STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALONZO C. BROWN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-1319
	)	
HERITAGE PAPER, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was held before the Division of Administrative Hearings by Daniel M. Kilbride, Administrative Law Judge, on October 7, 2004, in Orlando, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Alonzo C. Brown, pro se
7230 Plantain Drive
Orlando, Florida 32818

For Respondent: Robert T. Devine, Esquire
Alva L. Cross, Esquire
Coffman, Coleman, Andrews
& Grogan, P.A.
Post Office Box 40089
Jacksonville, Florida 32203

STATEMENT OF THE ISSUE

Whether Petitioner was terminated from his position with Respondent as a warehouse supervisor on or about August 9, 2002,

on the basis of his race (African-American), in violation of Subsection 760.10(1)(a), Florida Statutes (2003).

PRELIMINARY STATEMENT

Petitioner, Alonzo C. Brown, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) charging Respondent, Heritage Paper Company, Inc., with employment discrimination on or about July 16, 2003, alleging race and handicap discrimination and retaliation. On July 31, 2003, Petitioner filed an amended charge alleging only race and handicap discrimination. On or about March 12, 2004, a no cause determination was issued by the FCHR. Petitioner timely filed a Petition for Relief with the FCHR alleging that he had been "force[d] out" on the basis of race and requested a formal hearing. Although Petitioner's Amended FCHR Charge of Discrimination indicates that he was discriminated against on the basis of race and disability/handicap, his Petition for Relief indicates that he was terminated on the basis of race. This matter was subsequently referred by the FCHR to the Division of Administrative Hearings (DOAH) for a formal hearing, de novo, on April 13, 2004, and was set for hearing. Petitioner filed a Motion for Leave to Amend Petition on October 1, 2004. Petitioner's motion was denied. As such, the only issue in this case is Petitioner's assertion that he was terminated because of

his race. Following discovery, a formal hearing was commenced on October 7, 2004.

At the hearing, Petitioner appeared pro se and testified in his own behalf. Petitioner presented the testimony of five witnesses and submitted 11 exhibits (P-1 through P-11), which were admitted into evidence. Respondent presented the testimony of four witnesses and submitted five exhibits (numbered R-2 through R-6), which were admitted into evidence. A Transcript was ordered and was filed on December 13, 2004. The parties were allowed ten days from the hearing in which to file proposed findings of fact and conclusions of law. Petitioner has not filed proposed findings as of the date of this Recommended Order. Respondent filed Proposed Findings on December 23, 2004.

FINDINGS OF FACT

Based upon all of the evidence, the following Findings of Fact are determined:

1. Respondent, Heritage Paper Company, Inc. (Respondent), is an employer as that term is defined under the Florida Civil Rights Act of 1992 (FCRA). Respondent is a wholesale distributor of paper and plastic products.

2. Petitioner, Alonzo C. Brown, is an African-American male and is a member of a protected class.

3. Petitioner was employed in the warehouse at Respondent's Orlando facility from 1998 until he was terminated on or about August 9, 2002.

4. Dan Patterson ("Patterson"), who was the general manager at the Orlando facility during the relevant time period, supervised Petitioner throughout his employment with Respondent. Patterson made the decision to hire Petitioner, made the decision to promote Petitioner to warehouse supervisor, and made the decision to terminate Petitioner's employment.

5. In November 1999, Petitioner was officially promoted from warehouseman to warehouse supervisor. Petitioner's job duties as warehouse supervisor included supervising the drivers, receiving inventory, putting away inventory, pulling orders, and ensuring that the trucks were loaded. Petitioner was responsible for assigning work to his assistants, ensuring that the runs were pulled, and ensuring that the merchandise ordered by customers was actually on the trucks for delivery. He was also responsible for the overall condition of the warehouse.

6. Petitioner's performance deteriorated during approximately the last five months of his employment. When Petitioner got behind in the warehouse, Patterson assisted him and even hired an assistant to help Petitioner in the warehouse with inventory control and other assistance, where necessary.

7. At the final hearing, Petitioner testified that he was discriminated against based on his race in retaliation for filing a workers' compensation claim and for disagreeing with his supervisor's instruction to put matches on a truck during a fire inspection.

8. Petitioner was responsible for ensuring that the trucks left on time in the morning and for pulling the runs the previous afternoon. Even though an assistant was hired to help Petitioner in the warehouse at times, Petitioner refused to assign tasks to his assistant.

9. Patterson wrote a note to Petitioner on May 1, 2002, telling Petitioner that he could not send items to the customer, NSC Northport, without matching up purchase order numbers. NCS Northport had very strict delivery requirements and would refuse delivery if Respondent did not comply with their delivery procedures.

