STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PATRICIA HERRING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-4466
	)	
DEPARTMENT OF CORRECTIONS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on November 9, 2011, in Gainesville, Florida, before W. David Watkins, the duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael Owen Massey, Esquire
Massey and Duffy, PLLC
855 East University Avenue
Gainesville, Florida 32601

For Respondent: Todd Evan Studley, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

STATEMENT OF THE ISSUES

1. Did Respondent, the Florida Department of Corrections (Department or DOC), sexually harass or discriminate against Petitioner, Patricia Herring (Herring), on account of her sex?

2. Did DOC retaliate against Ms. Herring for opposing an unlawful employment practice?

PRELIMINARY STATEMENT

On March 16, 2011, Ms. Herring filed a Charge of Discrimination against the Department with the Equal Employment Opportunity Commission (EEOC) and the Florida Commission on Human Relations (Commission). The Charge alleged race and sex discrimination and retaliation. On August 19, 2011, the Commission issued a Determination of No Cause. On August 31, 2011, Ms. Herring filed a Petition for Relief from an Unlawful Employment Practice with the Commission. On September 1, 2011, the Commission transmitted the Petition to the Division of Administrative Hearings (DOAH) to conduct a Final Hearing. By notice dated September 12, 2011, the undersigned set the final hearing for November 9, 2011, and the hearing was held as scheduled.

At the commencement of the final hearing, Petitioner announced that she was withdrawing her claim of discrimination based upon race. Rather, Petitioner was proceeding on her claims of sexual harassment and gender discrimination, as well as her retaliation claim.

Ms. Herring testified on her own behalf. Petitioner also called Donald Davis, Warden of the Columbia Correctional Institution (CCI). Petitioner's Exhibit 1 (Employee Earnings

Statement) was received in evidence. The Department presented the testimony of Tony Anderson and Michael Willis, both Assistant Wardens at CCI, and Dorothy Minta, Inspector in the DOC Office of the Inspector General. The Department's Exhibit 1 (Investigative Memo); Exhibit 2 (statement of Petitioner's training history); and Exhibit 3 (Petitioner's letter of resignation) were received into evidence. Both parties reserved their closing arguments for inclusion in post-hearing submittals. The parties agreed to submit their Proposed Recommended Orders within 10 days of the hearing.

Although a court reporter was present at the final hearing, neither party ordered the proceedings transcribed, and consequently, no transcript has been filed with the Division. Both parties timely submitted their Proposed Recommended Orders, and they have been given careful consideration in the preparation of this Recommended Order.

All citations are to Florida Statutes (2010) unless otherwise indicated.

FINDINGS OF FACT

Based on the testimony and other evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. Petitioner began her career with the Department on February 17, 1989, as a Correctional Officer at the Madison Correctional Institute.

2. Over the next 21 years, Petitioner steadily rose through the ranks of correctional officers until her final promotion, to Major, on July 23, 2010. Petitioner was classified as a Select Exempt Service employee by DOC. As such, Petitioner could be transferred to any DOC facility based on need. Over this period of time Petitioner was assigned, and sometimes reassigned, to DOC facilities in Madison, Hamilton and Columbia counties. At the time of her promotion to Major, Petitioner was assigned to CCI.

3. On March 2, 2011, Major Dillard Jones observed a CCI inmate washing two cars, one of which belonged to Petitioner. Upon questioning by Major Jones, the inmate admitted to washing personal cars on several occasions, a violation of DOC policy. Accordingly, Major Jones filed a written report of the incident.[1/]

4. During the time of the incident-giving rise to the charge, Donald Davis was the Warden of CCI. Warden Davis regularly held morning staff meetings in a conference room with his assistant wardens and other employees of the facility.

5. Petitioner contends that during the morning staff meeting of March 3, 2011, Warden Davis stood up to get himself a

cup of coffee, and asked if anyone else would like some coffee. One of the employees, Fran Wood, stated that she would, handed Warden Davis her cup, and asked him to "top it off." According to Petitioner, Warden Davis then placed his hand on his genital area and pretended to urinate in the cup. After this behavior, laughter erupted in the conference room. Petitioner stated that she was offended by Warden Davis' actions.

