STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARKEITH DANIELS,

Petitioner,

vs. Case No. 14-2527

FRANKLIN CORRECTIONAL INSTITUTION,

Respondent.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case on July 22, 2014, and October 6, 2014, in Tallahassee, Florida, before Suzanne Van Wyk, an Administrative Law Judge assigned by the Division of Administrative Hearings (Division).

APPEARANCES

For Petitioner: Cortney Hodgen, Esquire
925 East Magnolia Drive, Suite B-2
Tallahassee, Florida 32301

For Respondent: Kambria Anderson, Esquire
Sena Bailes, Esquire
Todd Studley, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399-2500

STATEMENT OF THE ISSUE

Whether Respondent is liable to Petitioner for discrimination in employment on the basis of race, or in

retaliation, in violation of the Florida Civil Rights Act of 1992.

PRELIMINARY STATEMENT

Petitioner filed a Complaint of Discrimination (Complaint) with the Florida Commission on Human Relations (Commission) on October 31, 2013, alleging unlawful employment discrimination by Respondent on the basis of his race and in retaliation. The Commission investigated the Complaint, and, on April 21, 2014, determined there was no reasonable cause to believe that an unlawful employment practice occurred.

Petitioner timely filed with the Commission a Petition for Relief on May 23, 2014, which was forwarded to the Division for assignment of an Administrative Law Judge. The final hearing was initially set for July 1, 2014, in Tallahassee, Florida, but was rescheduled to July 22, 2014, due to unspecified scheduling conflicts.

The final hearing commenced as scheduled on July 22, 2014, but the parties did not complete the presentation of the case on that date. The hearing was continued to, and completed on, October 6, 2014.

Petitioner testified on his own behalf and offered the testimony of Willie Brown, Colonel Perez Bellelis, Captain Cory Fletcher, and Tammy Edwards. Petitioner offered Exhibits P1, P9, P11, P14, and P16, which were admitted into evidence.

Respondent offered the testimony of Warden Christopher Atkins and Erica McFarland-Williams. Respondent introduced Exhibits R1 through R18, which were admitted into evidence.

The proceedings were recorded, but the parties did not order a transcript. Respondent filed a Proposed Recommended Order on October 16, 2014. Petitioner filed a Proposed Recommended Order on October 23, 2014. The undersigned has considered both Proposed Recommended Orders in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a black male who was employed by the Respondent as a Correctional Officer at the Franklin County Correctional Institution (FCI), in Carrabelle, Florida, from July 13, 2007, until his dismissal effective October 24, 2013.

2. Respondent, Department of Corrections,[1/] is a state agency whose purpose is to protect the public through the incarceration and supervision of offenders and to rehabilitate offenders through the application of work, programs, and services. See § 20.315, Fla. Stat. (2014).

3. Petitioner alleges he was unlawfully terminated by Warden Atkins based upon his race and in retaliation for opposing an employment practice prohibited by the Florida Civil Rights Act of 1992. In support of his allegations, Petitioner recounts the following series of events.

Leave for Aunt's Funeral

4. The first incident occurred on July 12, 2013, while Petitioner was on duty in Bravo Dormitory (B Dorm). Petitioner notified Captain Casey Goff, the Officer in Charge (OIC) on Petitioner's shift, that there had been a death in Petitioner's family and that the funeral service was that afternoon at 2:00 p.m. in Apalachicola. Petitioner requested permission for leave to attend the funeral.

5. Capt. Goff stated he would approve annual leave for Petitioner to attend the funeral.

6. Petitioner testified that, shortly after 1:00 p.m., he attempted to exit the facility to travel to the funeral, but was prevented from doing so by Sergeant Crosby, who was in the control room. Allegedly, Sgt. Crosby told Petitioner that he did not have permission to leave until 2:00 p.m.

7. Petitioner spoke with Capt. Goff via telephone shortly thereafter, and confirmed that another officer, Sergeant Stubbs, was present in B Dorm and available to relieve Petitioner.

8. Petitioner introduced some evidence that he was again prevented from leaving the facility, and that he again contacted Capt. Goff around 1:30 p.m. and confirmed that Petitioner had been properly relieved in B Dorm.

