

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAFNEY L. COOK,)
)
 Petitioner,)
)
 vs.) Case No. 08-4983
)
 CORRECTIONS CORPORATION OF)
 AMERICA,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A final hearing was held in this case on December 17, 2008, by video teleconference between Jacksonville, Florida, and Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dafney L. Cook, pro se
2445 Dunn Avenue, Apt. 610
Jacksonville, Florida 32218

For Respondent: Chelsie J. Roberts, Esquire
Ford & Harrison, LLP
300 South Orange Avenue, Suite 1300
Orlando, Florida 32801

STATEMENT OF THE ISSUES

The issues are whether Respondent committed an unlawful employment practice in one or more of the following ways:

(a) by discriminating against Petitioner based on her race

and/or gender; (b) by subjecting Petitioner to a hostile work environment; and (c) by retaliating against Petitioner.

PRELIMINARY STATEMENT

Petitioner Dafney L. Cook (Petitioner) filed her Employment Complaint of Discrimination with the Florida Commission of Human Relations (FCHR) on June 30, 2008. The complaint alleged that Respondent Corrections Corporation of America (Respondent) had discriminated against her pursuant Sections 760.10(1)(a) and 760.10(7), Florida Statutes (2008).

On or about August 14, 2008, FCHR issued a Notice of Determination: Cause and Determination: Averse Inference Cause. Petitioner filed a Petition for Relief on September 18, 2008.

FCHR referred the case to the Division of Administrative Hearings on October 8, 2008. A Notice of Hearing by Video Teleconference dated October 22, 2008, scheduled the hearing for December 17, 2008.

On December 11, 2008, Petitioner filed a written request to continue the hearing. On December 15, 2008, the undersigned issued an Order Denying Continuance of Final Hearing.

During the hearing, Petitioner testified on her own behalf. She offered Petitioner's Exhibit Nos. P1-P8 that were accepted as evidence.

Respondent presented the testimony of three witnesses. Respondent offered Respondent's Exhibit Nos. R3-R7, R10, R19,

R21, R23-R24, R26-28, and R30-R31 that were accepted as evidence.

The Transcript was filed on January 6, 2009. Respondent filed a Proposed Recommended Order on January 23, 2009. As of the date that this Recommended Order was issued, Petitioner had not filed proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Respondent hired Petitioner, a black female, as a correctional officer on or about February 25, 2002. Petitioner was initially assigned to the Hernando County Jail.

2. After a series of transfers at Petitioner's request, Respondent assigned Petitioner to the Lake City Correctional Facility in July 2005. Petitioner continued to serve at that facility until she was terminated.

3. On multiple occasions during her employment, Petitioner received copies of Respondent's Harassment/Sexual Harassment policy and Respondent's Code of Ethics policy. Petitioner received formal training relative to the substance of these policies when she was hired and annually thereafter.

4. In October 2007, Petitioner filed two grievances against Captain Michael Register and Chief Daniel Devers. The grievance against Chief Devers alleged a "hostile" work environment. Specifically, Petitioner asserted that Chief Devers created a divide-and-conquer environment by telling new

staff that "several dirty officers work for Respondent and that the new staff are to tell on them and replace all the old staff members."

5. The grievance against Captain Register alleged race and gender harassment. Specifically, Petitioner claimed that Captain Register did not relieve Petitioner on time "for three weeks straight." Petitioner believed that Captain Register's alleged conduct was due to his dislike for her and favoritism toward other staff members. Petitioner did not allege that Captain Register or Chief Devers ever said anything to Petitioner or anyone else regarding her race or gender.

6. In response to Petitioner's grievances, Respondent performed an in-house investigation. Subsequently, Petitioner's grievances against Captain Register and Chief Devers were denied as unfounded.

7. Petitioner alleges that she was sexually harassed by Officer/Correctional Counselor Roderick Polite. As a Correctional Counselor, Officer Polite did not have authority to change the terms and conditions of Petitioner's employment except that it was possible for Petitioner to receive work orders from a Correctional Counselor.

8. Petitioner went on two consensual dates with Officer Polite prior to his alleged harassment. The first date was in late November 2007. The second date was in early December 2007.

At the time that Petitioner went on these dates, she was temporarily broken up with Correctional Officer Darian Blue.

