STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY L. ROBERTS, Petitioner, vs. ARGENBRIGHT SECURITY, INC., Respondent.	)	Case No. 03-4711

RECOMMENDED ORDER AFTER REMAND

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Daniel M. Kilbride, conducted a formal hearing on April 22, 2004, in Orlando, Florida. Following transmittal of the Recommended Order on June 25, 2004, to the Florida Commission on Human Relations (FCHR) and the filing of exceptions, the FCHR issued an Order Remanding Petition for Relief from an Unlawful Employment Practice dated November 4, 2004, directing this Administrative Law Judge to consider Petitioner's Proposed Recommended Order and, upon review, issue a new Recommended Order.

APPEARANCES

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For Respondent: John S. Snelling, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent unlawfully terminated the employment of Petitioner on July 31, 2000, because of his race and/or age in violation of the Florida Civil Rights Act of 1992, Subsection 760.10(1), Florida Statutes (2000).

PRELIMINARY STATEMENT

On June 11, 2001, Petitioner, Henry L. Roberts, commenced these proceedings by filing a Charge of Discrimination against Respondent, Argenbright Security, Inc., with the FCHR. After conducting an investigation, the FCHR issued a Notice of Determination dated September 23, 2003, in which it found "no reasonable cause" to support Petitioner's allegations of discrimination. On or about October 28, 2003, Petitioner timely 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 on December 1, 2003, and discovery ensued.

Following pre-hearing discovery, a formal administrative hearing was held on April 22, 2004, before the undersigned Administrative Law Judge. At the final hearing, Petitioner testified on his own behalf and offered 19 exhibits, which were

accepted into evidence. Petitioner's Exhibit 4 was admitted into evidence subject to hearsay objection. Petitioner's Exhibit 4 is determined to be hearsay. Respondent offered the deposition testimony of Petitioner's supervisor, Jerry Buckwalter (Buckwalter), and a total of 14 exhibits were accepted into evidence. Respondent's Exhibits 9, 13, and 14 were admitted into evidence subject to a hearsay objection. Respondent's Exhibit 9 is admissible for the limited purpose that Petitioner's supervisor received a complaint in regard to Petitioner's handling of the account. Petitioner's objection to Respondent's Exhibits 13 and 14 is overruled. The parties requested that proposed findings of fact and conclusions of law be submitted 20 days after the filing of the transcript. Said request was granted. A Transcript of the final hearing was prepared and filed with DOAH on May 7, 2004. Petitioner filed his Proposed Recommended Order on May 27, 2004, and Respondent filed its Proposed Recommended Order on May 27, 2004, as well.

On June 25, 2004, a Recommended Order was transmitted to FCHR. Both Petitioner and Respondent filed exceptions. On November 4, 2004, the FCHR issued an Order Remanding Petition. Following the issuance of the above Order, the undersigned issued an Order Reopening File dated November 15, 2004. On November 12, 2000, Petitioner filed a Motion for Disqualification/Recusal and Respondent filed a response

thereto. The undersigned Administrative Law Judge issued an Order Denying Petitioner's motion on November 18, 2004. Following the reopening of this case file, the undersigned reviewed the entire file in this matter and Petitioner's and Respondent's previously-filed Proposed Recommended Orders. Careful consideration has been given to each party's proposal.

FINDINGS OF FACT

1. Respondent, Argenbright Security, Inc., now known as Cognisa Security, Inc., is an Atlanta, Georgia-based corporation that provides commercial security services to customers on a nationwide basis. Respondent employs security officers who are placed on assignments at customers' premises. Relevant to this action, Respondent maintains an office in Orlando, Florida, to support its commercial security services in Central Florida.

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

3. Petitioner was employed with Respondent from May 1998 to July 31, 2000. Petitioner is an African-American male, born on December 23, 1948, who was 50 years of age upon hiring and 52 years of age upon his discharge from Respondent's employ. During his employment with Respondent, Petitioner was provided with Respondent's employment policies, including the equal employment opportunity policy which prohibits all types of unlawful discrimination in the workplace.

