STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CLARENCE CRAY, Petitioner, vs. WHITE SPRINGS AGRICULTURAL CHEMICAL, INC., Respondent.	)	Case No. 04-3887

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was conducted in this case on January 7, 2005, in Lake City, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent: David C. Braun, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent is guilty of an unlawful employment practice, to wit: racial discrimination, by its termination of Petitioner.

PRELIMINARY STATEMENT

On July 27, 2004, Petitioner filed a charge of discrimination with the Florida Commission on Human Relations against Respondent, White Springs Agricultural Chemical, Inc., a/k/a PCS Phosphate (PCS). The Commission issued a Determination: No Cause on September 24, 2004. Petitioner timely filed his Petition for Relief. The cause was referred to the Division of Administrative Hearings on or about October 28, 2004.

At the disputed-fact hearing on January 7, 2005, Petitioner testified on his own behalf and had three exhibits admitted in evidence. Respondent presented the oral testimony of Rick L. Kennington, George T. Sandlin, and Shirley Dilger, and had eight exhibits admitted in evidence.

The parties' Joint Pre-hearing Stipulation was admitted as ALJ Exhibit A.

A Transcript was filed on January 26, 2005.

An amended page of the Transcript was filed on February 14, 2005. The parties' respective Proposed Recommended Orders,

filed on February 16, 2005, have been considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an African-American male now 45 years old. He was discharged from employment as a heavy equipment operator with Respondent during his probationary term (within the first 120 days of employment) on July 16, 2004.

2. Respondent qualifies as an "employer" under Chapter 760, Florida Statutes.

3. At all times material, Respondent had an equal employment opportunity policy in place and employed Petitioner's uncle and two cousins, who are also presumably African-Americans. Respondent previously employed Petitioner's brother.

4. Petitioner testified that during his employment, his brother was being prosecuted for alleged sexual relations with the brother's "white" stepdaughter, but admitted that this situation was never mentioned by any member of management.

5. By all accounts, for the brief period of time Respondent employed Petitioner, Petitioner was a capable and reliable worker. Petitioner was very much desired by Respondent as an employee for his ability to handle heavy machinery until he was terminated on the basis of his criminal background.

6. Petitioner's explanation under oath at the hearing of his criminal history is as follows: In 1982, he was convicted

of the felony of conspiracy to commit armed robbery. He served nearly all of a five-year probation, but was "violated" for being in bad company. He consequently served six months in the Columbia County Jail. In 1987, he was charged with a lewd act, but was not "convicted" of that felony until he was picked up in 1990, for not completing court-ordered counseling. In 1990, Petitioner was sentenced to 12 years on the lewd act charge, but he only had to serve five years in prison. The undersigned interprets both of the foregoing situations to be revocations of probation under deferred prosecution programs. In 1997, Petitioner was convicted of the misdemeanor of driving under the influence of alcohol (DUI).

7. On his March 30, 2004, job application to Respondent, Petitioner saw the following question:

> Have you ever been convicted of any violation of law other than a minor traffic violation? If "yes," explain below. (A criminal record is not an automatic bar to employment.)

Petitioner erroneously interpreted the foregoing question to only require disclosure of felony convictions, so he only marked "yes" and wrote in "conspiracy & lewd act."

8. In anticipation of hiring Petitioner, Rick Kennington, PSC's Supervisor of Labor Relations and Security, interviewed Petitioner on April 16, 2004. Mr. Kennington is a Caucasian

male. During this interview, Mr. Kennington questioned Petitioner about his criminal history and made notes.

9. Petitioner testified that he made Mr. Kennington aware of the full extent of his criminal history during the pre-employment interview. However, in light of Mr. Kennington's testimony; Mr. Kennington's contemporaneous notes on the interview (see Finding of Fact 10); the consistency of Shirley Dilger's and George Sandlin's testimony with that of Mr. Kennington, concerning a near-contemporaneous oral report of the interview to them by Mr. Kennington (see Finding of Fact 13); and the difficulty Petitioner had at hearing in explaining his criminal record, Mr. Kennington's testimony concerning what occurred during Petitioner's pre-employment interview is more credible than Petitioner's testimony. On this basis, it is found that Petitioner did not tell Mr. Kennington about his non-felony DUI conviction. He did, however, tell Mr. Kennington during the pre-employment interview, that he had been convicted of conspiracy to commit robbery because he was aware that his cousins were going to rob a store, but he failed to report it; that he had received five years' probation for the conspiracy; that he violated probation and served one year in a county jail as a result of being caught in bad company; and that he was convicted of a lewd act with an underage girl when he and the

girl were both very young, but he served no jail time for the lewd act conviction.

