STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VERNELL KING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-4818
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes, before Edward T. Bauer, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on April 11, 13, and 19, 2011, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Vernell King, pro se
Post Office Box 705
West Palm Beach, Florida 33402

For Respondent: Jill Bennett, Esquire
Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUES

Whether Respondent committed the unlawful employment practices alleged in the Charge of Discrimination filed with the

Florida Commission on Human Relations ("FCHR") and, if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On January 4, 2010, Petitioner filed a Charge of Discrimination ("complaint") with the FCHR, which alleged that Respondent had discriminated and/or retaliated against her on the basis of her race, color, gender, religion, age, and marital status. In particular, the complaint reads:

> The Florida Department of Corrections has unfairly disciplined me, denied me training and promotional opportunities which it has afforded to others outside my protected class, and has subjected me to harassment due to my race (black), color (dark-skinned), sex (female), age (over 40), religion, marital status (single) and in retaliation for complaining of discrimination and harassment. My discrimination and harassment complaints have been ignored.
>
> I have been denied the opportunity to bring my medication while allowing other white male staff under the age of 40 to bring their medication.
>
> I was denied my religious right of reading and bringing the Bible during my lunch and other breaks.
>
> I have been subjected to explicit sexist and offense racial comments as well as language and gestures of a sexual nature by Warden Shannon, and by Supervisors McPherson[,] Brinson[,] and Carrigan, such as "all blacks from the city of Pahokee look like monkeys and tribesmen with their braids in their hair from Africa," stated by Carrigan. During a Christmas party in 2008, Carrigan

> made sexual gestures to female Sergeant Thornton using his tongue and said he wanted to "crack and eat a young girl's nut" in the present of Officers Wellington, and Parker. Such language is prevalent in my work environment.
>
> I was subjected to harassing comments relating to my marital status (single).

On June 15, 2010, following the completion of its investigation of the complaint, the FCHR issued a Notice of Determination: Cause. Petitioner elected to pursue administrative remedies, timely filing a Petition for Relief with the FCHR on July 2, 2010. Subsequently, on July 6, 2010, the FCHR referred the matter to DOAH for further proceedings.

As noted above, the final hearing in this matter was held before the undersigned on April 11, 13, and 19, 2011. During the final hearing, Petitioner testified on her own behalf and presented the testimony of Tiffany Fields, a personnel services specialist with the Florida Department of Corrections; Everett McPherson, a classification supervisor employed at Glades Correctional Institution ("Glades C.I."); and Robert Shannon, warden of Glades C.I. Petitioner's exhibits 1-12 were offered and received into evidence. Respondent introduced 31 exhibits into evidence, numbered 1-31, and presented the testimony of Everett McPherson and Robert Shannon. Following the final hearing and with the undersigned's consent, Petitioner filed an

additional exhibit, which has been accepted as Petitioner's Exhibit 13.

The Transcript of the first two days of the final hearing was filed with DOAH on May 5, 2011, and the remainder of the Transcript was filed on May 31, 2011.

On June 10, 2011, Respondent filed a "Motion for Extension of Time to File Proposed Recommended Order," which the undersigned granted and extended the deadline to June 24, 2011. Thereafter, Respondent timely submitted a Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Petitioner did not file a proposed recommended order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2010 Florida Statutes.

FINDINGS OF FACT

A. Background

1. From 2006 through May 3, 2010, Petitioner was employed by Respondent as a classification officer at Glades C.I.[1]

2. At all times material to this proceeding, Robert Shannon served as the warden at Glades C.I. and was responsible for the daily operation of the facility.

3. Petitioner's immediate superior, Everett McPherson, supervised Petitioner, several other classification officers, and three senior classification officers.

4. Petitioner contends that during her term of employment with Respondent, one of the senior classification officers (Barry Carrigan) and another co-worker (Janet Smith) subjected her to a hostile work environment. In addition, Petitioner alleges that she was subjected to a variety of discrete acts of discrimination, which include: a search of her person in May 2009; a written reprimand in June 2009; a delayed transfer to the work camp facility located at Glades C.I.; a belated performance evaluation from her supervisor; delayed training opportunities; and a prohibition against bringing her bible into the facility. Beginning with Petitioner's hostile environment claim, each allegation is discussed separately below.

B. Improper Comments / E-Mails

5. On December 23, 2008, various Glades C.I. employees—— including Petitioner and Mr. Carrigan——attended a Christmas luncheon on the grounds of the facility. During the event, Mr. Carrigan remarked to the other attendees (but not to Petitioner in particular) that all African-Americans from the city of Pahokee look like "monkeys" and African "tribesmen." In addition, Mr. Carrigan opined, in essence, that women are inferior to men.[2]

6. Understandably offended, Petitioner reported the remarks the next day by filing an anonymous complaint with

Warden Shannon. An investigation ensued, at the conclusion of which Warden Shannon suspended Mr. Carrigan for ten days.[3]

7. Subsequently, in May 2009, Petitioner discovered copies of two e-mails on the floor of her office, which were sent by a co-worker, Janet Smith (on Ms. Smith's work e-mail account), to another employee, Tricinia Washington. In the e-mails, Ms. Smith called Ms. Jackson "Blackee," and referred to Petitioner as a "monkey and idiot."

