

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALLEN LOCKLEAR, JR.,)
)
 Petitioner,)
)
 vs.) Case No. 00-5083
)
 ORANGE COUNTY OF FLORIDA, INC.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings (Division), held a formal hearing in this matter on April 26, 2001, in Lakeland, Florida.

APPEARANCE

For Petitioner: Merette L. Oweis, Esquire
DiCeasure, Davidson & Barker, P.A.
Post Office Box 7160
Lakeland, Florida 33897

For Respondent: David J. Stefany, Esquire
Allen, Norton & Blue, P.A.
324 South Hyde Park Avenue
Suite 350
Tampa, Florida 33606

STATEMENT OF THE ISSUE

Has Petitioner been the subject of an unlawful employment practice because of his race, American Indian, and if so, what relief is appropriate?

PRELIMINARY STATEMENT

On October 17, 1998, Petitioner filed a charge of Discrimination against Respondent based on his race, American Indian, alleging discrimination by Respondent because of Petitioner's race, in violation of the Florida Civil Rights Act of 1992.

On August 23, 2000, the Florida Commission on Human Relation (Commission) issued a Notice of Determination: No Cause and a Determination: No Cause. On October 20, 2000, the Commission issued a Notice of Dismissal, initially determining that Petitioner had failed to request an evidentiary hearing within 35 days from the date of service of its prior Notice of Determination: No Cause. On December 13, 2000, the Commission issued a Rescission of Notice Of Dismissal dated October 20, 2000, concluding that Petitioner had timely requested a review and a hearing on August 31, 2000, and re-opened Petitioner's Complaint of Discrimination. By a Transmittal of Petition dated December 14, 2000, the Commission referred this matter to the Division for the assignment of an Administrative Law Judge and for the conduct of a formal hearing.

At the hearing, Petitioner testified on his own behalf and presented the testimony of William Waples and Charles Palmer. Petitioner did not offer any documentary evidence. At the

conclusion of Petitioner's case-in-chief, Respondent argued an ore tenus motion for a Recommended Order of Dismissal in that Petitioner had failed to prove that he had been treated differently or that Petitioner had otherwise established a prima facie case of discrimination based on race. The undersigned deferred ruling on that motion and advised Respondent that it should present any relevant evidence that it may have for purposes of completing the record and for consideration in rendering a recommended order in this proceeding. Respondent presented the testimony of Bobby Branch and Gary Guard. Respondent did not offer any documentary evidence.

There was no transcript of this proceeding filed with the Division. Post-hearing, Petitioner filed an Unopposed Motion for Extension of Time to File Proposed Recommended Order, which was granted with the understanding that any time constraint imposed under Rule 28-106.216(1), Florida Administrative Code, was waived in accordance with Rule 28-106.2316(2), Florida Administrative Code. Petitioner timely filed its Proposed Recommended Order under the extended time frame. Respondent timely filed under the extended time frame a document that was titled "Respondent's Recommended Order of Dismissal" which shall be treated as Respondent's Proposed Recommended Order.

FINDINGS OF FACT

Upon consideration of the oral evidence adduced at the hearing, the following relevant findings of fact are made:

1. At all times relevant to this proceeding, Respondent operated a citrus processing facility in Bartow, Florida, and employed in excess 15 employees.

2. Petitioner is a full-blooded American Indian who resides in Lakeland, Polk County, Florida.

3. Bobby Branch, Respondent's Maintenance Supervisor, hired Petitioner as a Maintenance Mechanic. Petitioner commenced employment with Respondent on August 18, 1997. Petitioner was employed at an hourly rate of \$10.50. Petitioner was assigned by Bobby Branch to work under the direct supervision of Garry R. Guard, Lead Plant Mechanic. Petitioner had 37 plus years' experience as a mechanic and 15 years' experience with the citrus industry as a mechanic.

4. Petitioner understood at the time he was hired that he would be on probation for a period of 90 days.

5. Shortly after Petitioner began work, Garry Guard told Petitioner "I don't want to work with an Indian" and "I'm prejudiced and I don't give a damn who knows it" or words to that effect. Additionally, Guard let it be known that he would prefer working with a Mexican.