10. Mr. Kennington's contemporaneous notes on this interview show that however Petitioner explained the "lewd act" conviction, Mr. Kennington formed the opinion that the incident involved consensual sex with a 15-year-old girl when Petitioner was approximately 21-years-old and that Petitioner served no jail time as a result thereof.

11. At the end of the pre-employment interview, Mr. Kennington informed Petitioner that the employer would order a background check on him and that any failure of Petitioner to disclose his criminal history would result in termination of his employment. Petitioner offered nothing more.

12. Therefore, Mr. Kennington believed that, in light of the limited nature of what he then understood to be Petitioner's criminal history, Petitioner would be a good potential employee. He thought that Petitioner's one year in a county jail for violating the conspiracy probation was about 20 years old; that there had been no jail time associated with Petitioner's lewd act; and that Petitioner had "a relatively clean run for some years."

13. George Sandlin is Respondent's Superintendent of Human Resources. He is a Caucasian male. Mr. Kennington told Mr. Sandlin immediately after Mr. Kennington's pre-employment

interview with Petitioner that Petitioner had two convictions and had spent one year in Columbia County Jail. Mr. Sandlin did not know about any other convictions or about any time Petitioner had served in prison, and Mr. Kennington could not mention what he also did not know about. Shirley Dilger is Respondent's Human Resources Manager. She is a Caucasian female. According to her, Mr. Kennington told her immediately after the pre-employment interview that Petitioner had spent a year in a county jail. She erroneously thought this was in connection with a "burglary" charge. She did not know about, and Mr. Kennington did not inform her about, any prison time.

14. Mr. Kennington, Mr. Sandlin, and Ms. Dilger conferred and decided to offer Petitioner a job because his last conviction appeared to be 20 years old and because the Respondent employer had past positive experiences with Petitioner's relatives as employees. Ms. Dilger stated that the three managers made the decision to hire Petitioner, in part, because Petitioner had spent no time in jail in connection with the lewd act charge and "that obviously it wasn't anything that was serious or . . . something would have happened with that charge."

15. After Petitioner was hired on June 9, 2004, he participated in 40 hours of orientation during his first week of employment. At one point during the orientation week,

Mr. Kennington led a session on security, during which he informed Petitioner and other new employees that it was important to provide complete and accurate information about their criminal background history. After the session was over, Petitioner approached Mr. Kennington. Mr. Kennington and Petitioner have very different views of the ensuing conversation. Petitioner testified that he told Mr. Kennington that he did not know if it would show up on his background check, but he had just remembered getting arrested because a girl he quit living with told police he had burglarized her house, but the charges were dropped. Nothing like the foregoing was on Petitioner's job application, and Mr. Kennington thought Petitioner was reminding him about Petitioner's lewd act conviction. Both men agree that Mr. Kennington ended the conversation by assuring Petitioner that if he had revealed everything before, he did not have to worry.

16. At lunch that same day, Mr. Kennington told Mr. Sandlin and Ms. Dilger that he was puzzled by Petitioner's approaching him and suspected that Petitioner's background check might reveal a problem.

17. When Mr. Kennington received Petitioner's background check report, it was a problem for him.

18. Mr. Kennington was adamant that he received the background check report on July 14, 2004, which was a Wednesday,

but the internet date of July 12, 2004, shows that if the computer's clock was correct, someone printed the report off the internet on July 12, 2004, which was the preceding Monday. This discrepancy of dates is immaterial in that all witnesses agreed that Mr. Kennington and Mr. Sandlin confronted Petitioner as early as 7:00 a.m., on Thursday, July 15, 2004.

19. The criminal background report received on Petitioner by Mr. Kennington would be confusing even to a lawyer. Petitioner, Mr. Kennington, and Mr. Sandlin are not lawyers. On its face, the report shows a finding of "guilty" for a conspiracy/armed robbery charge on 10/10/84 resulting in two years, six-months' confinement, with 373 days credited for time served.

20. The report also shows that Case No. 1987-004757CFA, dated 5/16/87, as a "sexual battery/slight force" felony charge was placed in the deferred prosecution program as of 6/08/87. That same case number shows a "lewd assault on a child" felony charge was also placed in the deferred prosecution program as of 6/08/87. It further shows a different case number, Case No. 1988-003327CFA, peculiarly dated 5/02/87, resulted in a finding of guilty as of 11/29/90, on the felony of "lewd and lascivious act/simulated sexual battery," with a resultant prison time of 12 years with 124 days' credit for time served.

