STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FERNANDO J. CONDE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 03-4670
	)	
WALT DISNEY WORLD COMPANY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing in the above-styled case was held before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings, on February 19, 2004, in Orlando, Florida.

APPEARANCES

For Petitioner: Fernando J. Conde, pro se
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For Respondent: Paul J. Scheck, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent violated Section 760.10(1), Florida Statutes (2002), by forcing the termination of Petitioner's employment with Respondent because of his gender (male), and/or

national origin (Venezuela), and/or his age (37); and because Petitioner alleged that younger, female lifeguards were given better work assignments.

PRELIMINARY STATEMENT

These proceedings were commenced by Fernando J. Conde, Petitioner, by filing of a Charge of Discrimination against Walt Disney World Company, Respondent, dated July 8, 2003, with the Florida Commission on Human Relations (FCHR). After an investigation, FCHR issued a Notice of Determination dated October 2, 2003. Petitioner filed a Petition for Relief and requested that this matter be referred to the Division of Administrative Hearings (DOAH) for a formal hearing. This matter was referred to DOAH for a formal administrative hearing on December 8, 2003. Following pre-hearing discovery, a formal administrative hearing was held on February 19, 2004, before the undersigned Administrative Law Judge (ALJ). At the hearing, Petitioner testified in his own behalf and offered three exhibits which were accepted into evidence. Respondent presented the testimony of four witnesses, Christie Sutherland, Jerry Davis, Darin Bernhard, and Maria Fernanda Smith; and offered ten exhibits into evidence.

A Transcript of the hearing was prepared and filed on March 8, 2004. Respondent filed its Proposed Recommended Order

on March 26, 2004. Petitioner has not filed his proposals as of the date of this Recommended Order.

FINDINGS OF FACT

1. Petitioner was employed by Respondent from November 26, 2002, until April 17 2003, in the position of deep water lifeguard at Respondent's facility at the Grand Floridian Hotel (Grand Floridian) located in Lake Buena Vista, Florida. He worked in that position until his resignation on April 17, 2003. Petitioner is a Hispanic male, aged 37, and a member of a protected class.

2. Respondent is an employer as defined by the Florida Civil Rights Act of 1992 (FCRA).

3. Petitioner was hired for a full-time position to work 40 hours per week. He normally worked a ten-hour shift, four days a week. Petitioner never applied for any other position or promotions during his employment.

4. All full-time lifeguards at the Grand Floridian are covered by a collective bargaining agreement (CBA) between Respondent and the Services Trades Council Union. A lifeguard working at the Grand Floridian does not have to be a member or pay dues to the union in order to be covered by the terms of the CBA. Petitioner is not a member of the union.

5. At the time of his hire, Petitioner was provided with a packet of materials containing Respondent's employment policies.

Respondent had a policy regarding harassment that covered all of its employees and prohibited all types of harassment in the workplace, including any such behavior based on age, national origin, and/or gender. Respondent also has an "equal opportunity" policy that applies to all of its employees. This policy provides that all employees should be treated equally in terms of hours, work location, and scheduling based on seniority.

Operations at the Grand Floridian

6. Of the class of lifeguards hired at the same time, Petitioner was the only one assigned to the Grand Floridian. At the time of being assigned to the Grand Floridian, there were approximately 25 lifeguards employed there. The lifeguards at the Grand Floridian are full-time, part-time casual, or part-time regular employees. There are also "college program" lifeguards who perform all of the same duties as the full-time and part-time employees. The starting times for employees are staggered, based on the needs of the area and the time of the year.

7. The main duties of a lifeguard at the Grand Floridian are to ensure safety and guard the pools, clean the pool and beach areas, work the cash register, and operate the marina.

8. The head supervisor of the Grand Floridian lifeguards during Petitioner's employment was Jerry Davis. Davis has been

employed with Respondent for nine years. He has served in his current position as the recreation operations manager for six years. His duties in this position include supervising the outside recreation areas, including the pools, boats, and lifeguards at the Grand Floridian.

9. Davis plays no role in hiring the employees that report to him, but rather Respondent's Employee Relations Department is responsible for hiring these employees. Davis has the authority to terminate lifeguards that report to him. Prior to terminating an employee, however, Davis seeks the input of the Employee Relations Department.

10. The evidence is credible that Davis is accessible to his direct reports and makes sure that his office is always open to them. If a lifeguard wants to speak with Davis, he will make himself available to him or her.

11. As a manager, Davis has undergone training from Respondent regarding its equal employment policies and anti-harassment policies. He has also been trained that employees may raise complaints about working conditions with either their manager or the Employee Relations Department. All employees are made aware of these policies and complaint procedures as a part of their orientation program.

