

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALEXANDER TABAK,)
)
 Petitioner,)
)
 vs.) Case No. 04-1451
)
 OFFICE DEPOT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on July 1, 2004, in Fort Myers, Florida, before Fred L. Buckine, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alexander Tabak, pro se
214 Southwest 46th Terrace
Cape Coral, Florida 33914

For Respondent: Joanne B. Lambert, Esquire
Jackson Lewis LLP
390 North Orange Avenue
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice when it terminated Petitioner's employment on July 20, 2001.

PRELIMINARY STATEMENT

On July 19, 2002, Petitioner, Alexander Tabak, filed a Charge of Discrimination against Respondent, Office Depot, with the Florida Commission on Human Relations (Commission). Upon completion of its investigation, the Commission issued a Notice of Determination: No Cause (Notice) and a Determination: No Cause on March 12, 2004. Petitioner was advised that he may request an administrative hearing by filing a petition for relief within 35 days of the date of the Notice and that failure to request an administrative hearing within 35 days of the date of the Notice would result in dismissal of the administrative claim under Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes, pursuant to Section 760.11, Florida Statutes. Petitioner filed a Petition for Relief on April 19, 2004.

On April 22, 2004, the Commission referred this matter to the Division of Administrative Hearings for the assignment of an Administrative Law Judge to conduct all necessary proceedings required under the law and to submit recommended findings to the Commission.

On April 26, 2004, the Initial Order was sent to Petitioner and Respondent. On May 17 and 19, 2004, respectively, Counsel for Respondent filed a Notice of Appearance and Notice of Unilateral Compliance with Initial Order.

On May 19, 2004, Respondent filed a Motion to Dismiss, alleging that Petitioner was noticed on March 12, 2004, of his right to file his Petition for Relief within 35 days of the Notice and that Petitioner filed with the Commission on April 19, 2004, three days after the deadline imposed by Chapter 760, Florida Statutes.

On May 24, 2004, a Notice of Hearing, scheduling the final hearing for July 1, 2004, and an Order of Pre-hearing Instructions were entered.

At the final hearing on July 1, 2004, Petitioner testified on his own behalf and offered one exhibit (P-1) that was accepted into evidence. Respondent presented the testimony of five witnesses: Jeff Parry, Jaime Salazar, Vailoa Tavai, Glenn Michalak, and Richard York, employees of Respondent. Respondent's 17 exhibits (R-A through R-Q) were accepted in evidence.

The parties were afforded an opportunity to address preliminary matters prior to taking sworn testimony. Respondent's counsel raised two matters: (1) Respondent's Motion to Dismiss for Petitioner's failure to timely file his Petition for Relief with the Commission and (2) Petitioner's failure to respond to discovery demands. Both issues were taken under advisement, and a ruling was reserved until after presentation of the evidence.

On July 14, 2004, a one-volume Transcript was filed, and, on July 30, 2004, Respondent filed a Proposed Recommended Order. Petitioner did not file a post-hearing submittal.

FINDINGS OF FACT

Based upon observation of the witnesses while testifying, exhibits admitted into evidence, stipulations and arguments of the parties, and evidentiary rulings made, the following relevant and material facts are objectively determined:

Motion to Dismiss for Failure to Timely File Petition for Relief

1. This case arises out of a Charge of Discrimination (Charge) filed by Petitioner (Mr. Tabak) with the Commission on July 19, 2002.

2. Mr. Tabak alleged in the Charge that Respondent (Office Depot) discriminated against him based on his religion (Jewish), disability, and age (54 years) and retaliated against him for complaining of the same when it terminated his employment on July 20, 2001. Office Depot denied the allegations in the Charge and contends that it does not discriminate on the basis of religion, disability, age or any other factor.

3. On March 12, 2004, a no cause determination was issued by the Commission after its investigation of the allegations in the Charge. The determination states that "there is no reasonable cause to believe that an unlawful employment practice has occurred."

4. The no cause determination and the Notice were mailed to Mr. Tabak on March 12, 2004. The Notice informed Mr. Tabak of his right to request an administrative hearing by filing a petition for relief within 35 days of the date of the Notice (i.e. April 16, 2004), and it further informed Petitioner that his claim would be dismissed if it was not timely filed.

5. The Commission received Mr. Tabak's Petition for Relief (Petition) on April 19, 2004, 38 days after the date of the no cause determination and Notice of March 12, 2004.

6. Mr. Tabak gave no reason for the failure to timely file his Petition, other than "he put it in the mail and the postal services should have delivered it."

