STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALPHONSO WILLIAMS, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-2501
	)	
L. PUGH & ASSOCIATES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on March 12, 2003, in Pensacola, Florida, before the Division of Administrative Hearings by its Administrative Law Judge, Diane Cleavinger.

APPEARANCES

For Petitioner: Frederick J. Gant, Esquire
Allbritton & Gant
322 West Cervantes Street
Pensacola, Florida 32501

For Respondent: Michael J. Stebbins, Esquire
Michael J. Stebbins, P.L.
504 North Baylen Street
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

Whether Petitioner was discriminated against by the Respondent based on race and/or subjected to a hostile work environment based on race in violation of Chapter 760, Florida Statutes.

PRELIMINARY STATEMENT

On August 8, 2001, Petitioner, Alphonso Williams, Jr., filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), alleging that Respondent, L. Pugh & Associates, terminated him on the basis of race by creating a hostile work environment or in retaliation for engaging in an activity protected under Chapter 760, Florida Statutes. Petitioner alleged that he suffered an adverse employment action in that he was terminated after he complained of being attacked by Andy Pugh, subjected to racial slurs for several years, had his pay decreased, did not receive the same mileage benefits as white employees, repeatedly had his company car taken away, and was the only employee required to sign in and out. The allegations of discrimination were investigated by FCHR, and on May 1, 2002, FCHR issued its determination, finding "No Cause."

On June 18, 2002, Petitioner filed his Petition for Relief. In his petition, he reiterated the charges set forth in his original complaint filed with FCHR. The petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in his own behalf and called three witnesses to testify. Petitioner also offered 13 exhibits into evidence. Respondent called four witnesses to testify and offered seven exhibits into evidence. After the

hearing, Petitioner and Respondent filed Proposed Recommended Orders on May 13, 2003, and May 9, 2003, respectively.

FINDINGS OF FACT

1. Petitioner, Alphonso Williams, Jr., is an African-American male (Petitioner).

2. Respondent, L. Pugh & Associates (Respondent), is a closely held company in the business of designing, constructing and maintaining fire safety equipment and systems. The company is owned by Larry Pugh and his wife Sharon Pugh. Andy Pugh, the brother of Larry Pugh, is employed by the company as a construction supervisor and spends most the day in the field away from the company's shop and warehouse. Soni Sully is the company's office manager and bookkeeper.

3. In 1997, Petitioner was hired by Larry Pugh to run errands for him and to maintain the shop. Petitioner had learned of the job opening from Johnny James, an African-American employee of Respondent's. Prior to being hired, the employee warned Petitioner about Andy Pugh. The employee intended to communicate that Andy Pugh was a hard, irascible person to work for who did not tolerate mistakes, did not cut anyone any slack, and did not speak in socially polite terms. At hearing, Andy Pugh was described as an ex-marine sergeant. The employee did not intend to communicate that Andy Pugh was a racist. However, Petitioner interpreted the employee's remarks as such.

4. Throughout this process, Petitioner's allegations regarding Andy Pugh's racial slurs towards him have grown initially from three incidents of Mr. Pugh calling Petitioner a "nigger" to, by the time of the hearing, daily racial disparagement. Other than Petitioner's testimony, there was no evidence of such name calling or such racial disparagement being reported by Petitioner. Contrary to Petitioner's allegations, there was no evidence from either Petitioner or Respondent that Soni Sully ever issued any racial slurs against Petitioner. Given the lack of corroborative evidence regarding racial slurs and their increasing frequency, Petitioner has failed to establish that he was subjected to such racial slurs while he was employed by Respondent.

5. Petitioner also charged that Andy Pugh would deliberately take the company vehicle assigned to him and assign it to someone on one of the construction crews Mr. Pugh supervised. However, the evidence demonstrated that none of the company's fleet of vehicles were assigned to any one employee. The company's vehicles were for use as needed by the company and could be assigned by Andy Pugh as he needed. This policy was explained to Petitioner many times. However, he never seemed to understand the explanation or accept it. Indeed, Petitioner continued to complain to Ms. Sully and Andy Pugh about "his" vehicle being taken. Petitioner's constant complaints on the

subject irritated Andy Pugh who did not always respond politely to Petitioner's complaints.

6. Petitioner received an hourly wage and mileage for the number of miles he drove. Initially, his hourly wage was $7.00. Over time, his hourly wage was increased to $8.50. By his choice, he received mileage even though he usually drove a company vehicle because it benefited him financially to claim mileage. No employee, including Petitioner, received both mileage and a vehicle allowance. At some point, Respondent instituted a company-wide policy limiting the amount of overtime an employee could work. Larry Pugh felt overtime billing was out-of-control and therefore created the policy. All employees, including Petitioner, were affected by the limitation. When Petitioner complained of the reduction the limitation of overtime caused in his pay, Petitioner was treated more beneficially than other employees and was permitted to work five hours of overtime per week. There was no evidence that Petitioner did not receive the mileage or the hourly pay he was entitled to receive. Likewise, there was no evidence that Petitioner was the only employee required to sign in and out.