12. Under Davis, the next supervisor was Darin Bernhard. Bernhard has been employed with Respondent for eight years and

is currently employed as a recreation guest service manager. Until October 2003, Bernhard was employed at the Grand Floridian. In that capacity, Bernhard directly supervised lifeguards, marina employees, and activities' employees. Bernhard had continuous interaction with lifeguards throughout the day while at the Grand Floridian. Bernhard had an open-door policy to all employees and made himself accessible to them.

13. Under Davis and Bernhard, there were three coordinators who served as the immediate supervisors of the lifeguards.

14. The weekly work schedule for lifeguards was posted on the wall every week. Bernhard, along with Respondent's Labor Office, was responsible for preparing this weekly schedule. The factors used in preparing this schedule were a scheduling bid submitted by each employee, scheduled vacations, and operational needs.

15. As for operational needs, Bernhard would try to give a combination throughout the week based on full-time, part-time, and college program employees and avoid having all college program employees on duty at one time, thereby providing more experience on each shift.

16. The CBA contains a provision stating as follows: "The principles of seniority shall be observed in establishing days off and work schedules by department, location, or scheduling

pool." As a result, the schedule bids of all employees were considered based on the seniority of the employees.

17. At the time of his hire, Petitioner spoke with Bernhard about special scheduling requests. Specifically, Petitioner asked to receive early shifts and weekends off. He wanted the weekends off due to child-care issues with his son. Bernhard informed Petitioner that he would attempt to work with Petitioner on this, but that he was limited in what he could do based on the seniority requirements set forth in the CBA, as well as the fact that most of the lifeguards preferred to have weekends off. At that point in time, Petitioner had the least amount of seniority of all the full-time lifeguards, since he was the most recently hired employee.

18. Despite the CBA restrictions, Bernhard made every effort to provide Petitioner with at least one day each weekend off and tried to provide him with two, whenever possible. On a regular basis, Petitioner was scheduled to have Saturdays off. In addition, on numerous occasions, he was given Friday, Saturday, and Sunday off from work, in accordance with his special request. At no time during his employment did Petitioner ever complain to Bernhard about not getting enough days off on the weekend.

19. Employees would occasionally complain to Bernhard about the weekly schedule. When he received such complaints,

Bernhard would listen to their complaints and not take any adverse action against any employee for complaining to him about scheduling issues.

20. On occasion, lifeguards would be sent home early due to slow business or inclement weather. This decision would be made either by the immediate supervisor on duty or one of the coordinators. The lifeguards would be allowed to volunteer to go home on a "first-come, first serve" basis. No lifeguard, however, was forced to go home early. Similarly, Bernhard did not receive complaints from any lifeguard about being forced to go home early.

21. The coordinators at the Grand Floridian were responsible for making the daily rotation schedules. There were five primary positions that the lifeguards could be assigned to on a daily basis, consisting of two lifeguard positions at the pool, the slide, the marina, and cashier.

22. The coordinators made these assignment decisions based on the people they had available that day. The primary focus was to make sure that all of the areas were properly covered. Such daily rotation assignments were also based on certain needs during particular periods of the day. In addition, certain assignments were given to certain employees if they are more capable of performing the task. It is also not uncommon for the

daily rotation to be changed during the day based on unexpected factors, such as absent employees.

23. In terms of shift assignments, an effort is made to make sure that regular employees and college program employees are working together so that the regular employees can provide guidance when needed. During a workday, most of the employees rotate positions every 30 minutes to an hour. The rotation of duties for the lifeguards changed on a daily basis.

24. Petitioner enjoyed working as a lifeguard because he considered himself a stronger lifeguard than others in his department. He also described himself as the "leader of the lifeguards."

25. All lifeguards are trained in the cashier duties, but very few individuals are chosen to actually work as a cashier. These cashiers undergo special training prior to performing these duties. The primary attributes for a cashier are good guest interaction and good phone skills because a cashier is required to interact with guests, both on the telephone and in person. This assignment also differs from the other assignments in that the employee assigned to this position normally does not rotate throughout the day to other assignments. It is not uncommon for the same employee to serve as a cashier for an entire day. Petitioner was sometimes assigned to work at the marina, but not as a cashier. Petitioner never spoke with any

of his supervisors or coordinators about working more at the marina or as a cashier.

26. Each lifeguard at the Grand Floridian was required to complete four hours of in-service training each month, either at his home resort or at another resort. Attendance at these training sessions were tracked on a daily sign-in sheet. If a lifeguard failed to complete his or her in-service training for the month, he would be reprimanded.

