

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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TYRONE WHITE,

EEOC Case No. 15DA200810

Petitioner,

FCHR Case No. 22-02245

v.

DOAH Case No. 04-1280

FSR
Closed

ROAD MART, INC.,

FCHR Order No. 05-071

Respondent.

**ORDER REMANDING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

This matter is before the Commission for consideration of the Recommended Order, dated April 1, 2005, issued in the above-styled matter by Administrative Law Judge Florence Snyder Rivas.

Pursuant to notice, public deliberations were held on June 9, 2005, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order.

Findings of Fact and Conclusions of Law

With regard to the steps necessary for establishing that an unlawful employment practice has occurred, it has been stated, "The initial burden is upon Petitioner to establish a prima facie case of discrimination. Once Petitioner establishes a prima facie case, a presumption of unlawful discrimination is created. The burden shifts then to Respondent to show a legitimate, nondiscriminatory reason for its action. If Respondent carries this burden, Petitioner must then prove by a preponderance of the evidence that the reason offered by Respondent is not its true reason, but only a pretext for discrimination." See conclusions of law adopted by a Commission panel in Spradlin v. Washington Mutual Bank, d/b/a Great Western, 23 F.A.L.R. 3359, at 3364, 3365 (FCHR 2001), citations from the quoted statement omitted.

In conclusions of law adopted by a Commission panel it has been stated, "A prima facie case of discrimination in a disparate treatment action is made out when plaintiff adduces evidence tending to show that the challenged adverse employment action is not readily explainable by considerations of merit...The prima facie case method was never intended to be rigid, mechanistic, or ritualistic...A prima facie case can also be established by a plaintiff (Petitioner) showing that he suffered an adverse employment action while others having

comparable or lesser qualifications did not, or were accorded the more favorable treatment he was denied...The elements of a prima facie case are flexible and should be tailored to differing factual circumstances.” Ehlmann v. Florida A & M University, 21 F.A.L.R. 436, at 455 and 457 (FCHR 1998), citations from the quoted statement omitted.

With some exceptions, e.g., some disability discrimination cases (see Brand v. Florida Power Corporation, 633 So. 2d 504, at 508, fn. 5 (Fla. 1st DCA 1994)), retaliation cases (see Pall v. Cal Henderson, Sheriff of Hillsborough County, 21 F.A.L.R. 477, at 478 and 479 (FCHR 1997)), and cases involving allegations of harassment and hostile work environment (see Alexander v. Boehm, Brown, Seacrest, Fischer & Lefever, P.A., FCHR Order No. 03-054 (August 11, 2003), adopting conclusions of law set out in the Recommended Order of DOAH Case No. 02-4524), to name a few, the establishment of a prima case typically involves the comparison of the treatment of the Petitioner to the treatment of those outside Petitioner’s protected group or class. See, e.g., Ehlmann, supra.

The Commission has adopted conclusions of law that reflect that to establish a prima facie case of discrimination in a termination case, “the employee must prove (1) that he belongs to a group protected by the statute; (2) that he was qualified for the job; (3) that he was terminated; and (4) that after his termination, the employer hired a person not in petitioner’s protected class or retained those having comparable or lesser qualifications, not in the protected class.” See Martinez v. Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997), citing Arnold v. Department of Health and Rehabilitative Services, 16 F.A.L.R. 576, at 582 (FCHR 1993).

Further, Commission panels have adopted conclusions of law which indicate that to establish a prima facie case of discrimination in cases involving allegations of the discriminatory imposition of discipline, which is really the issue presented in the instant case, “Petitioner, ‘in addition to being a member of a protected class, must show either (a) that he did not violate the work rule [in question], or (b) that he engaged in misconduct similar to that of a person outside the protected class, and that the disciplinary measures enforced against him were more severe than those enforced against the other persons who engaged in similar misconduct.’ Lumpkin v. Occidental Chemical Company, 19 F.A.L.R. 1542, at 1547, 1548 (FCHR 1996).” Baxla v. Fleetwood Enterprises, Inc., d/b/a Fleetwood Homes of Florida, Inc., 20 F.A.L.R. 2583, at 2585 (FCHR 1998).