6. At hearing, Warden Davis flatly denied that he ever touched his genital area during the staff meeting, or feigned urinating in Ms. Wood's coffee cup. He did acknowledge, however, that there was laughter associated with his getting a cup of coffee for Ms. Wood. He explained that the laughter was because roles had been reversed, and he was getting coffee for a subordinate that would normally be getting it for him.

7. The Department called as witnesses two assistant wardens who were in attendance at the March 3, 2011, meeting, Tony Anderson and Michael Willis. Neither Mr. Anderson nor Mr. Willis saw Warden Davis touch his genital area or pretend to urinate in a coffee cup during the meeting. However, on cross-examination both witnesses testified that it was not unusual for Warden Davis to get coffee for subordinates at the staff meetings, including low-level employees and him doing so would not normally occasion laughter.

8. Following the March 3, 2011, staff meeting Petitioner called Warden Davis' supervisor, Timothy Cannon, to inform him of the incident. Mr. Cannon advised Petitioner to prepare a written incident report, which Petitioner did that same day.

9. It is standard DOC protocol to remove a complainant from the workplace during the pendency of the Department's investigation of the complaint. Consistent with this policy, Petitioner was placed on special assignment to Suwannee Correctional Institution (SCI) on March 7, 2011. There was no effect on Petitioner's rank, rate of pay, or work schedule by virtue of the transfer.

10. Petitioner was not given an office nor assigned any duties at SCI. She testified that she felt as if the other employees were purposely keeping her at a distance, and that the Warden wished she would simply "disappear." Notwithstanding this treatment, Petitioner did not view this assignment as a form of retaliation, and in fact, preferred it since the Suwannee facility was closer to her home.

11. Dorothy Minta has been employed as an investigator in the DOC Inspector General's office since 2001. Ms. Minta was assigned to investigate the allegations surrounding the March 3, 2011, incident. Ms. Minta interviewed (under oath) all 13 individuals who were in attendance at the March 3, 2011, staff meeting. None of the other twelve individuals, including

Ms. Wood,[2/] corroborated Petitioner's statement that Warden Davis placed his hands on his genitals and feigned urinating in Ms. Wood's coffee cup.

12. The Investigative Memorandum, dated October 11, 2011, and written by Emily Davis of the DOC Office of Employment Investigations,[3/] includes the following finding:

> Complainant contends she was subjected to sexual harassment by Respondent. However, the only incident of alleged sexual harassment was Warden Davis acting as if he was urinating in a cup during a warden's meeting on March 3, 2011. Witnesses, including the individual to whom the alleged incident was directed, deny this occurrence.

13. As a part of the DOC Management Performance Evaluation Process, DOC employees receive an annual evaluation by their supervisors. The evaluation form consists of a range of five performance ratings on a number of "performance expectations." A rating of 5 would reflect "Exceptional" performance, while a rating of 1 would reflect "Unacceptable" performance. The evaluation period for Ms. Herring is March 1st through February 28th of each year.

14. On April 14, 2011, Ms. Herring received her performance evaluation for the 2010/2011 evaluation period. The evaluation was done by Tony Anderson, an assistant Warden at CCI.[4/] Mr. Anderson assigned Ms. Herring a score of 3 ("Meets Expectation") on each of the nine performance expectations.

Mr. Anderson was not Petitioner's immediate supervisor at CCI.[5/] This was the first time that Mr. Anderson had done a performance evaluation of Petitioner.

15. Ms. Herring was surprised and disappointed in the April 2011, performance evaluation. Previously she had received scores that were overwhelmingly 4's and 5's.[6/] Ms. Herring felt she had done her job very well while at CCI, and was particularly concerned because scores of 4 or 5 are required in order to qualify for future promotions.