9. Petitioner finally departed the facility at approximately 2:30 p.m., after writing up an incident report to

document this event. The incident report was reviewed by Colonel Perez Bellelis and Assistant Warden Watson. Col. Bellelis requested incident reports from the other staff implicated by Petitioner in the report.

10. Both Sgt. Stubbs and Capt. Goff submitted written incident reports.

11. Petitioner's written incident report does not name Sgt. Crosby as the individual who prevented Petitioner from leaving the facility on July 12, 2013, instead referring to unidentified "control room staff."

12. Petitioner did attend his aunt's funeral, although he was late.

13. Petitioner presented no evidence that this incident was anything other than a miscommunication between the OIC and Sgt. Crosby.

14. An incident report is not a disciplinary action.

The Notebook Event and Disciplinary Meeting

15. The next event occurred on August 5, 2013, while Petitioner was on security detail in B Dorm. The OIC, Sergeant Matautia, had previously witnessed an inmate passing a notebook to another inmate in the recreation yard and directed Petitioner to take the notebook from the inmate and search it for contraband and gang-related materials.

16. Petitioner inspected the notebook and reported to Sgt. Matautia that the notebook contained only religious materials. Sgt. Matautia instructed Petitioner to return the notebook to the inmate.

17. Before Petitioner had a chance to return the notebook, he was called away to assist with movement of inmates to the "blacktop," a paved inmate recreation area.

18. When Petitioner returned to B Dorm, Sgt. Matautia was no longer there, and Sgt. Rickards was on duty in the officer's station. Petitioner picked up the notebook to return it to the inmate, but Sgt. Rickards instructed Petitioner not to return the notebook until Sgt. Rickards had determined whether it was gang-related.

19. Rather than leaving the notebook in the officer's station, Petitioner left the station with the notebook, had a discussion with the inmate from whom the notebook had been confiscated, then reentered the officer's station, and returned the notebook to Sgt. Rickards.

20. Petitioner maintains he was not insubordinate to Sgt. Rickards because he was given conflicting orders and followed the direction of the officer with the most seniority, Sgt. Matautia.

21. While Sgt. Matautia and Sgt. Rickards have the same rank, Petitioner maintains Sgt. Rickards was a new employee on

probation at the time of the incident, thus junior to Sgt. Matautia.

22. Almost every witness questioned about this incident testified that Petitioner's act of taking the notebook out of the officer's station, rather than leaving it with Sgt. Rickards when directed to, was insubordinate.

23. The one correctional officer whose testimony was most sympathetic to Petitioner, former Assistant Warden Willie Brown, admitted that Petitioner's actions were a violation of policy and "subject to some discipline."

24. On August 15, 2013, Petitioner received a pre-determination letter informing him that the Department intended to dismiss him effective August 29, 2013. The letter cited the notebook incident of August 5, 2013, and charged Petitioner with insubordination in connection with the incident.

25. The letter gave him an opportunity to request a pre-determination conference, which he did. A pre-determination conference is an informal conference in which an employee facing disciplinary charges is afforded an opportunity to present information relevant to the charges, including witness statements.

26. The pre-determination conference was held on a weekday evening in an office of the FCI administration building, apparently without incident.

27. On August 23, 2013, Petitioner was called to a disciplinary meeting in Warden Atkins' office. Present at the meeting were Petitioner, Warden Atkins, and then-Assistant Warden Willie Brown.

28. At the meeting, Warden Atkins presented Petitioner with two options: accept a Supervisory Counseling Memorandum (SCM) or be terminated.

29. An SCM is the lowest form of discipline in Respondent's progressive disciplinary process.

30. Attached to the SCM was a written agreement titled "Pre-Disciplinary Settlement Agreement" (PSA) by which Petitioner would agree to waive his right to grieve the discipline pursuant to Career Service Rules.[2/]

31. What ensued can best be described as a fiasco. Petitioner refused to sign the SCM and agreement without consulting his attorney. Petitioner left the Warden's office at least three separate times to contact his attorney, but was unsuccessful. According to Mr. Brown, Petitioner became visibly frustrated. At some point, Warden Atkins demanded Petitioner place his I.D. and badge on the table. Petitioner put his badge down, but picked it back up again. At that point, Warden Atkins threatened to call the police, and picked up the phone on his desk, but did not complete the call. The meeting lasted longer than an hour, which Mr. Brown described as unprecedented in his

20 years with the Department. In the end, Warden Atkins gave Petitioner until the following day to make a decision.

