STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PERRIN S. DAVIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 04-2337
	)	
NORTH FLORIDA LUBES, INC, d/b/a TEXACO XPRESS LUBE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A hearing was held pursuant to notice, on September 22, 2004, in Ocala, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Leonard H. Klatt, Esquire
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Ocala, Florida 34476-7049

For Respondent: John F. Dickinson, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Charge of Discrimination filed by Petitioner on December 8, 2003.

PRELIMINARY STATEMENT

On December 8, 2003, Petitioner, Perrin S. Davis, filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that North Florida Lubes, Inc., d/b/a Texaco Xpress Lube, violated Section 760.10, Florida Statutes (2003),[1/] by discriminating against him on the basis of race. The Charge of Discrimination alleged wrongful demotion, failure to promote, and wrongful termination.

The allegations were investigated, and on May 26, 2004, FCHR issued its determination of "No Cause" and Notice of Determination: No Cause.

A Petition for Relief was filed by Petitioner on June 30, 2004. FCHR transmitted the case to the Division of Administrative Hearings (Division) on or about July 6, 2004. A Notice of Hearing was issued setting the case for formal hearing on September 22, 2004.

At hearing, Petitioner testified on his own behalf and presented the testimony of Jason Yates. Petitioner offered Exhibits numbered 1 and 2, which were admitted into evidence. Respondent presented the testimony of Richard Grant, Lawrence Campbell, James Bailey, Michael Ghent, Marvin Freeman, Brian Fowler and Perrin Davis. Respondent offered into evidence Exhibits numbered 1 through 3, which were admitted into evidence.

A Transcript, consisting of two volumes, was filed on October 14, 2004. On October 20, 2004, the parties filed a Joint Motion for Extension of Deadline for Filing Post-Hearing Submittals. The motion was granted. The parties timely filed Proposed Recommended Orders which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American man who was employed by Respondent from July 16, 2003, until his termination on October 28, 2003.

2. Respondent, North Florida Lubes, Inc., d/b/a/ Texaco Xpress Lube, is an employer within the meaning of the Florida Civil Rights Act of 1992. Respondent operates more than 25 Texaco Xpress Lube stores in Florida and is headquartered in Jacksonville, Florida. Brian Fowler is Respondent's owner and president.

3. In the summer of 2003, Respondent acquired two lube stores and a car wash in Ocala, Florida. Prior to their acquisition by Respondent, these Ocala stores were owned and operated by John Costa.

4. One location included both the car wash and lube store and is located at 3680 East Silver Springs Boulevard. It was purchased in June 2003 and once acquired, Respondent designated it as Store No. 1018 (1018 Store). The other location, which is

located at 1708 East Silver Springs Boulevard, was acquired by Respondent in July 2003, is a lube store and has been designated by Respondent as Store No. 1020 (1020 Store). Respondent leases the 1020 store from John Costa under a lease purchase agreement.

5. At the time of their acquisition, both stores were in very poor condition, and Respondent made major repairs and improvements. The 1020 Store was in worse condition than the 1018 Store. Due to extensive renovations, the 1020 Store did not open for business until the beginning of August 2003.

6. At the time Respondent acquired these two Ocala stores, neither store was earning a profit. The 1018 Store was barely breaking even and had monthly sales revenues dating back to June of 2002 of between $11,000 and $14,000 per month. These sales figures were based on a volume of about 350 cars per month and equated to a monthly ticket average of $28 per car. Prior to the acquisition by Respondent, the 1020 Store was doing even worse with a monthly sales revenue of between only $9,000 and $11,000.

7. Since Respondent has taken over these stores, they have virtually doubled their total sales. Currently, Respondent's 1018 Store averages between $32,000 and $34,000 in monthly sales; whereas the 1020 Store has increased its monthly sales revenues by 30 percent. Respondent's normal and expected ticket average company-wide is between $47 and $50 per car.

8. Immediately prior to Respondent's acquisition of the two Ocala lube stores, Petitioner worked for Mr. Costa as the manager of what is now the 1020 Store. He was the manager of the store for three years and had several years of oil-changing experience. Another employee of Mr. Costa's was a white male, Jason Yates, who managed what is now the 1018 Store.

9. About the time of Respondent's acquisition of the two stores, Petitioner went on vacation. When he returned, the 1020 Store was closed, so he went to the 1018 Store. As there had been a change in ownership, Petitioner applied to work for Respondent. He was offered and accepted a job as an oil changer and lube technician with Respondent and began work at the 1018 Store. Mr. Yates also was offered and accepted a position as an oil changer and lube technician with Respondent.