10. The evidence demonstrates that Patterson notified Petitioner on May 1, 2002, that Respondent's procedure with regard to NSC Northport was not followed. Although Petitioner introduced testimony that he did not write the information on the NSC Northport invoice, Patterson reasonably believed that it was Petitioner's handwriting and testified that Petitioner never informed him that he did not write the information on that

invoice. Further, Marissa Moore, Petitioner's own witness, identified the handwriting as Petitioner's.

11. When problems in the warehouse first arose, Patterson spoke with Petitioner regarding Respondent's policies and procedures for the warehouse. Patterson wrote another note to Petitioner on May 13, 2002, regarding excessive overtime and the importance of having runs pulled the previous afternoon to prevent overtime.

12. Patterson wrote a third note to Petitioner and his assistant, Keynon Turner, on June 27, 2002, reiterating the importance of having the runs pulled in the afternoon and reminding them that the runs must be pulled by 4:00 p.m.

13. Petitioner's explanation for the overall condition of the warehouse from May through August 2002 is not credible.

14. Bob Purser, Sr., Respondent's chairman, CEO, and founder testified that in a conversation with Patterson, he told him that if Petitioner was unable to keep the warehouse organized, minimize the overtime, and get the trucks out on time, then they would have to get someone in the warehouse who would be able to do so. When Purser found out that incorrect merchandise was delivered to customers, he told Patterson to personally review the orders before the trucks were loaded.

15. Purser visited the warehouse where Petitioner was employed prior to his termination and found that the warehouse

was in disarray. He observed the aisles were blocked with merchandise and that the forklifts were unable to move up and down the aisles.

16. Denis Nieves, the current warehouse supervisor for Respondent's Orlando facility, was hired on August 12, 2002, three days after Petitioner's employment was terminated. When he was hired, the warehouse was disorganized and cluttered, inventory blocked some of the aisles, the bay doors, and the exits and that it was sometimes difficult to locate inventory. It took him approximately six to eight weeks to reorganize the warehouse, unblock the aisles, put the inventory on racks, and unblock the bay doors and the exits.

17. Respondent's Equal Employment Opportunity policy states that Respondent will provide equal employment opportunity to all qualified employees and applicants for employment regardless of race, color, sex, age, religion, national origin, handicap, marital status, and status as a disabled veteran or veterans of the Vietnam era. This policy was in effect when Petitioner was hired, and he received a copy of Respondent's employee handbook at the time of his hire, which contained the Equal Employment Opportunity policy prohibiting all types of unlawful discrimination.

18. Petitioner knew of Respondent's Equal Employment Opportunity policy. He was aware of the procedures for mailing a complaint about racial discrimination and/or harassment.

19. Respondent also maintained an open-door policy where employees could speak with Purser regarding any perceived problems.

20. Petitioner was aware of this open-door policy. Other employees took advantage of Respondent's open-door policy to address their concerns with Patterson and/or Purser.

21. Petitioner never complained to Purser about Patterson's alleged discriminatory treatment. Purser confirmed that Petitioner never addressed any concerns about race discrimination or any retaliatory actions by Patterson with him.

22. Petitioner testified that he did not feel that he was ever discriminated against at any time during his employment with Respondent, except when Patterson terminated his employment. Although Petitioner raised various instances of perceived unfairness throughout his employment with Respondent, such as being paged to the front office and having his uniform "stripped" from him, he testified that the only point he believed he was discriminated against because of his race was when Patterson terminated his employment.

23. Petitioner's witnesses, Ralph McDaniel and Ricky Vaughn, admitted that they never noticed any discriminatory acts

or racial inequalities against anyone while they were employed with Respondent. Moore testified that she never heard any discriminatory comments about Petitioner. Andrew Mitchell testified that he never noticed any discriminatory acts during his employment with Respondent.

24. Petitioner's only other witness, Kenyon Turner, testified that the only perceived discriminatory actions he experienced while employed at Respondent was Patterson's "getting mad and cursing [him] out every once in a while." When asked if Patterson cursed at others as well, Turner answered affirmatively stating, "[o]f course he cursed out the other people that was there," meaning all employees, regardless of race. This does not constitute evidence of racial discrimination.

25. Purser testified that his company does not discriminate against its employees on the basis of race and Patterson testified that he did not consider Petitioner's race in making the decision to terminate his employment.

