STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DENNIS BLACKNELL, Petitioner, vs. FREIGHT MANAGEMENT SERVICES, INC., Respondent.	)	Case No. 04-2854

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 6, 2004, in St. Petersburg, Florida, before T. Kent Wetherell, II, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Dennis Blacknell, pro se
4609 Eighteen Avenue, South
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For Respondent: No appearance

STATEMENT OF THE ISSUES

The issues are whether Respondent committed discriminatory employment practices against Petitioner in violation of Chapter 70 of the Pinellas County Code as alleged in the Complaint, and if so, what is the appropriate remedy.

PRELIMINARY STATEMENT

Petitioner filed a charge of discrimination against Respondent, Freight Management Services, Inc. (FMS), with the City of St. Petersburg's Human Relations Division. The charge was investigated by the Human Relations Officer, who found reasonable cause to believe that FMS committed discriminatory employment practices against Petitioner in violation of Chapter 70 of the Pinellas County Code (Pinellas Code).

Through a three-count Complaint dated July 13, 2004, the Human Relations Officer formally alleged that FMS committed discriminatory employment practices against Petitioner based upon his race. Thereafter, on August 13, 2004, this matter was referred to the Division of Administrative Hearings (Division) for the assignment of an administrative law judge to conduct a hearing on the Complaint.

The final hearing was scheduled for and held on October 6, 2004. At the hearing, Petitioner testified in his own behalf and offered Exhibits P1 through P4, all of which were received into evidence. FMS did not appear at the hearing and, as a result, no witnesses or exhibits were presented on its behalf.

No Transcript of the hearing was filed. The parties were given 10 days from the date of the hearing to file proposed recommended orders (PROs). Neither party filed a PRO.

FINDINGS OF FACT

A. Parties

1. Petitioner is a 44-year-old African-American male.

2. FMS is a package delivery company that does business in Pinellas County. According to Petitioner, FMS has more than 100 employees.

3. FMS was provided due notice of the date, time, and location of the final hearing in this case, but no appearance was made on its behalf.

B. Petitioner's Job Duties and Salary at FMS

4. Petitioner started working for FMS in late 1999 or early 2000 as a "driver."

5. Petitioner's primary job responsibility was to drive a delivery truck along a designated route to deliver and pick up packages. Petitioner was also responsible for loading the to-be-delivered packages on his truck in the morning and then unloading any picked-up packages from his truck in the evening.

6. Petitioner worked Monday through Friday. His shift started at 7:00 a.m. each day.

7. Petitioner's gross pay was initially $650 every two weeks, but at some point Petitioner's salary was increased to $750 every two weeks.[1]

8. Petitioner did not receive health or dental insurance or other benefits.

C. Failure to Switch Trucks as Directed (Complaint, Count III)

9. Chronologically, the first event alleged in the Complaint as a basis of Petitioner's discrimination claim started on the morning of Friday, February 8, 2002, when Petitioner's boss, Tom Aliotti, directed Petitioner to switch trucks with another driver named Eddie.

10. Later that day, Mr. Aliotti told Petitioner that he would switch the trucks over the weekend. As a result, Petitioner and Eddie did not switch the trucks on Friday.

11. The trucks were not switched over the weekend, and on the morning of Monday, February 11, 2002, Mr. Aliotti again directed Petitioner to switch trucks with Eddie.

12. Petitioner did not switch the trucks on Monday morning as directed by Mr. Aliotti because he was too busy preparing to run his delivery route.

13. Petitioner testified that Eddie was equally responsible for the trucks not getting switched because he could not switch trucks with Eddie without Eddie's participation; however, it is unclear from Petitioner's testimony what specifically Eddie did or did not do in regard to switching the trucks.

14. After Petitioner failed to switch the trucks on Monday as directed, he was given a written reprimand for insubordination by Mr. Aliotti.

15. The written reprimand, which is referred to as a Counseling Sheet (see Exhibit P4), stated: "[Petitioner] will switch trucks tonite [sic] 2/11/02 or [he] will not be working 2/12/02. Day off without pay."