21. The report finally shows a 1997 finding of guilty for DUI as a traffic misdemeanor, with a fine.

22. When Mr. Kennington and Mr. Sandlin called Petitioner in for a meeting about the background check report at 7:00 a.m., July 15, 2004, Mr. Kennington asked Petitioner why Petitioner had failed to tell him about the prison time Petitioner had served, but Petitioner had no response.

23. According to Petitioner, during their July 15, 2004, meeting, Mr. Kennington questioned him about a perceived disparity between a 1987 entry on the background report, when Petitioner was initially charged in connection with a lewd act on a child, when he was not sentenced to prison at all, and a 1990 entry, when Petitioner was convicted and sentenced to twelve years in prison. Petitioner stated that Mr. Kennington, "[k]ept asking me did I do anything else in 1987 and 1990, another sexual act."

24. It was obvious to Petitioner at the time that Mr. Kennington was concerned, based on the way the offenses were listed with different case numbers and dates on the background check report, that Petitioner might have committed three or four sexual felonies instead of just one, for which probation was ultimately revoked.

25. Mr. Kennington testified that during the July 15, 2004, meeting, Petitioner finally indicated to him that

Petitioner's "lewd act" conviction was a continuation of a single "lewd act" charge.

26. In this regard, Petitioner specifically testified at hearing that he had violated the K.I.D.D.S. Program and, as a result of that violation, he was later sentenced to 12 years in prison, of which he served five. (See Finding of Fact 6.)

27. Mr. Kennington took notes of the July 15, 2004, meeting and drew a star by an entry where he wrote, "5 years in prison, Baker Corr., Panhandle, 1990."

28. It is clear from the evidence as a whole that only on July 15, 2004, did Mr. Kennington fully understand that Petitioner had served time in prison, as opposed to a county jail, and that the time Petitioner served had been for the "lewd act" felony conviction, not the prior conspiracy to commit robbery felony conviction.

29. Petitioner claimed that during this interview, out of the blue, Mr. Sandlin asked him if the girl involved in the lewd act charge was "white" or "black." However, Mr. Sandlin and Mr. Kennington are more credible in their testimony that Mr. Sandlin asked the foregoing question when Petitioner told them that he had gone to trial in that case; that the underage girl involved in the lewd act charge did not testify; that it was her mother who forced the issue; and that his trial on the lewd act felony charge had been racially discriminatory.

30. Mr. Sandlin acknowledged that he had asked the question, but testified that the reason he asked it was that he was under the impression that Petitioner had been discriminated against in the lewd act trial.

31. Petitioner was less credible when he denied at hearing that he ever claimed in the July 15, 2004, meeting that discrimination occurred in his lewd act trial. However, it is undisputed that Petitioner answered Mr. Sandlin in that meeting that the girl was "black," and that otherwise, race was never discussed.

32. During the July 15, 2004, meeting, Petitioner told Mr. Kennington and Mr. Sandlin that he could not remember how old the girl or he was when the lewd act occurred. Kennington and Sandlin did the math and concluded that Petitioner was 27 and the girl was 15 at the time of the offense.

33. At the end of the July 15, 2004, meeting, Mr. Kennington told Petitioner that this was a very serious matter and there were going to be discussions with upper management.

34. Mr. Kennington, Mr. Sandlin, and Ms. Dilger met after the July 15, 2004, meeting of Mr. Kennington, Mr. Sandlin, and Petitioner.

35. Mr. Kennington, Mr. Sandlin, and Ms. Dilger each testified individually that he or she would not have hired

Petitioner if they had known the full extent of Petitioner's criminal history from the beginning. All three were concerned about the difference in age between Petitioner and the girl (a 27-year-old man and a 15-year-old girl) and that Petitioner had spent five years in prison instead of a year in a county jail, but each executive emphasized one or the other concern. All three executives were concerned with Petitioner's prior lack of candor. Ms. Dilger was concerned about the lewd act conviction as she finally understood it, because of the high number of women and low number of security persons Respondent employed in relation to the extensive size of Respondent's premises. Mr. Kennington was upset about Petitioner's nondisclosure of his DUI conviction, even though it was only a traffic misdemeanor, because Mr. Kennington did not consider any DUI to be "minor."

36. The three managers sought the advice of corporate representatives in Chicago in making the decision to terminate Petitioner.

37. Race, including the race of the girl with whom Petitioner had sex in 1987, was not discussed at any time during any managerial deliberations.

38. The next day, July 16, 2004, a meeting took place including Mr. Kennington, Mr. Sandlin, Petitioner and a security officer, Kenny Gaylord. Petitioner conceded at hearing that Mr. Kennington informed Petitioner at that time that

Petitioner's employment was being terminated for lack of confidence and for Petitioner not being truthful in the hiring process.