16. On April 22, 2011, Petitioner filed a second formal discrimination complaint with DOC, which, in addition to allegations of racial and sexual discrimination and harassment, also included a charge of retaliation. These charges were directed at Warden Davis, Assistant Warden Anderson, and Timothy Cannon, DOC's North Florida Regional Director. In addition to alleging that her April performance rating was evidence of retaliation against her, Petitioner also alleged:

> At the time of my arrival, Suwannee C.I. had two (2) vacant positions for Correctional Officer Major. I was under the impression I was going to be permanently assigned there since there were already vacancies. Instead, on April 7, 2011, a Promotion/Lateral Moves list was put out and I was not on the Lateral Move List to be assigned to Suwannee and remained assigned to Columbia C.I.
>
> Upon reviewing the list I observed two Captains were promoted to Major to fill

> these Major positions. With me already being a Major and doing the required job, I feel I should have received one of these positions. This was deliberate retaliation on Mr. Cannon's part by not permanently assigning me to a facility. He already knew of the Major's position vacancies at Suwannee C.I. and could have easily permanently assigned me there on March 4, 2011, knowing I cannot return to Columbia C.I. with all of the friction and enemies I've made because I filed a complaint.

17. Since Ms. Herring was promoted to Major on July 23, 2010, she held that rank during the majority of the 2010/2011 evaluation period. It is not unusual for performance ratings to be lower immediately following a promotion since promotions generally include additional responsibilities.

18. Petitioner (and other witnesses) acknowledged that some evaluators are known to be stricter in their evaluations than others. Mr. Anderson testified that he based the performance review on his personal observations of Ms. Herring, with additional input from Petitioner's immediate supervisor, Colonel Maddox. Mr. Anderson was adamant that his evaluation of Petitioner was not influenced by Petitioner's gender, or the complaint she filed against Warden Davis.

19. On or about July 22, 2011, Petitioner was notified by Mr. Cannon that she was being reassigned from the Suwannee facility to the Gainesville Correctional Institution (GCI), effective July 25, 2011. Petitioner was unhappy to learn of her

impending transfer, since travel to Gainesville would mean an hour and a half commute each way to her new assignment, and would make it even more difficult for her to care for her ailing mother.

20. Petitioner was surprised to learn of the transfer, since it was her understanding that all three of the Major positions at Gainesville were already filled. Mr. Cannon did not explain to Petitioner the reason for the transfer, but on cross-examination Petitioner acknowledged that there may have been a legitimate business reason for her transfer that she did not know.

21. Petitioner reported for work at GCI on July 25, 2011, and stayed at the facility for a "few hours" during which time she met with the GCI Warden, Eric Lane. During their conversation, Warden Lane reportedly told Petitioner that he had instructions to "watch her closely." According to Petitioner, this information, coupled with the unexplained transfer to Gainesville, confirmed that she was being retaliated against for filing the two complaints against Warden Davis and the others. Petitioner testified that she was well aware of the "techniques" used by DOC to force an employee to resign, and recognized that she had become the victim of those techniques.

22. That same day Petitioner submitted a letter of resignation, effective August 4, 2011. The letter stated that

she was resigning for "personal reasons," and that it had been a "blessing and a pleasure to have had such great experience over the past 22 years of service in my career with this agency." The letter made no mention of any negative feelings toward DOC or any of her former co-workers.

CONCLUSIONS OF LAW

23. Ms. Herring advances two claims. First, she maintains that DOC discriminated against her on account of her sex by creating a hostile work environment and by constructively discharging her. Second, she claims that the Department retaliated against her for complaining of unlawful harassment.

24. Sections 120.569 and 120.57(1), Florida Statutes (2011), grant DOAH jurisdiction over the subject matter of this proceeding and of the parties.

Gender Discrimination

25. Section 760.10(1)(a), Florida Statutes, makes it unlawful for an employer to take adverse action against an individual because of the individual's sex. Section 760.10(7) makes it unlawful for an employer to discriminate against any person because that person has opposed an unlawful employment practice.

26. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the Division of Administrative Hearings. "If the

administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back pay." Id.

27. Florida's chapter 760 is patterned after Title VII of the Civil Rights Act of 1964, as amended. Consequently, Florida courts look to federal case law when interpreting chapter 760, Florida Statutes (2009). Valenzuela v GlobeGround North America, LLC., 18 So. 3d 17 (Fla. 3rd DCA 2009).

28. Petitioner has the burden of proving by a preponderance of the evidence that Respondent discriminated against her. See Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). A party may prove unlawful sex discrimination by direct or circumstantial evidence. Smith v. Fla. Dep't of Corr., Case No. 2:07-cv-631, (M.D. Fla. May 27, 2009); 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. 2009). The record in this case did not establish unlawful discrimination by direct evidence.

