STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AUBRAY D. GRANDISON,)
)
Petitioner,)
)
vs.) CASE NO. 92-0214
)
CONSOLIDATED FREIGHTWAYS)
CORPORATION OF DELAWARE,)
)
Respondent.)
______________________________________)

RECOMMENDED ORDER

A final hearing in this case was held pursuant to notice on May 13, 1992, in Jacksonville, Florida, by Stephen F. Dean assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Aubray D. Grandison, pro se
661 Herschel Street
Gonzales, Florida 32560

For Respondent: Peter Reed Corbin, Esquire
F. Damon Kitchen, Esquire
731 May Street
Post Office Box 41566
Jacksonville, Florida 32203

STATEMENT OF THE ISSUES

Whether Respondent discharged Petitioner in violation of Section 760.10, Florida Statutes (1991).

PRELIMINARY STATEMENT

On December 18, 1989, Petitioner filed a timely charge of discrimination with the Florida Commission on Human Relations (hereinafter "The Commission" or the "FCHR"), claiming that he was discharged because of his race (Black), and in retaliation for having filed a discrimination complaint with the Escambia-Pensacola Human Relations Commission. On June 19, 1991, the FCHR, after an investigation, issued a "Notice of Determination: No Cause" in this case. The Determination found that there was no reasonable cause to believe that an unlawful employment practice had occurred in Petitioner's case. On September 3, 1991, the Commission, pursuant to a request from Petitioner, issued a "Notice of Redetermination: No Cause". The Redetermination also held that there was no reasonable cause to believe that an unlawful employment practice had occurred. Petitioner then filed a timely Petition for Relief requesting a formal administrative hearing, and the case was referred to the Division of Administrative Hearings by the Commission on January 13, 1992. Respondent filed a timely Answer on February 3, 1992, denying that an unlawful employment

practice had occurred, and raised various affirmative defenses. A Notice of Hearing was sent out on February 5, 1992, scheduling a hearing in Jacksonville, Florida, on May 13, 1992. Subsequent to the hearing, Respondent's Proposed Recommended Order was filed on July 27, 1992, which was read and considered, Petitioner submitted a letter which was read and considered. Appendix A states which of Respondent's findings were adopted and which were rejected and why.

FINDINGS OF FACT

1. The Petitioner, Aubray Grandison (hereinafter "the Petitioner" or Grandison"), is a black male, and began working as a casual local driver at the Pensacola, Florida terminal facility of the Respondent, Consolidated Freightways Corp. of Delaware (hereinafter "the Respondent" or "CF") in October, 1987. (Tr. 10, 71; R. Ex. 5 and 6) 1/

2. CF is an interstate trucking carrier, transporting general commodity freight to and from various locations throughout the United States, including its Pensacola terminal facility (Tr. 63-64). At CF's Pensacola terminal, it employs a terminal manager (who is generally responsible for the terminal operation), an account manager, a dock foreman, a part-time office clerk, and a number of local drivers, both casual and regular. At all times material herein, the Terminal Manager at the Pensacola facility was Ken Webb (Hereinafter "Webb"). (Tr. 63-64.

3. As of June 14, 1989, CF employed nine regular drivers at the Pensacola terminal, of whom seven were white, and two (or 22%), Robert Sparks and Aubray Grandison, were black. At this time, the Company also utilized four casual local drivers, of whom two were white and two (or 50%) were black (Tr. 65-66; R. Ex. 11). At all times material herein, Respondent had in effect a Company-wide EEO policy, insuring equal employment opportunity without regard to race, color, age, religion, sex, handicap or national origin. (Tr. 68; R. Ex. 3).

4. Local drivers at CF's Pensacola terminal were assigned various duties to include unloading incoming freight, properly loading and delivering freight to CF customers in the Pensacola area, picking up freight from customers to be delivered, and properly completing their paperwork for all their activities. The duties were the same for both casual and regular drivers (Tr. 69, 75). The difference between casual drivers and regular drivers was that regulars had seniority rights and were guaranteed 40 hours per week (unless on lay off), whereas casual drivers had no guarantee of hours or seniority rights, and were called on as needed for about 30 hours per week.

5. CF's drivers at the Pensacola terminal, including Petitioner, were covered by a collective bargaining agreement, the National Master Freight Agreement and Southern Conference Area Local Freight Forwarding Pick Up and Delivery Supplemental Agreement, and were represented by a labor union, Teamsters Local 991 based in Mobile, Alabama (Tr. 69; Burnthorn dep. 8-9). The Local 991 business agent representing CF's Pensacola drivers was Jerry Burnthorn, and the shop steward was Larry Douglas. (Tr. 70-71, Burnthorn dep. 7).