10. Mr. Yates began employment with Respondent in June 2003 at the 1018 Store, several weeks before Petitioner began his employment with Respondent. Both Petitioner and Mr. Yates believed they were in training for a management position. However, there is not an official job title of "manager-in-training" within Respondent's company. Hourly employees can receive on-the-job managerial training. In any event, there is no dispute that both Petitioner and Mr. Yates performed oil changing duties and that Respondent provided Petitioner with some managerial training during his employment.

11. When Petitioner began working at the 1018 Store, Mark Shepherd was store manager and was responsible for training new staff with Respondent's business practices and rules. Mr. Shepherd showed Petitioner how to run Respondent's computer software programs, how to calculate money received, and how to open and close the store.

12. Then Respondent transferred Richard Grant, an experienced store manager from Respondent's Daytona Beach area, to manage the 1018 Store. Mr. Grant supervised Petitioner for a couple of months before Mr. Grant voluntarily resigned due to what he described as the pressure associated with running the 1018 Store.

13. Petitioner was given on-the–job training with respect to making sales and greeting customers. According to Mr. Grant, Petitioner was not good at greeting customers or making sales because he was slow, quiet, and not out-going. Mr. Grant described Petitioner as having a poor attitude and always complained about the way Respondent did things and the operational changes since Respondent's acquisition of the store. Respondent emphasized to Mr. Grant that it wanted its employees to be energetic, enthusiastic, and upbeat, and Mr. Grant felt that Petitioner did not have those characteristics.

14. Mr. Grant repeatedly counseled Petitioner about wearing his safety glasses while at work, which was part of

Respondent’s safety policy. Further, Mr. Grant counseled Petitioner on the importance Respondent placed on maintaining clean work areas. He described Petitioner’s work area as not clean and the worst "basement" (i.e., oil changing area) that he had ever seen.

15. Larry Campbell is a regional or district manager for Respondent. This position is directly under the president of the company in the chain-of-command. Mr. Campbell oversees approximately a dozen lube stores and the car wash. He spent a great deal of time in the 1018 Store during Petitioner’s employment there. At one point, Mr. Campbell was asked by Mr. Grant if he should fire Petitioner. However, Mr. Campbell wanted to give Petitioner a chance to come around to Respondent’s way of doing business. Specifically, on a daily basis, he gave Petitioner the opportunity to greet customers, ring out tickets, work on the computer, work the clipboards, and conduct sales.

16. However, Mr. Campbell also expressed similar concerns regarding Petitioner, to those of Mr. Grant. According to Mr. Campbell, Petitioner was quiet, slow, lacked energy and enthusiasm, was resistant to Respondent's ways of doing things, and would not smile or make eye contact with the customers. Although Petitioner received training on Respondent's procedures, he did not follow those procedures, even after being

counseled by Mr. Campbell to do so. Petitioner also would not promote sales or specials that Respondent was offering to the customers despite being counseled to do so by Mr. Campbell.

17. Mr. Campbell also described Petitioner as consistently displaying a bad attitude at work that got worse as the day progressed. As a regional manager, Mr. Campbell, along with Respondent's president and owner, Mr. Fowler, participates in the hiring of store managers. Respondent looks for positive, motivated, and enthusiastic individuals with leadership qualities; however, Mr. Campbell did not observe these qualities in Petitioner.

18. Mr. Fowler also had occasion to observe Petitioner's attitude and work ethic at the 1018 Store. Like both Messrs. Grant and Campbell, Mr. Fowler found Petitioner to be quiet, stand-offish, and resistant to Respondent's way of doing things.

Respondent's Business Philosophy and Practices

19. Although both Mr. Costa and Respondent successively operated oil change businesses in the same two locations, the manner in which these two businesses were run was very different. Respondent has uniform standards to which all employees are required to adhere, regardless of whether they are responsible for sales, changing oil, greeting the customers, or ringing the customers out. Respondent has policies and procedures for how every position is to be performed.

Respondent also has policies addressing how its employees will act, communicate, conduct themselves, and dress in the workplace.

20. For example, employees are required to be well-groomed and wear clean uniforms with their shirt tails tucked in. Further, employees are specifically required to use certain commands and perform services in a certain order.

