

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THOMAS HARRIS,

Petitioner,

vs.

Case No. 16-2166

BREVARD COUNTY SHERIFF'S
DEPARTMENT,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, this case was heard on June 27, 2016, before J. D. Parrish, Administrative Law Judge, Division of Administrative Hearings (DOAH), in Titusville, Florida.

APPEARANCES

For Petitioner: Richard Manzo, Esquire
Manzo Law Firm
5095 South Washington Avenue
Titusville, Florida 32780

For Respondent: Marc Aaron Sugerman, Esquire
Wayne L. Helsby, Esquire
Allen, Norton and Blue, P.A.
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STATEMENT OF THE ISSUE

Whether the Brevard County Sheriff's Department (Respondent) violated law and discriminated against Thomas

Harris (Petitioner) by harassment or constructive termination of his employment on the basis of race.

PRELIMINARY STATEMENT

The Florida Commission on Human Relations (FCHR) forwarded this case to DOAH in order to conduct an administrative hearing based upon Petitioner's claim of discrimination. Petitioner alleged that Respondent discriminated against him on the basis of his race in that he was subjected to treatment not administered to other employees. Petitioner asserted that his job assignments were not equal to others', his promotion opportunities were not equal to others', and the continuous harassment by others at the job ultimately led to constructive termination of his employment in violation of law. After its investigation of the claim, FCHR rendered a determination of no cause. Petitioner timely challenged that decision, and the matter was referred to DOAH.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Kimberly Harris, his wife. Respondent presented testimony from James Dodson, Robert Lough, and Robbie Stokes. Respondent's Exhibits 1 through 13 were admitted into evidence.

The Transcript of the proceeding was filed with DOAH on July 18, 2016. The parties were granted an extension to file proposed orders no later than August 18, 2016. Respondent timely filed a proposed order that has been considered in the preparation of this Order.

FINDINGS OF FACT

1. Petitioner is a black male, who has worked for Respondent as a Corrections Officer in the county jail since 2001. He was assigned different areas of service throughout his tenure with Respondent including the "annex," as well as the main jail.

2. Respondent is responsible for the operation and control of the Brevard County jail(s) and employs a number of Correction Officers in the furtherance of that responsibility. Correction Officers are employed pursuant to the terms of a Collective Bargaining Agreement (CBA) that addresses multiple facets of the work performed by the bargaining unit members. Promotions and disciplinary actions are encompassed within the CBA.

3. Petitioner believes he was subjected to inappropriate treatment, denied promotions, and harassed to such an extent that he was forced to resign his position with the Respondent. Petitioner asserts that he was ill-treated because of his race.

4. In addition to Florida law, the CBA at Article 4.02 provides, in part:

No bargaining unit member will be discriminated against on the basis of age, race, creed, color, national origin, sex, disability, marital status, religion, or sexual orientation.

5. The position of Corrections Corporal is considered a lead position that may receive shift differential pay increase. Prior to 2011, Petitioner applied for a Corporal position, but was never selected. After 2012, Petitioner did not apply for the Corporal position. Petitioner believed the selection process for Corporal was "rigged." At the time of his separation from employment with Respondent, 18 percent of the Corrections Corporals were black. Petitioner's race had nothing to do with his failure to secure the position of Corporal.

6. The position of Corrections Sergeant is considered a promotion within the Respondent's work place. To become eligible for the rank of Sergeant, a Corrections Officer must pass the written Sergeant's test and then go through a screening process with others who successfully passed the test. Petitioner applied for the position of Sergeant twice during his employment with Respondent. On one occasion, Petitioner did not pass the written test for Sergeant; therefore, could not move on to the screening process. On a second occasion, Petitioner did not turn in his application within the designated time frame for

testing. Petitioner's race had nothing to do with his failure to achieve the rank of Sergeant.

7. There were two other non-promotional positions within the jail that Petitioner sought during his tenure. These positions did not require testing and did not increase the base pay of officers assigned to the duty. The position, Officer in Charge (OIC), was one such assignment. A second position, Field Training Officer (FTO), also did not increase base pay for the assignment, but shift differential increase might be applicable. Petitioner did not obtain these positions.

8. In January 2015, six (6) out of twenty-four (24) FTOs were black.

9. At all times material to this case ,there were no tests required for assignment to OIC, Corporal, or FTO. The process for selection to these positions was informal. An interested candidate could respond to an announcement and based on supervisory input, including disciplinary issues and leadership ability, candidates would be selected. Petitioner was not selected because his supervisors did not consider him to be appropriately qualified to take on the positions.

10. To be selected for one of these positions, an officer has to exhibit the ability to deal with other officers, let them know what they must do, and hold them accountable to policy. Petitioner was written up on two occasions for not following

policy. First, Petitioner was given a verbal counseling because he violated procedure and failed to keep a door open for a juvenile watch post. This failure to follow protocol was deemed carelessness, and Petitioner was counseled regarding the safety implications of not keeping the door open.

11. Second, Petitioner failed to report that he had misplaced his "chemical agent" while at work. Apparently Petitioner not only lost the item, but failed to notice that it was missing until several days later. He did not report the loss to his supervisor or complete the proper reports before attempting to obtain a replacement. For this infraction, Petitioner was given a written reprimand. This event happened in 2012, some 10 plus years into Petitioner's career as a Corrections Officer.

12. When Petitioner last applied for promotion to Corrections Sergeant, seven (7) out of twenty-three (23) Corrections Sergeants were black.

13. In January 2015, when Petitioner resigned his position with the Respondent, six (6) out of twenty-one (21) Corrections Sergeants were black.