6. Grandison worked as a casual driver for approximately one year, and during this time, his job performance was very good, including his performance with respect to the delivery of freight and the proper completion of paperwork relating to his loads of freight. His performance was good enough that Terminal Manager Webb recommended that he be hired as a regular driver, notwithstanding

an unfavorable reference from a previous employer (Tr. 74, 81-82). Grandison became a regular driver, effective October 25, 1988. (Tr. 78-79; R. Ex. 1, 7).

7. CF experienced no problems with Grandison's performance until approximately three months after he became a regular driver. Beginning in approximately February, 1989, Webb began experiencing various problems in Grandison's performance, particularly with respect to the misdelivery of freight and the improper completion of his paperwork relating to his loads of freight. (Tr. 82; R. Ex. 9).

8. CF did not have a formal training program for its personnel to teach them how the various paperwork was to be completed. The paperwork required was relatively complex as revealed in the extensive testimony of Webb about Grandison's errors.

9. Grandison received several verbal warnings in February and early March, 1989. During the course of the next six months, he received a number of written reprimands in accordance with the collective bargaining agreement.

10. On March 13, 1989, Grandison received a warning letter for a preventable accident on February 20, 1989. This accident originally was ruled nonpreventable by Webb because the police investigated and issued no citation. Webb was overruled by the Company's safety officer because the company paid a claim to the driver of the other vehicle. (Tr. 89-91; R. Ex. 10).

11. On March 31, 1989, Grandison received a warning letter for a misdelivery of freight on March 27, 1989, involving a tire delivered to the wrong customer. The tire was clearly marked with the destination. (Tr. 99-103; R. Ex. 11)

12. On March 31, 1989, Grandison received a warning letter for failure to follow instructions by misdelivering freight, involving two loads of freight, each cross-delivered to the wrong customer. (Tr. 103-104; R. Ex. 12).

13. On March 31, 1989, Grandison received a warning letter for failing to follow instructions on March 29, 1989, by failing to list the pro numbers for freight he picked up on his daily P&D Trip Manifest. The pro numbers identify the freight which the driver picked up. (Tr. 104-105; R. Ex. 13).

14. On March 31, 1989, Grandison received a warning letter for failing to follow instructions on March 23, 1989, by not properly completing a bill of lading upon which he failed to write the date and "CFWY" as required by Company policy. (Tr. 105-106; R. Ex. 14).

15. On March 31, 1989, Grandison received a warning letter for failing to follow instructions on March 23, 1989, by not properly completing eight different bills of lading by failing (1) to note the number of forklift moves, which the Company uses to properly bill the freight (Tr. 106-111; R. Ex. 15), and (2) failing to note the number of pieces of freight picked up on each bill. (Tr. 112-114; R. Ex. 16).

16. On March 31, 1989, Grandison received a warning letter for threatening a work slow down on March 30, 1989. (Tr. 199; R. Ex. 17).

17. On April 17, 1989, Grandison received a warning letter (reduced to verbal warning) for failing to follow instructions on April 7, 1989, by not noting that pick up was a single shipment pick up on the pro number. The

Company must have this information in order to bill the customer a surcharge for a single shipment pick up. (Tr. 120-121; R. Ex. 18).

18. On April 17, 1989, Grandison received a written warning (reduced to verbal warning) for failure to follow instructions on April 14, 1989, by failing to complete the required documentation and failing to place the required "refused" sticker on freight that was refused receipt. As a result, the Company did not have a record of why the freight was refused. (Tr. 121-122, R. Ex. 19). In conjunction with the April 17, 1989 letters, Webb met with Business Agent Burnthorn, Shop Steward Douglas, and Grandison. Webb agreed to reduce the written warnings to verbal warnings, in exchange for an agreement from Grandison that he would attempt to complete his paperwork properly from that point on. (Tr. 122-123).

19. On May 25, 1989, Grandison received a suspension letter suspending Petitioner for two days without pay for the misdelivery of freight on May 16, 1989. (Tr. 126-127; R. Ex. 20). Grandison filed a grievance under the collective bargaining agreement contesting this suspension, but the grievance was denied. (Tr. 26-27, 129).

20. On June 30, 1989, Grandison received a warning letter for failing to follow instructions on June 20, 1989, by not showing a single shipment pick up on his pro number. (Tr. 131; R. Ex. 21).

