STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAWRENCE HJORTSBERG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-3120
	)	
GREAT BAY DISTRIBUTORS, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 30, 2005, in New Port Richey, Florida, before Fred L. Buckine, Administrative Law Judge of the Division of Administrative Hearings (DOAH). However, Judge Buckine retired from DOAH prior to the completion of the Recommended Order in this matter. Therefore, pursuant to Subsection 120.57(1)(a), Florida Statutes (2005), the undersigned Administrative Law Judge was assigned to complete the Recommended Order. The entire record has been reviewed by the undersigned in accordance with applicable law.

APPEARANCES

For Petitioner: Angela E. Outten, Esquire
Reeser, Rodnite, Outten, and
Zdravko, P.A.
3411 Palm Harbor Boulevard,
Suite A
Palm Harbor, Florida 34683

For Respondent: Thomas Martin Gonzalez, Esquire
Thompson, Sizemore & Gonzalez
Post Office Box 639
Tampa, Florida 33601

STATEMENT OF THE ISSUE

Whether Petitioner's termination from employment by Respondent on November 12, 2004, for Petitioner's refusal to take a DNA test to affirmatively establish the paternity of a child he wanted to add to his company-provided insurance coverage was discriminatory in violation of the Florida Civil Rights Act, Chapter 760, Florida Statutes (2004).

PRELIMINARY STATEMENT

On January 18, 2005, Petitioner, Lawrence Hjortsberg, filed a Charge of Discrimination against Respondent, Great Bay Distributors, Inc., with the Florida Commission on Human Relations (FCHR). Petitioner alleged discrimination based on his gender (male) and marital status (divorced and unmarried).

The charge alleged that Respondent discriminated against Petitioner because "on or about October 12, 2004, [Petitioner] was told to have a DNA paternity test performed on his daughter and on or about November 12, 2004, [Petitioner] was terminated from [his] employment for not having the [DNA] paternity test performed."

On June 8, 2005, the Office of Employment Investigations concluded, "[T]here is reasonable cause to believe that

Respondent [Great Bay Distributors, Inc.] unlawfully discriminated against Complainant [Lawrence Hjortsberg] based upon Complainant's gender [male] and marital status." Nonetheless, on July 20, 2005, FCHR issued a "No Cause" determination.[1]

Because of the time lapse from January 18, 2005, to July 20, 2005, Petitioner filed a complaint in Circuit Court seeking redress for his discrimination claims. Petitioner's claim was filed pursuant to Subsection 760.11(8), Florida Statutes (2004), which permits an aggrieved party to elect civil or administrative remedies if FCHR failed to issue a cause determination within 180 days of filing a charge of discrimination.

When Petitioner filed his civil suit, he was unaware that FCHR had entered its determination. The issue of pursuing relief in two forums, circuit court and DOAH, was raised by motion of Respondent. During the pre-hearing telephone conference on all pending motions, the Administrative Law Judge concluded that FCHR's determination was timely filed, and Petitioner could properly seek an administrative hearing pursuant to Subsection 760.11(7), Florida Statutes (2005). The parties agreed that Petitioner's administrative action would go forward, and his civil suit would be dismissed.

On September 18, 2005, Petitioner filed his Petition for Relief, requesting an administrative hearing with DOAH. On September 20, 2005, Petitioner voluntarily dismissed his civil suit in the Sixth Judicial Circuit Court of Pasco County, Florida.

At the final hearing on November 30, 2005, Petitioner testified on his own behalf and presented the testimony of Sandra Ho, Director of Human Resources for Respondent; and offered 17 exhibits, of which 16 were accepted into evidence. Respondent presented the testimony of two witnesses: Sandra Ho and Mr. Scott Penland, Director of Warehouse Operations for Respondent and Petitioner's immediate supervisor. Petitioner's request for official recognition of Sections 382.013 and 742.10, Florida Statutes (2005), was granted.

At the conclusion of Petitioner's case-in-chief, counsel for Respondent moved for Summary Judgment (or Summary Recommended Order) based upon Petitioner's failure to establish a prima facie case without waiving presentation of Respondent's case-in-chief. The motion was taken under advisement until all evidence was entered in the record. It appearing that at least a prima facie case was established by Petitioner, the motion is hereby denied.

On December 20, 2005, the Transcript of this hearing was filed. An Agreed Motion for Extension of Time for the Parties

to Serve Proposed Recommended Orders was filed, and, by Order of December 27, 2005, the motion for extension of time was granted, requiring the proposed recommended orders to be filed no later than January 9, 2006. On January 9, 2006, Petitioner and Respondent filed Proposed Recommended Orders that were considered by the undersigned.

FINDINGS OF FACT

1. Petitioner was employed by Respondent from May 1998 until his termination on November 12, 2004. Petitioner had performed his duties adequately during his employment period and had no major disciplinary reports in his record.