4. Prior to working for Respondent, Petitioner served in the United States Army, where he was a sergeant in the military police. Petitioner worked for JC Penny for 13 years in operations and personnel and was involved in security with this company. Petitioner was then recruited by General Motors, where he served in a minority dealer development program. Petitioner did not become an automobile dealer, however, because this was during a period of declining market share for American automobile manufacturers. Petitioner next worked for Burns Security, which was owned by Borg-Warner. Petitioner held the position of special projects manager and, later, became vice-president of Human Resources. During this tenure with Borg-Warner, Petitioner was a district manager and a general manager. Petitioner's job functions with Borg-Warner as a district manager were similar to those he did with Respondent, including client relations. In addition, Petitioner had a similar coverage area which was from Jacksonville to Orlando.

5. Petitioner had 23 years of experience in the security field before beginning work for Respondent. Petitioner held management positions with the prior employers and had never been terminated before beginning work with Respondent.

6. Throughout his employment with Respondent, Petitioner worked as a district manager and was supervised by Buckwalter,

who was Respondent's vice president and general manager of the Southeast region.

7. After a series of interviews, Buckwalter made the decision to hire Petitioner. He also made the decision to discharge him. Based on a decline in business and a lack of work, Buckwalter himself was discharged by Respondent in January 2002.

8. Petitioner's job duties as a district manager included supervising Respondent's account managers who managed security officer accounts and ensured overall customer satisfaction. Petitioner was responsible for supervising the management of approximately 60 customer accounts in Orlando, Jacksonville, Tampa, and St. Petersburg. Petitioner supervised a staff of approximately 33 employees, excluding Respondent's security officers.

9. The list of Respondent's customers in Petitioner's region included, but was not limited to, the following entities: the City of Orlando, U.S. Airways, Delta Airlines, Northwest Airlines, Orange County, C&L Bank, Citrus Center (also known as Tricony Management), Florida Power Corporation, Solivita (also known as Avitar), and Ocwen.

10. Following his hire, Petitioner developed a plan for improving profitability. The first step involved mentoring his staff and improving the quality of service provided the clients.

After that, Petitioner would then seek rate increases from the client. Petitioner was successful in increasing profitability.

11. Petitioner had a performance review on June 11, 1999, with Jerry Buckwalter. The performance evaluation is a four-page document. On the evaluation, Petitioner is noted to be doing an excellent job in operational delivery of service, education of staff, and training ability. Petitioner received a 3.5 percent raise following the evaluation. The evaluation contains a June 12, 1999, note from Jerry Buckwalter. The note states that Petitioner acknowledged his shortcomings on the job. The note was not made in Petitioner’s presence and Petitioner disputed the substance of the note.

12. This was the only written performance review Petitioner received while employed by Respondent.

13. Respondent alleges that Petitioner's performance deteriorated during the last six months of his employment, and as a result, Petitioner was discharged on July 31, 2000. Buckwalter testified that he made the decision to terminate Petitioner's employment based on his receipt of numerous customer complaints regarding Petitioner's management of accounts and failure to resolve problems, numerous complaints from Petitioner's subordinates regarding Petitioner's management style and lack of guidance, and Petitioner's failure to properly perform his administrative duties. Buckwalter received eight to

ten complaints from Respondent's customers about Petitioner's management of their accounts. Several of Respondent's customers repeatedly complained about Petitioner's management skills.

14. Buckwalter received complaints from Respondent's customers regarding Petitioner's lack of attentiveness towards their accounts, failure to conduct client meetings, and inability and unwillingness to resolve client problems. When Buckwalter discussed the customer complaints with Petitioner, Petitioner sometimes acknowledged the seriousness of the concerns and sometimes became defensive and dismissed the complaints as unreasonable client demands. Two of Respondent's customers, Tricony Management and C&L Bank, specifically demanded that Petitioner be removed from the management of their accounts based on his lack of service and "cavalier" attitude toward their requests.