16. Petitioner testified that he did not switch the trucks even after the directive on the Counseling Sheet.

17. It is unclear from Petitioner's testimony whether he was suspended without pay on February 12, 2002.

18. According to Petitioner, Eddie was not reprimanded for the incident.

19. It is unclear from Petitioner's testimony whether a reprimand was appropriate for Eddie because it is unknown whether Mr. Aliotti also told Eddie to switch the trucks and, as stated above, it is unclear from Petitioner's testimony what specifically Eddie did or did not do to frustrate the truck switching.

20. Eddie, like Petitioner, is an African-American male.

D. Attendance Issues in March 2002
(Complaint, Counts I and II)

21. The other allegations of discrimination in the Complaint relate to discipline imposed on Petitioner for his unexcused absences from work on several occasions in March 2002.

22. Petitioner submitted a written request for a half-day of leave on Friday, March 1, 2002, in which he stated that he needed to "go out of town to attend a funeral" because of a "death in [his] family." See Exhibit P1, at page 3.

23. That request was approved, and Petitioner was expected to be back at work on Monday, March 4, 2002.

24. Petitioner attended the funeral of his brother in Largo, Florida, on Saturday, March 2, 2002. Later that same day, he traveled to Madison, Florida, to attend funeral services for his uncle. See Exhibits P2 and P3.

25. For reasons that are unclear in the record, Petitioner did not return to work on Monday, March 4, 2002, as he was expected to do.

26. If a driver was going to be unexpectedly absent from work, he or she was required to let the boss know before 7:00 a.m. so that a substitute or "on-call" driver could be contacted to take over the absent driver's route. Getting another driver to take over the absent driver's route was important to FMS

because some of the packages that the company delivers have to get to the customer by 10:30 a.m.

27. Petitioner understood the importance of this requirement.

28. According to Petitioner, he tried to call his boss before 7:00 a.m. on Monday to let him know that he would not be coming into work, but he was not able to reach his boss until several hours after 7:00 a.m.

29. Petitioner did not produce any credible evidence to corroborate his testimony that he attempted to call his boss prior to 7:00 a.m. on Monday, and the documents introduced by Petitioner include conflicting statements as to whether Petitioner ever called on that date.[2] Nevertheless, Petitioner's testimony on this issue is accepted.

30. When Petitioner returned to work on Tuesday, March 5, 2002, he was suspended for the day and, according to Petitioner, his delivery route was taken away. The Warning Letter that was received into evidence (Exhibit P1, at page 1) references the suspension, but not Petitioner's route being taken away.

31. According to Petitioner, his delivery route was given to a white female, whose identity Petitioner did not know.

32. Thereafter, Petitioner was given menial tasks such as sweeping the floor and taking out the trash, although he also helped load packages onto the delivery trucks in the morning.

33. Petitioner submitted a written request for leave on March 19 and 20, 2002, because he planned to be in Kentucky on those dates. Petitioner stated in the request that "I will be back to work on the [sic] 3-21." See Exhibit P1, at page 2.

34. The leave requested by Petitioner was approved, and he was expected to be back at work on March 21, 2002.

35. Petitioner got a "late start" on his drive back from Kentucky, which caused him to miss work on March 21, 2002.

36. According to Petitioner, he used his cellular phone to call his boss before 7:00 a.m. on March 21, 2002, to let him know that he would not be coming into work, but he was not able to reach his boss until 7:30 a.m.

37. Petitioner did not present any credible evidence, such as his cellular phone records, to corroborate his claim that he attempted to call prior to 7:00 a.m. Petitioner's testimony on this issue was not persuasive.

38. The record does not reflect what, if any, discipline Petitioner received for not calling prior to the start of his shift to report that he would not be coming into work on March 21, 2002.

39. Petitioner's pay was not reduced at any point during his employment with FMS even though, according to Petitioner, his primary job duties were changed from driving a delivery truck to sweeping the floors and taking out the trash.