27. Davis prepared a reprimand for Petitioner on April 1, 2003. This reprimand was the result of Petitioner's failing to complete his in-service training hours for the month of March 2003. As a result of failing to complete this training, Petitioner received a two-point reprimand for poor job performance. Petitioner did not know when Davis prepared the Poor Job Performance Memorandum dated April 1, 2003. Davis and Petitioner did not see each other between Petitioner's accident on March 30, 2003, and the date Petitioner signed the Poor Job Performance Memorandum on April 9, 2003. At the time that Davis prepared this memorandum, Petitioner had not made any complaints of discrimination or harassment to Davis.

28. The attendance of the lifeguards on a daily basis was tracked by the use of an electronic swipe card. The daily schedule and attendance of the lifeguards was also tracked on a daily sheet completed by the coordinators. This sheet was kept

in the managers' office and was forwarded to the Respondent's Labor Office when it was completed. Bernhard usually reviewed these sheets on a daily basis as well. The lifeguards did not have access to these sheets on a daily basis.

29. Under the attendance policy in the CBA, three absences in a 30-day period warranted a one-point written reprimand. An employee had to receive three written reprimands within a 24-month period before he could be terminated for attendance issues. The reasons for an absence did not make a difference for purposes of accruing points under the policy.

30. On March 24, 2003, Petitioner called in sick and did not appear for work. On his way home from work on March 31, 2003, Petitioner was in a car accident in a parking lot on Respondent's property. As a result of that accident, Petitioner's car had to be towed because it was not drivable. Petitioner did not, however, seek medical treatment as a result of the accident.

31. Shortly after the accident occurred, Petitioner contacted Bernhard. He informed Bernhard of the accident and told him that he would not be available for work the next day because his car had been destroyed. He did not inform Bernhard that he had been injured in any way.

32. Petitioner was absent from work on April 1, 2003, because he had no transportation. Petitioner called in his

personal absence on April 1, 6, 7, 8, 13, 14, 15, and 16, 2003, and was a "no show" on April 2, 2003.

33. As a result of these numerous absences, Davis made a decision to contact Petitioner by telephone and inquire about the reasons for these multiple absences. Petitioner informed Davis that he still did not have transportation. Petitioner expressed concern to Davis that he was afraid he was going to accrue too many points and get himself terminated. Davis responded to Petitioner that if he did not return to work, he would accrue points under the attendance policy. Petitioner asked Davis if it would be better if he terminated himself or if he was terminated by Respondent. Davis also informed Petitioner that if he terminated himself, at some point he might be able to return to his job at Respondent, though he did not guarantee him that he could simply return. Davis made it very clear to Petitioner that this was a decision he had to make.

34. At the time of Davis' phone call to Petitioner, he had accrued sufficient points under the applicable "attendance policy" set forth under the CBA to warrant giving him a one-point written reprimand. Davis had not been able to give the reprimand to Petitioner, however, because he had not returned to work. At no time had Davis ever informed Petitioner that such a reprimand was waiting for him. In addition, such absences would

not have provided a basis for terminating Petitioner at that point in time.

35. Petitioner contacted Davis the following day and informed Davis that he was going to voluntarily resign his employment. Upon learning of this decision, Davis informed Petitioner that he needed to return his uniform and all other of Respondent's property prior to receiving his last paycheck. All employees are required to return their uniform and Respondent's property at the time of resignation.

36. Davis never informed Petitioner that he was being terminated or that he had an intention of terminating him. Similarly, Davis never told Petitioner that he had no option but to resign. Davis had no problem with Petitioner returning to work, provided he could obtain proper transportation.

37. After Petitioner's resignation, Davis completed the required paperwork and indicated that Petitioner should be classified as a "restricted rehire." Davis chose this restriction due to Petitioner's tardiness and attendance issues, as well as his failure to take responsibility to make it to work. This decision to categorize him as a "restricted rehire" was not based on Petitioner's age, national origin or his gender.

38. Petitioner visited Respondent's casting center (human resource department) on June 17, 2003, approximately two months

after his resignation, with the intent to reapply for his prior position. Petitioner wanted to return to his same position at the Grand Floridian, working for Davis and Bernhard, as well as working under the same coordinators.

39. On June 17, 2003, Petitioner met with Fernanda Smith, who has served as a recruiter for Respondent for five years. Smith was born in Buenos Aires, Argentina, and is Hispanic. As a recruiter, Smith is responsible for interviewing, selecting, and hiring the strongest candidates for positions at Respondent. She is responsible for hiring employees for all hourly, entry-level positions.

40. The hiring process used by Respondent is the same for both new applicants and former employees of Respondent. That process is set forth in the "Rehire Review" policy given to each recruiter. Once Smith is randomly assigned an applicant, she brings them to her office and reviews their personal data in the computer. She then reviews the application for accuracy and completeness. She also confirms that they are qualified to work in the United States and their criminal background.

