STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WILLIE FOSTER, JR.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1455
	)	
PEPSI-COLA BOTTLING COMPANY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was conducted before Daniel M. Kilbride, Administrative Law Judge of the Division of Administrative Hearings, on July 20, 2005, in Orlando, Florida.

APPEARANCES

For Petitioner: Willie Foster, Jr., pro se
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For Respondent: Susan K. McKenna, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, Willie Foster, Jr., was discriminated against because of his race, age, and sex by Respondent, Pepsi-Cola Bottling Company, when Respondent failed to hire him, in violation of Subsection 760.10(1)(a), Florida Statutes (2004).

PRELIMINARY STATEMENT

Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR) charging Respondent with employment discrimination on or about July 12, 2004, alleging age, sex, and race discrimination. On or about March 11, 2005, a "No Cause" determination was issued by FCHR. Petitioner timely filed a Petition for Relief with FCHR, alleging that he had not been hired on the basis of his age, sex, and race and requested a final hearing. This matter was subsequently referred by FCHR to the Division of Administrative Hearings for a final hearing de novo on April 15, 2005, and this matter was set for hearing. Following discovery and denial of Petitioner's Motion for Continuance, a final hearing commenced on July 20, 2005.

At the hearing, Petitioner appeared pro se and testified in his own behalf. Petitioner presented the testimony of one witness, Jennifer Daniels. Respondent presented the testimony of two witnesses, Doreen Richards and Christopher Buhl. Twenty exhibits (marked for identification as R-1 through R-20) were admitted into evidence as joint exhibits. A Transcript was filed on August 15, 2005. The parties were allowed ten days from the filing of the Transcript in which to file proposed findings of fact and conclusions of law. Petitioner filed his proposals on August 8, 2005. Respondent filed its proposed

findings on September 2, 2005. The parties' proposals have been carefully considered in preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. Responding to an advertisement, Petitioner and Jennifer Daniels traveled together to Respondent's Orlando location and applied for employment as merchandisers on August 1, 2003. Petitioner is a black male, who was 45 years old at the time of his application. Daniels is a white female, who was 25 years old during that same time.

2. After Petitioner and Daniels completed their application forms and filled out other pre-hire paperwork, Petitioner and Daniels left Respondent's premises. Respondent later contacted each of them and asked them to appear to take a written employment test. Petitioner and Daniels took the same test on August 7, 2003.

3. In August 2003, Respondent utilized a pre-employment written test devised by an independent company, Saville and Holdsworth, Ltd. This independent company was solely responsible for scoring the tests and compiling the test results. Respondent played no role in either of these tasks. Respondent's Human Resources Department merely administered the test, but did not possess the answer key to the test.

4. Merchandiser applicants, such as Petitioner, take a two-part written test. The first portion of the test entitled, "Working with Words," was a timed reading comprehension test. The second portion was entitled, "Work Styles Questionnaire," and was a tool designed to determine whether the applicant was suitable to the position.

5. Respondent uses a standard procedure in its hiring process, including the administration of the pre-employment test. First, only those applicants who satisfy established criteria, such as a stable work history, are offered the opportunity to take the written test. Second, only those applicants who pass the written test are allowed to progress to the next step of the hiring process, which is participating in an interview.

6. No applicant who has failed the written test has ever been allowed to progress to the interview phase, nor has been hired by Respondent despite failing the test. However, applicants who fail the test are allowed to reapply and take the test again after six months. Respondent has hired individuals who, after failing the initial written test, reapplied after six months and then passed the test.

7. Petitioner failed the written test he took on August 7, 2003. On that same date, Respondent notified Petitioner by letter that he failed the selection test, but could reapply and

take the test again after six months. Petitioner never reapplied for employment at Respondent.

8. The test administration, scoring, and notification process used by Respondent with respect to Petitioner's application was consistent with its standard procedures. Petitioner's answer sheets were faxed to Saville and Holdsworth, Ltd., on the day he took the test, August 7, 2003. Respondent received the test results from the independent company by fax on that same day. Also, on that same date Respondent forwarded a form letter to Petitioner notifying him that he failed the test. This sequence of events is not unusual in that Seville and Holdsworth, Ltd., sometimes scored the tests and provided the results to Respondent as quickly as five minutes after receiving the faxed answer sheets from Respondent.