32. The following morning, Petitioner still refused to sign.

33. Warden Atkins issued an SCM to Petitioner for the August 5, 2013, "notebook incident." The SCM is dated August 28, 2013, and signed by Warden Atkins. In the space provided for the employee's signature, Warden Atkins noted, "refused to sign."

34. In explanation for the length of the disciplinary meeting on August 23, 2013, Warden Atkins testified that he thought he was required to obtain Petitioner's signature on the SCM, and that if Petitioner did not sign, Petitioner would be dismissed. He explained that he misunderstood the process at the time.

35. Warden Atkins' explanation is not credible. Warden Atkins has been employed by the Department for 25 years. It is improbable that he could have risen to the level of Warden in the correctional system and not have known that an employee's signature on an SCM is only an acknowledgment of the discipline given, and refusal to sign is not a matter for further discipline.

"Car Tag" Discussion

36. The next incident occurred on September 16, 2013. Col. Bellelis and Capt. Fletcher entered the B Dorm infirmary where Petitioner was on security duty. Col. Bellelis had a conversation with Petitioner regarding his fitness for service with the Department. While the specifics of the conversation were contested, the evidence established that Col. Bellelis questioned Petitioner's car tag, which read "Porn Star," as an inappropriate image for the institution, questioned Petitioner's ability to follow orders, as demonstrated by the notebook incident, and talked with him about staying alert on the job.

37. Col. Bellelis also accused Petitioner of talking and laughing with an inmate in the infirmary on "Self-Harm Observation Status" (SHOS), formerly known as "Suicide Watch."

38. However, Col. Bellelis did not witness Petitioner laughing or talking with an SHOS inmate. On cross-examination, Col. Bellelis admitted that his information to that affect "may have been second hand."

39. Capt. Fletcher testified that he observed Petitioner talking to an SHOS inmate at the inmate's cell. Capt. Fletcher did not hear any specifics of the conversation.

40. Col. Bellelis maintains that his conversation with Petitioner was in the nature of an informal counseling and that

his purpose was "to point Petitioner in a professional direction."

41. Petitioner spoke to then-Assistant Warden Brown following the conversation with Col. Bellelis in the infirmary. Petitioner told Asst. Warden Brown that he felt he was being subject to a hostile work environment. Asst. Warden Brown encouraged Petitioner to file an incident report documenting the incident.

42. Petitioner filed an incident report on September 16, 2013, regarding the conversation with Col. Bellelis in which he expressed his concern with a hostile work environment.

43. Neither Col. Bellelis nor Capt. Fletcher filed an incident report following the conversation with Petitioner in the infirmary. However, Col. Bellelis reported to Warden Atkins that Petitioner had been observed in "casual conversation" with an SHOS inmate in the infirmary.

Housing Log and Observation Checklist

44. That same day, Warden Atkins entered the B Dorm infirmary to speak with Petitioner. The Warden reviewed the housing log (a time log of security checks conducted by the officer on duty) and noted that Petitioner had made an entry at 10:00 a.m., but the Warden's watch showed 9:50. Warden Atkins instructed Petitioner not to post-time the log.

45. During this visit, the Warden also noted that the observation checklist was not up-to-date (the security officer on duty must observe each SHOS every fifteen minutes and record his or her observations on a checklist known as a form DC4-650). The Warden told Petitioner he would not be disciplined for the incomplete observation checklist.

46. Petitioner testified that, at the time he made this entry, the control room clock read "9:57" and he posted the time log as 10:00 before he made rounds to check the dorm, which would have taken three minutes.

47. After Warden Atkins left the infirmary, he called Petitioner in the infirmary and instructed him to file an incident report regarding the post-timed housing log.

48. The following day, September 17, 2013, Petitioner was instructed to report to Warden Atkins regarding the incident report he had filed the previous day regarding Col. Bellelis.