39. In the course of the Florida Commission on Human Relations' investigation of Petitioner's subsequent Charge of Discrimination, Mr. Kennington provided an affidavit which represented, among other things, that Petitioner was terminated because he was guilty of five felonies and failed to disclose them. This affidavit is technically a prior statement under oath which is inconsistent with the reason given by Mr. Kennington to Petitioner on July 16, 2004 (see Finding of Fact 38), and inconsistent with his testimony at hearing. However, other parts of the same affidavit break down the charges and convictions consistent with Mr. Kennington's testimony at the hearing. Furthermore, the greater weight of the credible evidence at hearing shows Mr. Kennington never has understood the number of felonies listed on the background check report, which may be either two or three felonies, depending upon how the case numbers are interpreted. It further shows that Petitioner's July 15, 2004, explanation that he had only two felony convictions. Accordingly, there is no significance to the insubstantial inconsistency on Mr. Kennington's affidavit. Moreover, by no interpretation does his July 16, 2004, statement to Petitioner, his affidavit, or his

hearing testimony establish that Mr. Kennington had a racial reason for terminating Petitioner.

40. Petitioner admits that no one told him, prior to his termination, that he was being terminated because he allegedly had "five felony convictions."

41. Petitioner also attempted to show at hearing that an affidavit by Mr. Sandlin stated as a reason for Petitioner's termination that Petitioner had failed to disclose that Petitioner had relatives working for Respondent. However, Mr. Sandlin's affidavit as a whole cannot reasonably be read to mean that.

42. Respondent has terminated both Caucasian and African-American employees during their probationary 120 days for nondisclosure, based on their background check reports.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Chapter 760, and Section 120.57(1), Florida Statutes.

44. In cases alleging racial discrimination based on disparate treatment, a petitioner bears the burden of proof established in McDonnell-Douglas Corp. v. Green, 411 U.S. (1973); Texas Department of Community Affairs v. Burdie, 450 U.S. 248 (1981). Under this model of proof, a petitioner bears

the initial burden of establishing a prima facie case of discrimination. If the petitioner meets this initial burden, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. Dept. of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). If the employer meets its burden of production, the petitioner must then persuade the court that the employer's proffered reason is a pretext for intentional discrimination.

45. To establish a prima facie case of racial discrimination based on disparate treatment, a petitioner must show the following: (a) he belongs to a racial minority; (b) he was subject to adverse employment action(s); (c) he was qualified for his position; and (d) the employer treated similarly situated employees outside the protected class more favorably. Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997). Petitioner herein asserts that because he had only two felony "convictions," not five, and because both felony convictions were divulged in an abbreviated way on his job application in compliance with the actual language of the job application, his termination was unfair and unlawful, and that therefore, the reason for his termination was racially motivated. That is not the legal test to be applied.

46. To establish that his termination was the result of discrimination on the basis of race, Petitioner must show by

direct, circumstantial, or statistical evidence that his termination and the discrimination were connected. McDonnell Douglas Corp., v. Green, supra. See also Longariello v. School Board of Monroe County, Florida 987 F. Supp. 1440 (S.D. Fla. 1997); and Walker v. Nationsbank of Florida, N.A., 537 F.3d 1540 (11th Cir. 1995)

47. Petitioner has shown no similar situation in which a person of a race different than his received better, or even different, treatment than he did. Apparently, Petitioner puts forth that disparate treatment need not be shown where there has been an overt discriminatory remark demonstrating racial animus: in this case, Mr. Sandlin's inquiry as to whether the underage female involved in Petitioner's spending five years in prison was "white" or "black."

48. However, the context of the question as related by Mr. Sandlin, to the effect that he was trying to assess Petitioner's allegations of a racially discriminatory trial, renders the inquiry insufficient to shift the burden of proof to Respondent. Even viewing Mr. Sandlin's inquiry in the worst possible light for Respondent, Petitioner's answer that he and his victim were both "black" nullifies any suggestion that Mr. Sandlin was prejudiced against interracial sexual relations and was thereby motivated to terminate Petitioner for that reason. Given Mr. Sandlin's inquiry and Petitioner's answer, it is more

reasonable to accept Respondent's explanation that the disparity in Petitioner's age and that of the girl; Petitioner's five years in prison for his sexual exploit with a minor; and management's belief in Petitioner's lack of candor on his job application and in the pre-employment interview, were the real motivators for Respondent to terminate Petitioner.

