

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JARROD RAPPAPORT,)
)
 Petitioner,)
)
 vs.) Case No. 10-1178
)
 CITY OF GAINESVILLE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on May 19, 2010, by video teleconference with sites in Gainesville and in Tallahassee, Florida.

APPEARANCES

For Petitioner: Jarrod Rappaport, pro se
402 Northwest 48th Boulevard
Gainesville, Florida 32607

For Respondent: Daniel M. Nee, Esquire
City of Gainesville
200 East University Avenue, Suite 425
Gainesville, Florida 32601-5456

STATEMENT OF THE ISSUE

The issue presented is whether Respondent City of Gainesville committed an unlawful employment practice when it terminated Petitioner's employment.

PRELIMINARY STATEMENT

On or after September 4, 2009, Petitioner Jarrod Rappaport filed an employment complaint of discrimination with the Florida Commission on Human Relations alleging that Respondent City of Gainesville had discriminated against him based upon his race. In that complaint form, he identified September 17, 2008, the date on which he was fired, as the date on which the most recent discrimination against him took place. On February 5, 2010, the Commission determined that there was no reasonable cause to believe that an unlawful employment practice occurred.

Petitioner then filed with the Commission a Petition for Relief, which expanded his claim by alleging that the discrimination was based upon both his race and his sex. This cause was transferred to the Division of Administrative Hearings on March 10, 2010, for an evidentiary hearing.

Petitioner testified on his own behalf, and the City presented the testimony of Felicia Stallworth, Sergeant John Lance Yarbrough, Sergeant Jorge Campos, and Lynne McClary. Additionally, Joint Exhibit numbered 1 and the City's Exhibits numbered 1-6 were admitted in evidence.

The Transcript of the final hearing was filed on June 11, 2010. Although both parties were afforded the opportunity to file proposed recommended orders, only the City did so. Those

documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a white male.

2. Petitioner's employment as a police officer was terminated by Respondent City of Gainesville on September 17, 2008.

3. On the evening of June 26, 2008, Petitioner was voluntarily working an extra duty assignment at the Super Wal-Mart store on Northeast 12th Avenue in Gainesville. Wal-Mart had been experiencing problems with juveniles entering the store in large groups and causing disturbances and property damage.

4. At approximately 11:15 p.m., Ms. Felicia Stallworth, a black female, pulled into a handicapped-parking space and hung her handicapped-parking decal from her rear-view mirror. She was accompanied by two children: her twelve-year-old son and her seven-year-old niece. At the time, Petitioner, who was in uniform and wearing his badge, was engaged in conversation with the occupants of a vehicle parked in another handicapped-parking space.

5. Stallworth and the children exited her vehicle and began walking to the store's entrance. Because Stallworth was talking on her cell phone while she was walking, she heard

Petitioner say something but did not know what he said. She stopped walking and asked him what he wanted.

6. Petitioner rudely and loudly demanded to see her documentation to prove she was entitled to park in a handicapped-parking space. Stallworth complied by walking back to her vehicle, sitting in the driver's seat with the driver's door open, and retrieving her handicapped-parking registration from her glove compartment.

7. While she was doing so, Petitioner, who was standing just outside the car door, was shining a flashlight into her car so that it was shining in her face. She told him several times to move the flashlight because she could not see, but he ignored her and continued to shine it in the same manner.

8. Concerned for the safety of the children who were standing at the back of the car on the passenger side, she instructed the children to get back in the car so as to be out of the path of passing vehicles. Petitioner rudely and loudly told them to stand in front of the car instead. The children complied.

9. Stallworth retrieved the registration and handed it to Petitioner. She also handed him her placard. She then attempted to get out of the car so she could put her purse on the hood of the car so she could find her driver's license.

10. As she stood up, Petitioner crossed his arms in front of his chest in a blocking motion and, using them, shoved her forcefully against her car and then down into the driver's seat. Her glasses were knocked askew, and the side of her face and earlobe began to burn, likely from being scraped against the doorframe.

