STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THERESA WILLIAMS,

Petitioner,

vs. Case No. 14-4994

FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

RECOMMENDED ORDER

An administrative hearing was conducted in this case on March 24, 2015, in Bushnell, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carlos V. Leach, Esquire
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For Respondent: Sena M. Bailes, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent Department of Corrections (Respondent or the Department) violated the Florida Civil Rights Act of 1992, sections 760.01–760.11 and 509.092, Florida Statutes,[1/] by

discharging Petitioner Theresa Williams (Petitioner) in retaliation for her participation as a witness during the investigation of an alleged discrimination claim brought by another employee.

PRELIMINARY STATEMENT

On April 14, 2014, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations ("FCHR" or "the Commission"), which was assigned FCHR No. 201400621 ("Complaint of Discrimination"). The Complaint of Discrimination alleges that the Department discriminated against Petitioner in employment by unfairly disciplining and discharging her in retaliation for participating in a discrimination investigation. After investigating Petitioner's allegations, the Commission's executive director issued a Determination of Cause on September 19, 2014, finding "that there is reasonable cause to believe that an unlawful employment discrimination practice occurred." An accompanying Notice of Determination notified Petitioner of her right to file a Petition for Relief for an administrative proceeding within 35 days of the Notice. On October 22, 2014, Petitioner timely filed a Petition for Relief and, on October 22, 2014, the Commission forwarded the petition to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct an administrative hearing. The case was

assigned to the undersigned and this case was initially scheduled for a hearing to begin on January 29, 2015. Following Petitioner's written request for a continuance, the final hearing was rescheduled for March 24, 2015.

During the administrative hearing, Petitioner testified, called three witnesses, and introduced six exhibits received into evidence as Exhibits P-1, P-2, and P-4 through P-7. Respondent presented the testimony of two witnesses and introduced four exhibits into evidence as Exhibits R-A through R-D.

The proceedings were recorded and a transcript was ordered. The parties agreed to file their respective proposed recommended orders within 10 days from the filing of the transcript. The two-volume Transcript of the hearing was filed on May 1, 2015. The parties filed their Proposed Recommended Orders prior to the filing of the Transcript. Both Proposed Recommended Orders were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department of Corrections is a state agency as defined in chapter 110, Florida Statutes, and an employer as that term is defined in section 760.02(7), Florida Statutes.

2. At all times material, Petitioner was employed as a nurse at the Department's Lake Correctional Institution ("the Institution") in Clermont, Florida. She was hired by the

Department as a Licensed Practical Nurse effective July 12, 2007.

3. Petitioner was terminated from her position with the Institution in May 2013. At the time of Petitioner's termination, her official title was "Senior Licensed Practical Nurse."

4. Prior to her termination, the Department provided Petitioner with a letter dated April 16, 2013, advising her of her proposed dismissal and scheduling a meeting ("termination conference") with the Institution's Warden to discuss the reasons why Petitioner was being considered for termination. The letter was excluded from evidence because it was not timely disclosed as an exhibit by the Department as required in the Order of Prehearing Instructions in this case. Nevertheless, Respondent testified that she attended the termination conference and that, during the termination conference, she was provided, and they discussed, three incident reports against her that she had previously seen.

5. The termination conference was attended by the Institution's Warden, the Assistant Warden, and Dr. Virginia Mesa, the Institution's Chief Health Operator. The incident reports discussed at Petitioner's termination conference included Petitioner's alleged violation on February 8, 2013, of the federal Health Insurance Portability and Accountability Act

of 1996 (HIPAA) for which Dr. Mesa recommended Petitioner's dismissal; Petitioner's alleged failure on February 8, 2013, to carry out an assignment to log walking canes provided to inmates; and an alleged argument on February 18, 2013, with a supervisor regarding Petitioner's reassignment to process transferred inmates known as "new gains."

6. There is no indication that the termination conference changed the Department's proposed decision to terminate Petitioner.

