STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DONALD J. BROWN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-1778
	)	
THE HERTZ CORPORATION,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on July 14, 2005, in West Palm Beach, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Donald J. Brown, pro se
Post Office Box 210651
Royal Palm Beach, Florida 33421

For Respondent: John W. Campbell, Esquire
Constangy, Brooks & Smith, LLC
100 West Kennedy Boulevard, Suite 500
Post Office Box 1840
Tampa, Florida 33601-1840

STATEMENT OF THE ISSUE

Whether The Hertz Corporation (Hertz) committed the unlawful employment practices alleged in the employment discrimination charge filed by Petitioner and, if so, what

relief should he be granted by the Florida Commission on Human Relations (FCHR).

PRELIMINARY STATEMENT

On or about May 25, 2004, Petitioner filed with the Palm Beach County Office of Equal Opportunity (PBCOEO) an employment discrimination charge against his former employer, Hertz, alleging that he had been discriminated against on the basis of his race and had been retaliated against "because I reported discriminatory practices." He gave the following "particulars" in the charge:

> On April 29, 2004, I was terminated from my position as a Bus Driver after almost five (5) years of employment.
>
> The employer did not give a reason for the disparate treatment.
>
> I believe that I have been discriminated against in violation of Article VI, Sections 2-216 through 2-313, Palm Beach County Code (the Palm Beach County Equal Opportunity Ordinance), Title VII of the Civil Rights Act of 1964, the Florida Civil Rights Act of 1992, as amended and retaliation under Section 704(a), Title VII Civil Rights Act and Chapter 760.10(7), Florida Civil Rights Act for the following reasons:
>
> 1. On April 16, 2004, I was placed on progressive discipline after a minor offense which happened six (6) months prior. I believe this action was taken in retaliation because as shop steward, I had to bring to the company's attention its discriminatory practices toward Black employees.

> 2. White employees have committed more serious offenses but they were not put on progressive discipline. In fact, one White employee had three (3) accidents where damages were over a hundred dollars each time. He only received a verbal warning after the third offense. I was put on progressive discipline for a minor offense and terminated. The White employee continues to work.
>
> 3. I believe that I have been discriminated against because of my race/Black and retaliated against because I reported discriminatory practices.

The charge was also filed with the FCHR (in FCHR Case No. 2005-01364). On January 5, 2005, the PBCOEO issued a Determination of No Reasonable Grounds, indicating that its file in the matter "is hereby closed with this agency" because, "[b]ased upon the information and evidence gathered during the investigation conducted by the Office of Equal Opportunity it is concluded that there are no reasonable grounds to believe that there has been a violation of either the ordinance or the federal statute as alleged." [Emphasis in original.] On April 13, 2005, the FCHR issued a Right to Sue in FCHR Case No. 2005-01364, advising that Petitioner could "pursue this case in the Division of Administrative Hearings by filing a Petition for Relief with the FCHR within 35 days from the date of this Right to Sue letter, or the Complainant may file a lawsuit in a circuit court of the State of Florida anytime within one year from the date of this Right to Sue letter, provided such time

period is not more than four years from the date the alleged violation occurred." Petitioner, on May 13, 2005, filed with the FCHR a Petition for Relief in connection with the charge he had filed in FCHR Case No. 2005-01364. On May 18, 2005, the FCHR referred the matter to the Division of Administrative Hearings for the assignment of a DOAH Administrative Law Judge.

At the final hearing in this case Petitioner testified on his own behalf, but did not call any other witnesses. Petitioner also submitted as Petitioner's Exhibit No. 1, a composite exhibit consisting of numerous documents related to his employment with Hertz.

Respondent presented the testimony of two witnesses, Michael Thebner and Michael Badders. Respondent also submitted as Respondent's Exhibit No. 1, a composite exhibit consisting of numerous additional documents related to Petitioner's employment with Hertz.

At the close of the hearing, the parties agreed that the deadline for filing proposed recommended orders would be seven days from the date of the final hearing. Neither party ordered a transcript of the final hearing. Respondent filed a timely proposed recommended order containing proposed findings of fact and conclusions of law. As of the date of this Recommended Order, Petitioner has not filed a proposed recommended order or any similar document.

FINDINGS OF FACT

1. Petitioner is a Black male who was employed by Hertz from 2001 until April 29, 2004, when his employment was terminated.

2. At all times material to the instant case, Petitioner worked as a courtesy bus driver. His basic job duties included picking up Hertz rental car customers at the West Palm Beach airport and driving them to the Hertz station where they could pick up their rental cars, as well as driving Hertz customers from the Hertz station back to the airport after they turned in their rental cars.