8. Upset by the contents of the e-mails, Petitioner timely reported the contents of the e-mails to Warden Shannon. At the conclusion of an investigation into the matter, Ms. Smith was suspended for five days.

C. Search of Petitioner

9. On or about May 15, 2009, Mr. McPherson observed Petitioner exiting the prison facility carrying a bulky package that he thought was suspicious. In compliance with Respondent's entry and exit procedure, Mr. McPherson notified the prison control room with the expectation that a search of Petitioner's person would occur. A search of Petitioner was subsequently conducted, which yielded no contraband or other improper items.[4]

10. During the final hearing, Warden Shannon credibly testified that because of unique problems regarding contraband at Glades C.I., facility employees are subject to search upon exit from the facility. As such, Mr. McPherson committed no

violation of policy by reporting what he observed Petitioner carrying as she left the facility.

D. Reprimand

11. On June 24, 2009, Warden Shannon disciplined Respondent by issuing a written reprimand. Warden Shannon credibly testified——and there is no evidence to the contrary—— that the reprimand was prompted by an incident in May 2009 in which Petitioner, in a loud and aggressive voice, called a co-worker "low down and dirty" in the presence of other employees.

12. As a result of the written reprimand, Department of Corrections Procedure 605.011 rendered Petitioner ineligible for promotion for a six-month period. Accordingly, Petitioner could not apply for an assistant warden position during the summer of 2009 that she was interested in pursuing.

13. However, Petitioner failed to prove that the reprimand was unwarranted or issued with the intent to deprive Petitioner of a promotional opportunity. In addition, there is no evidence that Warden Shannon issued the reprimand based upon a protected characteristic of Petitioner or in retaliation for five discrimination complaints Petitioner filed through Respondent's internal complaint procedure approximately one month before the reprimand.[5]

E. Late Performance Evaluation

14. As indicated previously, Everett McPherson served as Petitioner's immediate supervisor during her term of employment. As a classification officer supervisor, Mr. McPherson was responsible for preparing annual performance evaluations of his subordinates, including Petitioner, by the end of each April.

15. The evidence is undisputed that Mr. McPherson failed to timely complete Petitioner's evaluation, a copy of which was not provided to her until June 2009. While Mr. McPherson attempted during his final hearing testimony to attribute the delay to Petitioner, he was unable to recall on cross-examination if he had even completed a draft of Petitioner's evaluation by April 30, 2009. Accordingly, it is determined Mr. McPherson was responsible, at least in part, for the late completion of Petitioner's evaluation.[6]

16. Although Petitioner asserts that the belated performance evaluation deprived her of the opportunity to apply for an assistant warden position, the evidence refutes this contention. First, as discussed above, Petitioner's June 24, 2009, reprimand rendered her ineligible for promotion for six months. Further, even if Petitioner's reprimand did not temporarily disqualify her from seeking a promotion, Warden Shannon credibly testified that pursuant to Department of Corrections Procedure 605.011, Petitioner could have timely

submitted a promotional packet once her evaluation was completed.

F. Training Opportunities

17. During the final hearing, Petitioner testified that she was unable to obtain re-training to conduct criminal background checks because Mr. McPherson refused to provide her with a computer "code" necessary to complete an on-line course. Petitioner further testified that she filed a grievance regarding the matter that resulted in the training being conducted within one month.

18. Although the undersigned credits Petitioner's testimony as to particular claim, she adduced no evidence concerning when this event occurred, nor did she prove that the delay adversely affected her ability to complete her duties or impeded her ability to seek promotion. In addition, Petitioner failed to demonstrate that Mr. McPherson was motivated by any unlawful animus.

G. Transfer to Work Camp

19. At some point during June 2008 or earlier, Petitioner requested a lateral transfer from the main unit at Glades C.I. to the facility's work camp. Petitioner was ultimately transferred to the work camp shortly before her termination in May 2009.

20. Although Petitioner complains that she was not transferred to the work camp at an earlier date because of her gender, she adduced no evidence to support such an allegation. Further, Petitioner made no showing that the transfer to the work camp resulted in increased pay, benefits, or materially different responsibilities.

H. Allegations of Religious Discrimination

21. During all relevant times to this proceeding, Department of Corrections Procedure 602.016(4)(j)17 prohibited prison employees from bringing "recreational reading material (non-work related) such as books, magazines, newspapers, etc" into secure areas of corrections facilities.

22. There is no dispute that "recreational reading material" encompasses religious texts and that the policy therefore barred Petitioner from brining her Gideon Bible into the facility. However, Petitioner has wholly failed to demonstrate that the policy is improper on its face or was applied differently to any other prison employee.