40. Petitioner continued to work at FMS until April or May 2002 when he was injured on the job while lifting a box.

E. Petitioner's Post-FMS Activities and Employment

41. After his injury, Petitioner could not and did not work for approximately one year. During that period, Petitioner collected workers' compensation at the rate of $500 every two weeks.[3]

42. Approximately one year after his injury, Petitioner's doctor allowed him to return to work on "light duty."

43. Thereafter, in April or May 2003, Petitioner tried to return to work with FMS but, according to Petitioner, he was told that there were no available "light duty" positions. That effectively ended Petitioner's employment relationship with FMS.

44. The Complaint does not allege that FMS's failure to re-hire Petitioner was a discriminatory employment practice, nor is there any credible evidence in the record that would support such a claim.

45. From April/May 2003 to approximately March 2004, Petitioner held only one job. He worked for approximately one week cleaning floors at a nursing home, but he left that position because of his back problems.

46. After leaving the floor cleaning job, Petitioner did not actively look for other employment. He briefly attended a training class to become a security guard, but he did not

complete the class after learning that he would not be able to be licensed as a security guard "because of his prior record."

47. In approximately March 2004, Petitioner was hired by a former acquaintance to work as a driver for a mortgage company. In that position, Petitioner is paid $11 per hour and he typically works 40 hours per week, which equates to gross pay of $880 every two weeks.

48. As of the date of the hearing, Petitioner was still employed by the mortgage company.

F. Lack of Evidence Regarding Similarly Situated Employees

49. Petitioner presented no credible evidence regarding any "similarly situated" employees, i.e., employees who engaged in conduct that was the same as or similar to that for which Petitioner was disciplined.[4]

50. Although Petitioner testified that he "had heard" of situations where other employees had "put a manager off," rather than immediately doing what the manager told them to do, he was not able to offer any specific examples of such insubordination.

51. Petitioner also presented no credible evidence regarding how other employees (of any race) were disciplined for conduct that was the same as or similar to that for which Petitioner was disciplined.[5]

CONCLUSIONS OF LAW

52. The Division has jurisdiction over the parties to and subject matter of this proceeding pursuant to Chapter 70 of the Pinellas Code, Chapter 15 of the City of St. Petersburg Code (St. Pete Code), and Section 120.65(7), Florida Statutes (2004).

53. Even though the Complaint alleges violations of the Pinellas Code, the St. Pete Code governs the procedural aspects of this case because Petitioner's charge of discrimination was filed with the City of St. Petersburg's Human Relations Division, that office issued the Complaint that gave rise to this proceeding, and that office referred the case to the Division for a hearing.[6]

54. The Pinellas Code contains the substantive law that governs this case because the Complaint alleges that FMS violated Chapter 70 of the Pinellas Code, and not any provision of the St. Pete Code.

55. Section 70-53(a)(1) of the Pinellas Code provides that it is a discriminatory employment practice for any employer to:

> a. Fail or refuse to hire, discharge, or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment because of race, color, religion, national origin, sex, age, marital status, or disability; or
>
> b. Limit, segregate, or classify an employee in a way which would deprive or tend to deprive an individual of employment

> opportunities or otherwise adversely affect the status of an employee because of race, color, religion, national origin, sex, age, marital status, or disability.

56. Section 70-51 of the Pinellas Code defines "employer" as "a person who employs five or more employees for each working day in each of 13 or more calendar weeks in the current or preceding calendar year . . . ." FMS qualifies as an employer under this definition based on Petitioner's testimony that FMS has more than 100 employees.