41. Smith reviews the conditions of employment with the applicant, including compensation, appearance, ability to attend work and transportation. If the applicant was previously employed by Respondent, Smith also reviews the application for the reasons the employee previously left employment and the

applicant's rehire status. The different rehire statuses are "yes rehire," "restricted rehire," and "no rehire." If a former employee has been categorized as a "restricted rehire," Smith then must confirm that the person is currently employed and that he or she has been at that employment for a period of at least six months at the time of re-application. Assuming they can satisfy these requirements, the applicant is required to provide an employment verification letter from their current employer within one week of the interview. At that point, the information is forwarded to a rehire committee for consideration.

42. On June 17, 2003, Smith interviewed Petitioner for potential rehire with Respondent. She recalls that when she met him in the lobby, he was very professionally dressed. Upon entering her office, Smith reviewed the information on Petitioner's application with him. At that point, she noticed that he had a recent date of termination from Respondent and asked him the reasons for his termination. Petitioner responded that he had left his employment because of transportation problems and that he had missed a number of days from work.

43. In reviewing Petitioner's application, she realized that he did not meet the requirements for consideration as a "restricted rehire." First of all, Petitioner did not offer any evidence of current employment at the time of the interview.

Secondly, Petitioner had only been gone from Respondent for a period of approximately two months, and thus, did not have the six months of continuous employment to be considered for rehire.

44. Smith shared with Petitioner that he did not meet the minimum requirements for a "restricted rehire." Petitioner had no idea what that designation meant. At that point, Petitioner responded by getting very upset, yelling and screaming at Smith, standing up and pointing his finger at her. He then informed Smith that he was going to sue Respondent for discrimination and left her office. Petitioner did not allow Smith to make any other comments to him.

45. Immediately after Petitioner had left the building, Smith prepared the standard evaluation that she prepares for all applicants she interviews, including the incident that occurred in the interview with Petitioner.

46. If Petitioner had allowed Smith to explain the process and eventually provided the appropriate documentation, he might have been considered for rehire. Based on his behavior in the interview, however, Smith recommended that he not be considered for rehire, particularly for the position of lifeguard where he would be dealing with guests on a regular basis.

Allegations of Discrimination

47. Petitioner alleges that one of the coordinators referred to his national origin in a derogatory manner on one

occasion. Other than this isolated alleged comment, he stated he never heard anyone else at Respondent make any derogatory comments about his being Hispanic or Venezuelan. Petitioner did not complain about this comment to anyone at Respondent and specifically did not complain to Davis, Bernhard, or employee relations about it. Other than this one comment by an unnamed coordinator, Petitioner offered no evidence that any actions or decisions were taken against him based on his national origin.

48. In support of his age discrimination claim, Petitioner alleges that some of his co-workers referred to him once or twice as "old." Petitioner did not offer any evidence that any of his supervisors or coordinators ever used any of these terms in reference to him. Petitioner does not know whether or not he ever discussed his age with other workers. At the time of Petitioner's resignation, he was not the oldest lifeguard working at the Grand Floridian. Penny Ivey and Sherry Morris were both older than Petitioner, and Davis was born on February 5, 1951. At the time of Petitioner's resignation, Davis was 52 years old. Other than these alleged isolated comments, Petitioner offered no other evidence that any actions or decisions were taken against him based on his age.

49. Petitioner claims that one example of gender discrimination was that the rotation schedule was not equal. In particular, he alleges that the "young and beautiful girls" were

preferred in the rotation schedules because they were allowed to work in the marina and at the cash register more than males.

50. Petitioner alleges that Jaimy Tully, a 23-year-old female lifeguard, was always late. For example, Petitioner alleges that Tully was late on March 2, 2003, based on the fact that she was supposed to be there at 10:00 a.m. The daily schedule indicates that she arrived for work at 9:30 a.m. In reviewing the document, however, it indicates "S/C" which means that a schedule change was made, and Tully showed up for work half an hour early, not late, and she still worked her scheduled day of ten hours.

51. A schedule change would occur for several reasons, including the need to have certain employees come in early for an in-service session or the personal request of an employee. It sometimes required employees to come in for work early and other times required them to work later.

52. Petitioner similarly alleges that Tully was late on March 22, 2003, and should have been fired for that. In reviewing the daily schedule for that date, however, it is evident that a schedule change was made, and Tully was scheduled to work from 9:30 a.m. to 8:30 p.m., a regular 10-hour day, and that she actually worked those hours. Petitioner admitted at the hearing that she was actually early to work and not late.

53. Petitioner alleges that Tully was late again for work on April 7 and April 16, 2003. A review of those daily schedules, however, reveals that Tully had a schedule change on each of those days and that she worked the hours that she was assigned.

