STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALBERT L. PREVATT, SR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-4911
	)	
COUNTY OF VOLUSIA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Upon proper notice this cause came on for formal hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, on April 22, 2009, in Deland, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Clifford J. Geismar, Esquire
Law Offices of Clifford J. Geismar, P.A.
Crealde Executive Center
2431 Aloma Avenue, Suite 150
Winter Park, Florida 32792

For Respondent: Nancye R. Jones, Esquire
County of Volusia
123 West Indiana Avenue
Deland, Florida 32720

STATEMENT OF THE ISSUE

The issue to be resolved in this proceeding concern whether the Petitioner was terminated from employment with the Respondent because of his race. The Petitioner alleges that the

Respondent discriminated against him by engaging in disparate treatment and retaliation, in violation of Section 760.10, Florida Statutes (2007).

PRELIMINARY STATEMENT

This cause arose on March 26, 2008, when the Petitioner filed a complaint with the Florida Commission On Human Relations (Commission) in which he alleged that the Respondent had unfairly disciplined and suspended him because of his race (white) and then retaliated against him, for objecting to his treatment, by terminating his employment. A determination of no cause was issued by the Commission on or about September 18, 2008.

The Petitioner filed a Petition for Relief from the alleged unlawful employment practice on September 26, 2008 and filed an amended petition on October 20, 2008. The matter was referred to the Division of Administrative Hearings and the undersigned Administrative Law Judge to conduct a formal proceeding and submit a Recommended Order to the Commission.

The formal hearing was duly noticed and held on April 22, 2009. The Petitioner filed a Motion to Dismiss before the hearing, alleging that the Respondent had not stated a prima facie case for relief. The motion was denied without prejudice at the outset of the formal hearing.

The cause came on for hearing and the Petitioner presented the testimony of five witnesses and had five exhibits admitted into evidence. The Respondent presented the testimony of one witness and had four exhibits admitted into evidence. The Respondent advanced a motion in the nature of a motion for directed verdict or for dismissal at the conclusion of the Petitioner's case. The motion was taken under advisement and the remainder of the hearing was conducted and concluded.

Upon conclusion of the hearing a transcript of the proceeding was ordered and filed with the Division on May 14, 2009, the parties agreed to an extended time schedule for submission of proposed recommended orders, which were timely submitted. The proposed recommended orders have been considered in the rendition of this Recommended Order.

FINDING OF FACT

1. The Petitioner, Albert L. Prevatt, Sr., was employed with the Respondent, the Volusia County Department of Corrections (Department), as a Certified Correctional Officer. In July 2007, inmate Ronald Williams filed a complaint against the Petitioner, alleging that he had made a racial slur or comment directed toward Williams. A number of other inmates purportedly were present in the cell block at the time of the alleged racial comment and completed written witness statements as to what they had heard or observed.

2. Cindy Clifford was the Director of the Department of Corrections and ordered an Internal Affairs investigation concerning the matter. Investigator Captain Ken Modzelewski was assigned to conduct the investigation into the inmate's allegation. The Petitioner was notified of the investigation and notified to appear for an interview to address the matter. The Petitioner was given notice of the Correctional Officers' Bill of Rights with his initial notice of the internal investigation.

3. The Petitioner failed to attend the interview and failed to notify the Internal Affairs Unit or any of his supervisors that he would not appear for the interview. In fact, the Petitioner had suffered a dental emergency while at work on the day of the interview, which his supervisor was aware of. The Petitioner admitted however that he did not inform his supervisor of his scheduled Internal Affairs interview that day. The Petitioner also did not contact the Internal Affairs Unit after the fact to explain his failure to appear.

4. The Petitioner went on vacation until August 12, 2007, and was unavailable for an interview. This tolled the statutory 45 day requirement for an Internal Affairs investigation to be completed. Upon his return, a second interview was scheduled for August 23, 2007. This was to be the Petitioner's opportunity to address the inmate's racial comment allegations.

He was notified in writing of the date and time and again did not appear for the interview at the scheduled time.

5. After the Petitioner failed to appear for the second interview scheduled, Captain Modzelewski drafted a memorandum to Director Clifford, dated August 23, 2007. In that memorandum he requested that the Internal Affairs investigation be re-assigned due to the Petitioner's two acts of insubordination in failing to appear at the scheduled interviews. Captain Modzelewski noted in the memorandum that the actions by the Petitioner constituted sustained acts of insubordination, was a pattern of behavior he had exhibited in a previous Internal Affairs investigation and subjected the Petitioner to disciplinary action up to and including termination.

