

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TYRONE WHITE,)
)
 Petitioner,)
)
 vs.) Case No. 04-1280
)
 ROAD MART, INC.,)
)
 Respondent.)
 _____)

AMENDED RECOMMENDED ORDER

This matter is before the Division of Administrative Hearings on an Order Remanding Petition for Relief from an Unlawful Employment Practice dated June 15, 2005 (Remand).

The parties were provided opportunity to confer with their clients and on or about August 12, 2005, verbally advised that their clients took no position on the Remand.

Upon consideration, the Recommended Order dated and rendered April 1, 2005, is amended, nunc pro tunc, in accordance with the Florida Commission on Human Relations' (the Commission) request that the undersigned clarify the legal analysis employed, as follows:

APPEARANCES

For Petitioner: Marva A. Davis, Esquire
Marva A. Davis, P.A.
121 South Madison Street
Post Office Drawer 551
Quincy, Florida 32353-0551

For Respondent: Robert E. Larkin, III, Esquire
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906 North Monroe Street, Suite 100
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

Whether Respondent terminated Petitioner's employment on account of his race in violation of Florida law.

PRELIMINARY STATEMENT

By Petition for Relief dated April 9, 2004, Petitioner alleged he had been disciplined and terminated from employment in violation of Chapter 760, Florida Statutes, popularly known as the Florida Civil Rights Act (FCRA). The FCRA prohibits discrimination against an individual on the basis of, among other things, race.

The identity of witnesses and exhibits, and attendant stipulations and rulings are contained in the two-volume transcript of the proceedings, which was filed on February 21, 2005. The parties timely submitted Proposed Recommended Orders, which have been carefully considered.

References to statutes are to the Florida Statutes (2004).

FINDINGS OF FACT

1. Respondent, Road Mart, Incorporated, (Respondent or Road Mart) is a family-owned and operated tire sales and service company. Respondent is an employer within the meaning of Section 760.02(7), Florida Statutes.

2. Road Mart operates stores in North Florida and neighboring states, including the store at which all events relevant to this case occurred.

3. Petitioner, Tyrone White (Petitioner or White), is an African-American male. White was employed by Road Mart at one of its Florida stores at all times material to this case. White held positions of trust from May 24, 1999, when he commenced employment, until October 1, 2001, when he was terminated.

4. Sometime in 1999, White was offered a promotion to store manager. White declined the position because it would have required him to make other arrangements for his child's transportation.

5. A Caucasian male employee was thereafter offered the promotion which White had refused. In due course, White was offered a promotion which he was in a position to accept.

6. On May 8, 2001, Respondent imposed written discipline upon Petitioner in a disciplinary report which cited three separate violations of company policy. In particular, Petitioner charged merchandise to a customer's account without having an approved credit application on file; left work for a half-day without prior supervisor approval; and failed to take adequate measures to collect past due accounts assigned to him for follow-up.¹

7. On August 31, 2001, Petitioner was reprimanded for not completing daily duties.

8. Petitioner responded to this disciplinary action by directing Respondent's attention to a Caucasian male who was, similarly, failing to complete daily duties. Prior to Petitioner's complaint, Respondent was unaware of this individual's violation of company policy with respect to completion of daily duties.

9. Upon investigation, Respondent determined that the individual about whom Petitioner complained had in fact failed to complete daily duties, a fact of which Respondent previously had been unaware. Immediately, Respondent took appropriate disciplinary action against the Caucasian male employee.

10. On September 18, 2001, Petitioner received two additional written reprimands. The first concerned merchandise that Petitioner had placed "on quote" and removed from the store to show a customer. "On quote" is a term used at Road Mart to indicate that particular merchandise or services are to be made available to the customer at the "on quote" price for a reasonable length of time. "On quote" prices are to be reflected in the company computer under the customer's name. Merchandise held "on quote" is not to be removed from the store unless it is paid in full and documented in accordance with Road Mart's procedures for documenting specific transactions. Road

Mart reasonably requires that this policy be followed unless other arrangements acceptable to management are made in advance.

11. After receiving the reprimand, Petitioner billed the parts under his own account, at the employee discount price of Road Mart's cost, plus ten percent. Road Mart policy limits the use of the employee discount to bona fide employee purchases. The employee discount is a significant savings over the retail price charged to the public at large.

