

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1324

SHERMAN AUGUSTINE

VERSUS

DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS,
LOUISIANA STATE PENITENTIARY

Judgment Rendered: February 10, 2012

* * * * *

APPEALED FROM THE CIVIL SERVICE COMMISSION
STATE OF LOUISIANA
DOCKET NUMBER 16985

THE HONORABLE DAVID DUPLANTIER, CHAIRMAN
JOHN MCCLURE, VICE-CHAIRMAN; WILFRED PIERRE, C. PETE FREMIN,
D. SCOTT HUGHES, KENNETH POLITE, JR., MEMBERS
SHANNON S. TEMPLET, DIRECTOR

* * * * *

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

McDONALD, J.

Petitioner, Sherman Augustine appeals a decision of the Louisiana Civil Service Commission dismissing his appeal for failure to state a right of action, which had asserted agency wrongdoing related to his assigned work hours, performance evaluations, the denial of annual leave, and the failure to provide a pre-deprivation review before the denial of annual leave. For the following reasons, the decision is affirmed.

Augustine was employed by the Department of Public Safety and Corrections (DPSC) as a Corrections Master Sergeant at the Louisiana State Penitentiary (LSP) with permanent status. In August 2010, he filed a request for relief from duty to be credited against his annual leave, which was denied. At the time, he had annual leave hours considerably in excess of what he was requesting.

In September, Augustine amended his appeal to include a complaint against LSP for assigning him to a night shift beginning September 20, 2010. Prior to September, Augustine was assigned to a day shift. Augustine claimed that the “inconvenient” reassignment was a retaliatory action for filing the present appeal, for filing an appeal to the United States Court of Appeal, for filing a whistleblower lawsuit in the 20th Judicial District Court, for filing complaints and grievances to the Civil Service Commission and appeals to the First Circuit Court of Appeals. He also claims his 2010 PPR evaluation was “falsified.” He maintains that this and other actions of the warden and assistant warden of LSP are in violation of civil service rules, are in breach of a contractual agreement reached in settlement with LSP of a disputed Family Medical Leave Act claim, and fail to make legally required accommodation to his disability. Augustine correctly contends that civil service rules require a hearing before certain actions are taken. He alleges sexual discrimination because a female employee was given a pre-deprivation hearing before being removed from office.

On November 30, 2010, Augustine was removed from office for non-disciplinary reasons, effective December 7, 2010. He appealed this action and initially that appeal was consolidated with this pending appeal. However, on March 25, 2011, the civil service referee severed the appeals.

We have thoroughly examined the record in this case and given careful consideration to the arguments of the appellant. After due deliberation, we conclude that the findings of the civil service referee are legally correct and accurately reflect the factual circumstances surrounding the matter. Therefore, we adopt those findings as follows, and affirm the decision of the Civil Service Commission Referee.

Sherman Augustine worked for the Department of Public Safety and Corrections (DPSC) as a Corrections Master Sergeant at the Louisiana State Penitentiary (LSP). He served with permanent status.

On August 31, 2010, Mr. Augustine filed an appeal alleging that DPSC had denied his request for "vacation leave"¹ in violation of the Civil Service Rules (CSR). He asserts that the denial of his leave request constituted retaliation by LSP Warden Burl Cain. As relief, Mr. Augustine requests that DPSC allow him to use his leave or pay him for it by January 5, 2011.

On September 28, 2010, Mr. Augustine amended his appeal to complain that DPSC transferred him to the night shift effective September 20, 2010. He alleges that DPSC transferred him in retaliation for his filing this appeal and several other appeals, complaints, and grievances in various other venues. He further contends that the transfer and denial of the use of his leave is "discipline in disguise," and therefore, he is entitled to the full panoply of procedural rights that accompany a disciplinary action. Mr. Augustine also asserts that DPSC "falsified" his 2010 Performance, Planning, and Review (PPR) evaluation in violation of the Civil Service Rules. As relief, Mr. Augustine requests that DPSC: 1) transfer him back to the day shift, 2) restore all hours of leave that he used due to the transfer, 3) allow him to use his leave, and [3]) refrain from further retaliation.

On December 1, 2010, I issued a notice to Mr. Augustine questioning whether he had alleged a right of appeal to the Commission in accordance with CSR 13.10 and *Louisiana Department of Agriculture and Forestry v. Sumrall*, 98-1587 (La. 3/2/99); 728 So.2d 1254. I

¹ I assume that Mr. Augustine is referring to annual and/or compensatory leave.

gave Mr. Augustine fifteen calendar days to show cause in writing why his appeal should not be dismissed and/or to amend his appeal.

In response to the notice, Mr. Augustine amended his appeal on December 16, 2010. He restates his previous claims, alleges that DPSC has discriminated against him based on sex, and contends that DPSC did not provide a pre-deprivation hearing prior to denying his leave request and transferring him to the night shift. He further contends that the shift transfer and the denial of his leave request are barred by *res judicata* under a 2002 settlement agreement between DPSC and Mr. Augustine regarding two previous appeals. As additional relief, Mr. Augustine requests an award of attorney's fees and consolidation of this appeal with his "upcoming separation appeal."

By letter dated November 30, 2010, DPSC removed Mr. Augustine from his position effective December 7, 2010, pursuant to the provisions of CSR 12.6(a)1. Mr. Augustine filed an appeal of his removal on December 17, 2010, which was docketed as S-17061.

On January 28, 2011, I consolidated the appeals for hearing in accordance with the provisions of CSR 13.23. However, on March 25, 2011, I severed the appeals. Based on a review of the pleadings and pursuant to Article X, § 12(A) of the Louisiana Constitution of 1974, as amended, I reach the following conclusions.

