STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RICHARD D. MOORE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-4555
	)	
DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on November 7, 2008, in Milton, Florida.

APPEARANCES

For Petitioner: Richard D. Moore, pro se
Post Office Box 216
Century, Florida 32535

For Respondent: Stephen M. Donelan, Esquire
Department of Agriculture and Consumer Services
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STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice against Petitioner.

PRELIMINARY STATEMENT

On February 7, 2008, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR). Petitioner alleged in the complaint that Respondent discriminated against him based upon his sex and in retaliation for his complaints about the discrimination.

On July 25, 2008, FCHR issued a "no cause" determination based upon its investigation of the complaint. On August 27, 2008, Petitioner timely filed a Petition for Relief with FCHR.

On September 15, 2008, FCHR referred the petition to the Division of Administrative Hearings (DOAH) to conduct the hearing requested by Petitioner. The referral was received by DOAH on September 17, 2008.

The final hearing was scheduled for and held on November 7, 2008. At the hearing, Petitioner testified in his own behalf, and Respondent presented the testimony of Elaine Cooper, David Core, and Ben Wolcott. Respondent's Exhibits numbered A-1, A-2, and A-3 were received into evidence. Petitioner did not offer any exhibits.

The Transcript of the final hearing was filed with DOAH on December 4, 2008. The parties were given 14 days from that date to file proposed recommended orders (PROs). Respondent filed a PRO on December 11, 2008, and Petitioner filed a PRO on December 17, 2008. The PROs have been given due consideration.

FINDINGS OF FACT

1. Petitioner is a white male.

2. Petitioner was employed by Respondent from 1988 to April 2008. He initially worked as a dump truck driver. He was promoted to park ranger in 1993.

3. Petitioner worked as a park ranger at the Coldwater Horse Stable (Coldwater) from 1999 to January 2006. His job duties included maintaining the facilities at the park, collecting park fees, and interacting with the people using the park.

4. Petitioner utilized prison inmates as laborers to build fences and perform other maintenance work at the park. He was the only park ranger at Coldwater certified to supervise inmates at the time.

5. On November 28, 2005, Petitioner was given a Memorandum of Supervision (MOS) by his supervisor for "sleeping on the job, including times when prison inmates were assigned to [his] supervision."

6. Petitioner disputed that he was sleeping on the job, even though he testified that he was only getting three hours of sleep at night because he was working two jobs at the time.

7. Petitioner decided to stop supervising inmates around the time that he received the MOS. Inmate supervision was voluntary for park rangers at the time.

8. Ben Wolcott, the administrator responsible for operations at Coldwater and several other parks, was not happy with Petitioner's decision not to supervise inmates because he felt that it would reduce the amount of work that would get done at the park.

9. Petitioner testified that there were female park rangers at Coldwater who could have supervised inmates, but that Mr. Wolcott would not allow it. However, as Petitioner acknowledged in his testimony, park rangers were not required to supervise inmates, and Petitioner was the only park ranger at Coldwater certified to supervise inmates at the time.

10. In January 2006, Petitioner was reassigned to Krul Recreation Area (Krul), and the park ranger at Krul was reassigned to Coldwater because he was willing to supervise inmates. Petitioner's job duties and salary were not affected by this reassignment.

11. Krul and Coldwater are both located within the Blackwater River State Forest, but according to Petitioner, Krul was approximately 14 miles farther away from his home than was Coldwater.

12. Petitioner did not file a grievance or any other type of formal complaint regarding his reassignment to Krul or the preferential treatment allegedly given to female park rangers

with respect to inmate supervision until February 2008,[1] when he filed his complaint with FCHR.

13. On November 30, 2007, Petitioner received a MOS because he was observed by Mr. Wolcott studying for his boat captain's exam while he was on duty, even though according to Mr. Wolcott, there was "plenty of work to do" in the park at the time.

14. Petitioner did not dispute that he was studying for his boat captain's exam while he was on duty, but he claimed that there was no work for him to do at the time because it was raining. However, Mr. Wolcott credibly testified that it had not been raining for at least 30 minutes prior to the time that he observed Petitioner studying.

15. Petitioner received "very good" performance evaluations in 2006 and 2007. His 2008 evaluation was lower, but it still reflected that Petitioner was "consistently meeting expectations."

16. Petitioner quit his job as a park ranger effective April 21, 2008. He started working as a boat captain trainee for Cal Dive International the following day.

17. Petitioner is earning approximately $56,000 per year as a boat captain trainee, which is $30,000 more than he was making as a park ranger.

18. There is no credible evidence that the November 2007 MOS was related in any way to the November 2005 MOS or to Petitioner's decision to not supervise inmates.

19. Respondent's personnel director, Elaine Cooper, credibly testified that a MOS is considered counseling, not disciplinary action. Consistent with this testimony, Respondent's Disciplinary Policy and Employee Standard of Conduct explains that a MOS is to be used to document "[m]inor violations that do not warrant disciplinary action."

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes (2008).[2]

21. Section 760.10, Florida Statutes, provides in pertinent part:

> (1) It is an 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 . . . sex . . . .
>
> * * *
>
> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization 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.

22. Section 760.11(1), Florida Statutes, provides that "[a]ny person aggrieved by a violation of ss. 760.01-760.10 may file a complaint with the commission within 365 days of the alleged violation, naming the employer . . . responsible for the violation and describing the violation." (Emphasis supplied). See also Fla. Admin. Code R. 60Y-5.001(2).

23. A complaint is "filed" when it is received by FCHR, which in this case was on February 7, 2008. See Fla. Admin. Code R. 60Y-5.001(3).