Applying this to the instant case, the Administrative Law Judge concluded simply that the burden of proof is on Petitioner to establish that his termination constituted unlawful discrimination, and that Petitioner failed to meet this burden. Recommended Order, ¶ 35. In findings of fact, the Administrative Law Judge indicated that “Petitioner offered no persuasive evidence that any of the foregoing reprimands were improper or racially motivated,” (Recommended Order, ¶ 13), and that “There was no credible or persuasive evidence that race played any factor in Road Mart’s decision to terminate Petitioner’s employment” (Recommended Order, ¶ 33).

In our view, it cannot be determined from the Recommended Order the extent to which the Administrative Law Judge utilized legally correct analysis, as set out in Spradlin, supra, in

reaching the ultimate conclusion that race played no part in Respondent's decisions to discipline and terminate Petitioner.

This is not to say that the Administrative Law Judge's ultimate conclusion that no unlawful employment practice occurred is incorrect. Rather, the conclusions of law set out in the Recommended Order are insufficient for the Commission to determine whether that conclusion was reached in a legally correct manner.

In Hernandez v. Transpo Electronics, a Commission panel remanded the matter to the Administrative Law Judge when the panel concluded that "the order submitted to the Commission is not sufficient for the Commission to take final agency action." FCHR Order No. 02-038 (September 5, 2002). In that case the Administrative Law Judge had issued an "Order Closing File" following the filing of a motion to dismiss by Respondent. The Commission panel noted, "The Order does not contain findings of fact and conclusions of law, or indicate on what basis Respondent's motion was granted, or, for that matter, if in fact it was granted." Id.

We conclude that the Recommended Order submitted to the Commission is not sufficient for the Commission to take final agency action, and that this case should be remanded to the Administrative Law Judge to conduct the appropriate legal analysis for discrimination cases such as this, as set out above.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled "Exceptions to Recommended Order."

Paragraphs 4, 5, 6, 7, 9, 10 and 11, all suggest the Administrative Law Judge failed to consider the conduct of Petitioner in comparison to the conduct of similarly situated white employees.

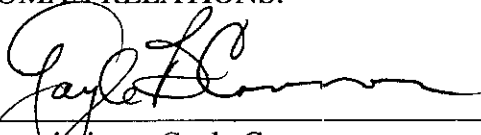
As reflected in the tests for establishing a prima facie case of discrimination set out above, comparing Petitioner to similarly situated nonclass members is an element of the appropriate tests for determining whether a prima facie case of discrimination occurred in this case. See Ehlmann, supra, Arnold, supra, and Baxla, supra. Further, the conclusions of law contained in the Recommended Order do not reflect the extent to which the appropriate prima facie case analysis was utilized by the Administrative Law Judge. See Recommended Order, ¶ 34 and ¶ 35, and the discussion of this issue set out above.

Petitioner's exceptions are accepted to the limited extent that they suggest that the appropriate legal analysis was not conducted by the Administrative Law Judge.

Remand

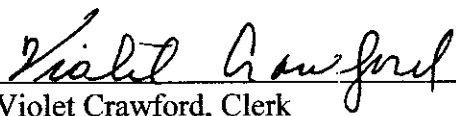
The Petition for Relief and Complaint of Discrimination are REMANDED to the Administrative Law Judge for further proceedings on the Petition for Relief consistent with this Order.

DONE AND ORDERED this 15th day of June, 2005.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:



Commissioner Gayle Cannon,
Panel Chairperson;
Commissioner Donna Elam; and
Commissioner Roosevelt Paige

Filed this 15th day of June, 2005,
in Tallahassee, Florida.



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Florence Snyder Rivas, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 15th day of June, 2005.

By: *Viola Crawford*
Clerk of the Commission
Florida Commission on Human Relations