6. The investigation was re-assigned to Captain Nikki Dofflemyer, who is an officer with the Internal Affairs Unit of the Department. She interviewed the Petitioner on September 4, 2007. The Petitioner at that time admitted saying to inmate Williams, "You can grab a rope and call the Pope." The Petitioner also provided a note to Captain Dofflemyer from inmate Anthony Pletcher which purported to clear him of Williams' allegations concerning the purported racial slur or comment.

7. The Petitioner asked Captain Dofflemyer to interview Pletcher. Captain Dofflemyer interviewed Pletcher, who was then

no longer in custody. At the interview on September 5, 2007, she obtained the name of another inmate, Shawn Jones, who purportedly was contacted by the Petitioner to write a letter exonerating the Petitioner. Pletcher told Captain Dofflemyer that the Petitioner had, in fact, made the racial comment, but had asked Pletcher to write the exculpatory note. Pletcher stated that the note was untrue but that the Petitioner asked him to write it because the Petitioner was in trouble.

8. Captain Dofflemyer interviewed inmate Jones on September 6, 2007, while Jones was still in custody. According to Jones the Petitioner entered the unit where Jones was housed on September 11, 2007, in the "Branch Jail." This was not the Petitioner's normal duty station. The Petitioner was off-duty at the time. Although off-duty, the Petitioner was in uniform and he had the inmate removed from his cell so the Petitioner could speak with him. The conversation with the inmate was interrupted by the Lieutenant in charge of the Branch Jail, who removed the Petitioner from the premises.

9. The Petitioner was advised that he was not to go to the Branch Jail where inmate Jones was housed, until the investigation was complete. That was not the Petitioner's work assignment area anyway and so this action did not preclude him from doing his job as a corrections officer.

10. An interview with the Petitioner was scheduled by Captain Dofflemyer, for the Petitioner to explain his actions of September 11, 2007. The Petitioner was given a written notice and directed to appear for the interview, but failed to do so.

11. The Petitioner filed a grievance with Director Clifford, in which he alleged he was being subjected to a hostile work environment by being escorted out of the correctional facility and directed not to return, pending the outcome of the investigation. Director Clifford responded to the grievance and determined that the directive to the Petitioner to refrain from entering the Branch Jail during the investigation was appropriate and did not constitute the imposition of a hostile work environment.

12. The Internal Affairs investigation was concluded and a final report to Director Clifford was made on October 10, 2007. The investigation sustained charges of: three counts of insubordination, tampering with a witness, use of violent, profane, provocative or offensive language, perjury in an official proceeding, and/or knowingly giving false statements to supervisors or other officers. Because the violations were sustained, according to the Internal Affairs investigation Final Report, Director Clifford issued a Notice of Intent to Terminate the Petitioner. The notice provided him three days to respond to all charges, pursuant to the Code of Ordinances of Volusia

County and the Volusia County Merit Rules and Regulations. The Petitioner did not provide any additional evidence or information to cause the Director to change her decision that termination was an appropriate disciplinary action for the violations of policies and laws that had been sustained as a result of the investigation. The Petitioner was given a Notice of Dismissal, dated November 12, 2007, which again set forth the basis for the action.

13. Based upon the conclusion that criminal laws had been violated, after consultation with the State Attorney's office, Captain Modzelewski submitted a complaint affidavit for review and possible criminal charges to the State Attorney. Ultimately the State Attorney's office elected not to pursue the charges.

14. The Petitioner exercised his right to an Administrative Review of the termination, and also filed a Petition for Writ of Certiori with the Circuit Court, which was denied. He then pursued this formal proceeding.

15. Subsequent to the Petitioner's termination, in March 2008, a letter was received by the Respondent from the Florida Department of Law Enforcement (FDLE), notifying the Department that the Petitioner had made certain allegations against the Department of Corrections. There is no evidence to show the Petitioner made any complaints against the Department to the

FDLE, or any other agency, prior to his termination or that the Respondent was ever aware of any such complaints.

CONCLUSIONS OF LAW

16. 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. (2008).

17. Section 760.10, Florida Statutes (2007), prohibits discrimination against any person with respect to compensation, terms, conditions or privileges of employment, because of that person's race or gender. Florida courts have determined that Federal case law applies to claims arising under the Florida Civil Rights Act, Chapter 760 Florida Statutes; therefore, the United States Supreme Court's instructive decision regarding burden of proof set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2nd 668 (1973), applies to employment discrimination claims arising under the above-cited section. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

18. Under the McDonnell-Douglas proof analysis, the Petitioner has the burden of establishing a prima facie case of unlawful discrimination. The standard of proof is by preponderance of the evidence. In order to do that the Petitioner must establish that the Respondent acted with a discriminatory motive. That can be established either by direct

or circumstantial evidence of discriminatory intent. Direct evidence of discriminatory intent is usually established through comments made by employers or supervisors that show discriminatory motive and are related to the employment decision at issue, both causally and temporally. Carter v. City of Miami, 807 F.2d 578 (11th Cir. 1989). No evidence was presented by the Petitioner of any discriminatory remarks or comments made by Director Clifford, the person ultimately responsible for the termination decision nor by any other supervisory personnel.