57. The prohibitions against employment discrimination in Section 70-53 of the Pinellas Code are virtually identical to the prohibitions in state and federal law. See, e.g., §§ 760.01-760.11, Fla. Stat. (2004) (Florida Civil Rights Act of 1992); 42 U.S.C. § 2000e-2, et seq. (Title VII of the Civil Rights Act of 1964); 29 U.S.C. § 621, et seq. (Age Discrimination in Employment Act). And cf. Pinellas Code § 70-52(a)(1) (stating that a purpose of Chapter 70 of the Pinellas Code is to "[p]rovide for execution within the county of the policies embodied in the Federal Civil Rights Act of 1964, as amended"). As a result, Section 70-53 of the Pinellas Code should be construed in a manner that is consistent with those laws. See, e.g., Conway v. Vacation Break, Case No. 01-3384 (DOAH Nov. 16, 2001) (construing Chapter 70 of the Pinellas Code in accordance with the comparable state and federal laws).

58. Under Title VII, an unlawful employment practice claim can be established by direct or circumstantial evidence. See, e.g., Bass v. Board of County Commissioners, 256 F.3d 1095, 1104 (11th Cir. 2001).

59. Petitioner did not present any direct evidence of discrimination[7]; his claim was based upon circumstantial evidence. Accordingly, Petitioner's claim must be analyzed under the framework established in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), and refined in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

60. Under that framework, Petitioner has the initial burden of establishing a prima facie case of unlawful discrimination. See Hicks, 509 U.S. at 506.

61. In order to establish a prima facie case of disparate treatment, Petitioner must establish that (1) he is a member of a protected class; (2) he was subjected to adverse employment action; (3) FMS treated similarly situated employees outside of his protected class more favorably; and (4) he was qualified to do the job. See, e.g., Maniccia v.Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

62. If Petitioner establishes a prima facie case, the burden shifts to FMS to produce evidence that the adverse employment action was taken for legitimate non-discriminatory

reasons. Hicks, 509 U.S. at 506-07. If Petitioner fails to establish a prima facie case, the burden never shifts to FMS.

63. Once a non-discriminatory reason is offered by FMS, the burden then shifts back to Petitioner to demonstrate that the proffered reason is merely a pretext for discrimination, or stated another way, that the proffered reason is false and that the real reason for FMS's decision to terminate Petitioner was his race. Id. at 507-08, 515-17. In this regard, the ultimate burden of persuasion remains with Petitioner throughout the case to demonstrate a discriminatory motive for the adverse employment action. Id. at 508, 510-11.

64. Petitioner established the first, second, and fourth elements of his prima facie case; however, he failed to establish the third element because he presented no credible evidence of any "similarly situated" employees who received less severe discipline for the same or similar conduct.

65. On this issue, the case law requires:

> In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways. The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments 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.

Maniccia, 171 F.3d at 1368 (quoting Jones v. Bessemer Carraway Medical Ctr., 137 F.3d 1306, 1311 (11th Cir. 1998)). See also Silvera v. Orange County School Board, 244 F.3d 1253, 1259 (11th Cir. 2001) ("In order to meet the comparability requirement a plaintiff is required to show that he is similarly situated in all relevant respects to the non-minority employee."); Anderson v. WBMG-42, 253 F.3d 561, 565 (11th Cir. 2001) ("[T]he law does not require that a 'similarly situated' individual be one who has 'engaged in the same or nearly identical conduct' as the disciplined plaintiff. Instead, the law only requires 'similar' misconduct from the similarly situated comparator.").

66. Petitioner's testimony regarding the two other drivers who missed a number of days of work but did not lose their delivery routes (see Endnote 4) is insufficient as a matter of fact and law to meet this standard because it is unknown whether those employees returned to work when they were scheduled to do so or whether they called in prior to the start of their shift on the days that they were not at work, which Petitioner failed to do and which was the misconduct that resulted in Petitioner's route being taken away. Without more detail regarding those employees, it cannot be determined whether they are similarly situated to Petitioner. See, e.g., Knight v. Baptist Hospital,

330 F.3d 313 (11th Cir. 2003) (discussing in detail the similarities and differences between the plaintiff and the allegedly similarly situated employees); Silvera, supra (same).