9. Daniels passed the written test. On the same day she took the test, Respondent notified Daniels by telephone that she had passed and scheduled her for an interview. The fact that Respondent's Human Resources coordinator apprised Daniels of her test results by telephone on the very day she took the test is not unusual.

10. Respondent's testing procedures were audited by the Office of Federal Contract Compliance Programs, which found no discrimination with respect to the company's merchandiser group.

At least 50 percent of Respondent's merchandisers are minorities.

11. Of those applicants who applied for merchandiser positions in August 2003, the individuals whom Respondent screened-out initially and who were not allowed to take the written test included three blacks, three whites, one Hispanic, and one applicant whose minority status was unknown. The individuals hired as merchandisers from August 2003 to January 2005 included 20 whites, 11 blacks, and 13 Hispanics or other minority classifications. From June 1, 2003, through November 30, 2003, Respondent hired six whites, four blacks, four Hispanics, and one other employee.

12. It is rare for a female to apply for a merchandiser position with Respondent. Similarly, merchandiser applicants typically are younger, rather than older individuals. From August 2003 to January 2005, Respondent hired one female and five age-protected (over the age of 40) individuals.

13. Every merchandiser hired by Respondent during the relevant time period passed the written test; no applicant who failed the test has been hired.

14. In addition, on his application form, Petitioner indicated the reason he left the employment of the Orange County Library was a "labor dispute." He also indicated his reason for leaving Universal Studios' employment was that his "contract

ended." It was later determined that, in fact, both the Orange County Library and Universal Studios terminated Petitioner for insubordination.

15. The employment application Petitioner signed included the language, "I understand that the information I provide in this application must be complete and accurate to the best of my knowledge. I realize that falsification and/or incomplete information may result in my employment being terminated now or at any time in the future."

16. At the time of the hearing, Respondent considered Petitioner's statements of why he left his previous jobs as falsifications of the application. Respondent did not discover Petitioner's falsifications during the hiring process. Consistent with its policy, had Respondent discovered that Petitioner falsified his employment application during the hiring process, the application would not have been considered further. Similarly, if Respondent had hired Petitioner and discovered the falsification later, Respondent would have terminated Petitioner.

17. Petitioner failed to prove that Respondent engaged in discriminatory hiring practices when Respondent failed to hire him in August 2003.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Florida Administrative Code Rule 60Y-4.016(1) and Section 120.569 and Subsection 120.57(1), Florida Statutes (2005).

19. The State of Florida, under the legislative scheme contained in Chapter 760, Florida Statutes (2004), incorporates and adopts the legal principles and precedents established in the federal anti-discrimination laws specifically set forth under Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e, et seq. The Florida law prohibiting unlawful employment practices is found in Section 760.10, Florida Statutes (2004). This section prohibits discrimination against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's age, race, or sex. § 760.10(1)(a), Fla. Stat. (2004). FCHR and the Florida courts interpreting the provisions of the Florida Civil Rights Act of 1964 have determined that federal discrimination laws should be used as guidance when construing provisions of the Act. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); Cooper v. Lakeland Regional Medical Center, 16 FALR 567, 574 (FCHR 1993).

20. Petitioner has the ultimate burden to prove discrimination either by direct or indirect evidence. Direct evidence is evidence which, if believed, would prove the existence of discrimination without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989). Blatant remarks, whose intent could be nothing other than to discriminate, constitute direct evidence of discrimination. See Earley v. Champion International Corporation, 907 F.2d 1077, 1081 (11th Cir. 1990). Petitioner has not presented any evidence which would constitute direct evidence of discrimination.

21. Absent any direct evidence of discrimination, the Supreme Court established, and later clarified, the burden of proof in disparate treatment cases in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and again in the case of St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993). FCHR has adopted this evidentiary model. Kilpatrick v. Howard Johnson Co., 7 FALR 5468, 5475 (FCHR 1985). McDonnell Douglas places upon petitioner the initial burden of proving a prima facie case of racial or sex discrimination. See also Davis v. Humana of Florida, Inc., 15 FALR 231 (FCHR 1992); Laroche v. Department of Labor and Employment Security, 13 FALR 4121 (FCHR 1991).