24. Violations that occurred more than 365 days prior to the filing of the complaint with FCHR are time-barred and not actionable. See Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997); Bias-Gibbs v. Jupiter Medical Center, Case No. 07-4785, at ¶ 22 (DOAH Apr. 24, 2008; FCHR July 8, 2008). See also National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 108 (2002) (explaining that strict adherence to the filing deadlines in the comparable federal law is necessary to ensure prompt consideration of discrimination complaints and even-handed administration of the law).

25. Petitioner's complaint was filed with FCHR more than two years after the November 2005 MOS and his January 2006 transfer from Coldwater to Krul, which, as Petitioner acknowledged in his testimony, was "[w]ell out of the . . . three hundred [sic] day time frame." Transcript at 37. See also Petitioner's PRO, at ¶ 15 ("It's true that the Petitioner did not file a complaint with the commission within the so called 365 day guideline.") Therefore, any discrimination claims based upon those events are time-barred and not actionable.

26. The only claim that is not time-barred is Petitioner's allegation that he received the November 2007 MOS in retaliation for his decision not to supervise inmates and/or his complaints about the alleged preferential treatment given to female park rangers.[3] However, as discussed below, there is no merit to this claim.

27. To establish a prima facie case of retaliation, Petitioner must prove that "(1) he engaged in statutorily protected activity, (2) he suffered an adverse employment action, and (3) there is a causal relation between the two events." Donovan v. Broward County Board of County Commissioners, 974 So. 2d 458, 460 (Fla. 4th DCA 2008). See also Bartolone v. Best Western Hotels, Case No. 07-0496, at ¶¶ 57-61 (DOAH June 8, 2007; FCHR Aug. 24, 2007).

28. The first element requires Petitioner to establish that he opposed an unlawful employment practice or that he participated in a formal investigation or proceeding relating to the unlawful employment practice. See Clover v. Total System Services, Inc., 176 F. 3d 1346, 1350 (11th Cir. 1999).

29. The second element requires Petitioner to establish that "a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." See Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 68 (2006) (internal quotation marks omitted).

30. The third element requires Petitioner to establish that the protected activity and the negative employment action "are not completely unrelated." See Rice-Lamar v. City of Ft. Lauderdale, 853 So. 2d 1125, 1132-33 (Fla. 4th DCA 2003).

31. If Petitioner establishes a prima facie case, the burden shifts to Respondent to proffer a legitimate, non-retaliatory reason for the adverse employment action. See Rice-Lamar, 853 So. 2d at 1132-33.

32. If Petitioner fails to establish a prima facie case, the burden never shifts to Respondent. See Bartolone, supra, at ¶ 59; Kirby v. Appliance Direct, Inc., Case No. 07-3807, at ¶ 60 (DOAH Nov. 26, 2007; FHCR Feb. 8, 2008).

33. Petitioner failed to establish a prima facie case of retaliation.

34. First, there is no credible evidence that Petitioner engaged in any "statutorily protected activity" prior to his receipt of the MOS in November 2007. His decision to stop supervising inmates in November 2005 was not an opposition to any unlawful employment practice, and he did not formally complain about being treated differently than female park rangers until February 2008 when he filed a complaint with FCHR.

35. Second, Petitioner did not suffer any "adverse employment action" by virtue of receiving the MOS in November 2007. The evidence establishes that a MOS is not considered disciplinary action by Respondent and that Petitioner continued to receive satisfactory performance evaluations after receiving the MOS. Moreover, there is no credible evidence that a reasonable employee would be dissuaded by a MOS from complaining about discrimination.

36. Third, there is no credible evidence that the November 2007 MOS was related in any way to Petitioner's decision not to supervise inmates in November 2005.

37. Even if it were somehow determined that Petitioner established a prima facie case of retaliation, the more persuasive evidence establishes that the November 2007 MOS was issued for a legitimate, non-retaliatory reason. Indeed,

Petitioner acknowledged in his testimony that he was engaged in the conduct--studying for his boat captain's exam while on duty--for which he was given the MOS.

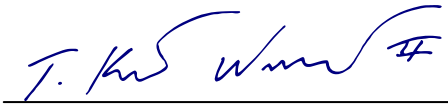
38. In sum, there is no factual or legal basis for Petitioner's discrimination claims against Respondent.

RECOMMENDATION

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

RECOMMENDED that FCHR issue a final order dismissing the Petition for Relief with prejudice.

DONE AND ENTERED this 30th day of December, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of December, 2008.

ENDNOTES

1/ Petitioner testified that he filed a Complaint with the federal Equal Employment Opportunity Commission (EEOC) on or about December 31, 2007, but no evidence was presented to

corroborate that testimony. The referral from FCHR did not include an EEOC Complaint, and Petitioner did not offer it into evidence at the hearing. The FCHR Complaint contained in the case file has a handwritten date of January 5, 2008, but according to the date-stamp on the Complaint, it was not received by FCHR until February 7, 2008.

2/ All statutory references are to the 2008 version of the Florida Statutes.

3/ This claim is construed as a retaliation claim because Petitioner alleged in the Employment Complaint of Discrimination filed with FCHR that "I feel that I received the memorandum of supervision because I made the complaint . . . about working with the inmates." See also Transcript at 12 (Petitioner's opening statement characterizing the 2007 MOS as "just an extension of previous discrimination factors"). To the extent the claim was construed as a disparate treatment claim (or a hostile work environment claim, as it is referred to for the first time in Petitioner's PRO), it would fail for the reasons set forth in paragraphs 21 through 32 of Respondent's PRO.

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.