



PRELIMINARY STATEMENT

In a Charge of Discrimination dually filed with the U.S. Equal Employment Opportunity Commission ("EEOC") on November 13, 2001, and with the Florida Commission on Human Relations ("FCHR") on December 5, 2001, Petitioner Rosemond Saint Fleur, who is a black man of Haitian descent, alleged that Respondent Superior Protection, which employs Petitioner as a security guard, had unlawfully discriminated against him by cutting his hours in favor of non-Haitians. The EEOC investigated Petitioner's claim and, on July 24, 2002, issued a notice stating that it was unable to conclude whether an unlawful employment practice had occurred. Thereafter, Petitioner filed a Request for Administrative Hearing with the FCHR.

On September 3, 2002, the FCHR transferred the matter to the Division of Administrative Hearings for further proceedings, and an administrative law judge ("ALJ") was assigned to the case. The ALJ scheduled a final hearing for October 18, 2002. On Petitioner's motion, the final hearing was later continued until December 10, 2002.

At the final hearing, Petitioner testified on his own behalf and called four additional witness: Mona Meus, Albert Roper, Stanley Pigniat, and Reddy Narendrakumar. Petitioner moved eight exhibits, identified as Petitioner's Exhibits 1A, 1B, and 2 through 7, into evidence. During its case, Respondent

presented the testimony of Mark Elias, Peterson Acluche, David Joseph, and George Busot. Respondent also introduced seven exhibits, numbered 1 through 7, into evidence.

The final hearing transcript was filed on January 3, 2002. Each party timely submitted a proposed recommended order, which the undersigned considered in preparing this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner Rosemond Saint Fleur ("Saint Fleur"), a black man of Haitian descent, was at all times material an employee of Respondent Superior Protection ("Superior"), for whom he continued to work as a security guard at the time of the final hearing.

2. Superior is in the business of providing security services to federal facilities in South Florida pursuant to a contract with an agency of the federal government. Superior employs approximately 230 security guards in the Miami area. These security guards are stationed at posts located around Miami-Dade County in some 27 sites for whose protection Security is responsible. It is not uncommon for security guards to be reassigned from one post to another.

3. At the time of the 9/11 terrorist attacks, Saint Fleur was stationed, most often, at the Brickell Plaza Federal Building ("Brickell Plaza"). He was working a full-time schedule, approximately 40 hours per week, as he had since

starting to work for Superior in June 2000. Saint Fleur was well regarded by his employer and was performing his duties to Superior's satisfaction.

4. After 9/11, security in and around federal buildings was stepped up in response to the resulting heightened state of alert. Employees working in Brickell Plaza became more security conscious, and before long some complained that the guards were, at least in some respects, too lax. On or about September 27, 2001, a federal official complained in writing to Superior that unnamed security guards were not requiring employees to send their lunch bags through the "x-ray" machine, and he requested that corrective action be taken.

5. Coincidentally perhaps,<sup>1</sup> Saint Fleur's supervisor happened to observe on or about September 27, 2001, that Saint Fleur was not thoroughly inspecting persons who triggered the alarm in the metal detector upon entering Brickell Plaza, as required by Superior's security procedures. Saint Fleur was given both a verbal warning and a written reprimand for this.

6. On or about October 3, 2001, Superior received another written complaint from its client, this one requesting that action be taken to correct the problem of security guards allowing persons who had set off the metal detector to enter the building without further inspection. On or about this same date, Saint Fleur's supervisor observed Saint Fleur committing

the very infraction about which the federal agency had just complained. Saint Fleur was again reprimanded, orally and in writing.

7. Within a short time, Saint Fleur was removed from his post at Brickell Plaza; however, he was neither fired nor immediately reassigned to another worksite. His replacement at Brickell Plaza was a female employee who, as far as the record shows, was qualified for the position. After Saint Fleur's removal, Security did not receive any additional complaints about the security guards on duty in the lobby of Brickell Plaza, where Saint Fleur had worked.

8. For a period of time after being removed from Brickell Plaza, Saint Fleur's work hours dropped, to about 20 hours per week. Although the record is not entirely clear, it is reasonable to infer that this period of essentially part-time employment lasted some 10 weeks, until late December 2001, at which time Saint Fleur accepted a post that brought his hours back up to 40 per week. From that point forward, Saint Fleur's workload remained constant.<sup>2</sup>

#### Ultimate Factual Determinations

9. Superior removed Saint Fleur from Brickell Plaza, not because of his national origin or race, but because Saint Fleur violated Superior's security procedures at least twice within one week, requiring that disciplinary actions be taken against

him, and also because these infractions occurred contemporaneously with client complaints that security guards at Brickell Plaza were failing to perform adequate inspections.