11. After she was shoved back into her car, Stallworth was able to find her driver's license in her purse, and she handed it to Petitioner. When Petitioner finished examining her placard, her placard registration, and her driver's license, he handed the documents back to Stallworth and told her to have a nice day.

12. Petitioner walked to the door of the store, turned and looked at Stallworth, and stood there, apparently laughing at her. Some of the numerous witnesses to this encounter between Petitioner and Stallworth came up to her, inquired as to how she was, and walked into the store with her.

13. Petitioner followed Stallworth while she was in the store. When Stallworth left the store, she saw Petitioner walk behind her car, write down her license tag, and then get into his vehicle. Stallworth thought he was "running her tag" and became afraid of what he might do to her next.

14. She called a relative who worked for the Alachua County Sheriff's Office and asked that person to come to Wal-

Mart and watch her leave. After calling, she went back into the Wal-Mart to wait. When she came out again, she and Petitioner did not interact.

15. Before Petitioner shoved her against and then into her vehicle, Stallworth had made no threatening remark or gesture that would cause Petitioner to have any concern for his safety.

16. After Stallworth returned to her home, her back started hurting, and her face and earlobe still burned. She telephoned the City of Gainesville Police Department and complained about Petitioner's unacceptable treatment of her.

17. The complaint was forwarded to Sergeant Lance Yarbrough, the Sergeant on the midnight shift. At 1:45 a.m., when he had "cleared" the matter he was working on, he called Stallworth. She described what had happened, including Petitioner's demeanor and her injuries. She told Yarbrough she had obtained the names and telephone numbers of some of the witnesses who had seen the entire encounter.

18. After attending to some additional duties, Yarbrough arrived at the Wal-Mart at 3:00 a.m. to talk to Petitioner about his use of force on a disabled person. Petitioner's version of what had happened essentially matched Stallworth's, including admitting he had "pinned" her to her vehicle. By the end of their conversation, Petitioner had become confrontational about defending what he had done and demanded of Yarbrough, "Do you

have a problem with that?" Yarbrough answered Petitioner in the affirmative.

19. Yarbrough tried to obtain a copy of Wal-Mart's video surveillance tape, but a copy of the tape could not be made by Wal-Mart employees at that hour.

20. After he left Petitioner, Yarbrough, a white male, completed an Administrative Investigation Referral Form regarding Petitioner's treatment of Stallworth, which he considered a violation of the City's Policies and Procedures Number 19, Rule 19. That Form is, essentially, a referral to the police department's internal affairs office. He filed that form on June 27, 2008, in his name and in Stallworth's name. Stallworth filed her own form on that same date.

21. Wal-Mart has a policy of releasing copies of its video surveillance tapes only to law enforcement officers conducting official business. Internal Affairs investigator Sergeant Jorge Campos, a white male, contacted Wal-Mart and arranged to obtain a copy of the video of Wal-Mart's parking lot showing Petitioner's encounter with Stallworth.

22. When he later called Wal-Mart to make sure the copy was ready, he was told that another police officer had come to pick it up, and the copy had been given to him. Campos requested an additional copy and when he went there to pick up that copy, the Wal-Mart loss prevention employees showed Campos

the video and also a video of Petitioner picking up the copy of the video that had been made for Campos. Since Petitioner had come there in a police car and in uniform, they had assumed that Petitioner was obtaining the copy of the video for official purposes.

23. In fact, Petitioner never reported to the police department that he was conducting an investigation and that he had obtained evidence of his encounter with Stallworth. Further, he never turned over to the police department his copy of the video so it could be preserved as evidence in the evidence room, as required by department policy. Petitioner did not obtain the video for law enforcement purposes, therefore, but rather for personal purposes.

24. Campos watched the copy of the surveillance video he had obtained from Wal-Mart in conjunction with his investigation. He also interviewed and obtained sworn statements from Yarbrough, from Stallworth, and from all of the identified witnesses who were willing to speak with him about what they saw.

25. During the course of the internal affairs investigation, it was discovered that Petitioner had also repeatedly contacted Stallworth's personal physician, allegedly in his capacity as a police officer, to ascertain what Stallworth's disability was that would have made her eligible

for a handicapped placard. Eventually, Petitioner did speak with a doctor in that office who disclosed Stallworth's disability.