CONCLUSIONS OF LAW

A. Jurisdiction

23. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

B. Introduction

24. The Florida Civil Rights Act of 1992 ("the FCRA") is codified in sections 760.01 through 760.11, Florida Statutes, and section 509.092, Florida Statutes.

25. "The [FCRA], as amended, was patterned after Title VII of the Civil Rights Acts of 1964 and 1991 . . . as well as the Age Discrimination in Employment Act . . . . Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases arising under [the FCRA]." Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000)("The [FCRA's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964"); Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009)("Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964 . . . we look to federal case law").

26. Among other things, the FCRA makes certain acts unlawful employment practices and gives the FCHR the authority—— if it finds following an administrative hearing conducted pursuant to sections 120.569 and 120.57, that such an unlawful employment practice has occurred——to issue an order "prohibiting the practice and providing affirmative relief from the effects

of the practice, including back pay." §§ 760.10 & 760.11(6), Fla. Stat.

27. To obtain such relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, within 365 days of the alleged violation, file a complaint containing a short and plain statement of the facts describing the violation and the relief sought with the FCHR, the EEOC, or "any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80." § 760.11(1), Fla. Stat. "[T]o prevent circumvention of [FCHR's] investigatory and conciliatory role, only those claims that are fairly encompassed within a [timely-filed complaint] can be the subject of [an administrative hearing conducted pursuant to Sections 120.569 and 120.57]" and any subsequent FCHR award of relief to the complainant. Chambers v. Am. Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994).

28. As noted above, Petitioner alleges that Respondent has violated the FCRA by: (1) permitting a hostile environment to subsist at Glades C.I.; (2) committing a variety of discrete acts of discrimination, such as searching her person in May 2009 as she left the facility, providing her with an untimely performance evaluation, and reprimanding her in June of 2009; (3) retaliating against her on the basis of her race, gender, or age, in response to various discrimination complaints she filed;

and (4) engaging in religious discrimination by prohibiting her from bringing a Bible inside the walls of the correctional facility. Each category of claims is discussed separately below.

C. Hostile Environment

29. The undersigned will begin by addressing Petitioner's hostile work environment claim, which can only be established upon proof that the "workplace [was] permeated with discriminatory intimidation, ridicule, and insult, that [was] sufficiently severe or pervasive to alter the conditions of [Petitioner's] employment and create an abusive working environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). Specifically, Petitioner must show: (1) that she belongs to a protected group; (2) has been subject to unwelcome harassment; (3) that the harassment must have been based on a protected characteristic of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for such environment under either a theory of vicarious or of direct liability. McCann v. Tillman, 526 F.3d 1370, 1378 (11th Cir. 2008); Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1276 (11th Cir. 2002); Williams v. W.G. Johnson & Son, Inc., 2010 U.S. Dist. LEXIS 139747, *7-8 (N.D. Fla. 2010).

30. It is undisputed that Petitioner is black and of African origin. Accordingly, Petitioner has established the first element of her hostile environment claim.

31. Petitioner has also satisfied the second and third prongs of the test outlined above, as the evidence demonstrates that on December 23, 2008, Mr. Carrigan made racially offensive statements——i.e., "all blacks from the city of Pahokee look like monkeys and tribesmen with their braids in their hair from Africa"——during a holiday gathering at Glades C.I. As discussed previously, Petitioner overheard these unwelcome remarks and was understandably offended. In addition, in May 2009, Petitioner discovered copies of two e-mails on the floor of her office, which were sent by her co-worker, Janet Smith (on her work e-mail account), to another employee, Tricinia Washington. In the e-mails, Ms. Smith called Ms. Jackson "Blackee," and referred to Petitioner as a "monkey and idiot." Aggrieved by the contents of the e-mails, Petitioner promptly reported the conduct to Warden Shannon.

32. In evaluating the proof sufficient to establish the fourth prong of a hostile work environment claim, the undersigned must examine both the subjective and objective severity of the harassment. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993). In assessing the objective severity of the harassment, it is necessary to consider, among other

factors, "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." Miller, 277 F.3d at 1275.

33. Petitioner's case falters at this juncture, as Mr. Carrigan's remark and Ms. Smith's e-mails, while no doubt insensitive and highly inappropriate, were isolated incidents and insufficiently severe from an objective viewpoint to establish an actionable claim.[7] See Herrera v. Lufkin Indus., Inc., 474 F.3d 675, 680 (10th Cir. 2007)("A plaintiff does not make a showing of a pervasive hostile work environment by demonstrating a few isolated incidents of racial enmity or sporadic racial slurs. Instead, there must be a steady barrage of opprobrious racial comments")(internal citations and quotations omitted); Edwards v. Wallace Cmty. Coll., 49 F.3d 1517, 1521 (11th Cir. 1995)("Racial slurs . . . spoken by co-workers ha[ve] to be so commonplace, overt and denigrating that they create[] an atmosphere charged with racial hostility") (internal quotation omitted). Indeed, conduct far more egregious than what occurred in the instant case has been held to be insufficiently severe or pervasive to establish a prima facie case. See Godoy v. Habersham Cnty., 211 Fed. Appx. 850, 853-54 (11th Cir. 2006)(summary judgment for defendant affirmed