21. On June 30, 1989, Grandison received a suspension letter imposing a five day suspension without pay for the misdelivery of freight on June 22, 1989. (Tr. 132; R. Ex. 22).

22. On August 4, 1989, Grandison received a warning letter for failing to follow instructions on July 24, 1989 by failing to sign the delivery receipt as required by Company policy. (Tr. 133; R. Ex. 23).

23. On August 4, 1989, Grandison received a warning letter for failing to follow instructions on August 1, 1989 by not properly completing two delivery receipts. (Tr. 133; R. Ex. 24).

24. On August 24, 1989, Grandison received a warning letter for failing to follow instructions on August 23, 1989, by not completing several dock expedite write ups while unloading freight at the CF depot. These are necessary in order to properly reroute the freight. (Tr. 133-139; R. Ex. 25).

25. On September 8, 1989, Grandison received a warning letter for failing to follow instructions on September 5, 1989, by failing to record the seal number removed from a trailer on the Terminal Unloading Check Sheet. This is required by the Company's security policy. (Tr. 140-141; R. Ex. 26).

26. On September 8, 1989, Grandison received a warning letter for failure to follow instructions on September 7, 1989, by dropping a 500 pound piece of medical equipment on the ground while attempting to load the equipment on the customer's truck with a forklift, and causing $7,000 of damage to the equipment. (Tr. 141-142; R. Ex. 27). This incident was personally witnessed by Terminal Manager Webb. (Tr. 196).

27. On September 21, 1989, Grandison also received a suspension letter for misdelivering freight to a customer (Scotty's, Inc.) on September 11, 1989. However, Grandison contested this suspension by filing a grievance. In an informal meeting at the terminal with Grandison and Business Agent Burnthorn,

Webb agreed to withdraw the suspension and give Grandison another chance. (Tr. 144-145; R. Ex. 28).

28. On October 12, 1989, Grandison received a suspension letter imposing a five day suspension without pay for the misdelivery of freight to a customer on October 2, 1989. (Tr. 148; R. Ex. 29).

29. On October 19, 1989, Grandison was discharged by CF for two separate misdeliveries of freight, one involving a shipment to Babbage's on October 10, 1989 and another involving a shipment to Eglin Air Force Base on October 16, 1989 (Tr. 152-156; R. Ex. 31). The Babbage's misdelivery allegedly involved Petitioner's failure to deliver 3 of 7 boxes in a delivery to Babbage's, and the Eglin misdelivery allegedly involved in failure to deliver ten boxes of phones in a 32 box shipment.

30. According to Webb, on October 28, 1989, he received a call from an employee of Babbage's, a retail store, complaining that only four of seven boxes had been delivered. Webb advised the woman that he had a receipt she had signed for seven boxes. She advised him she did not have a copy of the receipt, but that she only received four boxes. Webb had a search conducted, and found three boxes for delivery to Babbage's. The lady wrote Webb a letter stating she had only received four of seven boxes. (Tr-152.)

31. According to Webb, on October 16, 1989, the Respondent was suppose to deliver 32 phones to Eglin AFB. The Respondent called to get an exception number to permit him to deliver 22 of 32 items and reflect 10 items short. The 10 cartons he was supposedly short where found on his truck when he returned to the depot. (Tr.-155)

32. Terminal Manager Webb advised Grandison of the reason for his discharge at the terminal with Shop Steward Douglas present. Webb also personally handed to Grandison a copy of his discharge letter. When Grandison refused to sign CF's copy of the letter acknowledging receipt of it, Webb, also mailed him a copy via certified mail with a copy also being sent to the local union in accordance with the collective bargaining agreement. Grandison's copy of the letter was returned unclaimed, but the local union received its copy. (Tr. 157-158; R. Ex. 31).

33. Grandison filed a grievance contesting his discharge on October 30, 1989. (Tr. 158; R. Ex. 32). Grandison's grievance was heard by the Southern Multi-State Grievance Committee in Ft. Lauderdale, Florida on January 16, 1990. Grandison, who was present at this hearing and testified in his own behalf, was represented by Business Agent Burnthorn. CF was represented by Labor Relations Representative Bill Jenkins. (Burnthorn dep. 18-20). In accordance with Article 45 of the collective bargaining agreement, the Committee was an impartial arbitration panel comprised of an equal number of management and labor representatives, neither of whom was affiliated with either CF or Local 991. (Burnthorn dep. 12-14, 19). After hearing the evidence presented by both sides, the Committee denied Grandison's grievance and upheld his discharge. (Tr. 162; R. Ex. 33; Burnthorn dep. 21). This decision was final and binding on both sides. (Burnthorn dep. 15; R. Ex. 4, p. 124). Although the transcript of the Committee's proceeding was introduced, the Committee only records its ruling.