7. At the final hearing, Petitioner testified and presented evidence designed to prove that the incidents outlined above did not occur. However, following her termination in 2013, Petitioner timely filed a career service system appeal with the State of Florida, Public Employees Relations Commission (PERC), contesting her termination. Following an evidentiary hearing and a PERC hearing officer's recommended order in that proceeding, PERC entered a final order on November 6, 2013, providing in its pertinent part:

> The relevant facts found by the hearing officer relate three separate incidents that led to [Theresa] Williams' dismissal. On February 8, 2013, Dr. Virginia Mesa observed Williams showing Captain Reed, who was the security officer-in-charge of the shift, something in a green file. A green file is the type of medical file kept for each inmate. The green file was open in Williams' hand and Reed and Williams were looking into it. Mesa observed Williams

flipping through the file with Reed in the public hallway. The Agency's policy and federal law strictly prohibit prison medical personnel from allowing non-medical staff to see inmate medical records.

That same day, Debra Elder, who was a senior health services administrator and new manager, asked Williams to record various information about canes that were issued to inmates and to label each cane with an identifying mark. Williams turned to a co-worker and told her to do it. Elder considered Williams' attitude insubordinate and wrote an incident report as soon as she returned to her office.

On February 18, Williams was assigned to be the "sick call" nurse when she reported for her shift at 6:45 a.m. However, she was informed that, if the prison received a significant number of "new gains," she would be re-assigned to assist the two nurses doing that work. "New gains" is the Agency's term for the processing of inmates transferred to the institution from another facility. Around 8:00 a.m., Williams' supervisor, Joyce Isagba, arrived at work. Isagba reviewed the assignments and directed a subordinate to assign Williams to new gains that day. Williams believed Isagba, a relatively new supervisor, had a pattern of changing her assignment from sick call nurse to new gains and did not like it. Williams approached Isagba and questioned why she was being reassigned. Williams and Isagba became loud and argumentative. Other nurses were present in the room. The conversation lasted some time and Williams repeatedly stated that the change of her assignment was unfair and repeatedly wanted to know why she was being reassigned. Isagba told her she was more qualified to do that work and that she did not have to give her reason for her decisions. The dispute lasted several minutes and Williams reluctantly assisted with new gains. Later that day, Williams was sent to sick call to finish that duty.

> Isagba considered Williams to have been insubordinate and wrote an incident report.
>
> Based on these factual findings, the hearing officer concluded that the Agency had grounds to discipline Williams for poor performance, violating the Agency's medical information privacy, and insubordination in violation of Florida Administrative Code Rule 60L-36.005. He recommended that [PERC] adopt his recommended order and dismiss Williams' appeal.
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> * * *
>
> Upon review of the complete record, including the transcript, we conclude that all of the hearing officer's facts are supported by competent substantial evidence received in a proceeding that satisfied the essential requirements of law. Therefore, we adopt the hearing officer's findings. § 120.57(1)(l), Fla. Stat. Furthermore, we agree with the hearing officer's legal analysis of the disputed legal issues, his conclusions of law, and his recommendation. Accordingly, the hearing officer's recommendation is incorporated herein and Williams' appeal is DISMISSED.

8. The hearing officer's Recommendation and PERC's Final Order in the PERC Proceeding, Williams v. DOC, 28 FCSR 284 (2013), were submitted by both parties and received into evidence without objection in this case as Exhibits P-4 and P-5, respectively, and Exhibits R-B and R-C, respectively. The PERC Proceeding involved the same parties as in this case and the allegations in the incident reports discussed at Petitioner's termination conference were actually litigated and determined in the PERC Proceeding. In other words, whether the incidents

outlined in those incident reports occurred and are sufficient to support the Department's decision to terminate Petitioner's employment has already been determined.[2/]

9. Moreover, Petitioner failed to show, in this case, that the incidents did not occur. Although Petitioner testified that she did not show Captain Reed the inmate's medical chart in violation of HIPAA and introduced Captain Reed's written statement stating that Petitioner did not show him the chart, the evidence adduced at the final hearing showed that when she met with Captain Reed during the incident, she was flipping through papers with the medical chart in her hand. As found in the PERC hearing officer's Recommended Order:

> Williams violated the Agency's privacy policy when she held an open inmate medical file so a security staff officer could see the inmate's writing and signature. This was not a reasonable procedure to accomplish the task of notifying the officer of a potential security threat to other inmates. There was a real possibility that the sick call slip had been forged. It was unnecessary to show Captain Reed an inmate's medical file to determine if the slip was forged. Williams could have done that herself with the same accuracy as Reed, since neither is a handwriting expert.