15. Linda Mansfield, who was the client contact at Tricony Management, sent an e-mail complaint to Respondent's business development manager, Warren Bovich, in regard to Petitioner and Robert Stevenson on February 8, 2000. Tricony Management did not cancel its account with Respondent. However, they insisted that Robert Stevenson and Petitioner be removed from the account.

16. Petitioner admitted that the following customers complained regarding his servicing of or management of their

accounts: Ocwen, Citrus Center/Tricony Management, City of Orlando, Avitar/Solivita, C&L Bank, and Florida Power Corporation. Petitioner disagreed with the substance of those complaints and described them as ordinary client issues that he discussed with Buckwalter. Petitioner also admitted that he had a personality conflict with a Citrus Center employee. Regarding the City of Orlando account under Petitioner's supervision, Petitioner admitted that employee turnover was a problem, that the account was not meeting the budgeted goals, and that Respondent's employees routinely missed their scheduled work shifts. Petitioner further admitted that Avitar/Solivita was upset with him about his unauthorized recruiting efforts. However, Petitioner demonstrated that many other clients highly rated the service provided in his district.

17. In addition to the customer complaints, Buckwalter received approximately 30 to 35 complaints from Petitioner's subordinates regarding Petitioner's management style. Petitioner's subordinates complained that Petitioner was not concerned with their career development, failed to provide them with timely performance evaluations, failed to conduct staff meetings on a routine basis, failed to attend staff meetings which he had scheduled, did not provide proper support and mentoring for customer accounts, and was generally unavailable to them based on his lack of time in the office.

18. Petitioner admitted that a subordinate complained to Buckwalter regarding Petitioner's failure to provide him with a performance evaluation in a timely manner. Petitioner also acknowledged that Buckwalter received a complaint from Respondent's employee regarding his failure to properly process administrative paperwork. Petitioner admitted that he does not know whether Buckwalter received additional complaints from his subordinates regarding his management. Accordingly, Buckwalter's testimony that he received 30 to 35 complaints from Petitioner's subordinates regarding Petitioner's management is credible.

19. Buckwalter's decision to discharge Petitioner was also based, in part, on Petitioner's failure to properly process administrative paperwork. Buckwalter informed Petitioner, in writing, that his neglect of his administrative duties was unacceptable. Buckwalter also determined that on several occasions, Petitioner provided misleading information about his whereabouts by falsely reporting that he was out of the office conducting client appointments.

20. In addition to Petitioner, Buckwalter supervised several other district managers, including Blake Beach (Beach) and Scott Poe (Poe)--both of whom were formerly employed as district managers in South Florida.

21. While serving as Beach's supervisor, Buckwalter received a single complaint from Respondent's customer, United Airlines (United), regarding Beach's sending an inappropriate e-mail. United's complaint did not concern Beach's servicing or management of United's account. Other than United's single complaint, none of Respondent's other customers submitted complaints regarding Beach. Based on United's complaint regarding Beach's inappropriate e-mail, Respondent transferred Beach from South Florida to the Baltimore/Washington, D.C., area.

22. While serving as Poe's supervisor, Buckwalter received complaints from two of Respondent's customers (in the South Florida region) regarding Poe's management of their accounts. Because Poe had been successful with other accounts, Buckwalter believed that the two complaints might have been based on a personality conflict. Buckwalter decided to transfer Poe from the district manager position in South Florida to the district manager position in Central Florida. Buckwalter never received complaints from Poe's subordinates regarding Poe's management or supervision. After Poe became the district manager in Central Florida, Respondent received additional complaints from several customers regarding Poe's handling of their accounts. Based on these complaints, Buckwalter made the decision to terminate Poe's employment with Respondent.

23. Buckwalter made the decision to discharge Poe and Petitioner based on a similar number of complaints received from customers in their respective regions; but unlike Poe, Petitioner was discharged for additional reasons: the numerous complaints from his subordinates and the neglect of his administrative duties.

24. Robert Matecki, who was 55 years old when he was hired, replaced Petitioner as Respondent's district manager in Orlando.