54. Of all these allegations of Tully being late to work, Petitioner never complained to anyone about it.

55. Petitioner then alleges that Tully arrived for work early on February 15, 2003, and that she was allowed to work extra hours and earn overtime. On that particular occasion, however, Tully was called in early because she needed to attend an in-service training session that was occurring that day. Petitioner conceded that Tully was not late on that day.

56. Petitioner admitted that both males and females were called in to work additional hours as lifeguards. For instance, Michael Whitt, a male employee, was allowed to start work earlier based on a schedule change on March 4, 2003. Similarly, a schedule change was made involving Whitt on February 25, 2003, and he was required to report to work at 11:40 a.m., not 10:00 a.m., and as a result, was not given any breaks that day.

57. Petitioner never received any discipline as a result of being late to work or for leaving work early.

58. Petitioner claims that he suffered discrimination on January 12, 2003, because Tully was allowed to start work later

than he and then was allowed to work as a cashier for the majority of the day. He claims that she should have been on a rotation like him and that she was given more hours than he was.

59. Tully was trained as both a lifeguard and a cashier, but she had more cashier experience than the majority of the other lifeguards. She also had good guest-interaction and cash-handling skills, and thus, she was placed as a cashier more than most of the other lifeguards. The cashier assignment also differed from the other assignments in that the employee assigned to this position normally did not rotate throughout the day, and it was not uncommon for the same employee to serve as a cahier for an entire day.

60. Petitioner never spoke with any of his supervisors or coordinators about serving as a cashier, nor did he ever complain to Bernhard about any of his daily assignments.

61. He alleges that the woman and the "young girls" were always placed at the marina. When asked to identify "these girls," he stated he was referring to Mindy and Matt, a male employee. In particular, Petitioner testified that on December 25, 2002, Matt served in the marina for three consecutive rotations on that particular day. He also points out that Matt had a longer break than he did on that particular day.

62. There was no pay differential between employees who were assigned to work at the marina and those who worked at the pool. Similarly, there was no pay differential between employees working as a cashier and those at the pool.

63. Petitioner never made any complaints to Davis about his weekly schedule or his daily rotation assignments. Similarly, Petitioner never complained to Davis about any disparate treatment or harassment based on his age, national origin, or gender.

64. Petitioner never raised any complaints about discrimination or any other working conditions with Bernhard. Bernhard never made any derogatory comments to him or about him. Bernhard does not give any preference to any employees based on age, national origin, or gender.

65. Petitioner was aware that there was an Employee Relations Department located at the casting center, but never complained to them about his working conditions or alleged discrimination.

CONCLUSIONS OF LAW

66. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Sections 120.57(1) and 120.569, and Chapter 760, Florida Statutes (2003).

67. The State of Florida, under the legislative scheme contained in Chapter 760, Florida Statutes (2002), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq. The Florida law prohibiting unlawful employment practices is found in Section 760.10, Florida Statutes (2002). This section prohibits discrimination against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's sex, national origin, or age. § 760.10(1)(a), Fla. Stat. (2002). FCHR and the Florida courts interpreting the provisions of FCRA have determined that federal discrimination law should be used as guidance when construing provisions of the Act. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991); Cooper v. Lakeland Regional Medical Center, 16 FALR 567, 574 (FCHR 1993).

68. Petitioner has the ultimate burden to prove discrimination either by direct or indirect evidence. Direct evidence is evidence which, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989). Only blatant remarks, whose intent could be nothing other than

to discriminate, constitute direct evidence of discrimination. Id. at 582; See Earley v. Champion International Corporation, 907 F.2d 1077, 1081 (11th Cir. 1990). There is no record of any direct evidence of discrimination on the part of Respondent's supervisors. There is only one instance offered as evidence that a national origin-related comment or slur was made by a coordinator. This appears to have been an isolated incident. Petitioner has not presented any documentary evidence which would constitute direct evidence of discrimination.

69. Absent any direct evidence of discrimination, the Supreme Court established, and later clarified, the burden of proof in disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and again in the case of St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993). FCHR has adopted this evidentiary model. Kilpatrick v. Howard Johnson Co., 7 FALR 5468, 5475 (FCHR 1985). McDonnell Douglas places upon Petitioner the initial burden of proving a prima facie case of race or color discrimination. See also Davis v. Humana of Florida, Inc., 15 FALR 231 (FCHR 1992); Laroche v. Department of Labor and Employment Security, 13 FALR 4121 (FCHR 1991).

70. Judicial authorities have established the burden of proof for establishing a prima facie case of discriminatory treatment. Petitioner must show that:

> a. The Petitioner is a member of a protected group;
>
> b. The Petitioner is qualified for the position; and
>
> c. The Petitioner was subject to an adverse employment decision (Petitioner was terminated or forced to resign);
>
> d. The position was filled by a person of another gender, national origin or age or that he was treated less favorably than similarly-situated persons outside the protected class;
>
> e. There must be shown by the evidence that there is a causal connection between a. and c.