12. The second reprimand was given because Road Mart learned that White had, approximately six weeks earlier, purchased parts from a Road Mart supplier at Road Mart's cost to be used on White's personal vehicle. White failed to re-bill these charges to his personal account, contrary to company policy.

13. Road Mart reasonably viewed this conduct as dishonest and could have terminated him for this violation, but elected not to.

14. With respect to Petitioner's violation of company policy as regards the use of the "on quote" process, employee discount usage, and purchasing parts at cost from Respondent's dealers for personal use, Petitioner failed to identify any similarly situated individual outside the protected class who was treated more favorably with respect to the enforcement of company policy regarding such rules.

15. Petitioner offered no persuasive evidence that the September 18, 2001, reprimands were rendered with any discriminatory intent or impact. To the contrary, all of the persuasive evidence, much of it provided by White himself, established that the September 18, 2001, reprimands were not pretextual, but rather in furtherance of Respondent's desire to require all employees to adhere to company policy, particularly policies designed to prevent theft.

16. In addition, White offered no credible or persuasive evidence that any similarly situated individual outside the protected class was treated more favorably with reference to any of the company policies addressed in the September 18, 2001, reprimands.

17. On September 30, 2001, White committed multiple violations of company policy which resulted in his termination of employment.

18. Unbeknownst to any Road Mart employee, and without authority to do so, White arranged to meet an individual he described as an "associate," one Robert Newkirk, on September 30, 2001, at the Road Mart store.

19. That date fell on a Sunday, a day when Road Mart is closed to the public. Trusted employees, such as White was at the time, have access to the store to serve the emergency needs of customers. However, as White knew at all material times,

such access is only to be exercised under circumstances which did not exist here, and in accordance with specific procedures which White failed to follow.

20. White entered the store using another employee's security code number to de-activate the alarm system. Employees with a valid reason to access the store when it is closed are required to use their own security code.

21. White, by his own admission, met Newkirk at the store for the purpose of installing two deluxe tires on Newkirk's Lexus GS300.

22. Previously, Road Mart had sold a pair of these tires, known as Toyo Proxy 200s, to Newkirk, and on September 30, 2001, Newkirk wanted the mates installed on his car.

23. At least one Toyo Proxy 200 tire was on display in the Road Mart showroom until September 29, 2001, when the store was closed for the balance of the weekend. At that time, this tire and all other showroom inventory were placed in the store's warehouse for the weekend.

24. White installed the display tire and one other on Newkirk's Lexus.

25. Road Mart renders a separate charge to customers who receive such after-hours service. In addition, Road Mart imposes upon all customers a charge for the installation and balancing of tires, as well as for disposing of the old tires.

Each of these charges should have been billed to Newkirk and collected when the service was performed, absent other arrangements with White's supervisors. White did none of these things.

26. Newkirk paid White a portion of the retail value of the second pair of tires, in cash. White never informed anyone of this transaction, but, instead, pocketed Newkirk's money.

27. As previously noted, company policy reasonably requires that merchandise and services be paid for in full, and documented in the company computer, unless other arrangements acceptable to the owners are made, before merchandise leaves the property and/or services are performed. Apart from protecting the company against theft, the policy is essential for the legal and financial protection of buyer and seller.

28. In this case, documenting the sale of the tires to Newkirk would have obliged the manufacturer to honor warranties in the event the tires proved defective. Additionally, Road Mart's insurer would have been obligated to provide coverage if White had installed the tires in a negligent manner, resulting in injury to Newkirk or other parties.

29. Moreover, by giving Newkirk the tires without documenting what had been paid, the balance due, and what arrangements had been made with Newkirk to pay the balance,

Newkirk was in a position to claim he had paid in full, which he had not.

30. White's activities on September 30, 2001, violated company policy, placed his employer in legal and financial jeopardy, and, standing alone, warranted termination.

31. When the store opened for regularly scheduled business on Monday, October 1, 2001, White's co-workers almost immediately noticed that the display Toyo Proxy 200 was missing and began to search for it. White, who arrived at work shortly after the store opened, was aware that his co-workers were seeking the missing tires, but said nothing.