19. In order to prove intentional discrimination, the Petitioner must establish that the Respondent intentionally discriminated against him by terminating him because of his race. There is no basis in the law for a court or Administrative Law Judge to question or second-guess a decision to terminate a Petitioner, unless there is evidence of discriminatory intent underlying that termination. As stated in the case of Chapman v. A.I. Transport, 229 F.3d 1012, 1031 (11th Cir. 2000):

> Federal courts do not sit as a super-personnel department that reexamines an entity's business decisions . . . No matter how mistaken the firm's managers, the (Civil Rights Act) does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior (citations omitted).
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> An "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." NIX v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984).

The Racial Discrimination Claim

20. The Petitioner maintains that he was terminated because of racial discrimination, asserting that the Respondent engaged in disparate treatment and retaliation. In order to establish a prima facie case of racial discrimination based on disparate treatment, the Petitioner must show: (a) that he belongs to a protected class; (b) that he was subjected to an adverse employment action; (c) that he was qualified for his position; and (d) that the Respondent treated similarly-situated employees outside the protected class more favorably. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

21. If a prima facie case is established, the burden then shifts to the Respondent, as the employer, to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden then shifts back to the Petitioner to show, by a preponderance of the evidence, that the Respondent's stated reasons for its adverse employment decision were pretextual See Texas Department of

Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2nd 207 (1981).

22. Even if the trier of fact determines that the reasons put forward by the Respondent justifying its employment action taken are untrue, the ultimate burden of persuasion still remains with the Petitioner to prove the ultimate question of whether the Respondent intentionally discriminated against the Petitioner, as to one or more of the statutorily recognized types of discrimination. Simply disbelieving the employer's version of events or reasons is not enough; the fact-finder must also believe the explanation by the Petitioner of intentional discrimination. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 522 (1993).

23. In cases involving alleged racial bias and the application of discipline for violation of work rules, the Petitioner, who must be a member of the protected class, must demonstrate: (1) That he did not violate the work rule, or (2) that he engaged in misconduct similar to that of a person outside of the protected class and that the disciplinary measures enforced against him were more severe than those enforced against other persons, outside the protected class, who engaged in similar conduct. McCalister v. Hillsborough County Sheriff, 211 F. Appx. 883 (11th Cir. 2006), Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989). A petitioner is

similarly-situated to another employee only if "the quantity and quality of the comparator's misconduct (are) nearly identical. . . " Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Circuit 2006); citing Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

24. Petitioner has established that he is a member of a protected group, a white male. He also established that he was subjected to an adverse employment action because he was terminated from his job. He presented no evidence, however, that his race played a part in his termination. There is no persuasive evidence to show that any similarly-situated employee outside his protected class, who engaged in nearly identical conduct, was treated more favorably by the Respondent with respect to disciplinary action.

25. The Petitioner presented evidence that he asserts established that his termination was the result of disparate treatment. The evidence offered showed that there were two instances when an African-American employee of the Department violated a rule or policy and was subjected to a lesser punishment. In one case, the employee committed one act of insubordination and nothing more, and received a written reprimand. This is not comparable to the Petitioner's multiple acts of insubordination, as well as numerous other sustained serious violations.

26. In the second situation, an African-American employee admitted to failing to properly document rounds made while on duty and received a penalty less than that received by the Petitioner. Here again, the misconduct committed by the African-American officer was not "nearly identical" to that of the Petitioner.

27. The Petitioner also presented evidence that three Hispanic officers were accused of sexual battery by an inmate. All allegations against these officers, however, were determined to be unfounded or unsubstantiated after an Internal Affairs investigation. Thus no disciplinary action was taken against them. Clearly, this case is not comparable to the Petitioner's for purposes of a disparate treatment claim. In other words, those three officers were found not to have committed the violative conduct at all, so they could not be similarly-situated to the Petitioner. Since the Petitioner has failed to establish this element, he has not established a prima facie case of employment discrimination.

28. Assuming arguendo that a prima facie case had been made, the Respondent presented evidence of legitimate, non-discriminatory reasons for terminating the Petitioner. The un-rebutted evidence presented by the Respondent established that the Petitioner was terminated for multiple violations of Department policies and Volusia County rules and regulations.

29. The Petitioner contends that he was not afforded the opportunity of a "valid" investigation and that the Corrections Officers Bill of Rights was violated. The Petitioner claims that had the investigation been performed differently, a different conclusion might have been reached.