Crapp v. City of Miami Beach, 242 F.3d 1017, 1020 (11th Cir. 2001); Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Lee v. Russell County Board of Education, 684 F.2d 769 (11th Cir. 1982), appeal after remand, 744 F.2d 768 (11th Cir. 1984); Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982); Samedi v. Miami-Dade County, 134 F. Supp. 2d 1320 (S.D. Fla. 2001).

71. Proving a prima facie case serves to eliminate the most common non-discriminatory reasons for Petitioner's disparate treatment. See Teamsters v. U.S., 431 U.S. 324, 358, n. 44 (1977). It is not, however, the equivalent of a factual finding of discrimination. It is simply proof of actions taken

by the employer from which discriminatory animus is inferred because experience has proved that, in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible considerations. The presumption is that more often than not people do not act in a totally arbitrary manner, without any underlying reason, in a business setting. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

72. Once Petitioner has succeeded in proving all the elements necessary to establish a prima facie case, the employer must then articulate some legitimate, nondiscriminatory reason for the challenged employment decision. The employer is required only to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Texas Department of Community Affairs v. Burdine, supra, at 257. The employer "need not persuade the court that it was actually motivated by the proffered reasons . . . [i]t is sufficient if the [employer's] evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 254. This burden is characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

73. Once the employer articulates a legitimate reason for the action taken, the evidentiary burden shifts back to Petitioner who must prove that the reason offered by the employer for its decision is not the true reason, but is merely a pretext. The employer need not prove that it was actually motivated by the articulated non-discriminatory reasons or that the replacement was more qualified than Petitioner. Texas Department of Community Affairs v. Burdine, supra, at 257-8.

74. In Burdine, the Supreme Court emphasized that the ultimate burden of persuading the trier of fact that Respondent intentionally discriminated against Petitioner, remains at all times with Petitioner. Texas Department of Community Affairs v. Burdine, supra, at 253. The Court confirmed this principle again in St. Mary's Honor Center v. Hicks, supra, at 2742.

75. In the case sub judice, Petitioner has failed to produce any direct evidence of sex, national origin, or age discrimination. Scott v. Suncoast Beverages, 295 F.3d 1223, 1227 (11th Cir. 2002); Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1359 (11th Cir. 1999); Pashoian v. GTE Directories, 208 F. Supp. 2d 1293 (M.D. Fla. 2002). In addition, in order for a statement to constitute direct evidence of discrimination, it must be made by the decision-maker, must specifically relate to the challenged employment decision, and must reveal blatant discriminatory animus. Jones v. Bessemer

Carraway Medical Center, 137 F.3d 1306, modified, 151 F.3d 1321 (11th Cir. 1998). Petitioner has not offered any statements by any of the potential decision-makers in this case, namely Davis or Bernhard, that made any reference to his age, national origin, or gender. Further, Petitioner did not offer any statements by any of the decision-makers that relate to his alleged forced resignation. The only remote comment that was offered was an alleged comment by an unnamed coordinator in reference to his national origin, but that comment clearly had nothing to do with the reasons for his leaving his employment and was not made by a decision-maker. Based on the absence of any such evidence, Petitioner cannot prove his claim of discrimination by the use of direct evidence.

76. Applying the standards for a prima facie case set forth in McDonnell Douglas, Petitioner satisfies the element of being a member of two protected classifications under Section 760.10(1)(a), Florida Statutes (2002). Specifically, he is a male and he is Venezuelan. As for the second prong of the prima facie case, an "adverse action" for purposes of this analysis does not include every aspect of an employee's employment, but rather is limited to an "ultimate" employment decision, such as hiring, firing, granting leave, promoting and compensating employees. Mattern v. Eastman Kodak Company, 104 F.3d 702 (5th

Cir. 1997); Landgraf v. USI Film Products, 968 F.2d 427 (5th Cir. 1992), aff'd, 511 U.S. 244 (1994).

77. The credible evidence establishes that Petitioner voluntarily resigned his employment at Respondent. The testimony of Davis establishes that Petitioner asked Davis whether it would be better for him to terminate himself due to his on-going and prolonged absenteeism issues. Davis informed Petitioner that voluntary resignation is always a better option than involuntary termination. As a result, Petitioner made the decision on April 17, 2003, to voluntarily resign his employment as a lifeguard at the Grand Floridian. As such, Petitioner was not subjected to any adverse employment actions, and thus, he cannot establish this second element of the prima facie case.

