STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHNNY PENA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-4136
	)	
AMERICAN AIRLINES,	)	
	)	
Respondent.	)	
	)	
JOSE CASTELLANOS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 05-4139
	)	
AMERICAN AIRLINES,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in these consolidated cases pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings, on February 24, 2006, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioners: Lee Friedland, Esquire
Friedland & Associates, P.A.
4486 Southwest 64th Avenue
Davie, Florida 33314

For Respondent: Christopher P. Hammon, Esquire
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STATEMENT OF THE ISSUE

Whether American Airlines committed the unlawful employment practices alleged in the employment discrimination charges filed by Petitioners and, if so, what relief should Petitioners be granted by the Florida Commission on Human Relations.

PRELIMINARY STATEMENT

On July 1, 2005, Petitioner Jose Castellanos filed an employment discrimination charge with the Florida Commission on Human Relations (FCHR), alleging that American Airlines (American) terminated his employment "based on [his] national origin (Hispanic)." On October 5, 2005, following the completion of its investigation of Mr. Castellanos' charge, the FCHR issued a Notice of Determination: No Cause, advising that a determination had been made that "there [was] no reasonable cause to believe that an unlawful employment practice ha[d] occurred." Mr. Castellanos, on or about November 4, 2005, filed a Petition for Relief with the FCHR. On November 14, 2005, the

FCHR referred the matter to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge to conduct a hearing on the allegations of employment discrimination made by Mr. Castellanos against American. The DOAH Clerk docketed the case as DOAH Case No. 05-4139.

On July 18, 2005, Petitioner Johnny Pena filed an employment discrimination charge with the FCHR, alleging that he was "terminated from [his] position as an Aircraft mechanic at American Airlines based on [his] national origin (Hispanic)." On October 5, 2005, following the completion of its investigation of Mr. Pena's charge, the FCHR issued a Notice of Determination: No Cause, advising that a determination had been made that "there [was] no reasonable cause to believe that an unlawful employment practice ha[d] occurred." Mr. Pena, on or about November 4, 2005, filed a Petition for Relief with the FCHR. On November 14, 2005, the FCHR referred the matter to DOAH for the assignment of an administrative law judge to conduct a hearing on the allegations of employment discrimination made by Mr. Pena against American. The DOAH Clerk docketed the case as DOAH Case No. 05-4136.

On January 9, 2006, American filed an unopposed motion requesting that DOAH Case Nos. 05-4136 and 05-4139 be consolidated. By order issued that same day (January 9, 2006), the motion was granted.

On February 23, 2006, the parties filed a Corrected Joint Prehearing Stipulation, which contained, among other things, the following "[c]oncise [s]tatement of the [n]ature of the [c]ontroversy" and "[c]oncise [s]tatement of [a]dmitted [f]acts":

> I. CONCISE STATEMENT OF THE NATURE OF THE CONTROVERSY
>
> Petitioners were employed as mechanics (Aircraft Maintenance Technicians) at American's maintenance station at the Miami International Airport. They were discharged from employment after they were found to have spent the latter half (about 4 hours) of their overnight work shift on Friday night, July 30, 2004, at a nightclub and about town, while claiming pay as if they had worked this complete shift. Petitioners (both union members) grieved their discharge with American in accordance with the procedures established in their collective bargaining agreement, and the grievance was ultimately heard by a neutral arbitrator. The arbitrator denied Petitioners' grievances after a full evidentiary hearing and ruled that American had terminated their employment for good and just cause.
>
> Petitioners each filed a charge of discrimination against American with the Florida Commission on Human Relations ("FCHR") claiming that they were terminated because of their national origin, Hispanic. After investigation, the FCHR issued a no-cause determination and dismissed the Petitioners' charges. These petitions, now consolidated, follow.
>
> V. CONCISE STATEMENT OF ADMITTED FACTS
>
> 1. Both petitioners were aviation maintenance technicians for American and

worked at Miami International Airport ("MIA").

2. On July 30, 2004, Pena's scheduled shift began at 9:00 p.m., and ended at 5:30 a.m. the next morning.

3. On July 30, 2004, Castellanos' scheduled shift began at 10:30 p.m., and ended at 7:00 a.m. the next morning.

4. Both petitioners badged in at MIA at the start of their scheduled shifts.

5. Both petitioners left MIA at approximately 12:45 a.m. without badging out and without notifying their supervisor that they were leaving.