49. Petitioner met with Warden Atkins regarding the incident report. Warden Atkins noted Petitioner's claim of a hostile work environment. The Warden attempted to contact Tammy Edwards, the personnel officer who handled employee discipline cases and hostile workplace complaints.

50. Warden Atkins did not reach Ms. Edwards by phone during that meeting. Warden Atkins suggested Petitioner contact her regarding his claim and suggested that Ms. Edwards would

mail him a complaint form he could use to make a formal complaint.

51. Petitioner testified he never received the form from Ms. Edwards.

52. Before the meeting ended, Warden Atkins inquired about the incident report he requested Petitioner to submit regarding the post-timed housing log. He further instructed Petitioner to submit an incident report regarding the incomplete observation checklist from the previous day.

53. On September 17, 2013, Petitioner submitted the incident report regarding the post-timed housing log.

54. On September 20, 2013, Warden Atkins entered Echo Dormitory (E Dorm), the dormitory to which Petitioner was assigned. He discussed with Petitioner the recent incidents and incident reports. During this visit, Warden Atkins noted that the E Dorm housing log was not up-to-date.

55. After Warden Atkins left the dormitory, he called Petitioner and instructed him to complete an incident report regarding the incomplete E Dorm housing log.

56. Before Petitioner left the facility on September 20, 2013, he submitted to Warden Atkins an incident report regarding the E Dorm housing log. Warden Atkins asked for the incident report from the 16th. Petitioner explained that he had not completed the report, but would do so directly. Warden Atkins

instructed Petitioner to submit the incident report the following day so he would not accrue overtime.

57. On September 20, 2013, Warden Atkins prepared Incident Report Number 113-2013-1180, documenting his conversation with Petitioner regarding the incident report on the E Dorm housing log and the outstanding incident report regarding the B Dorm observation checklist from September 16, 2013. At the bottom of the report, Warden Atkins noted the report was being forwarded to Ms. Edwards for preparation of a pre-determination hearing letter.

58. On September 20, 2013, Petitioner completed Incident Report number 113-2013-1180-A, documenting the same conversation with the Warden. At the bottom of the report, Warden Atkins noted "Recommend written reprimand."

59. On September 20, 2013, Capt. Goff prepared Incident Report number 113-2013-1180-B, documenting his observations of the conversation between Warden Atkins and Petitioner on that date.

60. Petitioner did not submit an incident report regarding missing entries on the observation checklist on September 16, 2013.

61. When questioned why Warden Atkins instructed Petitioner, on September 17, to go back and complete an incident report on the observation checklist from September 16, Warden

Atkins stated that, because of Petitioner's hostile work environment complaint, Warden Atkins wanted to "document everything."

62. In later testimony on the date the hearing was continued, Warden Atkins denied that his request was related in any way to Petitioner's hostile work environment complaint.[3/] The undersigned finds that Warden Atkins' original testimony was the truthful answer and is accepted as credible and reliable.

Petitioner's Termination

63. On September 30, 2013, Petitioner received a pre-determination letter informing him the Department intended to dismiss him effective October 14, 2013.

64. In the letter, Respondent alleged "[t]he basis for these charges is contained in Franklin County Correctional Institution's Incident Report Numbers 113-2013-1180 through 113-2013-1180B; copies previously furnished to you." The cited incident reports relate solely to the September 16 observation checklist incident report and the September 20, 2013, E Dorm housing log.

65. The letter reads further, as follows:

> In arriving at the decision to dismiss you, I have also considered your employment record. Specifically, the fact that you received a supervisory counseling memorandum on March 17, 2008, for failure to report criminal activity; a written reprimand on July 21, 2008, and a supervisory counseling

> memorandum on August 9, 2013, for conduct unbecoming a public employee; supervisory counseling memorandums [sic] on September 22, 2008; and August 28, 2013, for failure to follow oral and/or written instructions; and a written reprimand on January 17, 2013, for failure to follow oral and/or written instructions.

66. Petitioner introduced no evidence contesting the legitimacy of discipline he received on any of those dates except the August 28, 2013, SCM for the "notebook incident."

67. Based on the findings of fact regarding that incident, the undersigned finds that Petitioner's conduct constituted insubordination under the Department's rules.