49. Evidence that only suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence of discrimination. See Chambers v. Walt Disney World Co., 132 F. Supp. 2d 1356 (M.D. Fla. 2001). See also Standard v. A.B.E.L. Services, Inc., 161 F.3d 1318 (11th Cir. 1998), and Merritt v. Dillard Paper Co., 120 F.3d 1181 (11th Cir. 1997). Proof that amounts to no more than mere speculation and self-serving belief on the part of the complainant concerning the motives of the employer are not sufficient, standing alone, to establish a prima facie case of intentional discrimination. See Little v. Republic Refining Co. Ltd., 924 F.2d 93 (5th Cir. 1991); Elliott v. Group Medical & Surgical Service, 714 F.2d 556 (5th Cir. 1983); and Shiflett v. G.E. Finance Automation Corp., 960 F. Supp. 1022 (W.D. Va. 1997).

50. Essentially, Petitioner's case amounts to the illogical scenario that Respondent hired Petitioner solely so that it could fire him 35 days later on the basis of his race. Where the facts demonstrate that the same decision-makers both

hired and fired an employee, an inference may arise that the employer's stated non-discriminatory justification for terminating the employee is not pretextual. Williams v. Vitro Services Corporation, 144 F.3d 1438 (llth Cir. 1998). Respondent's management staff, including Mr. Sandlin, were aware that Petitioner was African-American when they hired him. Petitioner was hired in part because of his African-American relatives already employed by Respondent. If local management had wanted to discriminate against Petitioner, they just could have not hired him. There is no evidence the corporate representatives whom Mr. Kennington, Mr. Sandlin, and Ms. Dilger consulted concerning Petitioner's termination even knew his race, nor is there any evidence that Petitioner's race was discussed with them.

51. Regardless of whether they fully and correctly understood Petitioner's criminal history, and regardless of how clearly they articulated their reasons for terminating Petitioner, it is clear that Respondent's management has demonstrated that it terminated Petitioner because of the seriousness of his sexual conviction, the length of his time in prison, and their loss of faith in his veracity. Respondent further has demonstrated that other employees, both Caucasian and African-American, have been terminated for substantially similar reasons. Respondent bears no burden of proving that its

employment decision was correct, justified, wise, or even fair, only that it was not illegally discriminatory. See Gilchrist v. Bolger, 733 F.2d 1551 (11th Cir. 1984). Petitioner has not demonstrated either disparate treatment nor a prima facie case of overt discrimination.

52. Assuming arguendo, but not ruling, that a prima facie case was presented by Petitioner, Petitioner still cannot prevail. The central inquiry in all discrimination cases is the employer's underlying motivation for its actions. Reeves v. Sanderson Plumbing Product, Inc. 530 U.S. 133, 141 (2000). It is not even enough to disbelieve the employer's stated motive. The trier-of-fact must also be convinced that the employee's proffered reason (i.e., discrimination) is correct. In determining whether an employer's stated reasons for its actions are pretextual, courts will not second-guess an employer's business judgment, and a plaintiff is not allowed to recast an employer's proffered non-discriminatory reasons or substitute its business judgment for that of the employer. Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000). Courts have cautioned that in discrimination cases, the temptation to decide who is "right," the boss or the employee, should be resisted . . . even where the employee who is unfairly treated is a member of a protected group. Roberts v. Gadsden Memorial Hospital, 835 F.2d 783 (11th Cir. 1988) (Hill, J., concurring);

majority opinion amended sua sponte on another issue at 850 F.2d 1549 (11th Cir. 1988).

53. The undersigned is not unmindful of the fact that the accuracy of the background check record was never proven up, but Respondent clearly gave Petitioner an opportunity to refute it, and Petitioner, in fact, confirmed the parts of the record that most troubled Respondent's management team.

54. The record as a whole demonstrates that there was a disparity between what the management team understood about the extent of Petitioner's criminal history prior to hiring him versus what they understood about Petitioner's criminal history after receiving the criminal background check. Mr. Kennington may never have correctly understood all the nuances of deferred prosecution or revoked probation. Clearly, he did not think the DUI conviction was a minor traffic offense, and that is a debatable matter. Conceivably, the precise language of the application form did not require Petitioner to reveal his misdemeanor DUI conviction. (See Finding of Fact 7.) However, nothing in this series of misunderstandings demonstrates that race played any part in Petitioner's termination.

55. In Florida, an employer may terminate an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. See Nix v. W.L.C.Y. Radio Rahall

Communications, 738 F.2d 1181 at 1187 (11th Cir. 1984). See also Loeb v. Textron, Inc., 1600 F.2d 1003 (1st Cir. 1979).

RECOMMENDATION

Based on the foregoing Findings of Facts and Conclusions of Law, it is

RECOMMENDED: that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief and Charge of Discrimination herein.

DONE AND ENTERED this 11th day of April, 2005, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of April, 2005.

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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.