3. The events which precipitated Petitioner's termination of employment occurred during the night shift that began at 6:00 p.m. on April 16, 2004, and was scheduled to end at 4:00 a.m. on April 17, 2004. Events proceeded normally on that shift until about 2:00 a.m. on April 17, 2004. At that hour of the morning, Petitioner was the only courtesy bus driver on duty. At that hour the manager for the Hertz station at the West Palm Beach airport was Michael Thebner. At approximately 2:00 a.m. Petitioner dropped off some passengers at check-in who had just arrived on Jet Blue. After dropping off those passengers, Petitioner looked around to see if there were any passengers waiting to be taken back to the airport. Seeing no such passengers and believing that there were no other

passengers at the airport waiting to be picked up by a Hertz courtesy bus, Petitioner parked the bus and decided to take a break.

4. Petitioner left the outside lights of the bus turned on and left the bus motor on. He turned off the lights inside the bus, turned off the air-conditioning inside the bus, closed the bus doors, and walked to the back of the bus to take a break. While taking a break in the back of the bus, Petitioner fell asleep and remained asleep for several minutes.

5. In the meantime, a few minutes after Petitioner parked the bus and began his break, the station manager, Thebner, received two telephone calls from Hertz customers who were waiting at the airport for the Hertz courtesy bus. Thebner immediately tried to contact Petitioner on the Nextel radio on the bus channel, but Petitioner did not respond. Thebner then paged Petitioner on the public address system, again with no response. Thebner next walked over to the bus Petitioner was operating that night and knocked first on the bus window and then on a bus door. There was no response to those knocks. Thebner tried unsuccessfully to page Petitioner on the intercom and searched for Petitioner in various places on the station premises, including the mens' room, the employee break room, and the security hut. When the search for Petitioner was unsuccessful, Thebner went back to the bus and pounded louder on

the bus. This time he observed Petitioner waking up from sleeping in one of the passenger seats in the bus. Thebner told Petitioner that Petitioner was not supposed to be sleeping and Petitioner denied sleeping. Thebner then told Petitioner to drive to the airport and pick up the two waiting Hertz customers. Petitioner promptly complied and went to pick up the waiting Hertz customers.

6. Before the end of the shift, Thebner wrote a report about the incident in which customers had to wait because Petitioner was asleep and could not be found. Thebner wrote the report because of Petitioner's conduct, which was contrary to company work rules. Thebner's decision to write the report had nothing to do with Petitioner's race.

7. At all times material to this case, Michael Badders was the City Manager for the Hertz station at the West Palm Beach airport. Badders was the person to whom Thebner reported. On April 19, 2005, Badders received Thebner's report about the incident in which customers had to wait because Petitioner was asleep and could not be found. On April 20, 2005, Badders held a meeting with Petitioner and with a shop steward from Petitioner's union. During that meeting Petitioner denied being asleep during the incident described above. Petitioner also denied hearing the radio calls telling him there were customers waiting to be picked up.

8. On April 20, 2004, Badders delivered a memorandum to Petitioner advising Petitioner that he was being suspended pending investigation. The substance of the memorandum read as follows: "You are hear [sic] by suspended pending investigation of violation of Company Rules and Regulations. Understand that based on the results of the investigation a determination will be made as to the status of your employment. Disciplinary action up to and including termination may result."

9. By letter dated April 23, 2004, Badders advised Petitioner as follows: "Your employment with the Hertz Corporation has been terminated effective immediately for violation of rules and regulations. Please return your uniforms when you pick up your last check."

10. Prior to the events in the early morning hours of April 17, 2004, Petitioner had already been through several steps of the Hertz progressive discipline policy as a result of several instances of prior breaches of Hertz work rules and policies. The termination of Petitioner's employment was consistent with established Hertz disciplinary policies applicable to all employees. Hertz has previously terminated the employment of another courtesy bus driver at its West Palm Beach facility who was discovered sleeping while he was supposed to be on duty.[1]

11. On one or more occasions Petitioner, in his capacity as Alternate Shop Steward of Teamsters Local Union #390, engaged in activity that was probably protected activity under the National Labor Relations Act, but there is no persuasive evidence that Petitioner engaged in any activity protected by Chapter 760, Florida Statutes.[2] Specifically, there is no persuasive evidence that, as asserted in his original charge, Petitioner "had to bring to the company's attention its discriminatory practices toward Black employees."