Conclusions of Law

In this appeal, Mr. Augustine complains DPSC transferred him to the night shift, denied his ["]vacation" leave request, and "falsified" his 2010 PPR evaluation. He also alleges that he is the victim of retaliation and discrimination based on sex, as more fully set forth below.

An employee appealing any action other than a removal or disciplinary action only has a right of appeal to the Commission if the employee alleges that he has been adversely affected by the violation of the Civil Service Article and/or Rules, or has been discriminated against because of his religious or political beliefs, sex or race. See CSR 13.10 and *Louisiana Department of Agriculture and Forestry v. Sumrall*, 98-1587 (La. 3/2/99); 728 So.2d 1254. Additionally, CSR 13.11(d) requires the employee to allege in detail the specific facts supporting a conclusion that a violation of the Civil Service Article or Rules, or prohibited discrimination, has occurred; a mere conclusion is insufficient. I therefore summarily dismiss Mr. Augustine's claims alleging that DPSC has violated any laws, regulations, or rules other than the Civil Service Rules or Article. I also summarily dismiss all claims of discrimination except those based on political or religious

beliefs, sex or race.²

Mr. Augustine complains that the denial of his request for "vacation" leave was a violation of CSR 11.7., which provides in pertinent part:

11.7 Use of Annual Leave

(a) Annual leave must be applied for by the employee and may be used only when approved by the appointing authority or his designated representative.

The "may" and "when approved" language of the rule clearly indicates the granting of annual leave is at the discretion of the agency. CSR 21.6(a) contains similar language regarding the use of compensatory leave. An agency has the right to make administrative and managerial decisions, which include an employee's use of annual and compensatory leave. *Flanagan v. Department of Environmental Quality*, 99-1332 (La. App. 1 Cir 12/28/99), 747 So.2d 763. Likewise, DPSC clearly has the right to determine Mr. Augustine's hours of work and transfer him to the night shift. DPSC thus did not violate the Civil Service Rules by denying Mr. Augustine's leave request and transferring him to a different shift.

However, Mr. Augustine contends that DPSC's denial of his leave request and his transfer to the night shift were "disciplinary action(s) in disguise" for which he was denied pre-deprivation hearings. This contention is without merit. Only suspensions without pay, reductions in pay, involuntary demotions, and dismissals are disciplinary actions under Civil Service Rule 12.3(a). A denial of a request for annual or compensatory leave and a transfer to the night shift are not disciplinary actions, nor can they be considered "discipline in disguise." The Commission has rejected the idea that an action that is not disciplinary under the Civil Service Rules can constitute disguised discipline. Such being the case, the disciplinary procedures of the Civil Service Rules are inapplicable to the denial of leave requests and changes to the employees[" "] work hours.

Mr. Augustine concludes that DPSC discriminated against him based on sex because it did not provide him with a pre-deprivation hearing prior to the shift change and the denial of his leave request, while it granted a pre-deprivation hearing to a female employee facing dismissal. However, a dismissal requires pre-deprivation procedure; a shift change and the denial of a leave request do not, so it cannot be said that DPSC's actions constituted discrimination. Although Mr. Augustine also concludes that DPSC has discriminated against him based on sex by denying his leave request and changing his shift, he has failed to plead sufficient specific facts to support this conclusion.

² The dismissed claims include those under the United States Constitution, Family and Medical Leave Act, Americans with Disabilities Act, Title VII of the of the Civil Rights Act of 1964, Occupational Safety and Health Act, Fair Labor Standards Act, Equal Employment Opportunity Commission policies, Louisiana Civil Rights for the Handicapped Act, American Federation of State, County, and the Municipal Employees Union contract and other contract laws.

Mr. Augustine contends that the shift transfer and the denied vacation request are retaliatory acts devised by Warden Cain and DPSC to exact revenge upon Mr. Augustine because he has spent years filing grievances, complaints, and appeals against DPSC and Warden Cain. Retaliation is a form of non-merit factor discrimination, but it is inapplicable to this appeal under CSR 13.10 and *Agriculture, supra*, as I find that no rule violation has occurred and this appeal does not involve a disciplinary action or removal.

Mr. Augustine further contends that *res judicata* resulting from the 2002 settlement agreement in the appeals bearing docket Nos. 14573 and S-14579 barred DPSC from denying his leave request and changing his shift. His reliance on *res judicata* is misplaced. Clearly, the subject matter of the 2002 settlement agreement was the two appeals that Mr. Augustine had filed. The events at issue in the present appeal had not yet occurred. The argument that a nine-year-old settlement agreement somehow bars DPSC from ever denying his leave requests or changing his shift is simply untenable.

Finally, Mr. Augustine asserts that DPSC "falsified" his 2010 PPR evaluation in violation of Chapter 10 of the Civil Service Rules. Under Civil Service Rule 13.10, there is no right of appeal as to a PPR evaluation unless the employee alleges that the PPR evaluation constituted discrimination based upon the employee's political or religious beliefs, sex, or race. Mr. Augustine has not alleged that DPSC engaged in prohibited discrimination against him regarding his PPR.

In view of the foregoing, and despite being given an opportunity to do so, Mr. Augustine has failed to allege a right of appeal to the Commission. Accordingly, I hereby dismiss this appeal.
(Footnotes from original referee's decision.)

As noted earlier, we adopt these findings. We find them an exemplary statement of the law and facts in this matter. We therefore affirm the judgment of the Civil Service Commission Referee dismissing the appeal. Costs in this matter are assessed against the appellant, Sherman Augustine.

AFFIRMED.