32. Mid-morning, White registered the tires in the store computer, placing them "on quote," in his name, at his employee discount.

33. Apart from the fundamental dishonesty of attempting to rewrite the history of this transaction as his colleagues were expending efforts to locate Respondent's missing tires, White violated company policy by placing the tires "on quote" in his own name and on his own authority. As previously noted, White was not at liberty to extend the employee discount to Newkirk or anyone else.

34. Later that morning, White entered the tires into the computer as a sale to himself at the employee discount rate.

35. By the end of the morning, Road Mart's management had uncovered most of the details regarding White's unauthorized and improper activities of the previous 24 hours. Management confronted White with the results of its investigation, and terminated his employment.

36. Petitioner's October 1, 2001, termination was based entirely upon his multiple violations of company policy in the 24 hours preceding his termination. Petitioner failed to identify any similarly-situated individual outside the protected class who was treated more favorably with respect to the enforcement of company policy regarding requirements that sales be timely and properly documented.

CONCLUSIONS OF LAW

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

38. Section 760.10, Florida Statutes, prohibits discrimination against any individual with respect to compensation, terms, conditions, or privileges of employment because of the individual's race or gender. See § 760.10(1), Fla. Stat.

39. As a condition precedent to bringing any civil cause of action under Chapter 760 an aggrieved person must file a

complaint with the Commission within 365 days of the alleged violation. See § 760.11(1), Fla. Stat.

40. Petitioner filed his Charge of Discrimination with the Commission on May 21, 2002. Thus, any complaint of discrimination grounded in the promotion which Petitioner refused in 1991 and/or the imposition of discipline on May 8, 2001, is time barred and must be dismissed as a matter of law. See Greene v. Seminole Electric Cooperative, Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997).

41. Florida courts have determined that federal case law applies to claims arising under Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under Section 760.10, Florida Statutes. See Florida Department of Community Affairs v. Bryant 586 So. 2d 1205 (Fla. 1st DCA 1991).

42. Under the McDonnell Douglas analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination.

43. To establish a prima facie case of racial discrimination based on disparate treatment, Petitioner must show: (a) he belongs to a racial minority; (b) he was subjected

to an adverse employment action; (c) he was qualified for his position; and (d) Respondent treated similarly-situated employees outside the protected class more favorably. See Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

44. If the prima facie case is established, the burden shifts to Respondent, as the employer, to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that Respondent's offered reasons for its adverse employment decision were pretextual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

45. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

46. Petitioner established that he is a member of a protected group, African-American. Petitioner also established that he was subject to adverse employment action in that he was terminated from his job. Finally, Petitioner established that he was qualified to do his job.

47. However, Petitioner presented no evidence that his race played any role in his termination. No other similarly-situated employee; i.e., an employee outside the protected class, was treated more favorably by management with respect to

any disciplinary issue. Having failed to establish this element, Petitioner has not established a prima facie case of employment discrimination.

48. Even if Petitioner had set forth a prima facie case, Respondent presented evidence of legitimate, non-discriminatory reasons for terminating Petitioner, thereby rebutting any presumption of race discrimination. The undisputed evidence presented by Respondent established that Petitioner was terminated for multiple failures to follow company policy on September 30, 2001, and October 1, 2001, with respect to handling after-hours transactions.

49. Petitioner failed to prove that Respondent's reasons for terminating him were pretextual.

RECOMMENDATION

Upon the Findings of Fact and Conclusions of Law it is RECOMMENDED that the Florida Commission on Human Relations enter a final order denying all claims and dismissing the Petition for Relief.

DONE AND ENTERED this 22nd day of August 2005, in
Tallahassee, Leon County, Florida.

Florence Snyder Rivas

FLORENCE SNYDER RIVAS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of August 2005.

ENDNOTE

1/ Claims under Chapter 760 relating to the promotion
Petitioner declined in 1999 or to the May 8, 2001, discipline
are time-barred, because they were made more than 365 days after
the discriminatory conduct alleged with reference to these
events. In addition, White offered no credible or persuasive
evidence that any similarly situated individual outside the
protected class was treated more favorably with reference to
promotions, nor to the discipline, for violating any of the
three company policies addressed in the May 8, 2001, written
disciplinary report.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.