Failure to Respond to Discovery

7. Mr. Tabak acknowledged receiving Office Depot's First Request for Production of Documents and First Set of Interrogatories.

8. Mr. Tabak acknowledged that he did not answer Respondent's discovery requests.

9. Office Depot did not file a motion to compel or any other pleading to have Mr. Tabak's refusal to comply with discovery addressed by the undersigned prior to the hearing, and the noncompliance issues are now moot.

Claim of Discrimination

10. Mr. Tabak was hired by Office Depot on November 25, 1994, as a delivery driver at the satellite facility located in Fort Myers, Florida. Delivery drivers would report to the warehouse each morning to be assigned a "route" and/or "delivery" by the "lead" driver. The lead driver was an employee promoted from among the drivers. Drivers with the most experience and knowledge of the "delivery aspect" of the business, who had demonstrated an ability to manage other drivers and interviewed well as a potential leader, as determined by management, was promoted to lead driver positions. During Mr. Tabak's employment with Office Depot, a male and female were promoted to lead driver positions.

11. At the time of hire, all of Respondent's employees, to include Mr. Tabak, were provided with a copy of Office Depot's employee handbook.

12. Office Depot's employee handbook includes policies regarding equal employment opportunity, prohibition of unlawful harassment, and appropriate workplace conduct. The policies prohibit discrimination or harassment of employees on the basis of several factors, including religion, age, disability, sexual orientation, race, and national origin and require employees to treat one another with respect. The handbook provided the accepted method for employees to file their objections to all

proposed disciplinary actions taken against them by management, at the time they were notified of adverse action impacting their employment status.

13. On October 13, 1997, some 35 months after he was hired, Mr. Tabak applied for a lead driver position that was advertised. Mr. Tabak was interviewed, selected, and promoted to the lead driver position with an increase in pay and responsibilities. The overall responsibility of the lead driver was to ensure each day (1) that all vehicles were operative, (2) that drivers were present and assigned delivery routes, and (3) that drivers were scheduled to fill in for drivers who were on vacation and out sick. When necessary, the lead driver will drive for a driver who is out sick and no replacement was timely found. All Office Depot drivers understood that "the daily delivery of goods was the ultimate objective to be achieved."

14. On or about May 11, 2001, driver Jamie Salazar radioed Mr. Tabak, his lead driver, informing Mr. Tabak that he ran out of gas while driving a delivery route. During their conversation on the office-to-truck radio, another driver, Daniel Vasquez, overheard Mr. Tabak tell Mr. Salazar, "if you have a fucking problem, say it to my face," or some vulgar statement to that effect.

15. Mr. Salazar and Mr. Vasquez reported Mr. Tabak's vulgar comment to Jeff Parry, the satellite manager. Mr. Parry

discussed Mr. Tabak's inappropriate conduct with his immediate supervisor, Tom Perrin, the district manager/supervisor.

Mr. Parry and Mr. Perrin agreed that Mr. Tabak's comments and conduct were inappropriate and were a violation of Office Depot's policy and practice that required "employees to treat one another with respect."

16. On May 11, 2001, Mr. Parry and Mr. Perrin concluded that Mr. Tabak would receive written counseling for his comment to Mr. Salazar, with the warning that the next policy infraction would result in a final written counseling warning and/or termination. The written counseling becomes a part of the employee's personnel file. Office Depot's Problem Resolution policy is included in the employee handbook. Through the Problem Resolution policy, employees may contest proposed disciplinary counseling or other adverse actions taken by Office Depot management. Mr. Tabak was given a Problem Resolution form at the time he was informed by management of the "written counseling warning," but he elected not to complete the form to contest the written counseling warning he received for his vulgar comment to Mr. Salazar.

17. On May 11, 2001, Mr. Parry and Mr. Perrin gave Mr. Salazar a final written warning for running out of gas. This final warning was given because it was the responsibility

of the driver, Mr. Salazar, to ensure that the truck assigned to him was fully gassed each morning before leaving the facility.

18. On or about July 10, 2001, driver, David Tollison, reported to Mr. Parry that at the end of his delivery run he attempted check-in with Mr. Tabak, his lead driver, by giving his signed clipboard evidencing deliveries made. According to Mr. Tollison, Mr. Tabak shoved the clipboard back to him and said "fucking check yourself in."

19. When confronted by management with this second complaint of using vulgarity to coworkers, Mr. Tabak denied using the specific word "fucking" but admitted he "may" have said "hell" or "damn" when he shoved the clipboard at Mr. Tollison.