21. By contrast, Mr. Costa's lube stores had no procedures or controls, no communications, no "echo system," and no standard methodology for servicing cars.

22. In Respondent's business, efficiency is considered to be critical. As a result, Respondent strives to service each car in under ten minutes and places an emphasis upon its employees to "hustle" while on the job. In particular, Respondent has a "five second" rule, which mandates that its employees must greet a customer within five seconds of the customer's arrival. Respondent specifically trains its employees concerning not only how to work quickly, but also how to appear knowledgeable, friendly, and helpful to its customers.

23. Unlike Respondent, the previous owner placed no such pressures on his employees. Similarly, Respondent has established a ticket average quota, which the previous owner did not.

24. Respondent also has strict safety policies. These policies are reduced to writing and are reviewed with all of Respondent's employees. These safety policies have been approved by OSHA and all employees are expected to follow them. One such safety policy is the requirement that employees wear safety goggles or glasses at work.

25. In Respondent's very competitive business, all employees, no matter what position they hold, are expected to exhibit an upbeat and enthusiastic attitude. Respondent's philosophy is that a negative attitude can drain the efficiency of the work team at a store. Also, a positive attitude is considered important because each day, every employee of Respondent's has some customer interaction. Respondent believes that a positive attitude is so critical for its employees to have that it states on the first page of its Employee Handbook that:

> North Florida Lubes is committed to service excellence, quality control and employee personality. North Florida Lubes demands the highest standards from its employees, as the quick lube and car wash industries become more and more competitive every year.
>
> Over the years, North Florida Lubes has improved training methods, computer systems, equipment and service procedures to insure the highest level of employee and customer satisfaction. It is the philosophy of North Florida Lubes that well trained employees, with positive attitudes, will enjoy a long,

> fulfilling career with any company they choose to work for.
>
> At North Florida Lubes, we hope that you will enjoy your employment experience and that you will be involved with the growth of America's fastest growing Texaco Xpress Lube operator. Remember, a consistent positive attitude, dependability and personality will be your greatest assets in growing with North Florida Lubes.

Respondent's Promotion of Other Employees to the Position of Store Manager.

26. Respondent did not promise Petitioner that he would be promoted to a store manager position. Notably, Petitioner acknowledges that at the time he was hired by Respondent, that he had not yet learned Respondent's methods of operation. Petitioner also acknowledges at the time he was hired, the 1018 Store had both a store manager, Mark Shephard, and an area manager, Mike Dogherty, based there. Petitioner further concedes that Respondent never told him that he was not being considered for a managerial position because he was African-American.

27. The determination of who is or is not qualified to be promoted to the position of manager of one of Respondent's lube stores is made by Messrs. Fowler and Campbell. Respondent's promotion policy states that if there are two or more employees whose qualifications are similar, seniority will be part of the selection decision, but the decision will not be made on that

basis alone. It also clearly states that an employee must be qualified in order to receive a promotion and that if there are no qualified applicants within the company, the best qualified candidate will be chosen.

28. In early August of 2003, Mr. Campbell transferred Mr. Yates to be the manager of the newly-opened 1020 Store. At the time, Mr. Yates had more seniority and experience working for Respondent than Petitioner did, as he had been working at the 1018 Store about a month-and-a-half longer than Petitioner. Mr. Campbell decided to place Mr. Yates in charge of the 1020 Store because he had achieved all of the goals Respondent was looking for. Specifically, Mr. Yates met Respondent's ticket average, he could operate the computer, and he followed Respondent's procedures. Mr. Campbell also described Mr. Yates as energetic and trying to apply himself.

29. By contrast, Mr. Campbell found that Petitioner did not perform these same functions, despite being given numerous opportunities to do so and despite being given instruction as to what he was doing wrong. Mr. Campbell specifically counseled Petitioner while he was receiving on-the-job managerial training that he was not getting the job done. Ultimately, because of his poor attitude, lack of leadership skills, inability to meet Respondent's ticket average, and promote Respondent's products and services, Mr. Campbell, and ultimately Mr. Fowler,

determined that Petitioner was not appropriately suited to be one of Respondent's store managers.