6. Both petitioners entered a black Ford Explorer and drove several miles to Coconut Grove, Florida.

7. At Coconut Grove, they parked their vehicle, changed out of their work uniforms and into "dress" clothes.

8. Both petitioners entered the Quench nightclub in Coconut Grove at approximately 1:20 a.m.

9. Both petitioners consumed two intoxicating beverages each at Quench.

10. At approximately 2:20 a.m., the petitioners left Quench, returned to their vehicle, and drove to a 24-hour lunchwagon near MIA where they ate sandwiches.

11. Following their meal, they drove back to MIA at approximately 4:40 a.m.

12. Both petitioners were paid as if they worked a full-shift, including those hours spent away from MIA and at Quench nightclub.

13. Petitioners' discharge grievances were denied by a neutral arbitrator after a full hearing, who found that American discharged Petitioners for just cause because they had engaged in timecard fraud.

14. No similarly situated, non-Hispanic aviation technician was treated more favorably than petitioners after engaging in similar conduct.

As noted above, the hearing in these consolidated cases was held on February 24, 2006. Four witnesses testified at the hearing: Mr. Castellanos, Mr. Pena, George Rojas, and Anthony DeGrazia. In addition, 39 exhibits (Petitioners' Exhibits 1 through 3, and Respondent's Exhibits A through JJ) were offered and received into evidence. At the close of the evidentiary portion of the hearing on February 24, 2006, the undersigned established the deadline for filing proposed recommended orders at 30 days from the date of the filing of the hearing transcript with the DOAH.

The Transcript of the final hearing (consisting of two volumes) was filed with the DOAH on March 31, 2006. Accordingly, proposed recommended orders had to be filed no later than Monday, May 1, 2006.

On May 1, 2006, American timely filed a Proposed Recommended Order, which has been carefully considered by the undersigned. To date, Petitioners have not filed any post-hearing submittals.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made to supplement and clarify the extensive factual stipulations set forth in the parties' February 23, 2006, Corrected Joint Prehearing Stipulation[2]:

1. Petitioners are both Hispanic.

2. Hispanics represent a substantial portion of the workforce in American's maintenance department at Miami International Airport (MIA).

3. Among these Hispanic employees in the maintenance department are those who occupy supervisory positions.

4. American's Vice-President for Maintenance, Danny Martinez, is Hispanic.

5. As aviation maintenance technicians for American, Petitioners' job duties, as set forth in the written job description for the position, were as follows:

> In addition to the work specified for the Junior Aviation Maintenance Technician, an Aviation Maintenance Technician's responsibility also includes the following: troubleshooting, individually or with Crew Chief, management or professional direction, disassembly, checking and cleaning, repairing, replacing, testing, adjusting, assembling, installing, servicing, fabricating, taxing or towing airplanes and/or run-up engines, de-icing aircraft, required to maintain the airworthiness of aircraft and all their components while in

> service or while undergoing overhaul and/or modification. Certifies for quality of own workmanship, including signing mechanical flight releases for all work done on field work. In those work positions where stock chasers are not utilized and/or available at the time may chase own parts. May have other Mechanic personnel assigned to assist him/her in completing an assignment. Works according to FAA and Company regulations and procedures and instructions from Crew Chief or supervisor. Completes forms connected with work assignments according to established procedures and communicates with other Company personnel as required in a manner designated by the Company.
>
> Performs the following duties as assigned: cleaning of aircraft windshields; connection/removing ground power and ground start units; pushing out/towing of aircraft and related guideman functions, fueling/defueling, de-icing of aircraft.

6. At all times material to the instant cases, Petitioners were members of a collective bargaining unit represented by the Transport Workers Union of America (TWU) and covered by a collective bargaining agreement between American and the TWU (TWU Contract), which contained the following provisions, among others:

> ARTICLE 28- NO DISCRIMINATION, AND RECOGNITION OF RIGHTS AND COMPLIANCE
>
> (a) The Company and the Union agree to make it a matter of record in this Agreement that in accordance with the established policy of the Company and the Union, the provisions of this Agreement will apply equally to all employees regardless of sex, color, race, creed, age, religious preferences, status as

a veteran or military reservist, disability, or national origin.

(b) The Union recognizes that the Company will have sole jurisdiction of the management and operation of its business, the direction of its working force, the right to maintain discipline and efficiency in its hangars, stations, shops, or other places of employment, and the right of the Company to hire, discipline, and discharge employees for just cause, subject to the provisions of this Agreement. It is agreed that the rights of management not enumerated in this Article will not be deemed to exclude other preexisting rights of management not enumerated which do not conflict with other provisions of the Agreement.