where South-American plaintiff claimed he was subject to racial slurs "almost every shift," and that his supervisor battered him and told him "to go back to his boat and sail to South America where he belongs"); Barrow v. Georgia Pacific Corp., 144 Fed. Appx. 54, 57-58 (11th Cir. 2005)(affirming order granting defendant's motion for summary judgment in connection with hostile environment claim due to absence of severe or pervasive conduct, notwithstanding plaintiff's testimony: that he saw displays of the rebel flag on tool boxes and hard hats, the letters "KKK" on a bathroom wall and on a block-saw console, and a noose in another employee's locker; that a superintendent called him "nigger" three times in one year, repeatedly called him "boy," and told him two or three times that he was going to kick his "black ass"; and that his supervisor called him a "nigger" and told him if he looked at "that white girl" he would "cut" him); Buckhanon v. Huff & Assocs. Constr. Co., Inc., 506 F. Supp. 2d 958, 965-68 (M.D. Ala. 2007)(granting motion for summary judgment for defendant where alleged wrongdoing failed to establish that the harassment was sufficiently severe or pervasive; on two separate occasions, supervisor stated to plaintiffs, "niggers like him don’t know anything," and "[I'm] not going to put up with a bunch of niggers on [my] job site"); Lawrence v. Wal-Mart Stores, Inc., 236 F. Supp. 2d 1314, 1318-19, 1325 (M.D. Fla. 2002)(summary judgment for defendant

granted, notwithstanding evidence that manager made threats to an African-American plaintiff such as "I have that gun at home along with several more at home just like it to shoot blacks," while patting him on the back, and explaining during another occasion after plaintiff received positive feedback from upper management, "we don't like heroes . . . remember how we did blacks back in the thirties when they got out of hand . . . we would take them out back and lynch them"; plaintiff was also told he was a "Jesse Jackson type black guy" and referred to as "homeboy" and "boy" on several occasions); Daso v. The Grafton Sch., Inc., 181 F. Supp. 2d 485, 493-94 (D. Md. 2002)(holding plaintiff failed to establish a prima facie case of a hostile work environment, notwithstanding allegation that supervisor angrily yelled at plaintiff, "next time you all niggers lock the door, I'm going to write you up").

34. Assuming, arguendo, that the conduct at issue was sufficiently severe or pervasive, Petitioner's claim still fails because there is no basis for holding Respondent liable for the behavior of Mr. Carrigan and Ms. Smith in light of appropriate remedial action——a ten-day suspension for Mr. Carrigan and a five day suspension for Ms. Smith——taken by Respondent. See Breda v. Wolf Camera & Video, 222 F.3d 886, 889 (11th Cir. 2000)("Employer liability in a case involving . . . harassment by a co-worker exists when the employer knew (actual notice) or

should have known (constructive notice) of the harassment and failed to take remedial action")(emphasis added).

35. For these reasons, Petitioner has failed to establish that she was subjected to a hostile work environment.

D. Discrete Acts of Alleged Discrimination

36. The undersigned will now turn to Petitioner's contention that Respondent committed various, discrete acts of unlawful discrimination, such as the search of Petitioner's person in May 2009, Petitioner's untimely evaluation by Mr. McPherson, Petitioner's June 2009 reprimand, Petitioner's belated transfer to the Glades Work Camp, and the delay in providing Petitioner with training to conduct background checks.[8]

37. Section 760.10, Florida Statutes, provides, in relevant 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 race, color, religion, sex, national origin, age, handicap, or marital status.

38. Complainants alleging unlawful discrimination may prove their case using direct evidence of discriminatory intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference

or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "only the most blatant remarks, whose intent could be nothing other than to discriminate," satisfy this definition. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(internal quotations omitted). Often, such evidence is unavailable, and in this case, Petitioner presented none.

39. As an alternative to relying exclusively upon direct evidence, the law permits complainants to profit from an inference of discriminatory intent, if they can adduce sufficient circumstantial evidence of discriminatory animus, such as proof that the charged party treated persons outside of the protected class (who were otherwise similarly situated) more favorably than the complainant was treated. Such circumstantial evidence, when presented, constitutes a prima facie case.

40. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, Petitioner has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination, which requires proof that she (1) is a member of a protected class;

(2) was qualified for the position; (3) was subject to an adverse employment action; and (4) was replaced by someone outside the protected class, or, in the case of disparate treatment, shows that other similarly situated employees were treated more favorably. Alvarez v. Royal Atl. Developers, Inc., 610 F.3d 1253, 1264 (11th Cir. 2010); Ramsey v. Henderson, 286 F.3d 264, 268 (5th Cir. 2002).