9. In late November and early December 2007, Petitioner worked the 6 p.m. to 6 a.m. shift. Officer Polite was assigned to the 2 p.m. to 10 p.m. shift.

10. Petitioner refused to go to Respondent's December 14, 2007, Christmas party with Officer Polite. Thereafter, Officer Polite called Petitioner's house continuously for three days. In a telephone conversation on December 17, 2007, Officer Polite allegedly told Petitioner that he "just had sex with a girl." Officer Polite also allegedly stated that his fascination with her would be over if she would just give him oral sex. Petitioner told Officer Polite "no" and ended the conversation.

11. Petitioner claims that Officer Polite began to harass her at work after the December 17, 2007, telephone conversation. According to Petitioner, the harassment continued until January 10, 2008. Specifically, Petitioner claims that Officer Polite was critical of her work performance and changed the procedures she was to follow regarding mail distribution and the cleaning of pods by inmates. Officer Polite allegedly also accused Petitioner of improperly counseling an inmate.

12. Petitioner alleges that Officer Polite "wrote her up" on one occasion. However, Petitioner admits that she never saw the alleged write-up. Petitioner also admits that she never

suffered any adverse action as a result of the alleged write-up. The greater weight of the evidence indicates that Officer Polite never filed a disciplinary action against Petitioner.

13. Petitioner did not complain about Officer Polite's conduct until January 9, 2008. On that date, Petitioner spoke with Captain Joseph Ruby about Officer Polite's alleged conduct.

14. Respondent's sexual harassment policy prohibits physical and verbal harassment, including inappropriate threats and requests. The policy also set forth the procedure by which employees should utilize to complain about harassment and states that complaints will be promptly and thoroughly investigated.

15. Accordingly, on January 10, 2008, Petitioner was interviewed by Respondent's in-house investigator. Petitioner told the investigator about Officer Polite's alleged harassment but stated that she did not want to file a formal grievance against him. Petitioner simply requested that she be allowed to return to work and that she not have to work with Officer Polite.

16. Officer Polite subsequently resigned his position as a Correctional Counselor and stepped down to a Correctional Officer position. Additionally, Respondent changed Officer Polite to the 6 a.m. to 6 p.m. shift. If there were occasions when Petitioner's and Officer Polite's shifts overlapped,

Respondent granted Officer Polite's requests not to work around Petitioner.

17. In March 2008, Petitioner applied for one of three open positions as a Correctional Counselor. Based on the interview panel's recommendation, Warden Jason Medlin selected a white female and two black females for the positions.

18. Petitioner was not selected for one of the positions because of her personnel and disciplinary record, including a prior allegation of excessive force against inmates. Moreover, there is no evidence regarding the personnel and disciplinary records of the three females selected for the positions.

19. On March 30, 2008, Petitioner was assigned to the control room in the South 2 Unit. Her primary duty was to maintain the log and to open doors for other officers.

20. At some point during her shift, Petitioner removed an inmate from his cell, took him to master control, and left him there. A Lieutenant requested another Correctional Officer, Amanda Sanders, to escort the inmate back to his cell and assist Petitioner with a search of the inmate's cell.

21. When Officer Sanders and Petitioner arrived at the cell, the inmate's cellmate, Jose Sandoval, was sitting on his bunk bed. Officer Sanders told Inmate Sandoval to leave the cell. When Inmate Sandoval did not comply, Petitioner ordered him to stand up to be handcuffed.

22. Inmate Sandoval continued to sit on his bunk bed. Petitioner then told Officer Sanders to call a "code red," a request for assistance from other officers. Officer Sanders did not comply immediately with Petitioner's request because Officer Sanders did not believe there was a need for assistance or a reason to handcuff Inmate Sandoval.

23. Next, Petitioner grabbed Inmate Sandoval by his arm, physically removed him from his bed, and placed him face first into the wall. Officer Sanders did not have any contact with Inmate Sandoval when Petitioner removed him from his bed.

24. Inmate Sandoval somehow turned to face Petitioner who had her back to Officer Sanders. Officer Sanders heard a "smack" and concluded that Petitioner had struck Inmate Sandoval. Officer Sanders then saw Inmate Sandoval spit at Petitioner. Officer Sanders immediately called a "code red" and assisted Petitioner in placing Inmate Sandoval on the floor and handcuffing him.