29. The direct evidence established, as set forth in the findings of fact, that Ms. Herring was temporarily transferred from CCI to SCI pending the investigation of her complaint against Warden Davis, and then from SCI to GCI. The evidence also established that Petitioner received an average performance

evaluation (as opposed to above-average) by Assistant Warden Anderson. But there is no evidence that any of these events were due to her sex.

30. To prove unlawful discrimination by circumstantial evidence, a party must establish a prima facie case of discrimination by a preponderance of the evidence. If successful, this creates a presumption of discrimination. Then the burden shifts to the employer to offer a legitimate, non-discriminatory reason for the adverse employment action. If the employer meets that burden, the presumption disappears and the employee must prove that the legitimate reasons were a pretext. Valenzuela v. GlobeGround North America, LLC., 18 So. 3d 17 (Fla. 3rd DCA 2009). Facts that are sufficient to establish a prima facie case must be adequate to permit an inference of discrimination. Id.

31. The findings of fact here are not sufficient to establish a prima facie case of discrimination based on gender. There is no evidence of record to support an inference that Petitioner was transferred more frequently, or to less attractive duty assignments, because she is female. To the contrary, Petitioner acknowledged that she was pleased with her transfer to SCI because it was closer to her home. Similarly, no evidence was presented that Petitioner received a less

favorable performance evaluation from Assistant Warden Anderson than did similarly situated male employees.

Hostile Work Environment

32. Ms. Herring advances a sexually hostile work environment claim. Under Title VII and section 760.10, Florida Statutes (2009), a plaintiff can establish gender discrimination through sexual harassment by the creation of a hostile work environment, by showing:

> (1) that she belongs to a protected group;
> (2) that she has been subjected to unwelcome sexual harassment;
> (3) that the harassment was based on her sex;
> (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 a basis for holding the employer liable exists.

Cotton v. Cracker Barrel Old Country Store, Inc., 434 F.3d 1227, 1231 (11th Cir. 2006). Ms. Herring was not subjected to unwelcome sexual harassment.

33. Even if the "coffee cup" incident took place as described by Petitioner and is assumed to be unwelcome sexual harassment, it was not sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment. Determining whether harassing conduct is sufficiently severe or pervasive to

alter the terms and conditions of employment has a subjective and objective component. The plaintiff must subjectively perceive the environment to be abusive, and the conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment. Blackmon v. Wal-Mart Stores East, L.P., Case No. 09-11953; 358 Fed. Appx. 101 (11th Cir. Dec. 23, 2009). If the "coffee cup" incident took place as described by Petitioner, such behavior would undoubtedly be rude, crass, and unprofessional. However, the single incident, which was directed to another female employee, is not objectively severe enough to establish a hostile work environment. See Smith v. Fla. Dep't of Corr., 2009 U.S. Dist. LEXIS 44885 (M.D. Fla. (2009), (stuffed monkey left for days in African-American employee's work place despite complaints was insufficient evidence of harassment to preclude grant of summary judgment); Agee v. Potter, Case No. 06-12391, 216 Fed. Appx (11th Cir. Feb. 5, 2007), (abusive conduct, including shouting and threat to "take care of you," did not make summary judgment for employer an error).

Retaliation

34. The court in Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009), described the analysis required for a retaliation claim. The opinion says:

> To establish a prima facie case of retaliation under section 760.10(7), a plaintiff must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action; and (3) that the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entm't Corp., 139 F.3d 1385 (11th Cir.), cert. denied, 525 U.S. 1000, 119 S. Ct. 509, 142 L. Ed. 2d 422 (1998). Once the plaintiff makes a prima facie showing, the burden shifts and the defendant must articulate a legitimate, nondiscriminatory reason for the adverse employment action. Wells v. Colorado Dep't of Transp., 325 F.3d 1205, 1212 (10th Cir. 2003). The plaintiff must then respond by demonstrating that defendant's asserted reasons for the adverse action are pretextual. Id.

35. Ms. Herring claims that her written complaint about the "coffee cup" incident was a complaint about sex discrimination and therefore was statutorily protected activity and that she suffered adverse employment action because of it. As noted above, the facts found do not establish a complaint about sex discrimination.

