

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BILLY J. FORD,)
)
 Petitioner,)
)
 vs.) Case No. 05-4055
)
 HANSON PIPE AND PRODUCTS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on May 5, 2006, in Panama City, Florida.

APPEARANCES

For Petitioner: Jerry Girley
Qualified Representative
1350 Vickers Lake Drive
Ocoee, Florida 34761

For Respondent: Ganesh Chatani, Esquire
Fowler White Boggs Banker P.A.
101 North Monroe Street, Suite 1090
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment action with regard to Petitioner Billy J. Ford.

PRELIMINARY STATEMENT

Petitioner Billy J. Ford (Mr. Ford) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (the Commission), on March 30, 2005. He complained of discrimination based on race by Respondent, Hanson Pipe and Products (Hanson Pipe). On May 25, 2005, he filed an Amended Complaint of Discrimination which alleged retaliation. The Commission, on September 26, 2005, issued its "Notice of Determination: No Cause." Mr. Ford timely filed a Petition for Relief that was forwarded to the Division of Administrative Hearings and filed on November 3, 2005.

The matter was set for hearing on February 3, 2006, in Panama City, Florida. Mr. Ford requested a continuance and the case was re-scheduled for March 3, 2006. Thereafter, Hanson Pipe requested a continuance and the case was set for May 5, 2006, and was heard as scheduled.

At the hearing, Mr. Ford testified in his own behalf and presented the testimony of one witness. Hanson Pipe presented the testimony of four witnesses. The parties stipulated to the admission of Joint Exhibit Nos. 1 through 23 and they were admitted into evidence.

A Transcript was filed on May 30, 2006. After the hearing, Respondent and Petitioner filed their Proposed Findings of Fact and Conclusions of Law on June 8 and 9, 2006, respectively.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. Mr. Ford is an African-American living in Panama City, Florida. He was born on December 22, 1967.

2. Hanson Pipe is a company that manufactures pre-cast concrete pipe and other structures. It has its headquarters in Charlotte, North Carolina. Some of these pipes and structures manufactured by Hanson Pipes are fabricated for purchase by the Florida Department of Transportation (DOT). Hanson Pipe's Panama City Plant is in the company's eastern region. Hanson Pipe has a total of 61 plants and has 3,500 employees in its eastern region.

3. The plant in Panama City at which Mr. Ford worked during times pertinent, which eventually became a Hanson Pipe facility, was acquired from WPC of Florida, Inc. (WPC) by Hanson Pipe, on July 17, 2004. The principal of WPC was George Wright (Mr. Wright). The plant manager, during times pertinent, was Michael Bascetta, a white person. His assistant was Renwick Chisolm, an African-American.

4. Mr. Ford's first job with WPC was operating a forklift. He would receive printed directions and would load products onto trucks in accordance with those directions.

5. Mr. Wright eventually promoted Mr. Ford to yard foreman. As such, he supervised four people and checked newly manufactured structures and turned in paperwork at the end of the work day.

6. Subsequently he was promoted to Quality Control Technician. As Quality Control Technician (QC Technician), Mr. Ford would ensure that designated standards were met, including standards required by DOT. However, the stamp denoting acceptability would have to be applied by Gracie Dowdy or Terry Pittinger because they were certified quality control technicians, and Mr. Ford was not.

7. When Hanson Pipe took over the WPC's Panama City plant, procedures remained largely unchanged, although some employees noticed that Hanson Pipe was more "strict." One procedure that was changed was the quality control procedure.

8. Hanson Pipe recognized that only American Concrete Institute certified persons could sign off on product quality when the product was destined for DOT use and believed that the method used by WPC did not conform to DOT requirements. Hanson Pipe understood that the failure to comply with state-mandated procedures could result in DOT's District Materials Office withdrawing the plant from the list of qualified plants. This would result in the refusal of DOT to purchase their product.

9. DOT publishes a Materials Manual that sets forth requirements for contractors selling materials to it. Section 6.3.7.2(D) of the DOT Materials Manual requires plants such as the Hanson Pipe plant in Panama City to have enough quality control technicians to "maintain adequate inspection and testing during the production of structures for Department projects." DOT requires that these technicians be certified as American Concrete Institute (ACI) Field Testing Technician, Grade I. DOT requires that all product bought by them have an approval stamp affixed by the ACI-certified technician who inspects the product.

10. In order to adequately comply with this requirement, Hanson Pipe, through plant manager Bascetta, informed Mr. Ford that he would have to pass the ACI examination so that he could become certified. Although Mr. Bascetta was the person who informed Mr. Ford of this, the decision was made by Dana Butterfield, the Quality Control Manager for 20 Hanson Pipe facilities. Mr. Butterfield's office is in Green Cove Springs, Florida. There was no evidence adduced that indicated Mr. Butterfield was aware of Mr. Ford's race.