25. Petitioner does not allege that Respondent discriminated against him at any time prior to Petitioner's termination on July 31, 2000. Petitioner does not contend that Buckwalter (the decision-maker in this case) ever made any discriminatory comments to him. Petitioner admits that he does not know what factors Respondent considered in making the decision to terminate his employment.

26. Buckwalter testified that he did not consider Petitioner's age and race in making the decision to discharge Petitioner. Instead, he based the decision on customer and subordinate complaints about Petitioner's management style and Petitioner's failure to perform his administrative duties.

27. Because Petitioner admits that he does not know upon what factors Buckwalter based his decision, Buckwalter's testimony is undisputed. Petitioner bases his allegations on

his own personal beliefs about his performance and his disagreement with the substance of the complaints made by Respondent's customers and his subordinates.

28. Upon his termination, Buckwalter did not attempt to provide out-placement services for Petitioner. Petitioner was unemployed for a period of time following his termination. Petitioner offered into evidence a document regarding his calculations on back pay. Petitioner deducted out any sums received for unemployment compensation and monies received for subsequent employment. Petitioner also entered into evidence job search documentation regarding his attempt to find employment.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2004).

30. The State of Florida, under the legislative scheme contained in Chapter 760, Florida Statutes (2000), 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 (the Act), as amended, 42 U.S.C. Section 2000e, et seq. The Florida law prohibiting unlawful employment practices is found in Section

760.10, Florida Statutes (2000). This section prohibits discrimination 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. See § 760.10(1)(a), Fla. Stat. (2000). The FCHR and Florida courts interpreting the provisions of FCRA have determined that federal discrimination laws 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).

31. 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. See 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 also Early v. Champion International Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

32. In the instant action, Petitioner has failed to offer any direct evidence of discrimination on the part of Respondent's supervisors. Petitioner admits that his

supervisor, Buckwalter, never made any discriminatory comments to him. In support of his age discrimination claim, Petitioner relies solely on a letter from Lee Larkin, one of Petitioner's former co-workers and who had no supervisory authority over Petitioner, to the FCHR as direct evidence. According to Larkin's unsworn letter, Buckwalter allegedly made two age-biased comments about Petitioner.

33. Larkin's letter is pure hearsay evidence, not direct evidence, which is insufficient to establish Petitioner's age discrimination claim. Petitioner did not produce Larkin as a witness at the final hearing to authenticate his letter. Moreover, Petitioner has not offered Larkin's letter to "supplement or explain other evidence" of alleged discrimination. In fact, Petitioner failed to offer any testimony whatsoever regarding Larkin's letter at the final hearing. He simply offered the letter at the outset and never mentioned it again. The letter was never authenticated, and no foundation was set for its admission. On the other hand, Buckwalter specifically denies making the purported comments. "Hearsay evidence . . . may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule. . . ." § 120.57(1)(c), Fla. Stat. (2003). <u>Department of Environmental Protection v. Department of</u>

Management Services, Division of Administrative Hearings, 667 So. 2d 369, 370 (Fla. 1st DCA 1995). Contrary to Petitioner's assertion, the law is clear that "courts cannot base direct-evidence analysis on hearsay testimony." Williams v. Housing Authority of City of Sanford, Florida, 709 F. Supp. 1554, 1562 (M.D. Fla. 1988) (refusing to classify unsworn hearsay statement as direct evidence.) See also State v. Kleinfield, 587 So. 2d 592, 593 (Fla. 4th DCA 1991) (such statements do not have an "indicia of reliability.) Based on the absence of any such evidence, Petitioner cannot prove his claims of discrimination by the use of direct evidence.