25. Other officers arrived and removed Inmate Sandoval from his cell and the unit. As recorded on the facility's video cameras, the officers carried Inmate Sandoval by his neck, two or three feet off the floor. The officers choked him and slammed him onto the floor. The cameras recorded Inmate Sandoval in the medical department, so incoherent that he had to be held up to prevent him from falling over.

26. When force is used against an inmate, the incident report must be sent to the Florida Department of Corrections' Inspector General (IG). In this case, the IG performed an investigation, concluding that Inmate Sandoval was assaulted by the facility's officers and that blood was cleaned off the walls to hide the assault.

27. Respondent subsequently received a copy of the IG's report. On April 11, 2008, Respondent terminated all officers involved, including Petitioner, for violation of Respondent's Code of Ethics. Specifically, Respondent terminated Petitioner for physically abusing the inmate, for failing to report the extent of abuse on the inmate in written reports and during the IG's investigation, and for failing to call into the facility as directed while on administrative leave after the incident.

28. Other officers that were terminated included the following: (a) Correctional Officer Darian Blue (black male) for use of excessive force; (b) Lieutenant Phillip Mobley (white male) for failure to accurately report the extent of abuse; (c) Captain/Shift Supervisor Joseph Ruby (white male) for failure to accurately report the extent of abuse; (d) Correctional Officer Grace Davie (white female) for failure to accurately report the extent of abuse; (e) Correctional Officer Melissa Fontaine (white female) for failure to accurately report the extent of abuse; and (f) Correctional Officer Eunice Cline

(white female) for failure to accurately report the extent of abuse.

29. Respondent did not terminate Officer Sanders. The IG's report did not show that she violated any of Respondent's policies during the incident.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 760.11, 120.569, and 120.57(1), Florida Statutes (2008).

31. It is unlawful for an employer to discriminate against any individual based on such individual's race or gender. See § 760.10(1)(a), Fla. Stat. (2008). Additionally, it is unlawful for an employer to retaliate against any person because that person has opposed any practice that is an unlawful employment practice. See § 760.10(7), Fla. Stat. (2008).

32. The Florida Civil Rights Act (FCRA), Sections 760.01 through 760.11, Florida Statutes (2008), as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. 2000e et seq., and federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369, 370-371 (Fla. 3rd DCA 1999); Florida State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

33. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated or retaliated against her. See Florida Dep't of Transportation v. J.W.C. Company, Inc. 396 So. 2d 778 (Fla. 1st DCA 1981).

34. Petitioner can establish a case of discrimination or retaliation through direct evidence or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997). In this case, Petitioner has not shown any direct evidence of discriminatory or retaliatory intent.

35. Under McDonnell Douglas Corp v. Green, 411 U.S. 792, 802-805 (1973), an employment discrimination case based on circumstantial evidence involves the following burden-shifting analysis: (a) the employee must first establish a prima facie case of discrimination; (b) the employer may then rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for the employment action in question; and (c) the employee then bears the ultimate burden of persuasion to establish that the employer's proffered reason for the action taken is merely a pretext for discrimination.

Sexual Harassment

36. To prove a prima facie case of sexual harassment, Petitioner must establish the following: (a) she belongs to a protected group; (b) she was subjected to unwelcome harassment; (c) the harassment was based on her gender; (d) the harassment

was sufficiently severe or pervasive to alter the terms and conditions of her employment and create an abusive working environment; and (e) a basis for holding Respondent liable. See Gupta v. Florida Bd. of Regents, 212 F.3d 571, 582-583 (11th Cir. 2000).

37. In this case, Petitioner has not shown that Officer Polite's conduct was so severe or pervasive to create an objectively hostile or abusive work environment. See Watkins v. Bowden, 105 F.3d 1344, 1355 (11th Cir. 1997).

38. In determining whether harassment objectively alters an employee's terms or conditions of employment, the following factors must be considered: (a) the frequency of the conduct; (b) the severity of the conduct; (c) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (d) whether the conduct unreasonably interferes with the employee's job performance. See Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993).

39. Here, the alleged harassment occurred over a four-week period and was intermittent at most. Petitioner did not identify any comments or conduct by Officer Polite that amounted to more than an offensive utterance during a telephone call after some consensual dating. The remainder of Officer Polite's alleged comments related to normal and customary work instructions.