20. Again Mr. Parry discussed this incident with Mr. Perrin, and they agreed that Mr. Tabak's conduct was inappropriate and violated Office Depot's policies and practices requiring "employees to treat one another with respect" and that he should receive a final written counseling.

21. On July 10, 2001, Mr. Tabak received his final written counseling for his inappropriate conduct toward Mr. Tollison. The final warning informed Mr. Tabak that the next infraction of Office Depot's employee policies would result in termination. Again, Mr. Tabak was given a Problem Resolution form at the time he was informed by management of the "final written warning,"

but he elected not to complete the form to contest the written counseling warning he received for his vulgar comment to Mr. Tollison.

22. On July 18, 2001, Mr. Parry was advised that Mr. Tabak had made derogatory comments about the sexual orientation of Lisa Holmes, a lead driver. It was reported that Mr. Tabak, in the presence of drivers, Dan Mouser and Glenn Michalak, had on more than one occasion referred to Ms. Holmes as "that gay bitch."

23. On two or more occasions Mr. Tabak made derogatory comments about Ms. Holmes in the presence of Vailoa Tavia, referring to Ms. Holmes as a "bitch" and stating that "she should not be working as a driver at Office Depot because she is a woman."

24. Mr. Tabak, in the presence of Mr. Michalak, continued his barrage of derogatory comments about Ms. Holmes, referring to her as a "dike" and stating "we sure don't need any gay leads [drivers] around here."

25. Mr. Tabak's derogatory comments about his coworkers were not restricted to just the sexual orientation of Ms. Holmes. In the presence of Mr. Michalak and on more than one occasion, Mr. Tabak expressed his opinion regarding his Mexican and Black American coworkers, to include the statement "if we could get rid of all the Blacks and Mexicans, this place

would run better," and "we don't need Blacks and Mexicans, because they are lazy."

26. Mr. Tabak's repeated inappropriate comments made about his coworkers in the presence of other coworkers, after two written warnings, were brought to the attention of Richard York, Office Depot's Regional Human Resources Manager, located in Atlanta, Georgia. Mr. York, through his own investigation of Mr. Tabak's comments regarding the race, national origin, and sexual orientation of other Office Depot employees confirmed repeated violations, after warnings, had occurred.

27. On July 20, 2001, Mr. Tabak was terminated for repeated violations of Office Depot's policies concerning equal employment opportunities and non-harassment. Again, at the time of his termination for the third and last time, Mr. Tabak was given a Problem Resolution form to complete to contest his termination. Mr. Tabak did not, however, mention in his Problem Resolution any claims of religious, age, or disability discrimination; failure to accommodate; or retaliation. It is undisputed that Mr. Tabak's termination was the sole and direct result of his having made three or more derogatory statements about his coworkers in the presence of other coworkers, each such statement being a separate violation of Office Depot's policy regarding mandatory respect of each employee for coworkers.

28. Mr. Parry terminated another employee, Mr. Mouser, for making derogatory remarks about Mr. Tabak's Jewish religion. He also terminated Michael Salters and Charles Wrotten for misconduct. Neither Mr. Mouser, Mr. Salters nor Mr. Wrotten was Jewish or disabled, and they were all in their early to mid 20's when terminated.

29. Mr. Tabak was terminated solely for his repeated violations of Office Depot's employee policy consisting primarily of derogatory remarks and inappropriate conduct toward his coworkers and for no other reason as he alleged some three years after his termination.

Religious Accommodation Claim

30. Office Depot does not have nor does it observe any company-wide, close all stores, religious holidays. The policy of Office Depot was to accommodate any employee's request, should another employee be found to replace the absent employee, or the day off was one of those listed for all employees. No day off was given any employee merely because of that employee's religion or other personal traits and/or desires. Leave and vacation time was available should an employee plan his schedule and have eight or more hours leave available for any purpose the employee deemed appropriate.

31. Mr. Tabak's claim of discrimination, to include religious discrimination, was filed on July 19, 2002, more than

1,000 days after he was required to come in to work on Yom Kippur in September of 1999. Mr. Tabak's requests for time off for religious holidays during his employment, beginning in November of 1994 through September of 1999, with Office Depot were granted without exception when another driver could and would be available to cover Mr. Tabak's assigned duties.

32. Mr. Parry was Mr. Tabak's manager in 1999 and 2000 during both Jewish holidays, Yom Kippur and Rosh Hashanah.

33. In 1999, Mr. Tabak was called in to work on Yom Kippur by Mr. Parry after his prior request for that day off had been granted. On that day, the unexpected absence of two drivers would have caused undue hardship on the operations of the facility where Mr. Tabak was employed as a lead driver.