41. Failure to establish a prima facie case of discrimination ends the inquiry. Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996). If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. Alvarez, 610 F.3d at 1264. This intermediate burden of production, not persuasion, is "exceedingly light." Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 516-518 (1993); Alvarez, 610 F.3d at 1264. Despite these shifts in the burden of production, "the ultimate burden of persuasion remains on the plaintiff to show that the defendant intentionally discriminated against her." Alvarez,

610 F.3d at 1264; Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir. 2004).

42. It is undisputed that Petitioner, as an unmarried African-American female over the age of 40, is a member of multiple protected classes. As such, Petitioner satisfied the first prong of a prima facie case of employment discrimination.

43. The second prong of the test has also been satisfied, as sufficient evidence was presented from which the undersigned can conclude that Petitioner possessed the basic skills necessary for the performance of the job. See Gregory v. Daly, 243 F.3d 687, 696 (2d Cir. 2001)(holding that a plaintiff "need only make the minimal showing that she possesses the basic skills necessary for performance of [the] job" to satisfy the requirement that the plaintiff was qualified for the position)(internal citations and quotations omitted).

44. Next, the undersigned must determine if any of incidents about which Petitioner complains rises to the level of adverse employment actions. Although an adverse action need not be an ultimate employment decision——e.g., termination, failure to hire, or demotion——it must meet a threshold level of substantiality. Grimsley v. Marshalls of MA, Inc., 284 Fed. Appx. 604, 608 (11th Cir. 2008); Byrne v. Ala. Alcoholic Beverage Control Bd., 635 F. Supp. 2d 1281, 1292 (M.D. Ala. 2009). Although evidence of direct economic consequences is not

always required, "to prove adverse employment action under Title VII's anti-discrimination clause, an employee must show a serious and material change in the terms, conditions, or privileges of employment." Grimsley, 284 Fed. Appx. at 608. Petitioner's "subjective perception of the seriousness of the change is not controlling; rather this issue is viewed objectively from the perspective of a reasonable person under the circumstances." Id.

45. With the foregoing authority in mind, nearly all of Petitioner's complaints——the delayed lateral transfer to the Glades Work Camp, the May 2009 search, Mr. McPherson's belated performance evaluation of Petitioner (which did not prevent Petitioner from applying for the assistant warden position), and the delay in providing background check training (which Petitioner failed to prove had any effect on her employment conditions or status)——do not meet the threshold level of substantiality. See Pagan v. Gonzalez, 2011 U.S. App. LEXIS 11866, *4 (3d Cir. 2011)("The District Court found that the denial of the training was not an adverse employment action because there was no evidence that the Appellant's work suffered or that her advancement or earning potential was affected. We agree with the District Court's conclusion"); Douglas v. Preston, 559 F.3d 549, 552 (D.C. Cir. 2009)(observing that a performance evaluation only constitutes an adverse employment

action where it adversely affects the employee's salary or chances for advancement); Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 928 (8th Cir. 2007)("An employer's denial of a training request, without something more, is not itself an adverse employment action"); Alvarado v. Texas Rangers, 492 F.3d 605, 612 (5th Cir. 2007)("It is well established that the denial of a purely lateral transfer is not an adverse employment action redressible under Title VII"); Amro v. Boeing Co., 232 F.3d 790, 795, 798 (10th Cir. 2000)(holding that employer's conduct in patting plaintiff down to search for a tape recorder and searching a folder that plaintiff was carrying did not constitute adverse employment actions); Hashemian v. Louisville Reg'l Airport Auth., 2010 U.S. Dist. LEXIS 76024, *11 (W.D. Ky. 2010)("Plaintiff alleges . . . that he was subjected to a dog search of his personal belongings because of his national origin in violation of Title VII. Defendants argue a search does not constitute an adverse employment action for purses of Title VII. The Court agrees with Defendants. As explained, an adverse employment action typically inflicts direct economic harm and involves a materially adverse change in the terms of employment"); Foster v. Tex. Health Sys., 2002 U.S. Dist. LEXIS 12081, *22-23 (N.D. Tex. 2002)(concluding that employer's search of plaintiff's locker did not constitute an adverse employment action).

46. However, the June 2009 reprimand constitutes an adverse employment action, as it rendered Petitioner ineligible for promotion for six months. See Atanus v. Perry, 520 F.3d 662, 675 (7th Cir. 2008)(observing that a reprimand that affects an employee's eligibility for promotion constitutes an adverse employment action); Breaux v. City of Garland, 205 F.3d 150, 157 (5th Cir. 2000)("Adverse employment actions are discharges, demotions, refusals to hire, refusals to promote, and reprimands")(emphasis added).