68. Petitioner requested a pre-determination conference with respect to the charges, which was conducted on October 15, 2013. During the conference, Warden Atkins presented Petitioner with two disciplinary options: 40-hour suspension (with mandatory PSA waiving his right to grieve) or dismissal.

69. Petitioner refused to sign the PSA.

70. On October 24, 2013, Petitioner received written notice he was being dismissed the same date. The notice cites both the failure to submit the incident report on the missing observation checklist (Form DC4-650) from September 16, and the missing entries on the housing log from September 20.

Similarly-Situated Employees

71. In an effort to make his case, Petitioner introduced evidence intended to prove that similarly-situated white correctional officers were treated more favorably than Petitioner.[4/]

72. Petitioner asserted that two married white officers with the surname Crosby, were disciplined less harshly (i.e., not dismissed) for more severe offenses. Mrs. Crosby was disciplined for carrying on a personal relationship with an inmate, while Mr. Crosby was disciplined for excessive use of force against said inmate.

73. Petitioner also offered testimony regarding discipline of his brother, also a correctional officer, who was suspended for losing keys to the facility. Petitioner compared the suspension his brother received to the discipline received by a white female officer, an SCM, for a similar incident. In the case of the white female officer, she left the facility with the keys, but returned them.

CONCLUSIONS OF LAW

74. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2014).

75. The Florida Civil Rights Act of 1992 (the Act), chapter 760, Florida Statutes, prohibits discrimination in the workplace.

76. Subsection 760.10(1), Florida Statutes, (2013), reads, 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.

77. The Department is an "employer" as defined in subsection 760.02(7), which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.

78. Florida courts have determined that federal case law construing Title VII of the Civil Rights Act of 1964 (Title VII) applies to claims arising under the Act, because the Act is patterned after Title VII, as amended. See Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

79. Under the Act, Petitioner has the burden to establish by a preponderance of the evidence that he was the subject of discrimination. In order to carry his burden of proof, Petitioner can establish a case of discrimination through direct or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). Direct evidence is composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. Evidence that only suggests discrimination, or that is subject to more than one interpretation, is not direct evidence. See Schoenfeld, 168 F.3d at 1266.

80. Usually direct evidence of discrimination is lacking, and one seeking to prove discrimination must rely on circumstantial evidence of discriminatory intent, using the shifting burden of proof pattern established in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).

81. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima

facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward with evidence shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). Importantly, the employer has the burden of production, not persuasion, and need only present the finder of fact with evidence that the decision was non-discriminatory. Id. See also Alexander v. Fulton Cnty., 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are pretexts for discrimination. Schoenfeld, 168 F.3d at 1267.

82. Notably, "although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007)("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.")

Racial Discrimination

83. Petitioner presented no direct evidence of racial discriminatory intent on the part of Respondent.

84. To establish a prima facie case of discrimination based on Petitioner's race through circumstantial evidence, he must prove that: (1) he belongs to a protected class; (2) he was subjected to an adverse employment action; (3) other similarly-situated employees outside his protected classification were treated more favorably; and (4) he was qualified to perform his job. See Holifield, 115 F.3d at 1562.

85. The first and second element of a prima facie case have been proven by Petitioner: he is black and he was dismissed from his position as a correctional officer.

86. Petitioner did not prove the third element, that other similarly-situated non-classified employees were treated more favorably.

87. An adequate comparator for Petitioner must be "'similarly-situated' in all relevant respects." Valenzuela v. GlobeGround N. Am., 18 So. 3d 17, 23 (Fla. 3d DCA 2009)(internal citations omitted); Johnson v. Great Expressions Dental Ctrs. of Fla., 132 So. 3d 1174 (Fla. 3d DCA 2014). One Florida court has explained the exacting nature of the similarly-situated comparator, as follows:

> Similarly situated employees must have reported to the same supervisor as the plaintiff, must have been subject to the same standards governing performance evaluation and discipline, and must have engaged in conduct similar to plaintiff's, without such differentiating conduct that would distinguish their conduct of the appropriate discipline for it.

Id. at 1176.