7. On June 7, 2001, Petitioner again complained to Andy Pugh about "his" vehicle being taken. At some point, words were exchanged between Andy Pugh and Petitioner. Petitioner alleged that Andy Pugh grabbed him by throat, called him a "nigger" and

threatened to kill him. However, the details of this exchange are unclear due to the changing story of Petitioner about those details, the irreconcilable testimony and statements of Petitioner and Mr. Pugh, witnesses to the altercation and the surveillance tape of the premises during the altercation. Other than words being exchanged, there was insufficient evidence to show that this altercation was based on Petitioner's race or occurred in the physical manner alleged by Petitioner.

8. After talking with Sharon Pugh, Petitioner filed a criminal complaint with the Sheriff's Department. The details of Petitioner's conversation with Ms. Pugh are unclear. After an investigation, including interviewing witnesses and reviewing the surveillance tape, no arrest or criminal charges were filed against Andy Pugh.

9. Petitioner was placed on paid administrative leave until Larry Pugh, who was away, could investigate the incident. Upon his return, Larry Pugh looked into the matter and decided to terminate Petitioner mostly for filing criminal charges against his brother, but also, in part, for other more minor personality conflicts Petitioner had had in dealing with others while on company business. The evidence did not show that Larry Pugh's reasons for terminating Petitioner were pretextual, retaliatory for Petitioner engaging in a protected activity or

based on race. Therefore, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

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

11. Under the provisions of Section 760.10(1), Florida Statutes, 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.
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> * * *
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> (7) . . . 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.

12. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

13. The Supreme Court of the United States established in McDonnell-Douglass Corporation v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII and which are persuasive in cases such as the one at bar. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

14. Pursuant to this analysis, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. Once this non-discriminatory reason is offered by Respondent, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519.

15. In Hicks, the Court stressed that even if the fact-finder does not believe the proffered reason given by the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id.

16. Here, Petitioner has alleged race discrimination based on both disparate treatment, retaliation and a hostile work environment. In order to establish a prima facie case of disparate treatment based upon race Petitioner must establish:

1. That he is a member of a protected class;
2. That he was qualified for his position;
3. That he suffered an adverse employment action; and
4. That he was treated less favorably than similarly situated employees who were not members of his protected class.

See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

17. There is no dispute as to Petitioner's qualifications or that he was a member of a protected class. Thus, the first issue to be analyzed is whether Petitioner suffered from adverse employment actions. Petitioner appears to have four primary complaints: (1) that his pay was cut; (2) that his assigned company car was frequently taken away; (3) that he was the only employee required to sign in and out; and (4) that he did not receive the same mileage benefits as white employees.

18. In this case, none of these allegations was shown by the evidence to have occurred, or, if these actions occurred, Petitioner failed to show that he was treated less favorably than similarly situated employees who were not members of his protected class. Petitioner's pay was not cut. He was paid for the number of hours he worked and at one time, unlike other

employees, received a benefit other employees did not receive because he was guaranteed five hours of overtime. The company's control on the amount of overtime an employee could work affected all the company's employees. Petitioner, like other employees, always received the mileage he was entitled to receive. He was never entitled to receive an allowance for driving his own vehicle on top of the mileage he received. Petitioner never had a company car directly assigned to him. Vehicles were used on an as needed basis. African-American, as well as white employees, were required to sign in and out and no one was disciplined for not doing so. Thus, a prima facie case has not been established.

19. Moreover, even if a prima facie case had been established, the Department articulated legitimate non-discriminatory reasons for the alleged adverse employment actions. Petitioner presented no evidence indicating that these explanations were pretextual in nature.

20. Petitioner also complains of discrimination based on a hostile work environment. A hostile work environment claim is established upon proof that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S. Ct.

367, 126 L.Ed.2d 295 (1993). In order to establish a prima facie case of a hostile work environment, Petitioner must show that (1) he belongs to a protected group; (2) he has been subject to unwelcome harassment; (3) the harassment was based on a protected characteristic of his; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) the employer is responsible for such environment under either a theory of vicarious or of direct liability. Miller v. Kensworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

21. Again, Petitioner has failed to provide evidence that any alleged harassment was based on race or that it permeated the work environment.

22. Petitioner next complains of retaliation by Respondent after he complained to Sharon Pugh. In order to establish a prima facie case of retaliation, Petitioner must show that (1) he engaged in statutorily protected activity; (2) an adverse employment action occurred; and (3) the adverse action was causally related to his protected activities. Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997).

23. Petitioner has failed to demonstrate that he engaged in statutorily protected activity. Section 760.10, Florida Statutes, provides that it is unlawful 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." Here, there is no evidence that Petitioner was retaliated against for his discussion with Ms. Pugh. Thus, his prima facie case for retaliation necessarily fails.

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 the Petition for Relief.

DONE AND ENTERED this 3rd day of July, 2003, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 3rd day of July, 2003.

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.