Williams v. DOC, 28 FCSR 284 (Recommended Order, 08/26/13).

10. Dr. Mesa's testimony in this case was consistent with the hearing officer's finding and is credited.

11. Regarding the other two incident reports, while Petitioner denied asking another to perform her assigned task of logging inmates' canes, she admitted that she delayed performing the task. Petitioner also admitted that she questioned her supervisor, Ms. Insagba, as to why she was being assigned "new gains," that during the incident Ms. Insagba raised her voice, and that they "were both talking at the same time and I guess she was trying to get a point across and I was just trying to ask her why."

12. In addition to the incidents addressed in the three incident reports, during cross examination in this case, Petitioner revealed that she was also disciplined twice in 2012. In August 2012, Petitioner received a record of counseling for insubordination. And in December 2012, Petitioner received a written reprimand for failure to follow instructions.

13. In sum, the record supports a finding that, by May 2013, the Department had cause to terminate Petitioner.

14. Although it has been determined that the Department had cause to terminate Petitioner's employment at the Institution, in this case Petitioner asserts that the real reason for her dismissal was her participation as a witness in a discrimination charge brought by another employee against the Department and Dr. Mesa.

15. The disciplinary incidents supporting Petitioner's dismissal occurred in February 2013, and before. The investigation in which Petitioner participated began in March of 2013 and Petitioner provided testimony in that investigation on April 23, 2013, after Dr. Mesa had already recommended Petitioner's dismissal and after Petitioner had been notified by the Department that she was being considered for dismissal. Petitioner was dismissed in May 2013.

16. In finding probable cause, the Commission stated in its summary of the Investigative Memorandum:

> Complainant did not demonstrate that she was harassed or disciplined because of participation in the internal investigation. Complainant provided no evidence of harassment, and she was not disciplined after her protected activity occurred. Respondent admitted that Complainant was disciplined for the alleged HIPAA violation, but this occurred prior to her protected activity.
>
> Based on the information received during the investigation, it does appear that Complainant was terminated in retaliation for her participation in the internal investigation. If the alleged HIPAA violation was a true terminable offense, Complainant should have been terminated in February of 2013 when it occurred. Instead, Respondent waited nearly three months to terminate her, which was about three weeks after her protected activity. Additionally, Respondent has a progressive disciplinary policy which it did not follow. The alleged HIPAA violation is Complainant's only documented incident. Respondent also claimed that Complainant was terminated

> after she was disciplined several times prior to the HIPAA event, yet it could provide no evidence that she had a disciplinary record prior to February of 2013.

17. Unlike the limited information available to the Commission in its probable cause determination, the evidence in the de novo proceeding conducted in this case demonstrated that Petitioner had a number of disciplinary offenses in February that were found by PERC to support her dismissal, and that Petitioner had been written up for two other disciplinary infractions in 2012.

18. Moreover, the showing necessary for a probable cause determination is less than Petitioner's burden to prove discrimination.

19. While there was a delay in Petitioner's termination, the evidence showed that Dr. Mesa recommended Petitioner for dismissal when she wrote up the incident report for the HIPAA violation in February 2013.

20. Although it is evident that management, including the Warden and Dr. Mesa, was generally aware that Petitioner had participated as a witness in another employee's discrimination claim in April of 2013, Petitioner did not show that she was terminated because of that participation.

21. And, while the Department's delay in dismissing Petitioner remained unexplained at the final hearing,[3/] that

delay, in light of the other facts and circumstances of this case, including Petitioner's numerous disciplinary infractions outlined above, is an insufficient basis to support a finding that Petitioner was terminated in retaliation for her participation in a protected activity.