34. Discharge of an employee is addressed in Article 46 of the collective bargaining agreement. Under this provision, there were certain dischargeable offenses (such as dishonesty or using or being under the influence of alcohol, narcotics or drugs while on duty) without a prior warning. For other offenses,

the contract required that the Company give the employee one prior written warning prior to discharging the employee (R. Ex. 4, p. 127; Burnthorn dep. 22-23). In order to uphold Grandison's discharge under the contract, the Committee had to find that he was properly discharged for the violations stated. (Burnthorn dep. 21). In the case of Grandison's dismissal for misdelivery of freight, he had received more than one written warning, and also had been suspended on two occasions, prior to being discharged for the same offense. (Burnthorn dep. 23-25, Ex. 4).

35. Grandison could have asserted a grievance under Article 37 of the collective bargaining agreement alleging race discrimination with respect to his discharge (R. Ex. 4, p. 98; Burnthorn dep. 30). He did not do so. Although Burnthorn did not uncover any evidence that CF was motivated by racial prejudice during his investigation of Grandison's discharge, he wasn't investigating this is because it was not alleged in the grievance. (Burnthorn dep. 30).

36. After Grandison was discharged, CF hired two regular drivers at the Pensacola terminal, Joe Fendley (white) on December 11, 1989, and Jessie Smith (black) on December 29, 1989 (R. Ex. 2). These drivers replaced both Grandison and driver Dean Dallas (white) who had retired shortly before Grandison's discharge (Tr. 163-164). It cannot be determined whether Grandison was replaced by the black or the white under the facts.

37. CF disciplined other employees at the Pensacola terminal, both white and black, for offenses similar to those for which Grandison was disciplined. For instance, written warning letters were issued on various occasions to drivers Robert Sparks (black) (R. Ex. 34), Steve King (white) (R. Ex. 35), Terry Ward (white) (R. Ex. 36), and Jimmy Foley (white) (R. Ex. 37, TR. 164-165). Terminal Manager Webb also had suspended white drivers for infractions, including Larry Douglas and Steve King (Tr. 166), and had discharged a white supervisor, Jimmy Hines. (Tr. 166).

38. Grandison showed that on one occasion he was charged with misdelivery but hadn't misdelivered the load. Grandison showed that Pat Gordon at Babbage's signed a receipt for seven packages. He returned the phones from Eglin because the NCO in charge would not accept the phones.

39. The parties stipulated that the Petitioner had suffered a reduction of $5.50/hour in pay as a result of his discharge. (Tr. 46).

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of this proceeding. Section 120.57(1), Florida Statutes (1991).

41. Petitioner is a person, and Respondent is an employer as defined within Chapter 760, Florida Statutes (1991).

42. In discrimination cases alleging disparate treatment (as opposed to disparate impact), the Petitioner generally bears the burden of proof. McDonnell Douglas v. Green, 411 U.S.792, 93 S. Ct. 1817 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089 (1981). Under this model of proof, the Petitioner bears the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; Burdine, 450 U.S. at 252-253, 101 S. Ct. at 1093.

43. Once the Petitioner has established a prima facie case by a preponderance of the evidence, the Respondent must "articulate some legitimate, nondiscriminatory reason" for the Respondent's action. McDonnell Douglas, 411 U.S. at 802, 93 S. Ct. at 1824; Burdine, 450 U.S. at 253, 101 S. Ct. at 1093. It is not necessary for the Respondent actually to convince the trier fact of its motive; rather the Respondent must only articulate its proffered reasons through admissible evidence. Burdine, 450 U.S. at 253, 101 S. Ct. at 1093. Once the Respondent has articulated a reason for its actions, the Petitioner must prove by a preponderance of the evidence that the Respondent's articulated reason was not the true reason, but was a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804, 93 S. Ct. at 1825.

44. The above federal standards under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 200e et. seq. have been adopted in Florida and are applicable to cases arising under Chapter 760, Florida Statutes (1991). School Board of Leon County v. Hargis, 400 So.2d 103, 108 (Fla. 1st DCA 1981): Jo Nees v. Delchamps, Inc., 8 FALR 4389 (1986); and Kilpatrick v. Howard Johnson Co., 7 FALR 4368, 5477 (1985).