40. Furthermore, Petitioner has not shown that Respondent is liable for Officer Polite's alleged statements. Officer Polite was not Petitioner's supervisor. Thus, he did not have power to take any tangible, adverse employment action against Petitioner.

41. If an alleged harasser is not the employee's supervisor, then the employer may only be held liable for the harasser's conduct if the employer knew or should have known of the harassment and failed to take prompt remedial action. See Watson v. Blue Circle, Inc., 324 F.3d 1252, 1259 (11th Cir. 2003).

42. Once Respondent became aware of Petitioner's allegations against Officer Polite, Respondent took prompt and effective remedial action by changing Officer Polite's position and work schedule to prevent further interactions with Petitioner. Petitioner did not present any evidence that Officer Polite continued to engage in harassing behavior after she made her complaint. Remedial action that results in the cessation of harassment precludes any recovery by an employee. See Bryant v. School Bd. of Miami Dade County, 142 Fed. Appx. 382, 385 (11th Cir. 2005).

Failure to Promote

43. To establish a prima facie case of discrimination for failure to promote, Petitioner must show the following: (a) she

is a member of a protected group; (b) she was qualified and applied for the promotion; (c) she was rejected despite her qualification; and (d) other equally or less qualified employees who were not members of the protected class were promoted. See Welch v. Mercer Univ., 2008 U.S. App. LEXIS 26291 (11th Cir. Dec. 24, 2008).

44. Petitioner presented no evidence to show that she was qualified for the position of Correctional Counselor. Petitioner also failed to show that the selected applicants were equally or less qualified than herself. Finally, Petitioner did not show any discrimination based on race or gender because the selected applicants were all female, one white and two black.

Discriminatory Discipline or Termination

45. To establish discrimination in discipline, Petitioner must show the following: (a) she belongs to a protected group such as a minority race; (b) she was qualified for the job; and (c) a similarly situated employee engaged in the same or similar misconduct but did not receive similar discipline or termination. See Nicholas v. Board of Trustees, 251 Fed Appx. 637, 642 (11th Cir. 2007).

46. To determine whether employees are similarly situated, one must consider whether "the employees are involved in or accused of the same or similar conduct and are disciplined in

different ways." See Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

47. In order to make that determination, courts "require that the quantity and quality of the comparator's misconduct be nearly identical to prevent . . . second-guessing employers' reasonable decisions and confusing apples with oranges." Id. at 1368.

48. Petitioner failed to present evidence that she was similarly situated with Officer Sanders, a white female, in regards to their involvement in the March 30, 2008, incident. The evidence indicates that Petitioner used excessive force in dealing with Inmate Sandoval, that she failed to accurately report the extent of abuse, and that she failed to call in as required while on administrative leave after the incident. There is no evidence that Officer Sanders used the same or similar physical force on Inmate Sandoval or that she engaged in any of the other behaviors for which Petitioner was terminated. Most importantly, the incident resulted in the termination of five other employees, one black male, two white males, and two white females.

Retaliation

49. To support a prima facie case of retaliation, Petitioner must prove the following elements: (a) she participated in a protected activity; and (b) she was subjected

to an adverse employment action. See Pipkins v. City of Temple Terrace, 267 F.3d 1197, 1201, (11th Cir. 2001).

50. Assuming that Petitioner engaged in a protected activity by filing her grievances against Captain Register and Chief Devers in November 2007, Petitioner cannot prove that she was denied a promotion or terminated in retaliation for filing those grievances. First, Petitioner was not promoted based on her personnel and disciplinary record. Second, Petitioner's termination was due entirely for using excessive force on an inmate, failing to report the extent of abuse, and failing to call in as required while on administrative leave.

51. Respondent had legitimate non-discriminatory, non-retaliatory, reasons for failing to promote Petitioner in March 2008 and for terminating her in April 2008. Petitioner presented no evidence to show that Respondent reasons were a pretext for discriminatory or retaliatory intent.

RECOMMENDATION

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

RECOMMENDED:

That FCHR dismiss the Petition for Relief with prejudice.

DONE AND ENTERED this 9th day of February, 2009, in
Tallahassee, Leon County, Florida.

Suzanne F. Hood

SUZANNE F. HOOD
Administrative Law Judge
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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.