34. 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 (1993). The FCHR has adopted this evidentiary model. See Kilpatrick v. Howard Johnson Co., 7 F.A.L.R. 5468, 5475 (FCHR 1985). McDonnell Douglas places upon a petitioner the initial burden of providing a prima facie case of race and age discrimination. See Davis v. Humana of Florida, Inc., 15 F.A.L.R. 231 (FCHR 1992); Laroche v. Department of Labor and Employment Security, 13 F.A.L.R. 4121 (FCHR 1991). To establish a prima facie case

of discriminatory treatment, a petitioner must show that: (1) he is a member of a protected class; (2) he was qualified for the position held; (3) he was subjected to an adverse employment decision; and (4) his former position was filled by a person who was not a member of his protected classifications or that he was treated less favorably than similarly-situated persons outside his protected classes. See Crapp v. City of Miami Beach, 242 F.3d 1017, 1020 (11th Cir. 2001); Coutu v. Martin County Board of County Commissioners, 47 F.3d 1068, 1073 (11th Cir. 1995); Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Samedi v. Miami-Dade County, 134 F. Supp. 2d 1320 (S.D. Fla. 2001).

35. 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 Subsection 760.10(1)(a), Florida Statutes (2003). Specifically, he is African-American and is above the age of 40. Petitioner has also satisfied the second and third prong of the prima facie case, given Petitioner established that he was qualified for the district manager position which he held and that Respondent terminated his employment on July 31, 2000.

36. As for the fourth prong of the prima facie case, Petitioner must show that he was treated less favorably than other employees who were "similarly situated" in all relevant

respects. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). 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. A claim of discriminatory discipline requires a showing that the misconduct for which the petitioner was disciplined was "nearly identical" to that engaged in by an employee outside the petitioner's protected class and that the petitioner was treated in a less favorable manner. Jones v. Winn-Dixie Stores, Inc., 75 F. Supp. 2d 1357, 1364 (S.D. Fla. 1999).

37. At the final hearing, Petitioner claimed that Respondent treated two younger, Caucasian employees (Beach and Poe--both former district managers) more favorably than he. Petitioner, however, has not demonstrated that Beach and Poe are proper comparators. Petitioner was discharged based on Buckwalter's receipt of customer complaints regarding Petitioner's management of accounts, complaints from Petitioner's subordinates regarding Petitioner's management style, and Petitioner's failure to properly perform his administrative duties. Buckwalter received eight to ten complaints from Respondent's customers about Petitioner's management, and two of Respondent's customers demanded that Petitioner be removed from the management of their accounts. In

comparison, and as acknowledged by Petitioner and Buckwalter, Respondent received only one complaint from Respondent's customer regarding Beach. Specifically, United complained about an inappropriate e-mail sent by Beach. In contrast to the complaints Buckwalter received from customers under Petitioner's supervision, United's complaint did not concern Beach's servicing or management of United's account. The eight-to-ten customer complaints Respondent received about Petitioner (as well as the complaints from Petitioner's subordinates) are not comparable to the lone complaint about Beach's e-mail. Because of the differences in the number and nature of such complaints, Petitioner and Beach cannot be classified as "similarly situated" and their "misconduct" was not "identical." See Jones v. Winn-Dixie Store, Inc., supra, at 1364-65 (dismissing discrimination claim because the plaintiff failed to demonstrate that similarly situated employees received more favorable treatment than he); Jones v. Gerwens, 874 F.2d 1534, 1541 (11th Cir. 1989) (affirming dismissal of discrimination claim because the plaintiff could not prove that employees outside of his protected class were treated more favorably.)

38. Similarly, Petitioner cannot show that his "misconduct" (in the form of customer and subordinate complaints and neglect of his administrative duties) was similar to Poe's "misconduct." While serving as Poe's supervisor, Buckwalter

initially received complaints from two of Respondent's customers regarding Poe's management of their accounts. Based on these complaints, Respondent decided to transfer Poe from the district manager position in South Florida to the district manager position in Central Florida. Notably, Buckwalter never received complaints from Poe's subordinates regarding Poe's management or supervision. After Poe became the district manager in Central Florida, Respondent received complaints from several more customers regarding Poe's handling of their accounts. Based on these complaints, Buckwalter made the decision to terminate Poe's employment with Respondent. Buckwalter made the decisions to discharge Poe and Petitioner based on a similar number of complaints received from customers in their respective regions. However, Poe did not have the subordinate complaints or administrative failures that Petitioner had. Thus, the record evidence reflects that when customer complaints accumulated, Buckwalter treated Poe and Petitioner in an identical manner. If anything, Petitioner was allowed to accumulate many more overall complaints than Poe before he was discharged. Given these facts, Petitioner cannot demonstrate that Poe was a "similarly situated" individual who received more favorable treatment. Consequently, Petitioner has failed to satisfy the fourth prong of his _prima facie_ case, and his discrimination claims fail as a matter of law. _See_ _Jones v. Winn-Dixie Stores,_