* * *

(e) Copies of the Peak Performance Through Commitment (PPC) Program will be available to all employees upon request. Any changes to the PPC Program will be provided and explained to the TWU prior to implementation.

ARTICLE 29- REPRESENTATION

* * *

(f) The Union does not question the right of the Company supervisors to manage and supervise the work force and make reasonable inquiries of employees, individually or collectively, in the normal course of work. In meetings for the purpose of investigation of any matter which may eventuate in the application of discipline or dismissal, or when written statements may be required, or of sufficient importance for the Company to have witnesses present, or to necessitate the presence of more than the Company supervisor, or during reasonable cause or post accident drug/alcohol testing as

provided in Article 29(h), the Company will inform the employee of his right to have Union representation present. If the employee refuses representation, the supervisor's record will reflect this refusal.

(1) At the start of a meeting under the provisions of Article 29(f), the Company will, except in rare and unusual circumstances, indicate the reason that causes the meeting and then provide an opportunity for the employee and his Union representative to confer for a reasonable period of time. Following that period, the 29(f) meeting will be reconvened and continue until concluded by the supervisor.

(2) Before written notification of discipline or dismissal is given, an employee will be afforded the opportunity to discuss the matter with his supervisor. If he desires, he will have a Union representative in the discussion. . . .

* * *

ARTICLE 30- DISMISSAL

(a) An employee who has passed his probationary period will not be dismissed from the service of the Company without written notification of that action. The notification will include the reason or reasons for his dismissal. Appeal from dismissal will be made, in writing, by the employee within seven (7) calendar days after receiving the notification and will be addressed to the Chief Operating Officer, with a copy to the appropriate Human Resources Office. The Chief Operating Officer will fully investigate the matter and render a written decision as soon as possible, but not later than twelve (12) calendar days following his receipt of the appeal, unless mutually agreed otherwise.

A copy of the written decision will be provided to the Union.

* * *

(b) If the decision of the Chief Operating Officer is not satisfactory to the employee, the dismissal and decision will be appealed in accordance with Article 30(c), provided, however, the appeal must be submitted within twenty (20) calendar days of receipt of the decision rendered by the Chief Operating Officer.

(c) An appeal from the decision of the Chief Operating Officer will be submitted to the appropriate Area Board of Adjustment in accordance with Article 32. . . .

* * *

ARTICLE 31- GRIEVANCE PROCEDURE

(a) An employee who believes that he has been unjustly dealt with, or that any provision of this Agreement has not been properly applied or interpreted, or against whom the Company has issued written disciplinary action, may submit his grievance in person or through his representatives within seven (7) calendar days. The grievance will be presented to his immediate supervisor, who will evaluate the grievance or complaint and render a written decision as soon as possible, but not later than seven (7) calendar days following his receipt of the grievance. . . .

(b) If the written decision of the immediate supervisor is not satisfactory to the employee whose grievance is being considered, it may be appealed within ten (10) calendar to the Chief Operating Officer, with a copy to the appropriate Human Resources Office. The Chief Operating Officer will fully investigate the matter

and will render a written decision as soon as possible, but not later than twelve (12) calendar days, unless mutually agreed otherwise, following his receipt of the appeal. . . .

(c) If the decision of the Chief Operating Officer is not satisfactory to the employee, the grievance and the decision may be appealed to the System Board of Adjustment, as provided for in Article 32.

* * *

ARTICLE 32- BOARD OF ADJUSTMENT

* * *

(c) Area Board of Adjustment, Discipline and Dismissal Cases

* * *

(2) Each Area Board will be composed on one member appointed by the Company, one member appointed by the Union, and a neutral referee acting as Chairman. . . .

* * *

(d) Procedures Generally Applicable to the Boards

* * *

(6) Employees and the Company may be represented at Board hearing by such person or persons as they may choose and designate. Evidence may be presented either orally or in writing, or both. The advocates will exchange all documents they may enter and the names of witnesses they may call in their direct case not later than ten (10) calendar days prior to the date set for hearing. Nothing in this paragraph will require either advocate to present the documents or the witnesses provided above

during the course of the hearing. The advocates will not be restricted from entering documents or calling witnesses that become known subsequent to the ten (10) ten calendar day exchange, provided a minimum of forty-eight (48) hours notice is provided to the other party and a copies are submitted to the other party prior to the presentation of the direct case. The party receiving the late document or witness has the option to postpone the hearing in light of the new document or witness.