2. Petitioner was at the time of his termination from employment a single, divorced, white male, and he was living with his girlfriend, Shannon Mitchell.

3. On September 28, 2004, Petitioner received a message while he was at work that his girlfriend had called and was in distress, purportedly suffering from back pains. Petitioner requested and was given permission to go home to attend to her.

4. Upon arrival at home, Petitioner discovered that his girlfriend had in fact given birth to a child. Petitioner may or may not have known about the birth before he left work; his testimony on that issue was contradictory. Petitioner had only learned of his girlfriend's pregnancy about one week before the

birth despite the fact they had lived together for almost a year.

5. Petitioner notified Respondent about the birth the next day (September 29) in accordance with company policies. He also requested and was granted leave from work. The child was immediately added to Petitioner's health insurance coverage in accordance with Respondent's normal practice.

6. Even though Respondent added the child to Petitioner's family insurance coverage, there were several concerns about the unusual circumstances surrounding Petitioner's reporting of the birth, to wit: That he didn't tell his employer about the birth when he left to go home that day even though he likely knew it had occurred; that he represented a lack of knowledge about the pregnancy even though he was living with the child's mother; that the hospital records did not list Petitioner as the father.

7. Respondent's insurance plan is self-funded and is administered directly by management of the company. Each employee's cost of insurance is determined by the prior year's costs and expenses. The company pays about 99.5 percent of the employee's cost; the employee pays the remainder plus the cost of coverage for family members. Proper administration of the health plan is therefore important to both management and employees alike.

8. Respondent employs over 250 people. The employee handbook is silent on the degree or kind of proof necessary to establish paternity of a child for insurance purposes. Neither Respondent nor its insurance program has an established policy requiring employees to obtain a paternity test in order to prove relationship to their child. There is no prohibition against an unmarried person adding his or her child and, in fact, the company has provided benefits for such children.

9. It is not common for Respondent to ask an employee to submit to a DNA examination in order to establish paternity for insurance coverage purposes. The only other time such a test had been required was for an unmarried male employee who was not able to provide a birth certificate for his child showing he was the father. That situation, like the present matter, had certain unusual facts associated with it.

10. While working for the company during the years of 1998 to 2003, Petitioner was married. During that time he and his wife had two children, both of whom were added to his family insurance coverage. He was not required to provide proof of paternity for those children other than a birth certificate.

11. Based upon the unusual circumstances regarding Petitioner's reporting of his most recent child's birth, Respondent demanded further proof of paternity. On October 12, 2004, Respondent's human resources director, Sandra Ho, asked

Petitioner to have a DNA test performed and to provide Respondent with the results on or before November 12, 2004. Respondent did not offer to pay for the required test.

12. Petitioner acknowledged receipt of this demand from his employer which included an ultimatum regarding his continued employment should he fail to comply.

13. In response to the request for proof of paternity, Petitioner provided Respondent a Social Security document for the child and a hospital discharge notice for Shannon Mitchell. Neither of these documents listed Petitioner as the child's father.

14. On or about November 10, 2004 (two days prior to the DNA test deadline), Petitioner provided Respondent with a copy of the child's birth certificate listing him as the father. He had filled out "paperwork" at the hospital to obtain the birth certificate. There was no evidence in the record as to what the paperwork entailed. Respondent had accepted birth certificates as proof of paternity for other employees.

15. Petitioner did not obtain or provide to Respondent a DNA test result. In fact, he did not make any effort to obtain such a test. He did discuss with Respondent his concerns about the costs of such a test.

16. Based upon Petitioner's refusal to comply with his employer's directives, he was terminated from employment on November 15, 2004, effective November 12, 2004.

17. The basis for termination was Petitioner's insubordination and refusal to follow the orders of his employer. Petitioner supervised approximately six people on a regular basis. Respondent was concerned about Petitioner's continued ability to properly supervise others while he was refusing to cooperate with management.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the subject matter of and the parties to this proceeding in accordance with Subsection 120.57(1), Florida Statutes (2005).

19. The Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes (2004), guards against discrimination in the workplace. The Act, among other things, forbids the discriminatory firing of an employee.