Inc., supra, at 1364-65 (dismissing discrimination claim because the plaintiff failed to satisfy "similarly situated" prong of prima facie case.

39. As noted above, the Eleventh Circuit Court of Appeals has also applied a modified standard whereby a petitioner establishes the fourth prima facie prong by proving that "he was replaced by a person outside the protected class." Coutu, supra, at 1073. Applying this standard, Petitioner cannot establish a prima facie case for his age discrimination claim because he was replaced by a person within his protected class. Specifically, Matecki, who was 55 years old when he was hired, replaced Petitioner as Respondent's district manager in Orlando. Thus, Petitioner cannot establish the fourth element of his prima facie case for his age discrimination claim. See Hawkins v. Ceco Corp., 883 F.2d 977, 983-84 (11th Cir. 1989) (holding that the plaintiff failed to establish a prima facie case because he was replaced by a member of his own protected class.)

40. As to his claim of race discrimination, Petitioner has succeeded in proving each of the elements necessary to establish a prima facie case. Respondent must then articulate some legitimate, non-discriminatory reason for the challenged employment decision. Respondent has done so. Respondent's 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, supra, at 257. 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. See Texas Department of Community Affairs, supra, at 254-255; see also Pashoian v. GTE Directories, 208 F. Supp. 2d 1293, 1308-09 (M.D. Fla. 2002) (noting that the employer bears a burden of production, but not a burden of persuasion and need only provide a specific legitimate reason which would support a finding that discrimination was not the cause of the employment decision.) This burden is characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

41. The next burden is that of Respondent to articulate some legitimate, non-discriminatory reasons for the adverse employment action that it took. The record evidence indicates that Buckwalter made the decision to terminate Petitioner's employment based on his receipt of customer complaints regarding Petitioner's management of accounts, complaints from Petitioner's subordinates regarding Petitioner's management style, and Petitioner's failure to properly perform his administrative duties. Buckwalter believed that Petitioner

displayed unacceptable leadership qualities and maintained poor relationships with his customers and staff. Based on Buckwalter's undisputed testimony, Respondent has more than satisfied its requirement of articulating a legitimate, non-discriminatory reason for its actions. See LeBlanc v. The TJX Cos., Inc., 214 F. Supp. 2d 1319, 1328 (S.D. Fla. 2002) (defendant-employer's discharge of plaintiff based, in part, on receipt of customer complaints about plaintiff constituted legitimate, non-discriminatory reason for adverse action).

42. Once the respondent articulates a legitimate reason for the action taken, the evidentiary burden shifts back to the petitioner who must prove that the reason offered by the employer for its decision is not the true reason, but is merely a pretext. Texas Department of Community Affairs, supra, at 255-256. The Supreme Court has emphasized the ultimate burden of persuading the trier of fact that the respondent intentionally discriminated against the petitioner, remains at all times with the petitioner. See Texas Department of Community Affairs, supra, at 253. Importantly, even when the non-discriminatory reasons articulated by a respondent have been demonstrated by the petitioner to be false, the petitioner must still prove that the adverse action truly was based upon unlawful discrimination. See St. Mary's Honor Center, supra, at 518-519.