30. Under Respondent's promotion policy, if there are no qualified applicants within the company to fill a vacancy, Respondent may look outside of the company to hire the best qualified applicant. This is what Respondent did with James Bailey when it determined Petitioner to be not qualified. After Mr. Grant resigned as manager of the 1018 Store in early October of 2003, Respondent hired James Bailey, a white male, to manage that facility. At the time Mr. Bailey was applying for this position, Messrs. Campbell and Fowler had already determined that Petitioner did not have the necessary qualifications to be one of Respondent's store managers. Upon making this determination, Mr. Campbell informed Petitioner that he was not suited to be one of Respondent's store managers.

31. Mr. Bailey was interviewed by Mr. Campbell and then hired by Messrs. Campbell and Dougherty, with Mr. Fowler's approval. Prior to working for Respondent, Mr. Bailey had spent approximately eight years working for Denro Service Center as an automotive mechanic's helper. In that capacity, he performed oil changes, lube jobs, tune-ups and brake jobs in New York. Over the course of his employment with Denro Service Center, Mr. Bailey performed hundreds, if not thousands, of oil changes. Mr. Bailey also possessed approximately 15 years of managerial

experience before coming to work for Respondent. In particular, he had managed a Subway Restaurant and a Kwik King Convenience Store, as well as the Denro Service Center. During the time he managed a Subway Shop, he doubled that store's sales and credits himself with driving the Miami Sub Shop across the street out of business.

32. Since Mr. Bailey became the manager of the 1018 Store, the sales at that location have drastically increased. By following Respondent's system to the letter, the 1018 Store went from monthly sales of $13,000 in January of 2003 (i.e., when Costa owned it) to $35,000 in January of 2004.

33. In addition to Messrs. Grant, Campbell, and Fowler, Mr. Bailey also had an opportunity to observe Petitioner while he worked at the 1018 Store. Mr. Bailey described Petitioner as being unmotivated, lackadaisical, stand-offish, unprofessional, and surly. According to Mr. Bailey, Petitioner spent more time at work on his personal cell phone than he did working on cars.

34. Mr. Campbell insists that Petitioner's race played no role in the decision not to promote Petitioner. Mr. Campbell has promoted several African-American employees, including Michael Ghent and Marvin Freeman, to managerial positions in Respondent's operations. Mr. Campbell has also recommended another African-American for such a promotion, but that employee declined.

35. Mr. Ghent has managed a store for Respondent for approximately nine years and asserts that he has never experienced anything which he considered to be racial discrimination from Mr. Campbell. Similarly, Mr. Freeman currently serves as a store manager for Respondent and has managed a total of four of Respondent's stores. Mr. Freeman is familiar with Messrs. Fowler, Campbell, and Dogherty and asserts that he has never been subjected to racial discrimination by any of these individuals. Further, Mr. Campbell recommended Mr. Freeman for a promotion which he received, and Mr. Freeman was hired back after he voluntarily left employment to work for another company.

Respondent's Termination of Petitioner

36. According to Mr. Campbell, Petitioner's attitude and work ethic declined further after Respondent hired Mr. Bailey. In particular, Mr. Campbell described Petitioner as always having a negative attitude and showed no interest in doing things the way Respondent wanted them done. Although Mr. Campbell spoke to Petitioner about his deteriorating attitude before he was terminated in an effort to allow him to change, Mr. Campbell did not observe improvement in Petitioner's work habits.

37. On October 28, 2003, Respondent terminated Petitioner's employment. Although Messrs. Campbell, Dogherty,

and Fowler were involved in the decision to terminate Petitioner, Mr. Fowler made the ultimate decision. The decision to terminate Petitioner was made because of Petitioner's: (a) negative attitude, which was impacting Respondent's other staff; (b) unwillingness to learn Respondent's way of doing things; and (c) constant resistance to the changes Respondent implemented in the workplace. At the time of his termination, Petitioner had been given almost four months to turn his attitude and performance problems around, yet he had not done so to the satisfaction of Respondent.

Petitioner's Allegations of Discrimination

38. Petitioner initially claimed that three employees of Respondent, Messrs. Campbell and Dogherty, and Kathy Dogherty, are the individuals who discriminated against him on the basis of his race. Ms. Dogherty was the manager of the car wash facility which was also located at the 1018 Store. Petitioner alleges she made racially offensive comments to him. Petitioner acknowledges that store managers, Messrs. Shepherd and Grant, did not discriminate against him and now concedes that Mr. Dogherty did not make any racially derogatory remarks against him and did not articulate any other form of discrimination regarding Mr. Dogherty.