6. Approximately one week after this incident, Petitioner complained to Bobby Branch, Maintenance Supervisor, about Guard's comment to Petitioner. This is supported by the testimony of Charles Palmer, a former employee of Respondent, that he was aware that Petitioner reported Guard's comment to Bobby Branch. There was no remedial action taken by either Branch or any other management personnel concerning Guard's comment to Petitioner.

7. Subsequently, Petitioner noticed his work being undone and Guard complaining that Petitioner's work was not done or that his work was done improperly.

8. Petitioner and William Waples, a former employee of Respondent, worked together on one of those projects, rebuilding and installing a pump. Waples considered Petitioner a good mechanic. Later, after Waples and Petitioner were finished with the pump, Guard was observed taking the pump apart. Subsequently, Guard complained that Petitioner failed to install a specific part in the pump. Waples specifically recalls that particular part being installed by himself and Petitioner.

9. Subsequent to that event, Guard, when questioned by another worker about the pump and the problem with it, was overheard by Waples saying words to the effect that the "Damn Indian did it."

10. On October 22, 1997, Petitioner filed a complaint with Branch that Guard was purposefully sabotaging his work because of his race. Again, there was no remedial action taken by Branch or any other management personnel.

11. Branch neither personally observed deficient work performance by Petitioner nor personally communicated to Petitioner the need for Petitioner to improve his performance if he were to successfully complete his probationary period with Respondent, notwithstanding Branch's testimony to the contrary, which I find lacks credibility in this regard. Petitioner was never reprimanded or counseled prior to being terminated.

12. Petitioner was not terminated because of his deficient work performance during his probationary period, but was terminated because of his complaints to Bobby Branch of being discriminated against due to his race, notwithstanding Branch's testimony to the contrary, which I find lacks credibility in this regard.

13. Petitioner was terminated by Respondent on November 14, 1997.

14. Petitioner claims lost wages at an hourly rate of \$10.50 for 40 hours per week for the period from November 15, 1997 to April 24, 1998. There does not appear to be any evidence of a set-off against the claim for lost wages.

15. Although Petitioner was represented by an attorney, there was no evidence presented as to the amount of Petitioner's attorney's fees.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.57(1), and 760.11, Florida Statutes.

17. Section 760.10(1)(a), Florida Statutes, provides that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual with respect to terms or conditions of employment because of a complaint of discrimination.

18. Petitioner has the initial burden of proving retaliation by showing that: 1) Petitioner engaged in statutorily protected activity; 2) Respondent took adverse action against Petitioner; and 3) there is a casual connection between the protected speech and the adverse action alleged. Berman v. Orkin Exterminating, 160 F.3d 697 (11th Cir. 1998). It is not necessary that the activities complained of were in fact legally discriminatory, just that the Petitioner at the time the complaint was made had a good faith belief the

activities complained of were made illegal by the Florida Civil Rights Act of 1992. Wideman v. Wal-Mart, 141 F.3d 1453 (11th Cir. 1998).

19. Petitioner has presented sufficient evidence to establish the three elements of a retaliation claim, and has therefore, presented a prima facie case of retaliation. The Petitioner having established a prima facie case of retaliation, the inference is that discriminatory intent motivated the adverse employment action, and the burden shifts to Respondent to "clearly articulate in a reasonably specific manner a legitimate non-discriminatory reason" for the adverse action with credible evidence. Berman v. Orkin Exterminating, 160 F.3d. 697 (11th Cir. 1998). Respondent has failed to meet its burden in this regard.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that Petitioner's Petition for Relief be granted, and as further relief, award Petitioner back wages for the period of November 15, 1997 until April 24, 1998, based on a 40 hour week at an hourly rate of \$10.50, and upon motion to the Commission, award reasonable attorney's, in accordance with Section 760.11(7), Florida Statutes.

DONE AND ENTERED this 20th day of August, 2001, in
Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of August, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.