78. Petitioner alleged in his Petition for Relief that the adverse employment action to which he was subjected was that he was forced to resign his employment. Petitioner did not allege in this Petition for Relief that the decision not to rehire him was discriminatory in any way. As for that decision, Petitioner had been designated as a "restricted rehire," in accordance with the Respondent's established policies. As a result, he did not satisfy the qualification of six months of continuous employment as of June 17, 2003, the date he reapplied for employment. Furthermore, his threatening and unprofessional behavior during the interview disqualified him from any consideration at that

point as well. Thus, this decision does not provide any additional evidence to support his claims of discrimination. To the extent that Petitioner has attempted to argue constructive discharge, he has failed to demonstrate that Respondent intentionally rendered his working conditions so intolerable that he felt compelled to quit involuntarily. Steele v. Offshore Shipbuilding, 867 F.2d 1311, 1317 (11th Cir. 1989); Buckley v. Hospital Corporation of America, Inc., 758 F.2d 1525, 1530 (11th Cir. 1985). He has similarly failed to establish that his working conditions were so difficult or unpleasant that a "reasonable person in the employee's shoes would have felt compelled to resign." Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11th Cir. 1987). See also Watkins v. Bowden, 105 F.3d 1344 (11th Cir. 1997).

79. The credible evidence submitted at the hearing establishes that Petitioner's separation was the result of his voluntary resignation. The unrebutted evidence is that because of Petitioner's repeated and excessive absences from work, Davis spoke with him and told him that his continued absences could lead to disciplinary action. At no time, however, did Davis or anyone else at Respondent's ever inform Petitioner that he was terminated or that he had to resign. In addition, no working conditions at Respondent's were so intolerable that a reasonable person would have felt compelled to resign. Petitioner

repeatedly stated during the hearing that "I love to work in Disney World." He also testified that he was prepared on June 17, 2003, to return to work at the same location, and he had no problem working for the exact same supervisors. Furthermore, he testified during the hearing that he never specifically complained to Davis, Bernhard, or the Employee Relations Department about any of these alleged working conditions, despite the fact that each had an "open door" policy for making such complaints. As such, it is impossible for Petitioner to now attempt to claim that he was constructively discharged from his employment at Respondent.

80. As for the third prong of the prima facie case, Petitioner must show that he and other employees that were "similarly situated" in all relevant respects were treated differently and that he was treated less favorably. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). In order to make such a determination, consideration must be given to "whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." Id. In addition, a claim of discriminatory discipline requires a showing that the misconduct for which the employee was disciplined was "nearly identical" to that engaged in by an employee outside the protected class and that employee was

disciplined differently. Jones v. Winn-Dixie Stores, Inc., 75 F. Supp. 2d 1357, 1364 (S.D. Fla. 1999).

81. Petitioner has not submitted any evidence that Respondent treated other employees differently than the way that he was allegedly treated. He has made references to a younger, female employee, Jaimy Tully, and claims that she was allowed to arrive at work late and was given more work hours. A review of the time records, however, clearly establishes that Tully was not late on the dates referenced by Petitioner, but rather arrived for work early on each such occasion, and did so as a result of schedule changes made by her coordinators. But even if she had been late to work, the fact remains that Petitioner admittedly was never disciplined for being late to work, and thus, this evidence has no relevance to show disparate treatment to a "similarly situated" individual.

82. As for Petitioner's allegations regarding his daily rotation assignments, he testified during the hearing that he preferred to serve as a lifeguard and that he felt he was, in fact, the best lifeguard. As for the assignments to the marina, Petitioner testified that he never requested more assignments to the marina and admitted that both males and females were assigned to the marina.

83. As for the assignment of Tully to the position of cashier, the record evidence establishes that she had been

specifically trained for that position and that she possessed the requisite guest-interaction and phone skills for the position, skills which Petitioner has not demonstrated he possessed. In addition, the person at the cashier position, including Tully, would usually serve in that position for an entire day because that was the customary policy to maintain continuity in that position, a fact that Petitioner has not refuted. Furthermore, the record evidence reveals that Petitioner never complained to Davis, Bernhard or the Employee Relations Department about any of these assignments and, specifically, never requested to serve as a cashier.

84. The unrefutted testimony also reveals that weekly work schedules were developed based primarily upon the seniority of the employees, and Petitioner was the lifeguard with the least amount of seniority. Despite this fact, Bernhard accommodated Petitioner's request and arranged for him to have multiple days on the weekends off, including some weekends where he did not work at all. Rather than suffering disparate treatment, Petitioner was actually given preferential treatment in terms of his weekly work schedule.

