the Respondent's work force compliance and legal divisions or offices. The Petitioner repeatedly violated rules and polices. The Department disciplined the Petitioner for these violations in a graduated progressive manner. Thereafter, within the proper exercise of its discretion, it took into account the prior disciplinary record and performance record of the Petitioner in determining, after the last incident involving negligence and violation of Department rules, that termination was proper. This does not violate Title VII or Chapter 760, Florida Statutes. This action by the Defendant, within its discretion, provides a legitimate, non-discriminatory reason under Chapter 760, Florida Statutes, for the dismissal of the Petitioner and overcomes the claim of disparate discriminatory treatment based upon age or gender advanced by the Petitioner, even assuming that a prima facie case for age or gender related discrimination had been made, which it has not.

48. In summary, the Petitioner maintained that she was discriminated against based upon age and gender. She failed to prove any of her theories in this regard because she failed to prove her prima facie case as to either theory. She did not prove a hostile working environment because she was not subjected to unwelcome sexual harassment and any alleged harassment was not shown to be because of her gender, if it occurred. She failed to prove that any alleged harassment was sufficiently severe or pervasive as to alter the terms and conditions of employment and create a discriminatorily abusive working environment. See Mendoza v. Borden, Inc., supra; Oncale v. Sun Downer Off-Shore Services, Inc., 523 U.S. 75, 81 (1998). Additionally, the Petitioner did not prove a prima facie case of disparate treatment because of age or gender, for the reasons set forth above, and a legitimate, non-discriminatory reason for disciplining of the employee was advanced and preponderantly proven by the Respondent.

49. The Petitioner repeatedly violated Department rules and policies, some of which violations could have constituted a danger to herself, her co-workers, and the inmates under her charge. Consequently, it has not been established that the Petitioner has been the subject of unlawful employment discrimination based upon age or gender-related reasons, based

upon the rationale contained in the Findings and Conclusions above.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witness, and the pleadings and arguments of the party, it is, therefore,

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition in its entirety.

DONE AND ENTERED this 30th day of May, 2007, in Tallahassee, Leon County, Florida.

S

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2007.

ENDNOTES

1/ The Petitioner also seemed to contend at hearing that she was treated differently because of her gender (female). This

position, however, was not pled in a petition for relief or in the original Charge of Discrimination and there was no notice to the Respondent that the Petitioner had any intent to litigate the question of whether she had been the subject of gender based discrimination in the employment decisions reached by the Respondent concerning her. Consequently, her arguments concerning discrimination, and particularly through hostile work environment, based upon gender, are not properly before this tribunal and will not be resolved.

2/ Burlington Industries, Inc., v. Ellerth, 524 U.S. 742, 753-54 (1998); Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999).

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.