14. Kimberly Wilson, a black female, was promoted to the rank of Corrections Sergeant while Petitioner was employed by Respondent. Sergeant Wilson scored the requisite 76 percent or better on the examination before being considered for promotion.

15. Clifford Ferguson, a black male who began working for Respondent about the same time as Petitioner, was promoted to the rank of Corrections Sergeant. Sergeant Ferguson scored the requisite 76 percent or better on the examination before being considered for promotion.

16. Vere Samuel, a black male who began working for Respondent in 2008, was promoted to the rank of Corrections Sergeant. Sergeant Samuel scored the requisite 76 percent or better on the examination before being considered for promotion.

17. Robbie Stokes, a black male, was promoted to the rank of Corrections Sergeant in 2008, and later to the rank of Lieutenant. As did all successful candidates, Stokes scored the requisite 76 percent or better on the examination before being considered for promotion.

18. In contrast, the only time Petitioner took the Sergeant's examination, he scored a 52 percent, which was the lowest score of any applicant in that testing cycle.

19. Respondent established that black officers who demonstrated the requisite examination results, abilities, and leadership qualities were promoted to the rank of Sergeant. Petitioner never met the threshold criterion of scoring well enough on the written examination.

20. As to Petitioner's claims that he was routinely harassed by other Corrections Officers, Petitioner did not report many of the alleged actions to his supervisors so that, if true, appropriate corrective action could be taken. Instead, Petitioner maintained he endured the stressful environment without seeking regress against any of the alleged perpetrators. Management cannot act against inappropriate employee conduct without notice of such behavior.

21. The one or two times that Petitioner did complain to a supervisor regarding his treatment by other officers, action was taken. None of the complaints would support a claim of a discriminatory environment based upon race. More likely, Petitioner was not regarded favorably by his peers and their comments were undoubtedly hurtful. His inability to move past his perceived slights contributed to his work stress, not discriminatory actions of others.

22. In January 2015, Petitioner submitted his resignation to Respondent. Petitioner was contacted to reconsider the decision. Petitioner was given a full payout of his benefits even though he did not provide two weeks' notice.

23. Petitioner was considered a dependable Corrections Officer who simply lacked a level of maturity and judgment to achieve promotion during his time with Respondent. Petitioner's lack of self-awareness and inability to demonstrate a command of

procedure and policy resulted in his failure to achieve promotion.

24. Petitioner's inability to move past his perceived slights from others created the stress he felt on the job. Discrimination was not a factor.

25. Sergeant Stokes noted Petitioner's deficiency to be the inability to make sound decisions.

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the subject matter and the parties of this proceeding. See §§ 760.11, 120.569, and 120.57, Fla. Stat. (2016).^{1/}

27. Section 760.10, Florida Statutes, provides, in pertinent part:

(1) It is 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.

28. Petitioner maintains he was discriminated against based upon his race (African-American).

29. In accordance with section 760.11, Petitioner timely filed his claim with FCHR.

30. Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. & Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

31. In accordance with law, Petitioner may establish his case by direct, statistical, or circumstantial evidence. See Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17 (Fla. 3d DCA 2009).

32. In this case, Petitioner presented no direct evidence of discrimination. There is nothing in the record to suggest Respondent maintained any bias for or against any employee based upon race. Respondent promoted black officers to positions of supervision based upon merit and job performance. Petitioner's performance was not comparable. Race did not have any part of Petitioner's failure to receive promotion to Corrections Sergeant.

33. Petitioner presented no statistical evidence of discrimination. There was no statistical evidence that non-black officers were more favorably treated than Petitioner.

34. In this case, to establish discrimination by circumstantial evidence, Petitioner must demonstrate that he is a member of a protected class, he was qualified for his promotion, he was subjected to an adverse employment action, and

that his employer treated similarly-situated employees outside of his protected class more favorably than he was treated. See Burke-Fowler v. Orange Cnty., 447 F.3d 1319 (11th Cir. 2006).

35. Respondent did not treat any employee more favorably than Petitioner. All candidates for Corrections Sergeant followed the same path. Petitioner could not qualify for promotion because the one time he took the examination, he scored the lowest grade among those who took the test. No officer could be promoted without meeting the testing requirement. Other black officers were successful; Petitioner was not. Discrimination bore no part in the decision.


36. Finally, Petitioner's perceived slights by co-workers were not racially motivated. There is no evidence that Petitioner was singled out by the alleged perpetrators to taunt him based upon his race. There is insufficient evidence that Petitioner's supervisors were made aware of any significant act of disrespect toward Petitioner. Petitioner simply did not enjoy the work environment. He was unhappy he had not been chosen for positions (OIC, FTO, or Corporal), he was unhappy with his co-workers who teased him (assuming the comments were made), and he did not pass the Sergeants' test the one time he took it. He may have assumed his career would be limited. Nothing in the work environment forced Petitioner to submit his resignation in January 2015.

37. Petitioner's lack of success in his job did not stem from a discriminatory employer. Respondent did not discriminate against Petitioner on the basis of his race. If discrimination is not the factor motivating an employment decision, companies are entitled to reach their own decisions "for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). In this case, Respondent chose employees for OIC, FTO, and Corporal based upon nondiscriminatory reasons, promoted all officers to Sergeant based upon criteria that were not based upon race, and did not foster a work environment hostile to Petitioner's race. As evidenced by the record in this case, members of Petitioner's race were successful within the ranks of Respondent's employees and others; nonmembers of Petitioner's race were not more favorably treated.

RECOMMENDATION

Based upon 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 claim of discrimination.

DONE AND ENTERED this 16th day of September, 2016, in
Tallahassee, Leon County, Florida.



J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of September, 2016.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2016).

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.