67. Furthermore, Petitioner's testimony regarding Eddie's being equally responsible for the failure to switch the trucks (and, hence, equally insubordinate) was not persuasive, and in any event, that testimony would not help Petitioner establish his prima facie case because he and Eddie are in the same protected class, African-American.

68. Even if Petitioner had established his prima facie case, the record includes sufficient evidence of a non-discriminatory reason for the discipline imposed on Petitioner in order to satisfy FMS's burden of production under Hicks. Indeed, Petitioner confirmed in his testimony that (1) he did not reach his boss prior to the start of his shifts on March 4 and March 21, 2002, to inform him that he would not be coming into work, and (2) that he did not switch trucks with Eddie despite having been told to do so by his boss, which provide a legitimate basis for FMS to discipline Petitioner. Accordingly, the burden shifted back to Petitioner to demonstrate that the grounds for the discipline set forth in the Warning Letter and Counseling Sheet were merely a pretext for discrimination.

69. Petitioner presented no credible evidence that the explanations provided in the Warning Letter and Counseling Sheet

for his discipline were pretextual. Indeed, it is not unreasonable for FMS to have taken Petitioner off his delivery route based upon his failure to return to work after approved leave and/or his failure to call prior to the start of his shift to inform his boss that he would be not be returning to work on the day that he was scheduled to return, and it is also not unreasonable for FMS to give Petitioner a written reprimand for his failure to switch the trucks as expressly directed by his boss.

70. Because Petitioner failed to prove that FMS committed discriminatory employment practices against him, he is not entitled to any monetary or other relief in this proceeding and it is not necessary to address that issue. Nevertheless, the issue will be addressed in an abundance of caution in the event that the St. Petersburg Human Relations Review Board (Board) rejects the conclusion that Petitioner did not prove his claim. And cf. St. Pete Code §§ 15-42(b)(5), 15-45(f)(4) (requiring the Recommended Order to include "analysis, findings of fact, conclusions of law and appropriate remedies").

71. Section 70-78(a) of the Pinellas Code authorizes the award of "actual damages and reasonable costs and attorney's fees" against an employer who is found to have committed a prohibited discriminatory employment practice, but the Pinellas Code does not include any further guidance regarding the precise

scope of relief that can be ordered as “actual damages.” Compare St. Pete Code § 15-46(a) (listing specific remedial actions that the Board may impose for violations of the St. Pete Code).

72. Petitioner failed to prove any actual damages resulting from the disciplinary action imposed on him because he continued to receive the same amount of pay after his delivery route was taken away. Thus, at most Petitioner would be entitled to an award of nominal damages for having to perform menial tasks such as sweeping the floors and taking out the trash, which other drivers were apparently not required to do.

73. Petitioner is not entitled to reinstatement or back pay because the termination of Petitioner's employment relationship with FMS was wholly unrelated to the disciplinary actions that formed the basis of the Complaint. Indeed, the Complaint did not allege that Petitioner's discharge from FMS was a discriminatory employment practice in violation of Chapter 70 of the Pinellas Code.

74. Moreover, Petitioner failed to establish that he actively looked for suitable employment after his workers' compensation benefits expired and he was unable to get a “light duty” position with FMS. He testified that he only applied for one job –- the floor cleaning job that was clearly not suitable for him in light of his back injury –- between the time that his

workers' compensation benefits expired and he obtained his current job. Petitioner's failure to actively look for suitable employment would preclude an award of back pay even if that remedy was otherwise appropriate. See, e.g., Ford Motor Company v. E.E.O.C., 458 U.S. 219, 231-32 (1982) (plaintiff in an employment discrimination case is required to mitigate her damages by attempting to obtain other suitable employment, and her failure to do so results in forfeiture of the right to back pay); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1526 (11th Cir. 1991) (although employer has the burden to prove that plaintiff failed to obtain comparable employment, employer does not have to establish the availability of comparable employment if the evidence shows that plaintiff has not made reasonable efforts to obtain work); Miller v. Marsh, 766 F.2d 490, 492-93 (11th Cir. 1985) (back pay not appropriate where plaintiff voluntarily removed herself from the job market by attending law school rather than seeking comparable employment); Champion Intern. Corp. v. Wideman, 733 So. 2d 559, 561 (Fla. 1st DCA 1999) (applying Ford Motor Company, supra, to a discrimination claim brought under the Florida Civil Rights Act).

