STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHERRI M. AKERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-1969
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to written notice, a formal hearing was held in this case before Daniel M. Kilbride, a duly-designated Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH) on October 29, 2009, in Punta Gorda, Florida.

APPEARANCES

For Petitioner: Thomas Adam, Esquire
6099 Stirling Road, Suite 218
Davie, Florida 33314

For Respondent: Scott Shevenell, Esquire
Department of Corrections
2601 Blairstone Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioner on the basis of her sex, by sexual harassment, in violation of Subsection 760.10(1) and/or (2), Florida Statutes (2008).[1]

PRELIMINARY STATEMENT

On or about October 5, 2008, Sherri M. Akers (Petitioner), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), alleging that the Florida Department of Corrections (Respondent or DOC), discriminated against her on the basis of sex and for retaliation. Specifically, Petitioner alleged she was discriminated against by being subjected to a hostile working environment in retaliation for complaining about a series of alleged sexual harassment incidents.

The allegations of discrimination were investigated by FCHR. On March 25, 2009, FCHR issued its Determination, finding "No Cause." On April 13, 2009, Petitioner filed a Petition for Relief. The Petition was forwarded to DOAH for a formal, de novo hearing. This matter was set for hearing and discovery ensued. The date of the hearing was continued once at the request of the parties. An Order was entered allowing two witnesses to appear by telephone.

At the hearing and contrary to clearly established laws, FCHR did not make arrangements to preserve the testimony at the final hearing, either by sending a court reporter or a recording device with someone to operate it. See § 120.57(1)(g), Fla. Stat.; Fla. Admin. Code R. 28-106.214. The parties were informed of the FCHR's policy to not provide an official means

of preserving the testimony at the final hearing. Neither party hired a court reporter to preserve the hearing. All parties consented to proceed with the hearing with the record being preserved by the court room recording system. At the conclusion of the hearing, the recording was downloaded to a compact disc and is attached as a part of the record in this matter.

During the hearing, Petitioner testified in her own behalf and entered one composite exhibit (consisting of Petitioner's job application; personal e-mails, and Respondent's Office of Inspector General's Sustained Investigative Report) into evidence. Respondent presented the testimony of two witnesses, Adro Johnson and Leanne Hodges. Respondent entered three exhibits into evidence.

Following the hearing, both parties timely filed a Proposed Finding of Fact.

FINDINGS OF FACT

1. Petitioner is an adult female, and as such, is a member of a protected class.

2. Respondent is an agency of the State of Florida charged with the duty to protect the public through the incarceration and supervision of offenders and to rehabilitate offenders, pursuant to Section 20.315, Florida Statutes.

3. In August 2007, Petitioner applied for a job as a correctional officer with the Florida Department of Corrections

through the Charlotte Correctional Institution (the Facility) located in Punta Gorda, Florida. Petitioner's contact person during the application process was Recruitment Sergeant Dennis Britton.

4. Petitioner was initially interviewed by Sergeant Britton. At the conclusion of the interview, Petitioner was about to leave when Britton grabbed her by the shoulder, pulled her to him and bent down to her face in a kissing position. Petitioner put her hands on his chest, pushed him away and left.

5. On other occasions during the interview process, specifically on August 21, 2007, and October 1, 2007, Briton coerced Petitioner to come into his office at the Facility and proceeded to physically and sexually assault Petitioner. Britton would grope, grab, and forcibly kiss Petitioner against her will.

6. Throughout the recruitment process, both Britton and Petitioner exchanged e-mails of a professional and personal nature.

7. On or about September 10, 2007, Warden Adro Johnson approved Petitioner for employment with the DOC. Warden Johnson, not Sergeant Britton, made the hiring decisions at Charlotte Correctional Institution.

8. November 30, 2007, was Petitioner's first day of employment at the Facility. On November 30, 2007, Petitioner

was again compelled to appear at Britton's office where he proceeded to physically and sexually assault Petitioner. Britton groped, grabbed, and forcibly kissed Petitioner against her will.

9. On several other occasions between November 2007 and March 2008, Britton would summon Petitioner to his office and proceed to make sexual advances on her against her will.

10. In December 2007, Petitioner completed New Employee Orientation. A component of the New Employee Orientation is training with regard to Respondent's Equal Employment Opportunity Policy and, specifically, the Sexual Harassment policy. Petitioner completed the computer-assisted training on sexual harassment in December 2007. In addition, new employees are routinely provided with hard-copy pamphlets on sexual harassment. Respondent's sexual harassment policy is also posted at various locations at Charlotte Correctional Institution.