88. Florida Administrative Code Rule 33-208.002 provides the Rules of Conduct for Department employees. Subsection (10) provides, "[n]o employee shall be insubordinate, neglectful, or unwilling to follow lawful orders or perform officially designated duties."

89. Petitioner did not introduce evidence of the discipline given to non-classified correctional officers charged with violation of subsection (10).

90. Petitioner introduced evidence regarding the discipline given to non-classified correctional officers charged with failure to protect and safeguard Department property, required by section 33-208.002(24); having a personal relationship with an inmate, prohibited by section 33-208.002(26); and using excessive force against an inmate, prohibited by section 33-208.002(14).

91. Thus, Petitioner did not introduce evidence to prove that other similarly-situated non-classified employees were treated more favorably than Petitioner.

92. Petitioner failed to prove a prima facie case of unlawful employment discrimination based on his race under the McDonnell Douglas standard.

Retaliation

93. Section 760.10(7) prohibits retaliation in employment as follows:

> (7) 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. (emphasis added).

94. The burden of proving retaliation follows the general rules enunciated for proving discrimination. Reed v. A.W. Lawrence & Co., 95 F.3d 1170, 1178 (2d Cir. 1996).

95. Petitioner can meet his burden of proof with either direct or circumstantial evidence. Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358 (11th Cir. 1999), cert. den. 529 U.S. 1109 (2000). Direct evidence must evince discrimination in retaliation without the need for inference or presumption. Standard v. A.B.E.L Svcs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998).

96. Petitioner did not introduce direct evidence of retaliation in this case.

97. Thus, Petitioner must prove his allegation of retaliation by circumstantial evidence. Circumstantial evidence of retaliation is subject to the burden-shifting framework established in McDonnell Douglas.

98. To establish a prima facie case of discrimination in retaliation, Petitioner must show: (1) that he was engaged in statutorily-protected expression or conduct; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events. Holifield, 115 F.3d at 1566.

99. Petitioner argues he opposed an unlawful employment practice when he filed an incident report on September 16, 2013, regarding his conversation with Col. Bellelis in the infirmary and expressed his belief that he was being subjected to a hostile work environment.[6/]

100. Petitioner introduced no evidence identifying the basis for his hostile work environment claim. The evidence did not establish whether Petitioner alleged that the hostile work environment was based on his race, his gender, or any protected characteristic at all. Col. Bellelis' comments were directed at Petitioner's "fitness to be a correctional officer" in general, at best.

101. Petitioner failed to establish that he was engaged in any protected activity. Thus, Petitioner failed to satisfy the

first element of the three-part test to establish a prima facie case of retaliation through circumstantial evidence.

102. Assuming, arguendo, that Petitioner's generalized complaint of a hostile work environment rose to the level of a protected activity under the three-part test, Petitioner failed to meet the third element of the test.[7/]

103. To prove the third element, Petitioner must demonstrate a causal connection between the protected activity and the adverse employment decision. This causal link element is construed broadly, and may be established by a demonstration that the employer was aware of the protected conduct and that the protected activity and the adverse action were not "wholly unrelated." Farley v. Nationwide Mut. Ins., 197 F.3d 1322, 1337 (11th Circ. 1999)(internal citations omitted); Olmstead v. Taco Bell Corp., 141 F.3d 1457, 1460 (11th Cir. 1998). Moreover, for purposes of demonstrating a prima facie case, close temporal proximity may be sufficient to show that the protected activity and adverse action were not wholly unrelated. Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 590 (11th Cir. 2000).

104. Warden Atkins' response to Petitioner's hostile work environment claim -- attempting to put Petitioner in contact with the appropriate personnel officer and advising Petitioner of his right to file a formal complaint -- demonstrates Respondent was aware of Petitioner's alleged protected conduct.

105. As to temporality, only four days elapsed between the date Petitioner lodged his hostile work environment complaint (September 16, 2013) and the date on which Warden Atkins recommended Petitioner for discipline (September 20, 2013). Further, despite the fact that Warden Atkins told Petitioner on September 20, 2013, that he could submit the incident report the following day, Warden Atkins decided that same day to discipline Petitioner for failure to submit the incident report.