39. Ms. Dogherty did not testify at the hearing. Accordingly, any alleged statements by her are hearsay and are

not sufficient in itself to support a finding of fact as contemplated by Subsection 120.57(1)(c), Florida Statutes.

40. Petitioner asserts that Mr. Campbell made two racially discriminatory remarks about him. On one occasion, Petitioner alleges that Mr. Campbell stated that he (Petitioner) made more money on his cell phone than he did working for Respondent. Petitioner never heard Mr. Campbell make this statement nor did he ever confront Mr. Campbell about the statement, after learning of it, to ascertain what Mr. Campbell may have meant by it, because he "didn't want to rock the boat." Instead, this statement was overheard by Mr. Yates, who perceived Mr. Campbell to mean that because Petitioner was African-American, he must be selling drugs on his cell phone. Mr. Yates admitted, however, that Mr. Campbell did not say anything about Petitioner's race when making this statement and that he did not know what Mr. Campbell's intent was in making this statement. Mr. Yates further conceded that he witnessed Petitioner on his cell phone at the time Mr. Campbell made this statement and that Petitioner, who was being paid an hourly wage, was talking on his personal cell phone while on company time. Mr. Yates also acknowledged that Respondent had a policy in its Employee Handbook restricting the receipt of personal calls while at work.

41. Mr. Campbell acknowledges making the statement that Petitioner made more money on his cell phone than he did working for Respondent, but denies that he intended any racially derogatory connotation or that he was implying Petitioner was dealing drugs. According to Mr. Campbell, Petitioner spent an inordinate amount of time on his cell phone attending to personal business while on company time, instead of performing work; thus, what he meant to convey was that Petitioner was being paid by Respondent to be on the phone instead of performing his job. Petitioner's cell phone usage while at work was frustrating to Mr. Campbell because it was not productive, it caused a distraction in the workplace, and it was contrary to Respondent's personal phone call policy.

42. Mr. Campbell was not the only one of Petitioner's supervisors to remark about Petitioner's excessive cell phone usage at work. Mr. Bailey asserted that Petitioner spent more time talking on his cell phone than he did working on cars and that Petitioner was on his cell phone while draining oil from the customer's cars. Similarly, Mr. Grant noted that Petitioner used his cell phone while on company time "quite a lot."

43. Respondent's Quarterback Rating System is a percentage-based rating system for Respondent's managers similar to the system used in the National Football League (NFL) for rating quarterbacks and consists of four rating categories:

(1) meeting the monthly sales quota; (2) meeting the agreed-upon ticket average; (3) servicing a certain number of cars per month; and (4) not exceeding the labor cap. Petitioner alleges that once while explaining Respondent's Quarterback Rating System, Mr. Campbell instead talked to him about a basketball analogy so that Petitioner could understand it. Mr. Campbell, while acknowledging talking about basketball and other sports to Petitioner, denies ever making such a comment and further states that he cannot envision how to explain Respondent's Quarterback Rating System via a basketball analogy, because it is distinctly based upon the game of NFL football (which has a quarterback) and is not comparable to the game of basketball (which does not have a quarterback and does not use a similar rating system).

44. After weighing the credibility of the witnesses, the undersigned finds Mr. Campbell's explanation of any basketball reference to be credible and such explanation is accepted.

45. Petitioner acknowledges that he never complained to Mr. Fowler about any racial remarks or discrimination at any time during his employment.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

47. Petitioner is a person and Respondent is an employer as defined within the Florida Civil Rights Act of 1992. See § 760.02(6) and (7), Fla. Stat.

48. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race.

49. In discrimination cases alleging disparate treatment, Petitioner bears the burden of proof which can be established either through direct or circumstantial evidence. See, e.g., Bass v. Board of County Commissioners, 265 F.3d 1095, 1103 (11th Cir. 2001); Carter v. Three Springs Residential Treatment, 132 F.3d 635, 641 (11th Cir. 1998).

50. Direct evidence is "evidence, which if believed, proves the existence of fact in issue without inference or presumption." Carter, 132 F.3d at 641; accord Merritt v. Dillard Paper Corp., 120 F.3d 1181, 1189 (11th Cir. 1997). Specifically, "direct evidence relates to actions or statements of an employer reflecting a discriminatory or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." Carter, 132 F.3d at 641. "'[O]nly the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of [race] . . . constitute direct evidence of discrimination.'" Bass, 256 F.3d

at 1105; quoting Damon v. Fleming Supermarkets of Florida, Inc., 196 F.3d 1354, 1358 (11th Cir. 1999) (brackets in original). Moreover, for statements of discriminatory intent to constitute direct evidence, they must be made by the person involved in the challenged decision. See, e.g., Bass, 256 F.3d at 1105; and Trotter v. Board of Trustees of the University of Alabama, 91 F.3d 1449, 1453-1454 (11th Cir. 1996).