26. Campos attempted to interview Petitioner, but Petitioner called in sick and did not appear for the scheduled appointment. Campos' further attempts to interview Petitioner were unsuccessful.

27. At the conclusion of his investigation, Campos prepared his report and consulted with the Chief of Police as to an appropriate disposition of the matter. It was concluded that Petitioner had violated Rule 19 regarding his encounter with Stallworth by his (1) excessive use of force, (2) obtaining a video recording under the color of a law enforcement officer for personal use, and (3) obtaining medical information under the color of a law enforcement officer without proper legal service. It was determined that Petitioner's employment should be terminated.

28. Policy 19, Rule 19 prohibits "[i]mmoral, unlawful, or improper conduct or indecency, whether on or off the job[,] which would tend to affect the employee's relationship to his/her job, fellow workers' reputations or goodwill in the community." The range of penalties for the first offense is from instruction plus 5 days' suspension up through dismissal, and for the second offense is dismissal.

29. Petitioner exercised his right to file a grievance regarding his termination and participated in a multi-level grievance process within the City. His grievance was unsuccessful, and he was terminated from his employment as a police officer.

30. At no time during Petitioner's conversation with Sergeant Yarbrough, during the internal affairs investigation, or during the City's grievance process did Petitioner raise any allegation of disparate or discriminatory treatment of him by the City due to his race or his sex.

31. Sergeants Yarbrough and Campos are, like Petitioner, white males.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569, 120.57(1), and 760.11(6), Fla. Stat.

33. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the bases, inter alia, of race or sex. Petitioner asserts that he was discriminated against by the City when he was terminated for these reasons. Petitioner has failed to present any evidence in support of his allegations.

34. Petitioner bears the burden of proof established by the Supreme Court of the United States in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and in Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981). Under this well-settled case law, Petitioner bears the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. If a prima facie case is established, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory reason for the employment action. The employee then has the burden of showing that the business reason is pretextual and that a discriminatory reason more likely than not motivated the decision.

35. In order to establish a prima facie case, Petitioner must prove that (1) he is a member of a protected class, (2) he was qualified for his position, (3) he suffered an adverse employment action, and (4) he was treated less favorably than similarly-situated employees who were not members of his protected class. Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997). Petitioner has failed to do so.

36. Petitioner argues that if he were a black female, he would not have been fired. His argument is premised upon his allegation in this proceeding that he was discriminated against based upon his race and/or sex. However, only Petitioner's

allegation of discrimination based upon his race can be resolved in this proceeding.

37. Petitioner's allegation of discrimination based upon his sex has not been timely raised. Petitioner was terminated from his employment on September 17, 2008, and he did not raise the allegation of discrimination based upon his sex until March 2010. Therefore, Petitioner did not timely raise that allegation before the Commission within the 365-day limitation of Section 760.11(1), Florida Statutes.

38. Petitioner's failure to raise that issue before the Commission prevented the Commission from considering that issue before it issued its Determination: No Cause, which determination represents the "proposed final agency action" herein, pursuant to Chapter 120, Florida Statutes. Accordingly, neither the Commission nor the Division has jurisdiction over Petitioner's allegation of sexual discrimination. See Ward v. Fla. Dep't of Juvenile Justice, 212 F. Supp. 2d 1349 (N.D. Fla. 2002); Cox v. Univ. of Fla., DOAH Case No. 03-4672 (RO: June 15, 2008; FO: Dec. 2, 2008); Young v. Dep't of Bus. and Prof. Reg., DOAH Case No. 03-1140 (RO: July 1, 2003; FO: Feb. 26, 2004); Luke v. Pic 'N' Save Drug Co., Inc., DOAH Case No. 94-0294 (RO: Aug. 25, 1994; FO: Dec. 8, 1995); Austin v. Fla. Power Corp., DOAH Case No. 90-5137 (RO: June 20, 1991; FO: Oct. 30, 1991).