10. There is no credible, competent evidence that Superior tolerated similar security breaches by non-Haitian (or other minority or non-minority) employees. Nor does the evidence support a finding that Superior either disciplined or reassigned Saint Fleur as a pretext for discrimination.

11. In short, Superior did not discriminate unlawfully against Saint Fleur.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes. See also Woodham v. Blue Cross and Blue Shield of Florida, Inc., 829 So. 2d 891, 897 (Fla. 2002).

13. It is unlawful for an employer to discharge or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin. Section 760.10(1)(a), Florida Statutes.

14. Federal discrimination law may properly be used for guidance in evaluating the merits of claims arising under Section 760.10, Florida Statutes. See Brand v. Florida Power

Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

15. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court of the United States articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where, as here, the plaintiff relies upon circumstantial evidence of discriminatory intent. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

16. Pursuant to this analysis, the plaintiff (Petitioner here) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

17. If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent here) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the

plaintiff must demonstrate that the proffered reason was not the true reason but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

18. In Hicks, the Court stressed that even if the trier of fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to dis believe the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

19. Saint Fleur complains that his removal from Brickell Plaza was motivated by his national origin. This is a disparate treatment claim. To present a prima facie case of disparate treatment using the indirect, burden-shifting method just described, Saint Fleur needed to prove, by a preponderance of the evidence, that "(1) he belongs to a racial minority; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified to do the job." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

20. Saint Fleur failed to establish a prima facie case of unlawful discrimination using circumstantial evidence. Although



he proved elements 1, 2, and 4, Saint Fleur produced no credible evidence that similarly situated employees of a different classification (either non-Haitians, other minorities, or non-minorities) were treated more favorably than he, as was his burden under McDonnell Douglas. See Campbell v. Dominick's Finer Foods, Inc., 85 F. Supp. 2d 866, 872 (N.D. Ill. 2000) ("To establish this element, [the claimant] must point to similarly situated non-[minority] employees who engaged in similar conduct, but were neither disciplined nor terminated.").<sup>3</sup> For this reason alone, Saint Fleur's claim cannot succeed.

21. Saint Fleur likewise offered no persuasive direct evidence sufficient to demonstrate that Superior removed him from his post at Brickell Plaza with a discriminatory intent. See Denney v. The City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield, 115 F.3d at 1563.

22. Although Saint Fleur's failure to meet his initial burden obviates the need for further analysis, Superior, as found above, proved a legitimate, nondiscriminatory reason for its action, and Saint Fleur failed to demonstrate that the stated ground for his removal—the back-to-back commission of two disciplinable offenses in the presence of his supervisor coupled with contemporaneous client complaints concerning the same or similar violations by unnamed security guards at the site—was merely a pretext for discrimination. These

circumstances provide an independent basis for the undersigned's recommendation.

23. The bottom line is, Superior did not discriminate in this instance: Saint Fleur, the record shows, was removed from his post at Brickell Plaza for legitimate, nondiscriminatory reasons.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order dismissing Saint Fleur's Petition for Relief.

DONE AND ENTERED this 21st day of February, 2003, in Tallahassee, Leon County, Florida.

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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 21st day of February, 2003.

#### ENDNOTES

<sup>1/</sup> There is little or no direct evidence that Saint Fleur was the subject of the federal official's contemporaneous complaint.

<sup>2/</sup> The upshot is that, if Saint Fleur's reduced workload were attributable to unlawful discrimination, his actual damages

would be (in round numbers) the equivalent of 200 hours' pay at his 2001 rate. This figure cannot be determined, however, because Saint Fleur did not offer any evidence concerning his compensation.

<sup>3/</sup> Saint Fleur makes much of the fact that his replacement at Brickell Plaza was, apparently, an Hispanic woman with less seniority than Saint Fleur. There is no evidence, however, that this woman, like Saint Fleur, had ever been disciplined for improper performance, much less twice in one recent week. What Saint Fleur needed to show—but did not—was that similarly situated security guards outside the protected class (Haitian), i.e. those having received two reprimands in a week's time for failing to follow proper inspection procedures, were not consequently assigned to a new post, as he had been.

COPIES FURNISHED:

Erwin Rosenberg, Esquire  
Post Office Box 416433  
Miami Beach, Florida 33141

Sameul A. Terilli, Esquire  
Ford & Harrison LLP  
100 Southeast 2nd Street, Suite 4500  
Miami, Florida 33131

Denise Crawford, Agency Clerk  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

Cecil Howard, General Counsel  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

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.