30. The Respondent initiated its investigation based on a written complaint from an inmate, not an uncommon occurrence in a correctional setting. From the inception of the investigation, however, the Petitioner's own actions determined the outcome. He repeatedly failed to appear, or provide an explanation for failing to appear, for his interviews, which were being conducted in an attempt to get his "version of the events in question." He went on vacation during the investigation, precluding the investigation from being timely completed. When he was finally interviewed, he provided the names of a witness and former inmate who he claimed would exonerate him, only to have that witness further implicate the Petitioner when the witness was interviewed. He then contacted a witness, an inmate, while in uniform off-duty, in a place where he had no right to be. This created an appearance of an attempt to tamper with or influence the testimony of the witness.

31. The Respondent offered legitimate, non-discriminatory reasons for the actions involved in the investigation. The

Petitioner's claims that this demonstrates discrimination against him are no more than subjective beliefs by the Petitioner. The preponderant evidence indicates that the Respondent did not commit an unlawful employment practice.

The Retaliation Claim

32. The Petitioner contends he was retaliated against for either filing a grievance alleging a hostile work environment or for submitting a complaint to the FDLE regarding the Department of Corrections, on January 16, 2008.

33. In order to establish a prima facie case for retaliation, a petitioner or plaintiff must show that he engaged in a statutorily protected activity, that an adverse employment action occurred, and that the adverse action was causally-related to the petitioner or plaintiff's protected activities. See Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997) and Wentz v. Maryland Casualty Company, 869 F.2d 1153, 1155, (8th Cir. 1989).

34. By the time the Petitioner filed a grievance claiming that his banishment from one of the facilities of the Department created a hostile work environment, he had already committed all the acts of misconduct which were the basis for his termination. He presented no evidence, direct or circumstantial, that he was terminated for filing a grievance.

35. Concerning the purported complaint to FDLE, the unrefuted evidence was that the Petitioner's letter to FDLE was dated January 16, 2008, and that the department of Corrections was not notified of it until March of 2008. The Petitioner was terminated in November 2007, well before the Petitioner had contacted FDLE, by his own admission. Notwithstanding this time and notice issue, there was no evidence that the action taken was in retaliation for any complaint made by the Petitioner.

36. The Petitioner thus did not establish a causal link between any claimed protected activity and the adverse employment action taken against him. He has not proven any claim here, because he cannot establish a connection between any protected activity and his termination. He did not prove that the county's reason for termination was pretextual.

37. Even assuming a prima facie case of retaliation could be made, the burden shifts to the Respondent to produce a legitimate, non-retaliatory reason for the adverse employment decision. E.E.O.C. v. Reichhold Chems., Inc., 988 F.2d 1564 (11th Cir., 1993) and U.H.L. v. Zalk Josephs Fabricators, Inc., 121 F.3d 1133, 1136, (7th Cir. 1997). Even if the Petitioner had established a prima facie case of retaliation, the Respondent came forward with a legitimate, non-discriminatory reason for the Petitioner's termination. As previously stated, the Petitioner was terminated for multiple, serious violations

of the Department's rules and policies. The preponderant evidence shows that the Respondent believed the violations, which it knew were sustained by the results of the Internal Affairs investigation, and thus determined that they justified termination. These are legitimate, non-discriminatory reasons for the Petitioner's termination.

38. Once this burden of going forward with a legitimate non-discriminatory reason was met, it became incumbent upon the Petitioner to prove that the proffered reason was a pretext for what actually amounted to discrimination based on retaliation. Even if a causal link between the protected activity and the adverse employment action was established, this simply enabled the Petitioner to overcome the initial hurdle of having to make a prima facie case of retaliation. It did not relieve him of the burden of overcoming the legitimate reason articulated by the Respondent, which he failed to do. See Simmons v. Camden County Board of Education, 757 F.2d 1187, 1189 (11th Cir. 1985)

39. In summary, the Petitioner has not proven intentional discrimination. The Petitioner has not established that the termination of employment was based on any discriminatory intent based upon the Petitioner's race, nor based upon any intent to effect retaliation against the Petitioner. Rather, it was because of the legitimate determination made by the Respondent that the Petitioner had violated the work rules and policies

mentioned above, and that such was an appropriate cause for termination. Whether or not that view of the results of the investigation was true, there was absolutely no proof that the reason the termination of employment was effected was in any way related to discrimination based on race, or based upon retaliation, for the reasons found and concluded above.

RECOMMENDATION

Having considered the foregoing findings of fact, conclusions of law, the evidence of record, the candor and demeanor of the witnesses and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a Final Order be entered by the Florida Commission on Human Relations denying the Amended Petition for Relief in its entirety.

DONE AND ENTERED this 3rd day of August, 2009, in Tallahassee, Leon County, Florida.

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 3rd day of August, 2009.

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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.