51. In the present case, none of the alleged racially derogatory statements attributable to Mr. Campbell rise to the level of direct evidence of discrimination.

52. The statement attributable to Mr. Campbell concerning Petitioner earning more money on his cell phone than he did working for Respondent, although made by a decision-maker, clearly does not constitute the most blatant remark that proves the existence of fact without inference or presumption. Similarly, Mr. Campbell's alleged use of a basketball analogy to explain Respondent's percentage-based rating system for its managers because Petitioner was African-American, even if true, does not constitute direct evidence of discrimination, as it is not tied to any adverse employment action and does not relate directly to the decisions not to promote and to terminate Petitioner.

53. In discrimination cases alleging disparate treatment, Petitioner generally bears the burden of proof established by

the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).[2/] Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., the Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id. Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Department of Corrections v. Chandler, supra, at 1186; Alexander v. Fulton County, Georgia, supra. Petitioner has not met this burden.

54. With respect to Petitioner's claims of demotion, Petitioner must establish the following prima facie case: (a) that he was a member of a protected minority; (b) that he

was qualified for the position he held; (c) that he was demoted from the position he held; and (d) that the position was filled by a non-minority. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993). Petitioner, however, failed to meet this threshold burden. The term "demotion" is defined as "[a] reduction to a lower rank or grade, or to a lower type position." See Black's Law Dictionary, 225 (Abridged 5th Ed. 1983). Petitioner clearly did not experience a reduction to a lower rank, grade, or type of position. His managerial position was with the previous owner and did not carry forward to Respondent. He was hired as an oil changer and lube technician and remained in that position until his termination.

55. In order to establish a prima facie case of racial discrimination concerning his "failure to promote" claim, Petitioner must establish that: (a) He was a member of a protected minority; (b) He was qualified and applied for the promotion; (c) He was rejected despite his qualifications; and (d) Equally or less qualified employees who are not members of the protected minority were promoted. See Alexander v. Fulton County, supra at 1339; citing Taylor v. Runyon, 175 F.3d 861, 866 (11th Cir. 1999); and Wu v. Thomas, 847 F.2d 1480, 1483 (11th Cir. 1988).

56. Petitioner has arguably met his burden of proving a prima facie case regarding the issue of promotion. First, he is

a member of a protected class. As to his qualifications, Petitioner presented evidence that he had several years of oil changing experience and had managed Mr. Costa's store for three years. No objective job qualifications or evaluations (e.g., a job vacancy announcement) are in evidence. Thus, regarding Petitioner's prima facie burden, it is difficult to objectively quantify the difference in Petitioner's and Mr. Bailey's qualifications. See Carter v. Three Springs Residential Treatment, 132 F.3d at 644 (Requirement such as ability to relate to people in a manner to win confidence is incapable of objective evaluation and employer cannot rely upon such requirements to defeat plaintiff's prima facie case by showing that the plaintiff is less qualified than the person chosen for the promotion.)

57. However, Respondent has met its burden of production by articulating a legitimate, non-discriminatory explanation of the employment action taken. Respondent presented ample evidence that its motivations in not promoting Petitioner were reasonable and were not racially motivated. Although Respondent did promote both Messrs. Yates and Bailey to the positions of store managers, Petitioner failed to demonstrate that he possessed greater qualifications than these individuals. It is undisputed that at the time of his promotion to store manager, Mr. Yates had greater seniority with Respondent than did

Petitioner (who had only been working for Respondent for approximately two weeks). Petitioner also failed to refute Mr. Campbell's testimony that Mr. Yates was energetic, was applying himself, had mastered Respondent's computer system, and met Respondent's ticket average, whereas Petitioner did not. Mr. Bailey possessed significant mechanical experience and possessed approximately 15 years of managerial experience compared to Petitioner's three years of managerial experience with Mr. Costa's business.