106. An additional 10 days elapsed before Warden Atkins notified Petitioner of his impending termination and right to a pre-determination conference (September 30, 2013). An additional 24 days elapsed until Petitioner's dismissal (October 24, 2013). These facts do not dissuade the undersigned from the conclusion that the alleged protected activity and Petitioner's dismissal are proximate in time.

107. Thus, the undersigned concludes there was a causal connection between the alleged protected activity and the adverse employment action.

108. Having proven all three elements, Petitioner established a prima facie case of discrimination in retaliation.

109. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the adverse employment action.

110. The pre-determination letter included a list of prior disciplinary actions against Petitioner which the Warden also considered in reaching his recommendation for discipline. Petitioner introduced no evidence challenging the legitimacy of these other disciplines, except the SCM for the "notebook incident." Based on the evidence related to that incident, the undersigned concludes that the discipline for insubordination was legitimate.[8/]

111. The range of disciplinary actions for violation of Department rules is set forth in Florida Administrative Code Rule 33-208.003. Subsections (26) and (32) govern insubordination and failure to follow oral or written instructions, respectively.

112. Pursuant to the rule, Petitioner could have been subjected to written reprimand, up to 30 days suspension, or dismissal, for the first incident of insubordination or failure to follow oral or written instructions. Petitioner could have been subject to dismissal for the second occurrence of either incident.

113. Respondent having introduced legitimate non-discriminatory reasons for Petitioner's dismissal, the burden shifts to Petitioner to demonstrate Respondent's reasons were mere pretext. Inasmuch as Petitioner stipulated to the introduction of Petitioner's personnel records documenting the

above-cited disciplinary actions, and introduced nothing to contest those actions, he did not prove pretext.

114. In sum, Petitioner failed to prove his Charge of Discrimination and it is otherwise concluded, based upon the evidence, that the Department of Corrections did not violate the Florida Civil Rights Act of 1992, and is not liable to Petitioner for discrimination in employment based on either race or retaliation.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner's Petition for Relief from an Unlawful Employment Action be dismissed.

DONE AND ENTERED this 26th day of November, 2014, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
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 26th day of November, 2014.

ENDNOTES

[1/] Petitioner incorrectly named the Franklin County Correctional Institution as the Respondent in this case. Petitioner's employer is the Florida Department of Corrections.

[2/] Neither party offered any evidence regarding whether including a "Pre-Disciplinary Settlement Agreement" with an SCM was Department policy or an extraordinary event.

[3/] Over two months elapsed between the date the hearing was initiated and the date it was reconvened.

[4/] Petitioner also sought to introduce evidence regarding the discipline meted out to unnamed white correctional officers accused of excessive use of force, among other accusations, in the death of an inmate, or inmates, at FCI. The undersigned excluded said evidence as irrelevant.

[5/] Petitioner does not argue in his Proposed Recommended Order that Warden Atkins' statement that he required, on September 17, 2013, Petitioner to file an incident report regarding the observation checklist on September 16, 2013, because Petitioner complained of a hostile work environment, is direct evidence of discrimination in retaliation. The undersigned notes that an incident report is not a disciplinary action.

[6/] At this stage, Petitioner need not prove that the conduct he opposed was actually unlawful, but that he reasonably believed that Respondent had engaged in an unlawful employment practice. See Ramirez v. Miami Dade Cnty., 509 Fed. Appx. 896 (11th Cir. 2013); Howard v. Walgreen Co., 605 F.3d 1239, 1244 (11th Cir. 2010).

[7/] There is no dispute that Petitioner was subject to an adverse employment action – dismissal effective October 24, 2013.

[8/] This conclusion does not eliminate the undersigned's serious concern with the procedure followed by the Warden in meting out that discipline. However, the propriety of the disciplinary meeting is beyond the scope of this case.

COPIES FURNISHED:

Cortney Hodgen, Esquire
925 East Magnolia Drive, Suite B-2
Tallahassee, Florida 32301
(eServed)

Cheyanne Michelle Costilla, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301
(eServed)

Sena Marie Bailes, Esquire
Florida Department of Corrections
501 South Calhoun Street
Tallahassee, Florida 32399
(eServed)

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 issues the Final Order in this case.