36. Ms. Herring complained of unprofessional conduct by Warden Davis during the morning staff meeting, including an alleged crass gesture directed to a female co-worker. However, as noted, a single incident of unprofessional behavior that was not directed at Petitioner, would not amount to discrimination on account of gender. Similarly, there was no evidence presented that the less-than-stellar performance evaluation done

by Assistant Warden Anderson was in any way related to Petitioner's gender.

37. The adverse employment actions asserted here are the average performance evaluation, the transfer from SCI to GCI (denial of permanent assignment to SCI), and constructive discharge from DOC. Constructive discharge is established where working conditions are so difficult, unpleasant, or intolerable that a reasonable person in the employee's position would have felt compelled to resign. See Pennsylvania State Police v. Suders, 542 U.S. 129, 141 (2004).

38. Based upon the facts of this record, there is no evidence of a nexus between the protected activity and any of the events complained of. By Petitioner's own admission the transfer to SCI was a preferred assignment, and there were no positions of Major to be filled at SCI at the time of her transfer to GCI. The greater weight of the evidence substantiates Respondent's contention that the transfer from CCI to SCI was consistent with Departmental policy, and that the transfer from SCI to GCI was based on legitimate, nondiscriminatory personnel needs of the Department. There was also no showing that the average performance evaluation was a retaliatory act.

39. Petitioner's claim of constructive discharge is fatally undermined by the fact that she spent but a "few hours"

on a single day at her new assignment at GCI before tendering her resignation. This very brief exposure to her new post was insufficient to conclude that working conditions were so "difficult, unpleasant, or intolerable" that Petitioner had no choice but to resign. The fact that the GCI warden informed Petitioner that he had been told to "watch her closely" is not enough to establish an "intolerable" working environment. Finally, the fact that the assignment to GCI would entail a longer commute does not justify the conclusion that Petitioner was constructively discharged. As a 21-year veteran of DOC, with multiple reassignments during the course of her career, Petitioner was certainly aware that relocations were a fact of life. Although she may have preferred to stay at SCI, Petitioner had no legal entitlement to a duty station of her choosing.

40. Petitioner failed to establish a prima facie case of gender discrimination, sexual harassment or retaliation by a preponderance of the evidence. Accordingly, her Petition for Relief should be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations dismiss the Petition for Relief from an Unlawful Employment Practice filed against Respondent.

DONE AND ENTERED this 30th day of November, 2011, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of November, 2011.

ENDNOTES

[1/] At hearing, Ms. Herring denied that she instructed the inmate to wash her car. As set forth in the DOC Investigative Memorandum of October 11, 2011, DOC concluded that there was insufficient evidence to find that Petitioner knowingly utilized inmate labor to wash her car, and hence, no disciplinary action was taken against her. In its Proposed Recommended Order counsel for Respondent posits the theory that "the Petitioner fabricated a story involving Warden Davis in the event she would be disciplined." Although the undersigned has concluded that Petitioner has failed to prove her charge of sexual harassment against Warden Davis, this record likewise fails to support the theory of motive posited by counsel for Respondent.

[2/] There is no evidence in this record that Ms. Wood, the target of the alleged misconduct, filed a complaint against Warden Davis.

[3/] At hearing, Petitioner raised a hearsay objection to the admission of the Investigative Memorandum (Respondent's Exhibit 1), since the author of the memorandum did not testify. However, pursuant to section 120.57(1)(c), Florida Statutes, the

above finding contained in the memorandum supplements and corroborates the testimony of Ms. Minta.

[4]/ When the performance evaluation was received by Ms. Herring it did not bear the signature of the evaluator. Subsequently, it was returned to Mr. Anderson at CCI, who then affixed his signature.

[5]/ Petitioner's immediate supervisor was Colonel David Maddox.

[6]/ Petitioner's testimony at hearing that she had received "all" 4's and 5's on previous evaluations is not entirely correct. She was assigned a score of 3 on Performance Expectation #7 on her 2008/2009 evaluation.

COPIES FURNISHED:

Michael Owen Massey, Esquire
Massey and Duffy, PLLC
855 East University Avenue
Gainesville, Florida 32601

Todd Evan Studley, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399

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

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.