58. Further, the testimonies of Messrs. Campbell, Grant, Fowler, and Bailey were consistent that Petitioner was unenthusiastic and did not have an upbeat attitude, was slow and lacked initiative, was unable to maintain the store's ticket average, was unable to effectively greet customers and/or promote sales, and continuously refused to comply with Respondent's policies, procedures, and service requirements. Where an employer proffers reasonable motivations for its promotional decisions, it is not up to the court to question the wisdom of the employer's reasons. See, e.g., Combs, 106 F.3d 1543; and Damon, 196 F.3d at 1361 ("we are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.")

59. Subjective evaluations of a job candidate are appropriate to be considered as part of an employer's decision-making process in the context of an employer's burden of production of legitimate, non-discriminatory reasons for an employment decision. Personal qualities, such as "common sense, good judgment, originality, ambition, loyalty, and tact" factor heavily into employment decisions concerning supervisory positions. See Denney v. City of Albany, 247 F.3d 1172, 1186 (11th Cir. 2001); quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 997, 991 (1988). "Subjective reasons are not the red-headed stepchildren of proffered nondiscriminatory explanations for employment decisions . . . A subjective reason is a legally sufficient, legitimate non-discriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion." Chapman v. A.I. Transport, 229 F.3d 1012, 1033-1034 (11th Cir. 2000) (en banc).

60. "In a failure to promote case, [Petitioner] cannot prove pretext by simply showing that [he] was better qualified than the individual[s] who received the position[s] that [he] wanted . . . '[D]isparities in qualifications are not enough in themselves to demonstrate discriminatory intent unless those disparities are so apparent as to virtually jump up and leap off the page and slap you in the face.'" Denney, 247 F.3d at 1187,

quoting Lee v. GTE Florida, Inc., 226 F.3d 1249, 1253, 1254 (11th Cir. 2000). No such disparities exist with respect to Petitioner's qualifications and those of Messrs. Yates or Bailey. Consequently, Petitioner did not meet his burden of showing that a discriminatory reason, more likely than not, motivated Respondent's decision-making, or of showing that Respondent's proffered reasons are not worthy of belief. Consequently, Petitioner has failed to prove pretext.

61. As to Petitioner's discriminatory discharge claim, to establish a prima facie case, he must show he is a member of a protected class, he was qualified for the job from which he was fired, and that employees who are not members of the protected class performed their duties in a similar fashion, but were not terminated. See McDonald, supra.

62. In determining whether the third prong of this prima facie test is met, the court must consider whether similarly-situated non-minority employees have been involved in, or accused of, the same or similar conduct, but have been disciplined in a different way than Petitioner. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997), citing Williams v. Ford Motor Co., 14 F.3d 1305, 1309 (8th Cir. 1994). If Petitioner fails to show the existence of a similarly-situated employee who has been treated more favorably than him, he cannot establish a prima facie case. Holifield, 115 F.3d at 1562. In

the present case, Petitioner has not provided any proof that Respondent had similarly-situated Caucasian employees who exhibited the same or similar attitude and performance problems that it did not terminate. Thus, he has not established his prima facie burden.

63. However, even if Petitioner had established his prima facie burden, Respondent has articulated legitimate non-discriminatory reasons for its termination decision. The testimonies of Messrs. Campbell, Grant, Bailey, and Fowler were consistent regarding Petitioner's poor attitude, unsatisfactory work ethic, and substandard performance. These individuals also agreed regarding the qualities and characteristics required of the staff who work for Respondent and how Petitioner either failed or refused to exhibit those qualities and characteristics. Further, Respondent's president and owner, Mr. Fowler noted, that after approximately four months of attempting to rehabilitate Petitioner's poor attitude and performance, Respondent made the decision to terminate him. As set forth above, Respondent's subjective, non-discriminatory reasons for terminating Petitioner are legally sufficient. Petitioner has not come forward with any evidence to demonstrate that more likely than not, Respondent's reasons are a pretext for unlawful discrimination or that these reasons are unworthy of belief.

64. In summary, Petitioner has failed to carry his burden of proof that Respondent has engaged in unlawful racial discrimination by demoting him, denying him a promotion, or terminating his employment. At most, Petitioner has produced nothing more than some stray remarks and his own speculation concerning the motives for Respondent's actions. This is insufficient. See Lizaro v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001) ("Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude it must have been related to their race. This is not sufficient.")

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 14th day of January, 2005, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of January, 2005.

ENDNOTES

[1/] All references to Florida Statutes is to 2003, unless otherwise indicated.

[2/] FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

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.