CONCLUSIONS OF LAW

12. The Florida Civil Rights Act of 1992 (Act) is codified in Sections 760.01 through 760.11, Florida Statutes. "Because th[e] [A]ct is patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2, federal case law dealing with Title VII is applicable." Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

13. Among other things, the Act makes certain acts "unlawful employment practices" and gives the FCHR the authority, if it finds, following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, that such an "unlawful employment practice" has occurred, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." §§ 760.10 and 760.11(6), Fla. Stat.

14. To obtain such relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, "within 365 days of the alleged violation," file a complaint ("contain[ing] a short and plain statement of the facts describing the violation and the relief sought") with the FCHR, the EEOC, or "any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80." § 760.11(1), Fla. Stat. "[O]nly those claims that are fairly encompassed within a [timely-filed complaint] can be the subject of [an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes]" and any subsequent FCHR award of relief to the complainant. Chambers v. American Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994).

15. The "unlawful employment practices" prohibited by the Act include those described in Section 760.10(1)(a) and (7), Florida Statutes, which provide as follows:

> It is an unlawful employment practice for an employer:
>
> (1)(a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> * * *

> (7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

16. As noted above, Section 760.10(7), Florida Statutes, makes it an "unlawful employment practice" for an employer to retaliate against an employee "because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section." "To establish a prima facie case of [such] retaliation, a plaintiff must show that (1) he engaged in a statutorily protected expression; (2) he suffered an adverse employment action; and (3) there is some causal relationship between the two events." Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d at 507. In this case, there is no persuasive evidence that Petitioner engaged in any expression protected by Chapter 760, Florida Statutes. Absent proof of such expression, it is impossible to prove that the employer retaliated against an employee for engaging in activities protected by Chapter 760, Florida Statutes. Therefore, so much of the charge as is based on

allegations of retaliation should be dismissed for failure of proof.

17. A complainant, like Petitioner, alleging that he was the victim of intentional employment discrimination in violation of the Act, has the burden of proving, at the administrative hearing held on his allegations, that such discrimination occurred. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996)("'The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."'); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974)("[T]he burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'"); and Hong v. Children's Memorial Hospital, 993 F.2d 1257, 1261 (7th Cir. 1993)("To ultimately prevail on a disparate treatment claim under Title VII, the plaintiff must prove that she was a victim of intentional discrimination.").

18. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001). "Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference

or presumption." King v. La Playa-De Varadero Restaurant, No. 02-2502, 2003 WL 435084 *3 n.9 (Fla. DOAH 2003)(Recommended Order). "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor. . . . If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).

19. "[D]irect evidence of intent is often unavailable." Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

20. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the "shifting burden framework established by the [United States] Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67

L. Ed. 2d 207 (1981)" is applied. "Under this framework, the [complainant] has the initial burden of establishing a prima facie case of discrimination. If [the complainant] meets that burden, then an inference arises that the challenged action was motivated by a discriminatory intent. The burden then shifts to the [employer] to 'articulate' a legitimate, non-discriminatory reason for its action.[3] If the [employer] successfully articulates such a reason, then the burden shifts back to the [complainant] to show that the proffered reason is really pretext for unlawful discrimination." Schoenfeld v. Babbitt, 168 F.3d at 1267 (citations omitted.).

21. Under no circumstances is proof that, in essence, amounts to no more than mere speculation and self-serving belief on the part of the complainant concerning the motives of the employer sufficient, standing alone, to establish a prima facie case of intentional discrimination. See Lizardo v. Denny's, Inc., 270 F.3d 94, 104 (2d Cir. 2001)("The record is barren of any direct evidence of racial animus. Of course, direct evidence of discrimination is not necessary. . . . However, a jury cannot infer discrimination from thin air. Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient.")(citations omitted.); Reyes v. Pacific Bell, 21 F.3d 1115 (Table), 1994 WL 107994 **4 n.1 (9th Cir.

1994)("The only such evidence [of discrimination] in the record is Reyes's own testimony that it is his belief that he was fired for discriminatory reasons. This subjective belief is insufficient to establish a prima facie case."); Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991)("Little points to his own subjective belief that age motivated Boyd. An age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value."); Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983)("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief."); Rouillard v. Potter, 2003 WL 21026814*9 (D. Minn. 2003)("A plaintiff's subjective belief or speculation that statements are discriminatory does not establish a claim of hostile work environment."); Coleman v. Exxon Chemical Corp., 162 F. Supp. 2d 593, 622 (S.D. Tex. 2001)("Plaintiff's conclusory, subjective belief that he has suffered discrimination by Cardinal is not probative of unlawful racial animus."); Cleveland-Goins v. City of New York, 1999 WL 673343 *2 (S.D. N.Y. 1999)("Plaintiff has failed to proffer any relevant evidence that her race was a factor in defendants' decision to terminate her. Plaintiff alleges nothing more than that she 'was the only African-American man [sic] to hold the position of administrative assistant/secretary at Manhattan