26. Through Mitchell's testimony, Petitioner attempted to establish that he was a "good employee" and that he was a "capable and knowledgeable" warehouse supervisor, but offered no additional evidence demonstrating that he was doing a good job.

27. The greater weight of evidence supports the fact that Patterson made the decision to terminate Petitioner's employment

based on the continuing problems in the warehouse and a load factor decline of approximately 22 percent. The load factor is a percentage used to determine how many customer orders are being accurately filled.

28. At the time of Petitioner's termination, he was earning $11.72 per hour. Petitioner testified that he did not begin looking for work until the first part of 2003. Petitioner worked sporadically for Florida Courier and that he earned approximately $11,000.00 in 2003. Petitioner did not work many hours and did not seek alternative employment during the summer months. Petitioner is also a full-time pastor, and his church pays his mortgage payment, which is approximately $1,000.00 per month. Petitioner testified that he has submitted "a couple of applications" to prospective employers, but has not really been interested in working for someone else.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2003), and Florida Administrative Code Rule 60Y-4.016(1).

30. The State of Florida, under the legislative scheme contained in Chapter 760, Florida Statutes (2003), 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 Section 2000e, et seq. The Florida law prohibiting unlawful employment practices is found in Section 760.10, Florida Statutes (2003). This section prohibits discrimination against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's race and/or sex. § 760.10(1)(a), Fla. Stat. (2003). The FCHR and the Florida courts interpreting the provisions of the 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 (Fla. 1st DCA 1991); Cooper v. Lakeland Regional Medical Center, 16 F.A.L.R. 567, 574 (FCHR 1993).

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. Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989). Blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. 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 Petitioner's supervisor. There is no evidence Patterson made any race-related comments or slurs. Petitioner has not presented any documentary evidence which would constitute direct evidence of discrimination.

32. 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), 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). The FCHR has adopted this evidentiary model. Kilpatrick v. Howard Johnson Co., 7 F.A.L.R. 5468, 5475 (FCHR 1985). McDonnell Douglas places upon Petitioner the initial burden of proving a prima facie case of racial discrimination. See also 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).

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

a. Petitioner is a member of a protected group;

b. The employee is qualified for the position;

c. The employee was subject to an adverse employment decision (Petitioner was terminated);

d. The position was filled by a person of another race or that he was treated less favorably than similarly-situated persons outside the protected class:

Jones v. Winn-Dixie Stores, Inc., 75 F. Supp. 2d 1357, 1363 (S.D. Fla. 1999).

34. Proving a prima facie case serves to eliminate the most common nondiscriminatory reasons for Petitioner's disparate treatment. See International Brotherhood of 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).

35. 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." Burdine, 450 U.S. 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." Burdine, 450 U.S. at 254. This burden is characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

36. 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 nondiscriminatory reasons or that the replacement was more qualified than Petitioner. Burdine, 450 U.S. at 257-8.

37. 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. Burdine, 450 U.S. at 253. The Court confirmed this principle again in Hicks, supra.

38. In the case sub judice, Petitioner has established that he is a member of a protected class. He has established that he was qualified for the position at the time he was hired and when he was promoted and that he was subjected to an adverse employment decision when he was terminated. However, Petitioner has failed to come forward with credible evidence that there is a causal connection between his race and his termination. Petitioner has failed to show that similarly-situated persons outside the protected class received more favorable treatment under similar circumstances. Therefore, there can be no inference of discrimination. Roud v. Stone, 945 F.2d 796 (4th Cir. 1991). "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993). This standard requires Petitioner to establish that "but for" his protected class and the employer's intent to discriminate, he would not have been terminated. Petitioner has failed to came forward with sufficient evidence to meet his initial burden of proof on the issue of racial discrimination.

39. Assuming Petitioner was qualified for the position of warehouse supervisor at the time of his promotion, he failed to meet the fourth element of the McDonnell Douglas analysis.

Petitioner has not introduced any evidence to create an inference of discrimination. He has failed to cite any non-minority employees who were treated differently than he was treated under similar circumstances. In order to make a prima facie case, Petitioner must demonstrate there were employees outside of the protected class who engaged in similar conduct, but were not terminated. Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1998). The most important factors in comparing disciplinary actions imposed on employees are the nature of the offenses in relation to the punishment imposed. "We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges." Id. Petitioner failed to introduce any evidence whatsoever to support the fourth and most important element in proving any claim of discrimination through indirect evidence. The hearing record is completely devoid of any evidence which would create even an inference that employees who were outside of a protected class were treated differently than Petitioner. Jones, 75 F. Supp. at 1365.