39. As to his claim that he was treated unfairly due to his race, Petitioner has failed to establish even a prima facie case of discrimination by failing to prove the fourth element of the analysis. Petitioner offered no evidence in support of his claim. He assumes that because Stallworth is black, the witnesses to the incident that were willing to give statements concerning what they observed were black, and the Wal-Mart is located in an African-American community according to Petitioner, then, the City only fired him to appease the black community. No evidence was offered, however, as to the race of those persons making the decision to terminate him to suggest any foundation for Petitioner's assumption, and the two Sergeants who investigated Petitioner's treatment of Stallworth are white.

40. Assuming arguendo that Petitioner had established a prima facie case, which he has not, his claim still fails because the City has articulated a legitimate, non-discriminatory reason for its actions, and Petitioner has failed to meet his burden of showing that the reason the City gave is a pretext for discrimination.

41. The evidence is convincing that Petitioner violated the City's personnel policies three times regarding his mistreatment of Stallworth, who was compliant with his rude orders and who was legally entitled to park where she had

parked. First, Petitioner's excessive use of force in shoving a handicapped person against and then into her vehicle for trying to stand up is unwarranted and inexplicable. Second, his obtaining of the video by pretending to be doing so in his official capacity by appearing in full uniform and in his patrol vehicle when he was obtaining it for his personal use is contrary to the honesty expected of a law enforcement officer. Third, his obtaining medical information by pretending to be doing so in his official capacity indicates that he intended retribution against Stallworth who had parked legally and then had complained to the City about Petitioner's treatment of her.

42. Each of Petitioner's three improper acts was witnessed by and/or became known to numerous citizens who could expectedly view Petitioner as a dishonest police officer and, perhaps, one who might be physically dangerous to the public. Each of these three acts alone was sufficient to warrant dismissal.

43. Petitioner in his presentation at final hearing maintained that his actions were justified and proper. The primary thrust of his presentation was to attempt to show that the City had not properly conducted its investigation, allegedly violating Petitioner's rights under Sections 112.532 and/or 112.533, Florida Statutes. No evidence was offered, however, that any alleged deficiency was racially-motivated.

44. In summary, this record is devoid of any evidence that anyone made a negative comment, in writing or verbally, about Petitioner's race. This record is devoid of any evidence that any decision-maker made any decision regarding Petitioner's employment with consideration of his race. This record is devoid of any evidence indicating that Petitioner was treated differently than any similarly-situated person of a different race.

45. An employer may terminate an employee for a good reason, for a bad reason, for a reason based upon erroneous information, or for no reason at all, as long as the termination is not based upon a discriminatory reason. See Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991), and the cases cited therein. The City has articulated a good reason for Petitioner's termination, and Petitioner has not shown by any direct evidence, statistical evidence, or even circumstantial evidence, that the reason was pretextual or discriminatory.

46. In its proposed recommended order, the City includes a request for attorney's fees, arguing that Petitioner's claim is frivolous, unreasonable, and without foundation in law or fact. The City relies upon a federal civil action and a cite to a non-existent section in Chapter 760, Florida Statutes. Section 760.11(5), Florida Statutes, authorizes a court to award attorney's fees in a civil action and does not, therefore, apply

to this administrative proceeding. Section 760.11(6) does apply to administrative proceedings but only those in which the Florida Commission on Human Relations has determined there is reasonable cause to believe that a discriminatory practice has occurred; it does not, therefore, apply to this proceeding.

47. Section 760.11(7), Florida Statutes, does apply to administrative proceedings in which the Commission has preliminarily determined that there is not reasonable cause to believe that a discriminatory practice has occurred, as in the case at bar. That Section, however, does not authorize an administrative law judge to award attorney's fees. Rather, it provides that the Commission has discretion to award attorney's fees to a prevailing party, apparently in conjunction with its final order authority in this type of proceeding.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that Petitioner failed to meet his burden of proof and dismissing the Petition for Relief filed in this cause.

DONE AND ENTERED this 16th day of July, 2010, in
Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2010.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Daniel M. Nee, Esquire
City of Gainesville
200 East University Avenue, Suite 425
Gainesville, Florida 32601-5456

Jarrold Rappaport
402 Northwest 48th Boulevard
Gainesville, Florida 32607

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.