20. Specifically, Subsection 760.10(1)(a), Florida Statutes (2004), states that it is an "unlawful employment practice for an employer ... to discharge ... any individual because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status." Respondent, Great Bay Distributors, Inc., is an "employer" as defined in Subsection 760.02(7), Florida Statutes (2004). Marital status

discrimination arises under the Florida Civil Rights Act only when the adverse employment action occurs on the basis of that person's state of marriage, i.e., married, single, divorced, widowed, or separated. See Donato v. American Telephone and Telegraph, 767 So. 2d 1146 (Fla. 2000)

21. Florida courts have determined that federal case law applies to claims arising under Florida's Civil Rights Act and, as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) applies to claims arising under Section 760.10, Florida Statutes (2004). Chanda v. Engelhard/ICC, 234 F.3d 1219, 1221 (llth Cir. 2000); Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437 (4th DCA 2003); The Florida State University v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1997); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

22. The McDonnell shifting burden analysis is as follows: (1) Petitioner must prove a prima facie case of discrimination by the preponderance of the evidence; (2) if Petitioner proves a prima facie case, the burden shifts to the defendant who must "articulate some legitimate, nondiscriminatory reason for the employee's rejection" to rebut Petitioner's presumption of a

prima facie case. McDonnell, 411 U.S. at 802, 93 S. Ct. at 1824.

23. Petitioner retains the ultimate burden of persuasion in an employment discrimination case. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

24. Petitioner presented neither direct evidence of discriminatory intent nor statistical evidence demonstrating a pattern of such intent. Thus, only circumstantial evidence, if any, can be applied to analyze Petitioner's claim under the McDonnell framework. Early v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990).

25. Petitioner is a member of a protected class.

26. Termination is considered adverse employment action because it is an ultimate decision regarding employment. Gupta v. Fla. Bd. Of Regents, 212 F.3d 571, 587 (11th Cir. 2000); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

27. The burden of proof in this case is on Petitioner to prove by a preponderance of the evidence the affirmative of the issue, i.e., that Respondent committed an unlawful employment practice. Fla. Dept. of Transportation v. J.W.C. Co. 396 So. 2d 778 (Fla. 1st DCA 1981). In order to establish a prima facie case of disparate treatment, Petitioner must show that he was a qualified member of a protected class and was subjected to an

adverse employment action in contrast to similarly situated employees outside the protected class. Maniccia v. Brown, 171 F.3d 1364 (11th Cir. 1999). In the present case, Petitioner attempted to meet his burden by showing that no married male employee was required to submit to a DNA test to prove paternity of their claimed dependents. However, Petitioner's unique circumstances cannot be absolutely compared to those of other employees so he did not meet the "similarly situated" standard. See Maniccia at 1368-1369, citing Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989).

28. Assuming this initial burden was met, the burden then shifted to the employer to elucidate a legitimate, nondiscriminatory reason for the action it took. McDonnell Douglas Corp v. Green, 411 U.S. at 802. It is clear from the evidence that the employer's motivation for terminating Petitioner was not related to his marital status. Rather, Respondent set forth a clearly stated basis for termination: Petitioner failed to respond to direct orders and was insubordinate. Recognizing that Petitioner served as a supervisor to other employees, Respondent had a legitimate concern about how Petitioner would advise those employees to respond to management. The action had nothing to do with Petitioner's marital status or his gender.

29. Thus, the burden shifts back to Petitioner to prove that the reason espoused by the employer was a pretext for illegal discrimination. McDonnell Douglas, 411 U.S. at 804-805 and Burdine, 450 U.S. at 256. Petitioner did not rebut or call into question any of his employer's bases for the action taken. He did not establish that any non-protected employee was allowed to remain employed despite acting insubordinately to management. The record contains ample evidence of Respondent's stated requirement that Petitioner obtain a paternity test, his sworn acknowledgement of the requirement, and his decision not to comply. This body of evidence rebuts any presumption of discrimination created by a prima facie case.

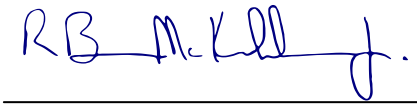
30. Petitioner correctly asserts that a birth certificate does create a presumption of paternity for an unmarried parent. See § 742.10, Fla. Stat. (2004). It may be assumed by way of circumstantial evidence in this case that Petitioner executed an affidavit affirming his paternity in accordance with the requirements of Section 382.13, Florida Statutes (2004). Respondent could have relied upon the birth certificate as conclusive evidence of paternity just as it had done in other instances (for both married and single employees). However, this conclusion is irrelevant due to the fact that Petitioner was terminated for a reason not associated with paternity of the child.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 11th day of July, 2006, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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 11th day of July, 2006.

ENDNOTE

1/ In the No Cause determination letter, the Executive Director apparently made a scrivener's error in the last paragraph, wherein he stated "[I]t is my determination that reasonable cause does exist to believe that unlawful employment practice has occurred." However, that sentence is contrary to the Conclusion and to the stated Determination: No Cause finding.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Thomas Martin Gonzalez, Esquire
Thompson, Sizemore & Gonzalez
Post Office Box 639
Tampa, Florida 33601

Angela E. Outten, Esquire
Reeser, Rodnite, Outten and Zdravko, P.A.
3411 Palm Harbor Boulevard, Suite A
Palm Harbor, Florida 34683

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.