CONCLUSIONS OF LAW

22. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 60Y-4.016(1).

23. The State of Florida, under the legislative scheme contained in sections 760.01-760.11 and 509.092, Florida Statutes, known as the Florida Civil Rights Act of 1992 (the Act), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq.

24. The Florida law prohibiting unlawful employment practices is found in section 760.10. Section 760.10(7) provides:

> 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.

25. Florida courts have held that because the Act is patterned after Title VII of the Civil Rights Act of 1964, as amended, federal case law dealing with Title VII is applicable. See, e.g., Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

26. As developed in federal cases, a prima facie case of discrimination under Title VII may be established by statistical proof of a pattern of discrimination, or on the basis of direct evidence which, if believed, would prove the existence of discrimination without inference or presumption.[4/] Usually, however, as in this case, direct evidence 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 Corp. v. Green, 411 U.S. 792 (1973). See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

27. Under the shifting burden pattern developed in McDonnell Douglas:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie case, the burden shifts to [Respondent] to "articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this

> burden, [Petitioner] has the opportunity to prove by a preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext. U.S. Dep't of Hous. and Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990)(housing discrimination claim); accord Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 22 (Fla. 3d DCA 2009)(gender discrimination claim)("Under the McDonnell Douglas framework, a plaintiff must first establish, by a preponderance of the evidence, a prima facie case of discrimination.").

28. Therefore, in order to prevail in her claim against the Department, Petitioner must first establish a prima facie case by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure proceedings or except as otherwise provided by statute and shall be based exclusively on the evidence of record and on matters officially recognized.").

29. "Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination." Holifield, 115 F.3d at 1562; cf., Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000) ("A preponderance of the evidence is 'the greater weight of the evidence,' [citation omitted] or evidence that 'more likely than not' tends to prove a certain proposition.").

30. Petitioner's Complaint of Discrimination against the Department alleges that the Department terminated her employment

in retaliation for her participation as a witness during the investigation of an alleged discrimination claim brought by another employee.

31. In order to prove a prima facie case of retaliation prohibited by Title VII, the plaintiff must show "(1) that there was a statutorily protected participation; (2) that an adverse employment action occurred; and (3) that there was a causal link between the participation and the adverse employment action." Fleming v. Boeing Co., 120 F.3d 242, 248 (11th Cir. 1997).

32. Petitioner successfully showed that, by virtue of her participation as witness in an investigation of another employee's discrimination claim, she participated in a protected activity. See § 760.10(7), Fla. Stat. (prohibits discrimination because a person has "testified, assisted, or participated in investigation, proceeding, or hearing" involving a claim of discrimination).

33. The evidence also demonstrated an adverse employment action; namely, Petitioner's dismissal.

34. Petitioner, however, failed to show, by a preponderance of the evidence, a causal link between her participation in a protected activity and her discharge. While the burden of causation can be met by showing close proximity between the time of the protected activity and adverse employment action,[5/] the evidence in this case does not satisfy

that burden. Petitioner's protected activity occurred after she had been recommended for dismissal and notified of a meeting with the Warden to discuss her proposed dismissal.

35. Therefore, Petitioner failed to carry her burden of persuasion necessary to state a prima facie case for her claim of a retaliatory discharge because of her participation in a protected activity.

36. Even if Petitioner had demonstrated a prima facie case, the Department successfully offered and proved legitimate, nondiscriminatory reasons supporting Petitioner's dismissal, and Petitioner failed to show, by a preponderance of the evidence, that those legitimate reasons were not the real reasons for her termination.

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 dismissing Petitioner's Complaint of Discrimination and Petition for Relief consistent with the terms of this Recommended Order.

DONE AND ENTERED this 30th day of June, 2015, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The DeSotoBuilding
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Tallahassee, Florida32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 2015.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes, Florida Administrative Code, and federal laws are to the current versions which have not substantively changed since the time of the alleged discrimination.