11. Mr. Ford was given books to help him prepare for the examination and time to study them. Hanson Pipe paid for Mr. Ford's travel to Orlando to take the test, his testing fees, and his hotel expenses. He took the test September 11, 2004,

but did not pass it. Hanson pipe paid Mr. Ford's expenses to take the test a second time on November 6, 2004, but he failed it again.

12. When Mr. Butterfield learned on December 6, 2004, that Mr. Ford had failed the test yet again, he told Mr. Bascetta that Mr. Ford was no longer qualified to be quality control technician. Mr. Bascetta, not wishing to discharge Mr. Ford, offered him a position as a forklift driver at a salary of \$10.56 per hour. Mr. Ford accepted this reduction from his former \$13 per hour.

13. Mr. Bascetta designated Montie Foster, a white employee, as quality control technician. He was informed that he would have to take and pass the ACI certification examination as a condition of holding that position. Mr. Foster took the examination twice, failed it twice, and resigned. Justin Perky was thereafter hired. He took the examination and passed it. He therefore was able to continue in the position of quality control technician.

14. Mr. Ford believed his demotion represented a form of discrimination and harassment, and his attitude began to deteriorate as is demonstrated by the events related hereinafter.

15. On December 8, 2005, Mr. Ford called Webber Ferguson, Hanson Pipes's Employee Relations Manager, on the telephone.

Mr. Ferguson works in Hanson Pipe's Charlotte, North Carolina office. Mr. Ferguson provides employee relation support for 61 Hanson Pipe plants in the eastern United States. Mr. Ford complained about his demotion and asserted that Mr. Bascetta was mistreating him. He also alleged that he was a victim of discrimination.

16. In response, Mr. Ferguson went to the plant and conducted an investigation. He interviewed Mr. Hanson, Mr. Bascetta, and some of the minority employees. He found no evidence of discrimination. He did not generate a written report because there was insufficient evidence adduced indicating discrimination or mistreatment of employees.

17. Mr. Ford had some unexcused absences and on January 10, 2005, was "written up" for failure to appear for work on a Saturday as he had agreed to do. He responded to this by threatening to call Hanson Pipe's Human Resources Department.

18. On March 21, 2005, Roy Myers was terminated from his job with Hanson Pipe. Mr. Myers bore the working title, "yard foreman," but he was paid the same as Mr. Ford. There was no job description for "yard foreman," and in fact, no job description for any position in Hanson Pipe. Mr. Ford wanted to be the "yard foreman," but Mr. Bascetta did not need a position like that and therefore did not move Mr. Ford into what was a

nonexistent position. Mr. Ford believes this was a manifestation of prejudice.

19. On April 27, 2005, Mr. Ford requested a training topic outline he had signed earlier in the day. By the time Mr. Bascetta took the time to obtain it, he was informed that Mr. Ford had departed the plant.

20. On April 29, 2005, Mr. Bascetta was informed by several employees that Mr. Ford had turned in his uniforms. He did not inform management that he was terminating his employment and indicated to someone that he would return Monday, May 2, 2005. In fact, he never returned. On May 2, 2005, he called the plant office to announce that he had quit.

21. No evidence was adduced that would indicate that Mr. Bascetta is prejudiced toward African-Americans. To the contrary, Mr. Ford said, "I couldn't really say" that Mr. Bascetta was prejudiced. Mr. Ford and other employees would have breakfast with Mr. Bascetta from time to time. Mr. Ford was invited to Mr. Bascetta 's home for a barbeque on one occasion.

22. In the fall of 2005, Mr. Bascetta left Hanson Pipe and opened his own pre-cast concrete operation in Freeport, Florida. He employed Mr. Chisolm as his plant manager. It is unlikely that Mr. Bascetta would seek out and hire an African-American as his plant manager, if he were prejudiced.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) and 760.11(7), Fla. Stat.

24. The Florida Civil Rights Act (the Act), Section 760.01, et seq., is patterned after Title VII of the Federal Civil Rights Act, 42 U.S.C. Section 2000e, et seq. Federal case law interpreting Title VII and similar federal legislation is applicable to cases arising under the Florida Act. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991) and School Board of Leon County v. Weaver, 556 So. 2d 443 (Fla. 1st DCA 1990).

25. Mr. Ford is an "aggrieved person" and Hanson Pipe is an "employer" within the meaning of Section 760.02(10) and (7), Florida Statutes, respectively. Section 760.10(1)(a), Florida Statutes, makes it unlawful for Hanson Pipe to refuse to hire any individual based on that individual's race, handicap, or age.