47. During her final hearing testimony, Petitioner clarified that her discrimination claim regarding the June 2009 reprimand is based on her protected status as a female. Accordingly, to satisfy the fourth element of a prima facie case, Petitioner was required to prove that one or more similarly situated male employees were treated differently. Petitioner wholly failed to meet her burden on this point, and as such, cannot establish a prima facie case. See Wierman v. Casey's Gen. Stores, 638 F.3d 984, 994 (8th Cir. 2011)(affirming order granting defendant's motion for summary judgment on plaintiff's Title VII claim where plaintiff failed to identify any similarly-situated individuals for comparison; "[Plaintiff] has not cited any evidence that similarly-situated store managers were accused of similar misconduct and were disciplined differently"); Lyons v. Metro. Gov't of Nashville, 2011 U.S.

App. LEXIS 5932, *14 (6th Cir. 2011)("Lyons does not identify any similarly-situated employee who was treated more favorably. We therefore affirm the district court's determination that Lyons failed to establish a prima facie case of gender discrimination"); Walton-Horton v. Hundai of Ala., 402 Fed. Appx. 405, 408 (11th Cir. 2010)("Here, Walton-Horton failed to identify any male comparators who engaged in conduct 'nearly identical' to that for which she was discharged . . . . Accordingly, because Walton-Horton failed to show any similarly situated male employee was treated more favorably, summary judgment was proper on this claim").

48. Even assuming Petitioner had established a prima facie case of gender discrimination in connection with her reprimand, Respondent has proffered a legitimate non-discriminatory reason for the action: Petitioner's reference to Ms. Robinson, a co-worker, as "low down and dirty" in the presence of Ms. Robinson and four other employees. In response, Petitioner has adduced no evidence to establish that the proffered reason was merely a pretext for discrimination. See Combs v. Plantation Patterns, 106 F.3d 1519, 1538 (11th Cir. 1997)(holding that a plaintiff must show "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence").

49. For these reasons, Petitioner has failed to prove that she is the victim of any discrete act of employment discrimination.

E. Retaliation Claim

50. The undersigned will now address Petitioner's retaliation claim, in which she alleges that Respondent subjected her to adverse employment actions in response to the discrimination complaints she filed.

51. Subsection 760.10(7), Florida Statutes, provides, in pertinent part:

> It is an unlawful employment practice for an employer . . . 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.

52. As there is no direct evidence to support Petitioner's claim, the undersigned must apply the specialized burden-shifting framework applicable to Title VII retaliation actions in analyzing her claim of retaliation under the FCRA. See Gant v. Kash N' Karry Food Stores, 390 Fed. Appx. 943, 944-45 (11th Cir. 2010). Pursuant to this framework, an employee must first establish a prima facie case of retaliation, which requires proof that Petitioner: (1) engaged in protected activity; (2) bore the brunt of a materially adverse employment action; and

(3) that the first two elements were casually linked to one another. Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008). If a prima facie case is shown, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions. Bryant v. Jones, 575 F.3d 1281, 1308 (11th Cir. 2009). If the employer articulates a legitimate, non-discriminatory reason, the burden of production shifts to the employee to offer evidence that the alleged reason of the employer is a pretext for illegal discrimination. Id.

53. Turning to the merits of her claim, Petitioner has satisfied the first element of a prima facie case, as the evidence is undisputed that she filed numerous discrimination complaints with Respondent during the relevant time period. Carrington v. City of Des Moines, 481 F.3d 1046, 1051 (8th Cir. 2007)("[C]arrington's numerous verbal and written complaints of discrimination are protected activity").

54. Moving on to the second prong, it is critical to note that the category of adverse actions sufficient to trigger Title VII's anti-retaliation provision is "not limited to discriminatory actions that affect the terms and conditions of employment." Ahern v. Shinseki, 629 F.3d 49, 55 (1st Cir. 2010)(quoting Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 64 (2006)). Unlike the substantive anti-discrimination provisions of Title VII, the anti-retaliation provision covers

all "employer actions that would have been materially adverse to a reasonable employee," defined as actions that are "harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." Burlington, 548 U.S. at 57; Johnson v. Cambridge Indus., Inc., 325 F.3d 892, 902 (7th Cir. 2003)(observing that in the context of retaliation claims, a "more generous standard" applies when analyzing adverse actions). This objective assessment "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

55. Even under this more lenient standard, of the incidents about which Petitioner complains (the June 2009 reprimand, the belated provision of background check training, the search of her person, the untimely performance evaluation, and the delay in approving her lateral move to the Glades Work Camp), only the reprimand——which rendered her ineligible for promotion for six months——constitutes an adverse employment action. See Leatherwood v. Anna's Linens Co., 384 Fed. Appx. 853, 858 (11th Cir. 2010)(holding that employer's reprimands of plaintiff constituted an adverse employment action for the purpose of satisfying a prima facie case of retaliation); Ahern v. Shinseki, 629 F.3d 49, 56 (1st Cir. 2010)(holding delay in providing training to plaintiff did not constitute an adverse

action in the retaliation context); Amro v. Boeing Co., 232 F.3d 790, 795, 799 (10th Cir. 2000)(holding that employer's conduct in patting plaintiff down to search for a tape recorder and searching a folder that plaintiff was carrying did not constitute adverse employment actions for the purpose of establishing a prima facie case of retaliation); Everroad v. Scott Truck Sys., 604 F.3d 471, 480 (7th Cir. 2010)(holding that even in the context of a retaliation claim, a purely lateral transfer does not constitute an adverse employment action); Roff v. Low Surgical & Med. Supply, Inc., 2004 U.S. Dist. LEXIS 30845, *18-19 (E.D.N.Y. 2004)(dismissing plaintiff's retaliation claim for failing to state a cause of action; "[P]laintiff's allegation that her vehicle and personal belongings were searched also does not constitute an adverse employment action").