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

a. Petitioner is a member of a protected group;

b. The employee is qualified for the position;

c. The employee was subject to an adverse employment decision (Petitioner was not hired); and

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

23. Proving a prima facie case serves to eliminate the most common nondiscriminatory reasons for Petitioner's disparate treatment. See International Brotherhood of Teamsters v. U.S., 431 U.S. 324, 358, n. 44 (1977). It is not, however, the equivalent of a factual finding of discrimination. It is simply proof of actions taken by the employer from which discriminatory animus is inferred because experience has proven that, in the absence of any other explanation, it is more likely than not that those actions were bottomed on impermissible considerations. The presumption is that more often than not, people do not act in a totally arbitrary manner, without any underlying reason, in a business setting. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

24. Once Petitioner has succeeded in proving all the elements necessary to establish a prima facie case, the employer must then articulate some legitimate, nondiscriminatory reason for the challenged employment decision. The employer is required only to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Texas Department of Community Affairs v. Burdine, 450 U.S. at 257. The employer "need not persuade the court that it was actually motivated by the proffered reasons . . . [i]t is sufficient if the [employer's] evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 254. This burden is characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138 (11th Cir. 1983).

25. Once the employer articulates a legitimate reason for the action taken, the evidentiary burden shifts back to Petitioner who must prove that the reason offered by the employer for its decision is not the true reason, but is merely a pretext. The employer need not prove that it was actually motivated by the articulated nondiscriminatory reasons or that the person hired was more qualified than Petitioner. Texas Department of Community Affairs v. Burdine, 450 U.S. at 257-8.

26. In Burdine, the Supreme Court emphasized that the ultimate burden of persuading the trier of fact, that Respondent intentionally discriminated against Petitioner, remains at all times with Petitioner. Texas Department of Community Affairs v. Burdine, 450 U.S. at 253. The court confirmed this principle again in St. Mary's Honor Center v. Hicks, 509 U.S. at 502.

I. Petitioner Failed to Establish a Prima Facie Case of Discrimination

27. In the case sub judice, Petitioner has established that he is a member of a protected class. However, he has failed to establish that he was qualified for the position at the time he applied. In addition, Petitioner has failed to come forward with credible evidence that there is a causal connection between his age, race, or gender and his failure to be hired. Petitioner has also failed to show that similarly-situated persons outside the protected class received more favorable treatment under similar circumstances. Therefore, there can be no inference of discrimination. Proud v. Stone, 945 F.2d 796 (4th Cir. 1991). "Whatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610, 113 S. Ct. 1701, 1706 (1993). This standard requires Petitioner to establish

that "but for" his protected class and the employer's intent to discriminate, he would have been hired.

28. Petitioner has failed to come forward with sufficient evidence to meet his initial burden of proof on the issue of age, sex, or racial discrimination. It is undisputed that in order to be qualified for employment as a merchandiser with Respondent, an applicant must pass the written test. Failing to pass the written test disqualified an applicant from further consideration. There was no evidence that Respondent has ever made an exception to this pre-hire requirement. Respondent's evidence is credible. In addition, Petitioner offered no evidence to rebut Respondent's assertion.

29. Petitioner did not dispute that he, in fact, failed the written test. Respondent played no role whatsoever in scoring the test to determine whether Petitioner passed or failed. Indeed, Respondent did not even have the answer key in its possession. Rather, an independent company with whom Respondent contracted was responsible for developing, scoring and reporting the results of the written test to Respondent. Because passing the written test was an essential requirement of gaining employment as a merchandiser, the fact that Petitioner failed the test meant he was not qualified for the position. Therefore, Petitioner failed to prove an essential element of

his prima facie case, namely, that he was qualified for the position for which he applied.