Mr. Tabak's suggestion that a driver could be requested from the Miami location to travel to Ft. Myers for one day's work that he might celebrate a religious holiday was rejected by Mr. Parry because had never requested driver assistance from Weston/Miami on the day of a crisis. Mr. Tabak was not called in to work on Jewish holidays in the year 2000 because no drivers called in sick.

Religious Discrimination Claim

34. Mr. Tabak's claim of religious discrimination was based on his not getting promoted to the Ft. Myers managerial

position in November 1998 for which he also applied. Again, the religious discrimination claim was not raised in 1998.

35. Mr. Parry's employment with Office Depot began in 1988, when Office Depot acquired Allstate Office Products, by whom Mr. Parry was already employed as a driver in Tampa, Florida.

36. In 1993, Office Depot incorporated the Allstate Office Products Tampa office system for computer centralized customer delivery from the warehouses into the Fort Myers facility.

37. In December 1994, one month after Mr. Tabak was hired, Mr. Parry was temporarily assigned to the Ft. Myers facility to set up and implement the computer centralized customer delivery system and to train its drivers.

38. Tim Edwards, Office Depot's manager, made the decision to promote Mr. Parry because he felt that Mr. Tabak did not do well during his interview. Mr. Edwards gave Mr. Tabak an out-of-cycle pay increase in November 1998 of approximately six percent.

39. Mr. Parry hired Jordan Silverstein, a Jewish driver, after Mr. Tabak's termination on July 20, 2001.

40. At the request of Mr. Tabak, and as a part of its business practice of giving back to the community, Office Depot made two voluntary donations of \$2,500 each to Mr. Tabak's Jewish Temple, once in 2000 and again in 2001.

41. Considering all evidence of record favorable toward Mr. Tabak regarding religious discrimination, Mr. Tabak failed to establish a prima facie case that Office Depot discriminated against him because of his religion when he was not selected for promotion to the position of manager of the Ft. Meyers facility in November 1998.

42. Mr. York was 53 years of age in July 2001 when he participated as a manager in the decision to terminate Mr. Tabak.

43. Mr. Perrin was in his early 40's when he participated in the decision to discipline and ultimately terminate Mr. Tabak.

44. Mr. Michalak was 51 years old in July 2004. During his employment with Office Depot, Mr. Michalak testified to never having experienced age discrimination and never having observed or heard of any age-related discriminatory remarks toward Mr. Tabak.

45. Mr. Tabak's only evidence of age discrimination was his allegation that Mr. Michalak made the remark, which Mr. Michalak denies, that "an old fart like you is never going to make manager."

46. Considering all evidence of record favorable toward Mr. Tabak regarding age discrimination, Mr. Tabak failed to establish a prima facie case that Office Depot discriminated

against him because of his age, when he was not selected for promotion to a manager's position or because of an alleged statement made by Mr. Michalak.

Disability Discrimination

47. Mr. Tabak based his claim of disability discrimination on his alleged diminished hearing capacity.

48. Mr. Tabak alleged that he suffered with diminished hearing that was corrected and restored to 100 percent when he would wear his hearing aid.

49. Mr. Tabak's alleged diminished hearing did not interfere with or prohibit his performance of his job and duties while employed at Office Depot.

50. Mr. Tabak passed his annual Department of Transportation hearing tests while he worked under Mr. Parry's management in the Ft. Myers facility.

51. Mr. Tabak never personally made Mr. Parry aware of his diminished hearing, and, consequently, Mr. Parry was not aware that Mr. Tabak suffered with a hearing problem that was corrected with a hearing aid.

52. Mr. Tabak offered no medical evidence in support of his "diminished" hearing allegation.

53. Considering all evidence of record favorable toward Mr. Tabak, he failed to establish a prima facie case that Office Depot discriminated against him because of his diminished

hearing that was corrected and restored to 100 percent when he would wear his hearing aid.

Retaliation

54. At no time during his employment or during his termination process, including his opportunity to identify and address his retaliation claim on his Problem Resolution form, did Mr. Tabak allege that not being selected to a position of manager and his termination were acts of retaliation. Indeed, when his termination was first and in the forefront of his concerns, Mr. Tabak did not complete his Problem Resolution form to raise a claim of retaliation or to contest his termination.

55. Office Depot was first made aware of Mr. Tabak's claims of alleged religious, age, and disability discrimination; failure to accommodate; and retaliation on July 19, 2002, one year after his termination.