56. To satisfy the third prong of a prima facie case of retaliation, Petitioner must demonstrate a causal connection between the protected activity and the adverse decision. This casual link element is construed broadly:

> [S]o that "a plaintiff merely has to prove that the protected activity and the . . . [adverse] action are not completely unrelated." Olmsted v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). "A plaintiff satisfies this element if she provides sufficient evidence" of knowledge of the protected expression and "that there was a close temporal proximity between this

> awareness and the adverse . . . action." Shotz, 344 F.3d at 1180 n.3 (quoting Farley v. Nationwide Mutual Ins. Co., 197 F.3d 1322, 1337). A "close temporal proximity" between the protected expression and an adverse action is sufficient circumstantial evidence of a causal connection for purposes of a prima facie case. See Olmsted, 141 F.3d at 1460. We have held that a period as much as one month between the protected expression and the adverse action is not too protracted.

Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004)(emphasis added); Donnellon v. Fruehauf Corp., 794 F.2d 598, 600-01 (11th Cir. 1986)(holding plaintiff established a prima facie case of retaliation where an adverse employment action was taken one month after plaintiff filed a sexual discrimination complaint; "The short period of time, however, between the filing of the discrimination complaint and the plaintiff's discharge belies any assertion by the defendant that the plaintiff failed to prove causation. The plaintiff carried her initial burden").

57. Returning to the facts at hand, the evidence demonstrates Petitioner was reprimanded on June 24, 2009, less than one month after she filed five discrimination complaints through Respondent's internal complaint procedure. Pursuant to the authority cited above, the close temporal proximity between Petitioner's filing of the complaints and the adverse action is sufficient to satisfy the casual connection element of a prima facie case.

58. As Petitioner has established a prima facie case of retaliation, the burden shifts to Respondent to articulate a legitimate, non-discriminatory reason for its actions. Bryant v. Jones, 575 F.3d 1281, 1307-08 (11th Cir. 2009). Respondent has met its burden, as Warden Shannon credibly testified that Petitioner was reprimanded due to disrespectful and inappropriate remarks Petitioner made to a co-worker, Ms. Robinson.

59. As Respondent has advanced a legitimate, non-discriminatory explanation for the reprimand, "the presumption of retaliation disappears, and [Petitioner] must demonstrate that [Respondent's] reason[] [is] a pretext for prohibited retaliatory conduct." Entrekin v. City of Panama City Fla., 376 Fed. Appx. 987, 997 (11th Cir. 2010)(internal quotations omitted). To meet this burden, Petitioner must demonstrate "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [Respondent's] proffered legitimate reason[] for its action that a reasonable factfinder could find [the reason] unworthy of credence." Id.

60. Petitioner has not demonstrated that Respondent's explanation for her reprimand is incoherent, contradictory, implausible, inconsistent, or defective in any other manner. As the undersigned finds Warden Shannon's explanation regarding the

reprimand wholly credible, Petitioner's retaliation claim fails. See id. at 997-98.

F. Religious Discrimination Claim

61. As described previously, Department of Corrections Procedure 602.016(4)(j)(17) prohibits employees from bringing "recreational reading material (non-work related) such as books, magazines, newspapers, etc" inside the secure perimeter of department institutions. Respondent does not dispute that this rule encompasses all non-work related reading materials, including religious texts. It is further undisputed that the rule has precluded Petitioner from bringing her Bible into her work areas, a situation which Petitioner claims rises to the level of religious discrimination.

62. In the context of the FCRA, which is interpreted in accordance with Title VII, a claim for religious discrimination can be asserted under two different theories: "disparate treatment" and "failure to accommodate." Peterson v. Hewlett-Packard Co., 358 F.3d 599, 603 (9th Cir. 2004). Although Petitioner has not specified which of the two alternatives she is relying upon, the undersigned will broadly construe her complaint of discrimination so as to consider her allegation under both theories.

63. To succeed under the theory of disparate treatment, Petitioner must show that Respondent treated her differently

than other employees because of her religious beliefs. Chalmers v. Tulon Co. of Richmond, 101 F.3d 1012, 1017 (4th Cir. 1996); Breech v. Ala. Power Co., 962 F. Supp. 1447, 1456 (S.D. Ala. 1997). However, Petitioner has adduced not a scintilla of evidence that would permit the undersigned to conclude that the Department policy was applied differently to her than any other prison employee. Accordingly, Petitioner is unable to establish a claim of religious discrimination under a disparate treatment theory.