45. In the first step under McDonnell Douglas and Burdine, generally must show:

> (a) He/she is a member of a protected class (black);
>
> (b) He/she was qualified and able to perform his/her duties and did perform such duties satisfactorily;
>
> (c) He/she was treated differently than other similarly situated individuals not within his/her protected group. See, e.g., Jones v. Gerwens, 874 F.2d 1534 (11th Cir. 1989); and Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1185 (11th Cir. 1985).

46. The Petitioner met his burden of establishing a prima facie case by a preponderance of the evidence. Petitioner demonstrated he was black; that he worked for Respondent for a year as a casual and for three months without problems, that he was discharged, and that a white was hired following his discharge. (CF obfuscated its intent by hiring two employees at the same time, one white and one black.)

47. The Respondent articulated legitimate nondiscrimina-tory reasons for discharging the Petitioner. Respondent gave Petitioner numerous oral warnings, written warnings, suspensions, conferences, and reduced disciplines, for numerous misdeliveries of customer freight, paperwork infractions in violation of Company policy, and other offenses. After this progressive discipline, Respondent discharged Petitioner for misdelivery of only four boxes to Babbage's and 22 phones to Eglin AFB. The Petitioner then had to show that CF's articulated reason for his discharge (misdelivery of freight) was a pretext for discrimination.

48. The Petitioner may make this showing of pretext either directly by persuading the trier of fact that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation

is unworthy of credence. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) at 1095. The employee may demonstrate that the employer's reasons are unworthy of credence by showing (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate his discharge. See Kier v. Commercial Union Insurance Companies, 808 F.2d 1254 at 1259 (7th Cir. 1987).

49. The Petitioner testified that Pat Gordon at Babbage's signed for seven boxes. He testified that he delivered seven boxes. However, Webb testified that Pat Gordon telephoned him demanding her other three boxes and stating she only was delivered four boxes. Three boxes were discovered at CF for Babbage's. The letter from Pat Gordon confirms the Petitioner's failure to receive three boxes.

50. Petitioner testified that Eglin refused delivery of the ten phones because the military shipping papers were not correct, and he returned the phones to the CF depot. Webb testified that after getting permission to make a short delivery and to leave 22 of 32 boxes, the Respondent returned to CF with the ten boxes on his truck.

51. Terminal Manager Webb believed that the Petitioner was guilty of a misdelivery of freight because the facts supported such a belief. Like Causey v. K & B INC., 670 F.Supp. 681 (E.D.La. 1987), the Respondent had substantive evidence of a misdelivery. According to the evidence, three boxes for Babbage's were found on the dock at the depot. Babbage's was complaining about a misdelivery. Webb was concluded that the Petitioner had failed to deliver them. Similarly, the phones were found on his truck after he had obtained permission to "short" a delivery. Webb concluded that he had misdelivered the phones. These findings logically lead Webb to the conclusion, in light of the Petitioner's past record, that he had misdelivered freight. If Webb.s belief was reasonible, it was not a pretext for discrimination. The Respondent failed to carry his burden and show that the grounds for discharge were pretextual.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is therefore,

RECOMMENDED:

That the Commission enter its final order dismissing Petitioner's petition.

DONE and ENTERED this 20th day of August, 1992, in Tallahassee, Florida.

____

STEPHEN F. DEAN, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 1992.

ENDNOTES

1/ References to the transcript of the hearing on May 13, 1992, will be referred to as "Tr." followed by the appropriate page number(s). References to the deposition testimony of Jerry Burnthorn, taken in Mobile, Alabama on May 5, 1992, will be referred to as "Burnthorn dep.", followed by the appropriate page number and/or exhibit number. References to exhibits for the Respondent will be referred to as "R. Ex.", followed by the appropriate exhibit number. Petitioner introduced no exhibits.

APPENDIX A
CASE NO. 92-0214

The Respondent's Proposed Findings were adopted with the exception of the last sentence of Paragraph 7 which was contrary to the facts, and Paragraph 9 which was rejected as being too general a statement given the length of Petitioner's service and the specificity of the other allegations of misfeasance.

COPIES FURNISHED:

Aubray D. Grandison
661 Herschel Street
Gonzales, FL 32560

Peter Reed Corbin, Esquire
F. Damon Kitchen, Esquire
731 May Street
Post Office Box 41566
Jacksonville, FL 32203

Margaret A. Jones, Clerk
Human Relations Commission
325 John Knox Road
Building F, Suite 240
Tallahassee, FL 32399-1570

Dana Baird, General Counsel
Human Relations Commission
325 John Knox Road
Building F, Suite 240
Tallahassee, FL 32399-1570

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.