43. In the instant matter, because Respondent has articulated legitimate, non-discriminatory reasons to support the termination of Petitioner's employment, 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. See Texas Department of Community Affairs, supra, at 253. Petitioner has not produced any evidence to show that Respondent's legitimate reasons for his termination are actually a pretext for discrimination. To the extent Petitioner argues that the letter submitted by Larkin to the FCHR constitutes evidence of pretext (in support of his age discrimination claim), such an argument fails for several reasons. First, Larkin's purported letter is not a sworn statement but, instead, is a letter that has not been authenticated. At the final hearing, Petitioner did not produce Larkin (or any other witness) to authenticate the letter. Second, the letter constitutes hearsay evidence which is insufficient to establish pretext under the Florida Administrative Code "hearsay evidence . . . shall not be sufficient in itself to support a finding of fact unless the evidence falls within an exception to the hearsay rule. . . ." Fla. Admin. Code R. 28-106.213. Petitioner cannot and has not contended that the letter falls within an exception to the

hearsay rule. Moreover, Petitioner has not offered Larkin's letter to "supplement or explain other evidence" of alleged discrimination. Indeed, at the final hearing, Petitioner failed to offer any testimony regarding Larkin's letter. In contrast, Buckwalter specifically denies making the purported comments to Larkin. Given these facts, any attempt by Petitioner "to support a finding" of discrimination based solely on Larkin's letter is impermissible. See Fla. Admin. Code R. 28-106.213.

44. To the extent Petitioner attempts to prove discrimination by presenting evidence that he (personally) thought he was a good employee, Petitioner's own evaluation of his abilities is not sufficient to rebut the articulated reasons for Respondent's employment decision. The law is clear that "[t]he inquiry into pretext centers upon the employer's beliefs, and not the employee's own perception of his performance." LeBlanc, supra, at 1331 (dismissing discrimination claim because plaintiff failed to prove pretext); Vickers, supra, at 1381 (dismissing discrimination claim and noting that the employee's perception of himself is not relevant; it is the perception of the decision-maker that is relevant); Webb v. R & B Holding Co., Inc., 992 F. Supp. 1382, 1387 (S.D. Fla. 1998) ("The fact that an employee disagrees with an employer's evaluation of him does not prove pretext.")

45. In addition, Petitioner admits that numerous customers of Respondent, including Ocwen, Citrus Center/Tricony Management, City of Orlando, Avitar/Solivita, C&L Bank and Florida Power Corporation complained regarding his servicing or management of their accounts. Petitioner also admits that a subordinate complained to Buckwalter regarding his failure to provide the subordinate with a timely performance evaluation and that Buckwalter received a complaint from an employee of Respondent's regarding Petitioner's failure to properly process administrative paperwork. It is, thus, undisputed that Respondent received complaints from customers and Petitioner's subordinates regarding Petitioner's management. Petitioner offers only his various explanations for the problems complained about and his disagreement with the substance of those complaints. He never disputes that Respondent received the complaints or that Respondent based its decision on those complaints.

46. Petitioner further admits that he does not know what factors Respondent considered in making the decision to terminate his employment. Therefore, any additional argument Petitioner could make regarding pretext would be based solely on his speculation. Fatal to his claims, however, Petitioner cannot satisfy his burden of persuasion simply by making conclusory allegations of discrimination or basing them upon his

subjective belief as to unlawful discrimination. See Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1471 (11th Cir. 1991) (holding that "[c]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [the defendant-employer] has offered . . . extensive evidence of legitimate, non-discriminatory reasons for its action"). Further in the absence of evidence of intent to discriminate, courts have repeatedly recognized that it is not their role to second guess or scrutinize an employer's legitimate business decisions. See Lee v. GTE Fla., Inc., 226 F.3d 1249, 1253 (11th Cir. 2000); Elrod, supra, at 1470 (noting that courts "do not sit as a super-personnel department that re-examines an entity's business decisions"). Courts and administrative agencies are "not in the business of adjudging whether employment decisions are prudent or fair." Pashoian, supra, at 1309; Chapman v. AI Transport, 229 F.3d 1012, 1031 (11th Cir. 2000). Instead, courts are to be concerned only with the question whether discriminatory animus motivated a challenged employment decision. Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1361 (11th Cir. 1999).