11. At no time during this period did Petitioner complain, verbally or in writing, to her supervisor or anyone else at the Facility.

12. On March 14, 2008, Petitioner started the correctional officer training academy at the Facility.

13. On March 17, 2008, Petitioner filled out an incident report stating she had been sexually harassed by Sergeant Dennis

Britton. The report was sent up the chain of command, and Warden Johnson immediately removed Sergeant Britton from his position as the recruitment sergeant and reassigned him to a position on the compound.

14. An investigation into the allegations was started on March 19, 2008, by Respondent's Office of the Inspector General. The investigation was led by Inspector Daryl J. McCasland of the Office of the Inspector General. The findings of the investigation were that Britton violated Section 784.03, Florida Statutes, and Florida Administrative Code Rule 33-208.033(22) (Conduct Unbecoming a Public Employee).

15. On April 9, 2008, while the investigation was still pending, Sergeant Britton submitted his resignation, effective May 1, 2008. Britton admitted to the accusations of sexual battery against Petitioner to the warden of the Facility.

16. Britton was removed from the Facility on or about April 9, 2008.

17. Petitioner testified that on at least five separate occasions between April 23, 2008, and May 23, 2008, Respondent allowed Britton to return into the Facility and granted Britton access into the restricted-access inner-compound where Petitioner worked so that he was able to continue to harass Petitioner. However, this testimony was uncorroborated and deemed unreliable.

18. At no time during Petitioner's employment did Sergeant Britton supervise Petitioner or work directly with her. He did not discipline her, set her schedule, or assign her duties. From November 30, 2007, until March 14, 2008, Petitioner worked inside the secure perimeter, while Britton worked as the recruitment sergeant outside the secure perimeter in the administration building at the Facility. Petitioner was in the academy beginning March 14, 2008, and Sergeant Britton had no supervisory or training responsibilities over officers in the training academy.

19. Petitioner was continually in the correctional officer academy from the time she filed her initial complaint on March 17, 2008, until Britton's resignation became effective on May 1, 2008. While in the academy, Petitioner was continually with other trainees and other instructors.

20. Sergeant Britton never made any additional sexual advances or had any conversation with Petitioner following her complaint on March 17, 2008.

21. Inspector Daryl McCasland substantiated the complaint against Sergeant Britton for battery, conduct unbecoming a public employee, and failure to follow written procedures. The inspector forwarded his results to the Office of the State Attorney in Punta Gorda which declined to prosecute.

22. Respondent acted in a prompt and reasonable manner to stop the harassment and address it once it was known. Petitioner failed to exercise reasonable care in the reporting of the harassment.

23. Petitioner presented no evidence on the issue of retaliation.

24. Petitioner presented no evidence of quantifiable damages. Her testimony was that she felt harassed and physically upset by the conduct of Britton and that she felt harassed and physically upset by her fellow officers after her complaint become known, but no proof of an adverse employment action was presented.

25. Given the lack of evidence to support Petitioner's allegations, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 760.11(6), 120.569, and 120.57, Fla. Stat. (2009).

27. Section 760.10, Florida Statutes, provides that:

> (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 race, color, religion, sex,

> national origin, age, handicap, or marital status.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

28. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); and Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

29. The Supreme Court of the United States established in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). See also Walker v. Prudential Property & Casualty Insurance, Co., 286 F.3d 1270 (11th Cir 2002); Standard v. A.B.E.L. Scvs., Inc., 161 F.3d 1318 (11th Cir. 1998) and Zappa v. Wal-Mart Stores, Inc., 1 F. Supp. 2d 1354, 1356 (M.D. Fla. 1998).

30. Under the McDonnell Douglas analysis, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. Once this non-discriminatory reason is offered by Respondent, the burden of production then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519. Additionally, "[d]efendant's burden is exceedingly light" and is merely one of production, not proof. Perryman v. Johnson Products, Co., 698 F.2d 1138, 1143 (11th Cir. 1983).

31. In Hicks, the Court stressed that even if the fact-finder does not believe the proffered reason given by the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id. See also Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

32. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption." King v. La Playa-De Varadero

Restaurant, Case No. 02-2502 (DOAH February 19, 2003) (adopted, in toto, Final Order July 3, 2003), 2003 WL 435084.