30. To establish a prima facie case, Petitioner also must establish that similarly-situated employees outside the protected categories in question were treated more favorably. An employee is "similarly situated" if he or she is similarly situated to a plaintiff in all relevant respects and is treated more favorably. For example, in a discharge for misconduct case, a plaintiff must point to an individual outside the protected category who was involved in or accused of the same or similar conduct, but was disciplined differently. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997). In Petitioner's case, an individual "similarly situated" to him would be a merchandiser applicant who: (1) passed the initial screening process and hence was allowed to take the written test; (2) failed the written test; and (3) was allowed to advance to the interview phase despite failing the test. No such comparator exists, however. Daniels passed the written test, so she is not similarly situated to Petitioner. For this reason, Petitioner cannot satisfy this essential element of his prima facie case.

II. Respondent's Reason for Not Hiring Petitioner Was a Legitimate, Nondiscriminatory Reason Which Was Not Proven to be Pretextual

31. Assuming, arguendo, that Petitioner had met his initial burden, the sequence of presentation of evidence then required Respondent to come forward and articulate valid, nondiscriminatory reasons for the resulting decision not to hire Petitioner. Respondent has done so. The burden to articulate a legitimate business reason for the action is one of production, not of persuasion. The credibility of the nondiscriminatory reasons need not be weighed at this stage of the burden-shifting analysis. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142, 120 S. Ct. 2097, 2105 (2000); St. Mary's Honor Center v. Hicks, 509 U.S. at 509.

32. Even if it is assumed that Petitioner was able to establish a prima facie case of discrimination, he cannot carry his ultimate burden of proof. Respondent articulated a legitimate, nondiscriminatory reason for its decision not to hire Petitioner, namely, because he failed the written test. There was no evidence that the test was discriminatory in nature, the test has never been administered in a discriminatory fashion, large numbers of African-American males and other minority employees of various ages have been hired for merchandiser positions after successfully passing the test, and Petitioner was free (but chose not) to retake the test after six

months, an opportunity other applicants who initially failed the test took advantage of and were hired as a result.

33. In the face of this unrebutted evidence, Petitioner offered nothing more than speculation and skepticism. Petitioner's skepticism appears to stem from the recollection he and Daniels share that when administering the written test, Richardson stated the test results would not be back for two or three days. Richardson denied this alleged statement, noting that she sometimes received test results from Saville and Holdsworth, Ltd., as quickly as five minutes after she faxed the answer sheet to them. However, even if Petitioner's recollection is accurate, the utterance of the alleged statement proves nothing, other than that Richardson did not want applicants who failed the test to be calling her office for test results until they received written notification. Petitioner's own subjective feelings, without evidence of age, sex, or racial bias are insufficient to support a claim of discrimination. Wright v. Wyandotte County Sheriff's Department, 963 F. Supp. 1029 (D. Kan. 1997). The law is clear that "the inquiry into pretext centers upon the employer's beliefs, and not the employee's own perception of his performance." LeBlanc v. TJX Companies, Inc., 214 F. Supp. 2d 1319, 1331 (S.D. Fla. 2002); see also Webb v. R&B Holding Co., Inc., 992 F. Supp. 1382, 1387

(S.D. Fla. 1998) ("The fact that an employee disagrees with an employer's evaluation of him does not prove pretext.")

34. Petitioner has the continuing burden of persuading the trier of fact that Respondent intentionally discriminated against him. Texas Department of Community Affairs v. Burdine, 450 U.S. at 253-254. When a petitioner alleges disparate treatment, "liability depends on whether the protected trait actually motivated the employer's decision." Hazen Paper Co. v. Briggins, 507 U.S. at 610. Petitioner's age, race, or gender must have actually played a role in the employer's decision-making process and had a determinative influence on the outcome. Petitioner simply cannot prevail on his claim of disparate treatment, unless he can demonstrate that Respondent intentionally discriminated against him. Cason Enterprises, Inc. v. Metropolitan Dade County, 20 F. Supp. 2d 1331, 1337 (S.D. Fla. 1998). There is no evidence to demonstrate that his failure to be hired was a result of his age, gender, or race. Petitioner failed to introduce any evidence to establish a prima facie case or to prove that Respondent's legitimate, nondiscriminatory basis for his failure to be hired was a pretext for discrimination. Thus, there has been no showing that Respondent violated Subsection 760.10(1), Florida Statutes (2004).

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 which denies the Petition for Relief.

DONE AND ENTERED this 7th day of October, 2005, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 7th day of October, 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.