85. The only actual discipline that Petitioner ever received was on April 1, 2003. That discipline was the result of Petitioner's failing to satisfy his in-service training requirements for the previous month of March 2003. Though

claiming that he did not receive this reprimand until April 9, 2003, Petitioner does not refute that he had failed to accumulate the appropriate training hours. Just as significantly, however, he has not put forth any evidence that other employees, namely any female or non-Hispanic employees, failed to satisfy these requirements and did not receive any discipline for it. Therefore, he has again failed to put forth "similarly situated" individuals who were treated differently based on their gender or national origin. Consequently, Petitioner has failed to satisfy this prima facie element.

86. Under the modified McDonnell Douglas test, Petitioner can establish a prima facie case of age discrimination by showing that: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he received disparate treatment from other similarly-situated individuals in a non-protected class; and (4) there is sufficient evidence of bias to infer a causal connection between his age and the disparate treatment. Andrade v. Morse Operations, Inc., 946 F. Supp. 979 (M.D. Fla. 1996). As for the first element of the prima facie case, FCHR has expanded the scope of protection under Chapter 760, Florida Statutes (2002), for individuals subject to its provisions, thereby providing protection for persons of all ages. Sims v. Niagara Lockport Industries, Inc., 8 FALR 3588

(FCHR 1989). Thus, Petitioner is a member of a protected class based on his age.

87. As discussed in detail above, Petitioner has failed to present sufficient evidence regarding the remaining elements necessary to establish a prima facie case. In addition, with the exception of one set of alleged comments by a few unidentified co-workers, Petitioner has submitted no evidence, whether it be direct, circumstantial or statistical of any alleged age-based discrimination. This evidence raises no inference of discriminatory intent, and thus, Petitioner has failed to establish a prima facie case of age discrimination.

88. Assuming, arguendo, that Petitioner had satisfied his burden of establishing a prima facie case, the next burden is that of Respondent to articulate some legitimate, non-discriminatory reason for the adverse action that it took. Respondent need not persuade the trier of fact that it was actually motivated by the proffered reasons, but must merely set forth, through the introduction of admissible evidence, the reasons for those actions. Texas Department of Community Affairs v. Burdine, supra at 254-255; Pashoian, supra at 1309. The employer bears a burden of production, but not a burden of persuasion, and need only provide the finder of fact a specific legitimate reason why the decision was non-discriminatory.

Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000).

89. In the instant case, Respondent offered credible testimony that Petitioner was given his two-point warning on April 1, 2003, based on his failure to participate in mandatory in-service training. Other than this disciplinary action, Petitioner was not subjected to any other actual discipline or adverse treatment. Though the record evidence indicates that he was going to receive an additional reprimand upon his return to work for having violated the absentee provisions of the applicable CBA contract, Petitioner chose to voluntarily resign before any such discipline could be provided to him. Therefore, Respondent has more than satisfied its requirement of articulating legitimate, non-discriminatory reasons for its actions.

90. Thereafter, Petitioner retains the burden of persuasion and must prove by a preponderance of the evidence that the legitimate reasons offered by Respondent were not its true reasons, but rather were a pretext for intentional discrimination. Burdine, at 253. Thus, the ultimate burden of persuading the trier of fact that Respondent intentionally discriminated against Petitioner remains at all times with Petitioner. Id. Indeed, even when the non-discriminatory reason articulated by a respondent has been demonstrated by the

petitioner to be false, the petitioner must still prove that the adverse action truly was based upon unlawful discrimination. St. Mary's Honor Center v. Hicks, supra, at 518-519 (1993).

91. Petitioner cannot satisfy his burden of persuasion by making mere conclusory allegations of discrimination or basing them upon his subjective belief as to unlawful discrimination. Samedi, 134 F. Supp. 2d at 1346. Furthermore, in the absence of evidence of intent to discriminate, courts and administrative agencies are "not in the business of adjudging whether employment decisions are prudent or fair," but rather "whether unlawful discriminatory animus motivates a challenged employment decision." Pashoian, supra, at 1309; Chapman v. AI Transport, 229 F.3d 1012, 1031 (11th Cir. 2000).

92. Petitioner has utterly failed to show that any adverse employment action was taken against him since he voluntarily resigned his employment in April 2003. Furthermore, the one written reprimand that he did receive was based on his failure to comply with established policies that were equally applied to all employees. Respondent's policies clearly prohibit discrimination and harassment against all employees based on gender, age, or national origin, and guarantee equal employment opportunities to all employees. As such, Petitioner utterly failed to raise any credible evidence to support his claim that any actions by Respondent were pretextual.

93. Petitioner has failed to show that his decision to resign was made due to discriminatory actions on the part of Respondent, and thus, there has been no showing that Respondent violated Section 760.10(1), Florida Statutes.

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 which DENIES Petitioner's Petition for Relief and dismisses his complaint.

DONE AND ENTERED this 14th day of April, 2004, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
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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.