75. In sum, Petitioner failed to prove that FMS committed discriminatory employment practices against him, and even if Petitioner had met his burden of proof on that issue, he would

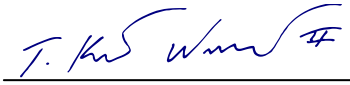
only be entitled to an award of nominal damages because he failed to prove any actual damages.

RECOMMENDATION

Based upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Board issue a final order dismissing Petitioner's Complaint against FMS.

DONE AND ENTERED this 27th day of October, 2004, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of October, 2004.

ENDNOTES

1/ Petitioner did not produce any pay stubs or other documentation showing the amount he was paid, and Petitioner's testimony regarding his salary lacked the specificity and certitude that would be expected for something as significant as his salary. Nevertheless, Petitioner's testimony regarding his salary is accepted for the reasons described in Endnote 3.

2/ Page 3 of Exhibit P1 includes a notation made by Mr. Aliotti that "[Driver] also missed 3/4/02. No call." (emphasis

supplied), but page 1 of Exhibit P1, which is the Warning Letter issued to Petitioner states that Petitioner "didn't call or called hours late on Monday stating that he would not be to work" (emphasis supplied).

3/ Petitioner did not produce any documentation showing the amount of his worker's compensation benefit, but his testimony as to the amount of the benefit was specific and certain. The amount of Petitioner's workers' compensation benefit bolsters Petitioner's testimony regarding the amount of his salary because workers' compensation benefits for temporary total injuries such as Petitioner' back injury are typically two-thirds of the employee's salary. See § 440.15(2)(a), Fla. Stat. (2001).

4/ In making this finding, the undersigned did not overlook Petitioner's testimony that a driver named Holly (a white female) also missed a number of days of work and that a driver named Wayne Luecke (a white male) took off seven days because of a death in his family, but neither of them lost their delivery routes. Petitioner's testimony regarding those employees was unconvincing. Moreover, Petitioner acknowledged in his testimony that he did not know any of the specific circumstances surrounding those employees' leave, such as whether the leave taken by those employees was approved or whether those employees came back to work when they were supposed to do so.

5/ In making this finding, the undersigned has not overlooked Petitioner's testimony that he was called into his boss' office and verbally reprimanded for cursing over the intercom system (which he acknowledged doing), but several white employees were not reprimanded for doing the same thing. These events are beyond the scope of the Complaint, and in any event, Petitioner's testimony regarding the events was unconvincing.

6/ The most significant procedural difference between the two codes is that under the Pinellas Code, the undersigned issues a final order subject to judicial review whereas under the St. Pete Code, the undersigned issues a recommended order subject to review by the St. Petersburg Human Relations Review Board. Compare Pinellas Code § 70-77(g)(13)-(14) with St. Pete Code § 15-45(f)(4)-(5) and (g). See also City of Pinnellas Park v. Henault, Case No. 02-9757-CI-88A (Fla. 6th Cir. Ct. Apr. 1., 2004), cert. denied, Case No. 2D04-1914 (Fla. 2d DCA Sept. 17, 2004) (reviewing the Board's rejection of the administrative law judge's Recommended Order in DOAH Case No. 01-3838, and filed in that case as an attachment to the Board's letter of remand).

7/ As explained in Bass, 256 F.3d at 1105:

> Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact in issue without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate . . . constitute direct evidence of discrimination. For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision. Remarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination.

(citations and internal brackets and quotations omitted).

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 30 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with Human Relations Officer in accordance with Section 15-45(f)(5) and (g) of the St. Petersburg Code.