Construction.' (Compl.¶ 9.) The Court finds that this single allegation, accompanied by unsupported and speculative statements as to defendants' discriminatory animus, is entirely insufficient to make out a prima facie case or to state a claim under Title VII."); Umansky v. Masterpiece International Ltd., 1998 WL 433779 *4 (S.D. N.Y. 1998)("Plaintiff proffers no support for her allegations of race and gender discrimination other than her own speculations and assumptions. The Court finds that plaintiff cannot demonstrate that she was discharged in circumstances giving rise to an inference of discrimination, and therefore has failed to make out a prima facie case of race or gender discrimination."); and Lo v. F.D.I.C., 846 F. Supp. 557, 563 (S.D. Tex. 1994)("Lo's subjective belief of race and national origin discrimination is legally insufficient to support his claims under Title VII.").

22. In the instant case, Petitioner failed to meet his burden of proving, at the administrative hearing, that Hertz committed the "unlawful employment practices" alleged in the employment discrimination charges that are the subject of this case.

23. To prove that he was discriminated against by Hertz managers, Petitioner did not present any testimony other than his own. Petitioner, however, was not a credible witness. Hertz presented convincing evidence, in the form of testimony

from Mr. Thebner and Mr. Badders, that not only established that there were legitimate nondiscriminatory reasons for Petitioner's termination, but that also cast serious doubt on the credibility of Petitioner's entire testimony (even those portions that were not directly contradicted by Hertz' evidentiary presentation).[4] See Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652, 655 (Fla. 5th DCA 1998)(Dauksch, J., specially concurring)("[T]he trier of fact is never bound to believe any witness, even a witness who is uncontradicted."); Maurer v. State, 668 So. 2d 1077, 1079 (Fla. 5th DCA 1996)("A judge acting as fact-finder is not required to believe the testimony of police officers in a suppression hearing, even when that is the only evidence presented; just as a jury may disbelieve evidence presented by the state even if it is uncontradicted, so too the judge may disbelieve the only evidence offered in a suppression hearing."); and Bellman v. Yarmark Enterprises, Inc., 180 So. 2d 663, 664 (Fla. 3d DCA 1965)("The two principal witnesses relied upon by appellant for the proof of usury were substantially impeached and we cannot say that the trial court was bound to accept their testimony. A chancellor as the 'finder of fact' may find a witness who has been impeached completely unworthy of belief, and in such circumstances it is within his province to reject such testimony.").

24. The record in this case is bereft of any credible evidence that Petitioner was subjected to any adverse employment action by his supervisors that was based on any Section 760.10-protected status he enjoyed at the time or any Section 760.10-protected activity in which he had engaged. While Petitioner may sincerely and genuinely believe that he was so victimized, such a good faith belief, unaccompanied by any persuasive supporting proof, is simply insufficient to establish that such intentional discrimination occurred.

25. In view of the foregoing, no "unlawful employment practice" should be found to have occurred, and the employment discrimination charges that are the subject of this case should therefore be dismissed.

RECOMMENDATION

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

RECOMMENDED that the FCHR issue a final order in this case finding that Hertz is not guilty of any of the "unlawful employment practices" alleged by Petitioner and dismissing the Petition for Relief.

DONE AND ENTERED this 5th day of October, 2005, in Tallahassee, Leon County, Florida.

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

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 2005.

ENDNOTES

1/ The evidence in this case does not indicate the race or gender of the other bus driver whose employment was terminated for sleeping.

2/ All citations to the Florida Statutes are to the current version of the statutes. At the time of the events from which this case arises, all material portions of Chapter 760, Florida Statutes, were the same as the current version of the statutes.

3/ "To 'articulate' does not mean 'to express in argument.'" Rodriguez v. General Motors Corporation, 904 F.2d 531, 533 (9th Cir. 1990). "It means to produce evidence." Id.

4/ Of specific significance in this regard is the fact that at several different times Petitioner gave several different versions of what he was doing in the bus while Thebner was looking for him.

COPIES FURNISHED:

Donald J. Brown
Post Office Box 210651
Royal Palm Beach, Florida 33421

David B. Friedman, Senior Staff Counsel
The Hertz Corporation
225 Brae Boulevard
Park Ridge, New Jersey 07656

John W. Campbell, Esquire
Constangy, Brooks & Smith, LLC
100 West Kennedy Boulevard, Suite 500
Post Office Box 1840
Tampa, Florida 33601-1840

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 323301

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 323301

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.