56. Mr. Tabak failed to establish a prima facie case that Office Depot retaliated against him when they terminated his employment on July 20, 2001.

CONCLUSIONS OF LAW

57. The Division of Administrative Hearing has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsections 120.57(1) and 760.11(7), Florida Statutes (2002).

58. Subsection 760.10(1)(a), Florida Statutes (2002), provides that it is an unlawful employment practice for an employer:

To discharge or to fail or refuse to hire any individual, or otherwise to discriminate 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.

59. Petitioner alleged in the Charge that Respondent discriminated against him based on his religion (Jewish), disability, and age and retaliated against him for complaining of the same when his employment was terminated on July 20, 2001.

60. The Commission and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes (2002). 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).

61. The United States Supreme Court established, in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct., 1817; 36 L.Ed.2d 668 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII, which is

persuasive in cases such as that at bar, as reiterated and refined in the case of St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

62. This analysis illustrates that a petitioner has the burden of establishing, by a preponderance of evidence, a prima facie case of discrimination. If that prima facie case is established, the defending respondent must articulate a legitimate, non-discriminatory reason for the action taken against the petitioner. The burden then shifts back to the petitioner to go forward with evidence to demonstrate that the offered reason is merely a pretext for unlawful discrimination. The Supreme Court stated in Hicks, before finding discrimination in that case, that "the fact finder must believe the plaintiff's explanation of intentional discrimination." 509 U.S. at 519.

63. In the Hicks case, the Court stressed that even if the factfinder does not believe the proffered reason given by the employer, the burden remains with the petitioner to demonstrate a discriminatory motive for the adverse employment action taken.

64. In order to establish a prima facie case, Petitioner must satisfy each prong of a four-prong test establishing that before or at the time of termination: (1) he was a member of a protected group, (2) he was qualified for the position in question, (3) he was discharged, and (4) he was actually subjected to an adverse employment decision. Failure to satisfy

one prong of the test is fatal to the claim. See Williams v. Motorola, Inc., 303 F.3d 1284, 1293 (11th Cir. 2002); Canino v. U.S. E.E.O.C., 707 F.2d 468 (11th Cir. 1983); and Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982).

Timeliness of the Petition

65. Subsection 760.11(7), Florida Statutes (2002), and the Commission require that a petition for relief from a "no cause" determination by the Commission requesting an administrative hearing must be filed with the Commission within 35 days of the date of the "no cause" determination.

66. Florida Administrative Code Rule 28-106.104 provides that a petition for relief is "filed" when it is received by the office of the Commission during normal business hours.

67. The timeliness of a request for an administrative hearing is determined based on the date the request is filed, regardless of when it was mailed or otherwise served by the requesting party.

68. The doctrine of excusable neglect no longer saves an untimely request for an administrative hearing. See, e.g. Patz v. Dept. of Health, 864 So. 2d 79 (Fla. 3rd DCA 2003); Whiting v. Dept. of Law Enforcement, 849 So. 2d 1149 (Fla. 5th DCA 2003); Cann v. Dept. Children & Family Services, 813 So. 2d 237 (Fla. 2d DCA 2002).

69. Petitioner introduced no evidence that suggests the doctrine of equitable tolling described in Machules v. Department of Administrative, 523 So. 2d 1132 (Fla. 1988). Thus, dismissal as untimely filed is required. See § 120.569(2)(c), Fla. Stat. (2004) (untimely petition for administrative hearing "shall be dismissed"); § 760.11(7), Fla. Stat. (2002) ("claim will be barred" if request for administrative hearing is not made within 35 days).

70. The Petition in this cause must be dismissed as untimely filed in violation of Subsections 760.11(7) and 120.569(2)(c), Florida Statutes (2002).

Merits of the Petition

71. Petitioner failed to establish a prima facie case and, therefore, failed to met the first prong of the four-prong test established by the United States Supreme Court in McDonnell-Douglas Corporation v. Green and Texas Department of Community Affairs v. Burdine, and, on that ground, the Petition in this cause must be dismissed.

RECOMMENDATION

Based upon the foregone, it is RECOMMENDED that the Commission issue a final order dismissing with prejudice the Petition for Relief and the Charge of Discrimination.

DONE AND ENTERED this 1st day of October, 2004, in
Tallahassee, Leon County, Florida.



FRED L. BUCKINE
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of October, 2004.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Alexander Tabak
214 Southwest 46th Terrace
Cape Coral, Florida 33914

Joanne B. Lambert, Esquire
Jackson Lewis LLP
390 North Orange Avenue
Orlando, Florida 32801

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.