[2/] Although Petitioner also attempted to disprove the allegations in the same incident reports in this case, the legitimacy of those allegations has already been determined in the PERC proceeding prior to this case. As the PERC Proceeding involved the same parties and same incident reports discussed at Petitioner's termination conference, principles of collateral estoppel, also referred to as estoppel by judgment, prevent Petitioner from re-litigating those matters. While the previous litigation before PERC should bar Petitioner's re-litigation of the issues involving Petitioner's HIPAA violation and insubordination or rule violations set forth in the incident reports discussed at Petitioner's termination conference, it does not bar Petitioner's claim of retaliation. As explained in City of Bartow v. Public Employees Relations Commission, 382 So. 2d 311, 313 (Fla. 2d DCA 1979):

> The City raises several points on appeal, but we need discuss only two. We first address its contention that PERC was without jurisdiction to make a determination in this cause because of the prior adjudication of

> the Bartow Civil Service Board. The City contends that the Board's action barred the Commission from even considering whether Ott's discharge resulted from an unfair labor practice on the ground that the Board's adjudication was res judicata. We disagree. The issue before the Civil Service Board was whether Ott was insubordinate and not whether the City was guilty of an unfair labor practice in terminating his employment. Therefore, while the principle of estoppel by judgment applied to the Board's determination that Ott was insubordinate, it did not apply to PERC's contention that the City had committed an unfair labor practice. Estoppel by judgment bars only those matters actually litigated and determined in an initial action. Gordon v. Gordon, 59 So. 2d 40 (Fla. 1952); see also Jet Air Freight v. Jet Air Freight Delivery, Inc., 264 So. 2d 35 (Fla. 3d DCA 1972); Board of County Commissioners v. Rockmatt Corp., 231 So. 2d 41 (Fla. 3d DCA 1970). Accordingly, while the Commission was estopped from rehearing the issue of Ott's insubordination, it had jurisdiction to determine whether the City had committed an unfair labor practice. See PERC v. Fraternal Order of Police, Local Lodge, No. 38, 327 So. 2d 43 (Fla. 2d DCA 1976).

Therefore, although Petitioner is barred from re-litigating the incidents addressed in the PERC order, because Petitioner's claim of retaliation was not previously determined in the PERC proceeding, it is appropriate to determine that issue in this case.

[3/] It is likely that an explanation of the delay could have been provided by the Institution's Warden. The Warden was not called as a witness in this case. The Warden was reportedly unavailable during the final hearing because of a family medical emergency which occurred the night before. Although offered the opportunity to present the Warden's testimony by telephone or at a later date, the Department chose not to call the Warden as a witness. As seen in the rest of the analysis, an explanation of the delay was not critical to the Department's defense.

[4/] For instance, an example of direct evidence in an age discrimination case would be the employer's memorandum stating, "Fire [petitioner] – he is too old," clearly and directly evincing that the plaintiff was terminated based on his age. See Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

[5/] As explained in Thomas v. Cooper Lighting, Inc., 506 F.3d 1361, 1364 (11th Cir. 2001):

> The burden of causation can be met by showing close temporal proximity between the statutorily protected activity and the adverse employment action. See Brungart v. BellSouth Telecomms., Inc., 231 F.3d 791, 798-99 (11th Cir. 2000). But mere temporal proximity, without more, must be "very close." Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 273, 121 S. Ct. 1508, 1511, 149 L. Ed. 2d 509 (2001) (internal citations omitted). A three to four month disparity between the statutorily protected expression and the adverse employment action is not enough. See id. (citing Richmond v. ONEOK, 120 F.3d 205, 209 (10th Cir. 1997) (3 month period insufficient) and Hughes v. Derwinski, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (4 month period insufficient)). Thus, in the absence of other evidence tending to show causation, if there is a substantial delay between the protected expression and the adverse action, the complaint of retaliation fails as a matter of law. See Higdon v. Jackson, 393 F.3d 1211, 1220 (11th Cir. 2004) (citing [**6] Wascura v. City of South Miami, 257 F.3d 1238, 1248 (11th Cir. 2001)).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.