33. However, "[d]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997). Importantly, proof that, in essence, amounts to no more than mere speculation and self-serving belief on the part of the complainant concerning the motives of Respondent is insufficient, standing alone, to establish a prima facie case of intentional discrimination. See Lizardo v. Denny's Inc., 270 F.3d 94, 104 (2d Cir. 2001) ("The record is barren of any direct evidence of racial animus. Of course, direct evidence of discrimination is not necessary. . . . However, a [fact-finder] cannot infer discrimination from thin air. Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.") (citations omitted); Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991)("Little points to his own subjective belief that age motivated Boyd. An age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value.");

Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983) ("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief."); Umansky v. Masterpiece International Ltd., No. 96-Civ. 2367, 1998 U.S. Dist. LEXIS 11775, 1998 WL 433779 (S.D. N.Y. 1998) ("Plaintiff proffers no support for her allegations of race and gender discrimination other than her own speculations and assumptions. The Court finds that plaintiff cannot demonstrate that she was discharged in circumstances giving rise to an inference of discrimination, and, therefore, has failed to make out a prima facie case of race or gender discrimination.")

34. In order to establish a prima facie case of discrimination, Petitioner must demonstrate that:

a. Petitioner is a member of a protected class;

b. Petitioner is qualified for the position;

c. Petitioner was subject to an adverse employment decision; and,

d. Petitioner was treated less favorably than similarly situated persons outside the protected class.

Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Smith v. Georgia,

684 F.2d 729 (11th Cir. 1982); and Lee v. Russell County School Board, 684 F.2d 769 (11th Cir. 1982).

35. In this case, Petitioner has alleged that Respondent unlawfully discriminated against her on the basis of her sex and in retaliation for her complaint of sexual harassment perpetrated by Sergeant Britton.

36. As an adult female, Petitioner is a member of a protected class. Petitioner was qualified for the position of candidate to be a corrections officer and was admitted to the Corrections Officer Academy. However, the evidence did not demonstrate that she suffered an adverse employment action. No evidence was offered whether she completed the academy or not, whether she continued or continues her employment with Respondent in the same or a different position, or if she resigned, that her resignation constituted a constructive discharge of Petitioner.

37. Petitioner's hearsay evidence does not fall into any of the hearsay exceptions found in Section 90.803, Florida Statutes. Under Subsection 120.57(1)(c), Florida Statutes, this hearsay evidence is not sufficient in itself to support findings of fact. Department of Environmental Protection v. Department of Management Services, Division of Administrative Hearings, 667 So. 2d 369, 370 (Fla. 1st DCA 1995); Department of Administration, Division of Retirement v. Porter, 591 So. 2d

1108 (Fla. 2d DCA 1992); Harris v. Game and Fresh Water Fish Commission, 495 So. 2d 806, 809 (Fla. 1st DCA 1986). Without the hearsay evidence, Petitioner's evidence did not prove that Respondent's articulated reasons for the handling of Petitioner's complaint were pretextual. In addition, Respondent's witnesses were credible.

38. In addition, there was no evidence offered by Petitioner to demonstrate that Petitioner was retaliated against after complaining of her sexual harassment by Sergeant Britton. Respondent acted immediately on Petitioner's complaint and transferred Britton out of administration and reassigned him to a position in the compound. Respondent promptly investigated her charges and did find evidence to support her allegations; Britton admitted to his misconduct and resigned. Respondent's investigation determined that Britton violated existing state laws and administrative rules. Petitioner was authorized to continue her instruction at the academy. Respondent was not legally required to do more.

39. Although Petitioner testified otherwise, there was no competent evidence that Respondent allowed Britton to return to the Facility and continue to harass Petitioner over a period of time. There was no credible evidence that an unlawful employment practice was directed against Petitioner by supervisory staff of Respondent after Petitioner reported the

sexual harassment charge on March 17, 2008, nor was it a pretext to hide an unlawful employment practice.

40. Petitioner's case was based on her speculation or belief that she was retaliated against after she reported Britton's misconduct. Such belief is insufficient to establish discrimination or retaliation.

41. There has been no evidence submitted by Petitioner of any quantifiable damages which Respondent has authority to levy in such cases. As the court determined in Laborers' International Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989), quantifiable damages can be authorized by an administrative agency. However, humiliation, pain and suffering, discomfort, and inconvenience are damages which are not quantifiable and may not be awarded through administrative procedures; see also Broward County v. LaRosa, 505 So. 2d 422 (Fla. 1987).

42. Based on the lack of evidence, Petitioner has not established a prima facie case of discrimination and the Petition for Relief should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issued a final order dismissing the Petition for Relief with prejudice.

DONE AND ENTERED this 1st day of December, 2009, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of December, 2009.

ENDNOTE

[1/] All statutory references are to Florida Statutes (2008), unless otherwise noted.

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.