47. The undisputed facts also show that Respondent had a good faith belief that Petitioner's performance was unacceptable and warranted termination. See E.E.O.C. v. Total System

Services, Inc., 221 F.3d 1171, 1176 (11th Cir. 2000) (in an employment context, a decision-maker's good faith belief is the relevant inquiry); Damon, supra, at 1363 n. 3 (holding that an employee cannot be held liable for discharging an employee "under the mistaken but honest impression that the employee violated a work rule.")

48. Therefore, Petitioner is left to argue that Respondent was wrong when it concluded that his performance was deficient. It is well-settled, however, that even if an employer wrongly believes that an employee's performance was unacceptable, acting upon that belief does not give rise to a discriminatory motive. See Jones v. Gerwens, 874 F.2d at 1540 (11th Cir. 1989) ("[t]he law is clear that, even if a Title VII claimant did not in fact commit the violation with which he is charged, an employer successfully rebuts any prima facie case of disparate treatment by showing that it honestly believed the employee committed the violation.") Following this legal authority, Respondent was entitled to conclude that Petitioner's unacceptable handling of customers' and subordinates' needs and concerns (as well as neglect of his administrative duties) was ground for termination of employment, as long as this practice is enforced in a non-discriminatory manner.

49. Even if Petitioner could cast doubt on the reasons for his discharge, his claim fails because he has offered no proof

that his race and/or his age were the reasons for his discharge. See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 146-47 (2000) (noting that a plaintiff must do more than simply prove that the employer's proffered reason for discharge is false by presenting evidence of intentional discrimination.) It is well-settled that "[t]he employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or no reason at all, as long as its action is not for a discriminatory reason." Kossow v. St. Thomas University, Inc., 42 F. Supp. 2d 1312, 1317 (S.D. Fla. 1999). Petitioner's assertions that Respondent discriminated against him reflect merely a strained attempt to second-guess Respondent's decision about managing Petitioner and its business--a result not permitted by law. See Elrod, supra, at 1470.

50. Also, because Petitioner was hired and fired by the same individual (Buckwalter), Petitioner cannot demonstrate that his race and age were factors in Respondent's decision to discharge him. See also Williams v. Vitro Services Corp., 144 F.3d 1438, 1443 (11th Cir. 1998) (noting where the hirer and the firer are the same individual a "permissible inference" arises that discrimination was not a determining factor for the adverse action taken by the employer); and Kossow, supra, at 1316. Petitioner's allegations are further belied by the fact that Petitioner has failed to demonstrate that any "similarly

situated" individuals received more favorable treatment than he. Beach and Petitioner were not "similarly situated." Similarly, Petitioner and Poe were not "similarly situated," as Respondent never received any complaints from Poe's subordinates regarding Poe's management. Upon receipt of complaints from several customers regarding Poe's handling of their accounts, Respondent terminated Poe's employment also. Thus, the record evidence reflects that when customer complaints mounted, Respondent treated Poe and Petitioner exactly the same by discharging them. See Jones v. Gerwens, supra, at 1541 (affirming dismissal of discrimination claim because the plaintiff could not prove that employees outside of his protected class were treated more favorably.) Based on Respondent even-handed discipline of its employees, it is wholly immaterial that Petitioner may have felt that he was discriminated against. See Webb, supra, at 1388 (noting that a plaintiff's subjective beliefs are "wholly insufficient evidence to establish a claim of discrimination as a matter of law.")

51. Petitioner has failed to show that the adverse employment action taken against him was done in a discriminatory manner. Respondent's employment policies clearly prohibit discrimination against all employees based on race or age and guarantee equal employment opportunities to all employees. As such, Petitioner failed to raise any credible evidence to

support his claim that any actions by Respondent were pretextual.

52. Petitioner has failed to show that Respondent's termination of his employment was done in a discriminatory manner, and thus, Petitioner's discrimination claims under Subsection 760.10(1), Florida Statutes (2000), fail as a matter of law.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby:

RECOMMENDED that the Florida Commission on Human Relations enter a final order which denies Petitioner's Petition for Relief and dismisses his complaint with prejudice.

DONE AND ENTERED this 21st day of December, 2004, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
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Filed with the Clerk of the
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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.