Discrimination based on race

26. No direct or statistical evidence of race discrimination exists in this case. Therefore a finding of discrimination, if any, must be based on circumstantial evidence.

27. Because there is no credible direct evidence of discrimination, Mr. Ford's claim must be analyzed under the framework established by the United States Supreme Court in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). That framework was reaffirmed and refined by the Court in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993)

28. Under that framework, Mr. Ford must establish a prima facie case of race discrimination. If he accomplishes this, the burden shifts to Hanson Pipe to articulate a legitimate, nondiscriminatory reason for its actions. If Hanson Pipe satisfies its burden, the burden then shifts back to Mr. Ford to prove by a preponderance of the evidence that the proffered reason was merely a pretext for race discrimination. The ultimate burden in this case remains with Mr. Ford.

29. Mr. Ford first has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. See Hicks, 509 U.S. at 506. In order to establish a prima facie case, Mr. Ford must establish that: (1) he is a member of a protected group; (2) he was qualified for the position; (3) he was subject to an adverse employment decision; and (4) after his demotion, the position was filled by a person outside Mr. Ford's protected group. See Combs v. Plantation Patterns, Meadowcraft, Inc., 106 F.3d 1519 (11th Cir.

1997) and School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

30. Mr. Ford failed to establish a prima facie case of discrimination. He did prove that he was a member of a protected group, African-American; and that he was subject to an adverse employment decision, a demotion; and that after his demotion a person outside of Mr. Ford's protected group was hired.

31. However, he did not prove that he was qualified for the position. The position required that the incumbent be a qualified quality control technician. The incumbent in that position was required to be certified as American Concrete Institute (ACI) Field Testing Technician, Grade I. Mr. Ford did not pass the ACI test, which was a prerequisite for certification, so he could not be certified.

32. Assuming arguendo that Mr. Ford proved a prima facie case, Hanson Pipe produced and articulated legitimate, nondiscriminatory reasons for demoting Mr. Ford. These reasons were convincing reasons. Mr. Ford did not demonstrate that these reasons were merely pretextual reasons for discrimination.

Retaliation

33. Retaliation based on a complaint of an unlawful employment practice is addressed by Section 760.10(7), Florida Statutes, which provides that, "It is an unlawful employment

practice for an employer to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section. . . ."

34. Mr. Ford's retaliation claim is based on his claim that he was treated badly by Mr. Bascetta and Hanson Pipe and was denied promotion to an asserted position of "yard foreman" because he complained to Webber Ferguson, Hanson Pipes's Employee Relations Manager, about being demoted.

35. The McDonnell Douglas Corp. v. Green analysis is also the test used to demonstrate that retaliation has occurred. Mr. Ford must first establish a prima facie case of retaliation. Thereafter, the Hanson Pipe may offer legitimate, non-retaliatory reasons for its failure to hire him. If the employer succeeds, Mr. Ford must establish that Hanson Pipe's articulated legitimate reasons were a pretext to mask unlawful retaliation. Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385, 1388 (11th Cir. 1998).

36. To prove a prima facie case of retaliation, Mr. Ford must show the following: that (1) he engaged in statutorily protected expression; that (2) he suffered an adverse employment action, such as not being hired; and that (3) the adverse employment action was causally related to the protected activity. See Harper v. Blockbuster Entertainment Corp., 139

F.3d 1385, 1388 (11th Cir. 1998) and EEOC v. Navy Federal Credit Union, 424 F.3d 397 (4th Cir. 2005).

37. Mr. Ford proved that he engaged in statutorily protected expression in that he complained to Mr. Ferguson about alleged discrimination. He did not, however, suffer an adverse employment action because of his report. His allegation that Mr. Bascetta's motivation in failing to hire him as "yard foreman " because of his report, fails because there was no extant job at Hanson Pipe as "yard foreman."

38. By extension, because there was no adverse employment action as a result of the report, it could not be causally related to the report.

39. Assuming arguendo that a prima facie case has been established, Hanson Pipe has articulated legitimate reasons why it did not put Mr. Ford in a position entitled, "yard foreman." The reason for refusing to do so was grounded in the fact that the position did not exist. No one was put into what at one time was a position, but had subsequently been abolished as a position. Mr. Bascetta simply accomplished those duties himself. Mr. Ford did not prove that the reason for Hanson's Pipe's refusal was pretextual.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Mr. Billy J. Ford's Employment Complaint of Discrimination and Amended Employment Complaint of Discrimination be dismissed.

DONE AND ENTERED this 14th day of June, 2006, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
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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.