64. Nor can Petitioner succeed under a theory of failure to accommodate, as there is no evidence that she failed to comply with the policy and was penalized by Respondent as a result. See Beadle v. City of Tampa, 42 F.3d 633, 636 n.4 (11th Cir. 1995)(holding that to establish a prima facie case of religious discrimination based upon a failure to accommodate, the plaintiff must show "(1) that he had a bona fide belief that compliance with a requirement of employment would be contrary to his religious belief or practice; (2) that he informed his employer about the conflict; and (3) that he was discharged or penalized for failing to comply with the conflicting employment requirement")(emphasis added); cf. EEOC v. Geo Group. Inc., 616 F.3d 265, 271-77 (3d Cir. 2010)(holding that prison dress code, which applied to all employees and had the effect of preventing

plaintiff from wearing Muslim religious attire to work, did not constitute religious discrimination pursuant to Title VII).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. Further, it is RECOMMENDED that the final order dismiss the Petition for Relief.

DONE AND ENTERED this 22nd day of July, 2011, in Tallahassee, Leon County, Florida.

Edward T. Bauer
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2011.

ENDNOTES

[1] Respondent's termination of Petitioner's employment is not at issue in this proceeding. See King v. Dep't of Corr., Case No.

10-4818 (Fla. DOAH Oct. 14, 2010)(Order on Respondent's Motion to Limit Issues).

[2] Although Petitioner further alleges that Mr. Carrigan made a comment during the Christmas gathering that he wanted to "crack and eat a young girl's nut," the undersigned finds, based upon the testimony of Mr. McPherson, that no such remark was made.

[3] Warden Shannon credibly testified that the ten-day suspension meted out to Mr. Carrigan, who had been discipline free for approximately fifteen years, was consistent with Respondent's progressive discipline policy.

[4] Although Mr. McPherson was aware at the time of the search that Petitioner had previously filed various complaints and grievances, the undersigned credits his testimony that the search was not conducted in retaliation for Petitioner's complaints.

[5] Petitioner also claims that Warden Shannon refused to approve her request to bring injectable prescription medication into the facility. The undersigned finds the contrary testimony of Warden Shannon to be more credible on this point.

[6] Petitioner successfully challenged the evaluation——which rated Petitioner at a level below expectations——on the basis of its untimeliness. As a result, the evaluation was amended to change Petitioner's rating to "meets expectations." However, there is no evidence that the delay in completing the evaluation was due to any protected classification or activity of Petitioner.

[7] Although Petitioner further testified that Mr. Carrigan made improper comments on other occasions, she failed to offer any specificity regarding the contents of the remarks, their context, or when they were made. It is well-settled that vague testimony of the sort offered by Petitioner is insufficient to sustain a hostile environment claim. See Easterly v. Dep't of the Army, 2010 U.S. Dist. LEXIS 26725 (E.D. Cal. 2010)("Here, Plaintiff's allegation of two specific comments and vague allegations of other remarks is insufficient to state a hostile environment claim"); Lester v. Sec'y of Veterans Affairs, 514 F. Supp. 2d 866, 873 n.3 (W.D. La. 2007)("[Plaintiff] has not alleged specific comments and conduct in support of a purported hostile work environment claims and the record evidence does not support a finding of a workplace permeated by offensive conduct based on race"); see also Hillburn v. Murata Elecs. N. Am.,

Inc., 181 F.3d 1220, 1228 (11th Cir. 1999)("Conclusory allegations without specific supporting facts have no probative value"); Bamawo v. Dep't of Corr., Case No. 02-3786, 2003 Fla. Div. Adm. Hear. LEXIS 1042 (Fla. DOAH Sept. 18, 2003)("Mr. Bamawo complains that Captain Pardue made 'countless' derogatory remarks to him, that Captain Pardue gave him work assignments that no one else wanted, that Captain Pardue refused to approve his requests time off, that Captain Pardue refused to designate him as supervisor because Captain Pardue thinks 'Africans are dumb,' but these complaints are not sufficiently specific to establish that Mr. Bamawo was subjected to harassment that was 'severe or pervasive.' In a Title VII employment discrimination case, conclusory allegations without specific supporting facts have no probative value")(internal quotation and citation omitted).

[8] These allegations, which do not involve acts of ridicule or insult, must be analyzed independently of Petitioner's hostile environment claim. See McCann v. Tillman, 526 F.3d 1370, 1379 (11th Cir. 2008)("As the district court properly found, the remainder of McCann's allegations concern patterns of discrimination practiced against black employees, which constitute discrete acts that must be challenged as separate statutory discrimination and retaliation claims. These cannot be brought under a hostile environment claim that centers on discriminatory intimidation, ridicule, and insult")(internal quotations omitted).

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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.