40. In addition, Patterson made the decision to hire Petitioner, promote Petitioner to warehouse supervisor, and to terminate Petitioner's employment. Under the same factor inference, because Petitioner was hired, promoted, and fired by

Patterson, Petitioner cannot demonstrate that his race was a factor in Respondent's decision to terminate his employment. See Williams v. Vitro Services Corp., 144 F.3d 1438, 1443 (11th Cir. 1998) (noting where the same person hires and fires an employee, a "permissible inference" arises that discrimination was not a determining factor for the adverse action taken by the employer.)

41. Assuming arguendo that Petitioner had met his initial burden, the sequence of presentation of evidence then required Respondent to come forward and articulate valid, nondiscriminatory reasons for the resulting termination decision. Respondent has done so. The burden to articulate a legitimate business reason for the action is one of production, not of persuasion. The court need not weigh the credibility of the nondiscriminatory reason at this stage of the burden-shifting analysis. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2106 (2000); Hicks, 509 U.S. at 509. Respondent terminated Petitioner's employment because, under Petitioner's supervision, the warehouse was disorganized, and Respondent was incurring excessive overtime since the runs were not pulled and ready for loading the previous afternoon, as required; and thus, the trucks were late in leaving the warehouse the following morning. Patterson repeatedly reminded Petitioner of his duties as warehouse supervisor and other

company policies. Three witnesses testified that the warehouse was disorganized, inventory was not put away, inventory was difficult to locate, bay doors were blocked, exit doors were blocked, and the aisles were blocked so that the forklift was unable to maneuver down the aisles. Respondent had a legitimate, nondiscriminatory basis for terminating him. See Davidson v. Time, Inc., 972 F. Supp. 148 (E.D.N.Y. 1997) (discrimination laws should not be used as a vehicle for second guessing an employer's business judgment).

42. The record in this case is undisputed. Petitioner failed to introduce any evidence to suggest that the basis offered for his termination by his employer was false or that the real basis was invidious discrimination. To the extent that Petitioner attempts to prove intentional discrimination by presenting evidence that he was a "good employee" and a "competent and knowledgeable" warehouse supervisor, Petitioner's attempt to elicit this information through Mitchell's testimony is insufficient to rebut the articulated reasons for Respondent's employment decision. First, Mitchell's testimony established that he was employed with Respondent from September 26, 2000, until February 16, 2001. Patterson testified that there were no issues with Petitioner's performance until approximately March of 2002. At the time of Mitchell's departure from Respondent's employ, approximately 18

months prior to Petitioner's termination, Patterson did not have any issues with Petitioner's performance. Second, Mitchell was not in a position during his employment with Respondent to evaluate Petitioner's performance.

43. Petitioner's own subjective feelings, without evidence of racial bias, are insufficient to support a claim of discrimination. Wright v. Wyandotte County Sheriff's Department, 963 F. Supp. 1029 (D. Kan. 1997). 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 v. TJX Companies, Inc., 214 F. Supp. 2d 1319, 1331 (S.D. Fla. 2002); see also 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.")

44. Petitioner has the continuing burden of persuading the trier of fact that Respondent intentionally discriminated against him. Burdine, 450 U.S. at 253. When a Petitioner alleges disparate treatment, "liability depends on whether the protected trait actually motivated the employer's decision." Hazen Paper Co. v. Briggins, 507 U.S. at 610. The plaintiff's race must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome. Petitioner simply cannot prevail on his claims of

disparate treatment unless he can demonstrate that Respondent intentionally discriminated against him. Cason Enterprises, Inc. v. Metropolitan Dade County, 20 F. Supp. 2d 1331, 1337 (S.D. Fla. 1998). An employer may terminate an employee fairly or unfairly and for any reason or no reason at all without incurring Title VII liability unless its decision was motivated by invidious discrimination. Kossow v. St. Thomas University, Inc., 42 F. Supp. 2d 1312, 1317 (S.D. Fla. 1999); Fucci v. Graduate Hospital, 969 F. Supp. 310 (E.D. Pa. 1997).

45. Petitioner worked for Respondent for approximately four years, first as a warehouseman, then as the warehouse supervisor. Two of Petitioner's supervisors had a good-faith belief that Petitioner's performance was poor in the second and third quarter of 2002 and that his employment should be terminated. There is no evidence to demonstrate that his termination was a result of his race. Petitioner failed to introduce any evidence to prove that Respondent's stated legitimate, nondiscriminatory basis for his termination was a pretext for discrimination.

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 the Petition for Relief.

DONE AND ENTERED this 19th day of January, 2005, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of January, 2005.

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.