(7) Upon the request of either party to the dispute, or of two (2) Board members, the neutral referee will summon witnesses to testify at Board hearing. The Company will cooperate to ensure that all witnesses summoned by the board will appear in a timely fashion. Reasonable requests by the Union for employee witnesses will be honored. The requests for witnesses will normally not be greater than the number, which can be spared without interference with the service of the Company. Disputes arising from this provision will be immediately referred to the Director of the Air Transport Division and the Vice President-Employee Relations, or their respective designees, for resolution.

(8) A majority of all members of a Board will be sufficient to make a finding or a decision with respect to any dispute properly before it, and such finding or decision will be final and binding upon the parties to such dispute. . . .

* * *

ARTICLE 36- MEAL PERIODS

(a) Meal periods will be thirty minutes, except when a longer period is agreed upon between the parties.

> (b) Meal periods will be scheduled to begin not earlier than three (3) hours after commencement of work that day and not later than five hours after commencement of work that day. The commencement of work is from the start of the employee's regular shift. If an employee is not scheduled for a meal period within the foregoing time span, the meal period will be provided immediately before or after it. In the event that a meal period has not been provided in accordance with the foregoing, the employee is then free, if he so desires, to take his meal period.

7. At all times material to the instant cases, American had Rules of Conduct for its employees that (as permitted by Article 28(b) of the TWU Contract) were applicable to TWU-represented bargaining unit members, including Petitioners. These Rules of Conduct provided, in pertinent part, as follows:

> As an American Airlines employee, you can expect a safe and productive workplace that ensures your ability to succeed and grow with your job. The rules listed below represent the guidelines and principles that all employees work by at American.
>
> Attendance
>
> * * *
>
> 3. During your tour of duty, remain in the area necessary for the efficient performance of your work.
>
> 4. Remain at work until your tour of duty ends unless you are authorized to leave early.
>
> * * *

> 17. Work carefully. Observe posted or published regulations.
>
> * * *
>
> Personal Conduct
>
> * * *
>
> 34. Dishonesty of any kind in relations with the company, such as theft or pilferage of company property, the property of other employees or property of others entrusted to the company, or misrepresentation in obtaining employee benefits or privileges, will be grounds for dismissal and where the facts warrant, prosecution to the fullest extent of the law. Employees charged with a criminal offense, on or off duty, may immediately be withheld from service. Any action constituting a criminal offense, whether committed on duty or off duty, will be grounds for dismissal. (Revision of this rule, April 10, 1984)
>
> * * *
>
> Violations of any of the American Airlines Rules of Conduct (listed above) . . . could be grounds for immediate termination depending of the severity of the incident or offense and the employee's record. . . .

8. At all times material to the instant cases, American had a Peak Performance Through Commitment Policy (PPC Policy) to deal with employee performance and disciplinary problems. The policy, which (as permitted by Article 28(b) of the TWU Contract) was applicable to TWU-represented bargaining unit members, including Petitioners, provided, in pertinent part, as follows:

Peak Performance Through Commitment (PPC) is a program that fosters ongoing communication between managers and employees. It encourages managers . . . to regularly recognize outstanding performance and to work together with employees to address and correct performance issues fairly.

For the few employees whose performance does not respond to regular coaching and counseling, the following steps advise them that continued performance problems have serious consequences, ultimately leading to termination:

-First Advisory for employees with problem performance or conduct who do not respond to coaching or counseling.

-Second Advisory for employees whose performance fails to respond to initial corrective steps.

-Career Decision Advisory for employees whose problem performance or conduct warrants termination. They are given a paid Career Decision Day away from work to consider their future and continued employment with American Airlines.

-Final Advisory for employees whose problem performance or conduct requires termination, or those who have failed to honor the Letter of Commitment signed after their Career Decision Day.

Please note that steps can sometimes be skipped, in instances where the nature of the conduct is very serious.

It is your responsibility as an employee to know the company's rules of conduct and performance standards for your job, and to consistently meet or exceed those standards. In the event that your performance does not measure up to the company's expectations,

> your manager will work with you to identify the problem and outline steps to correct it.
>
> * * *
>
> SERIOUS INCIDENTS OR OFFENSES
>
> Some violations of our guiding principles and rules of conduct will result in immediate termination. For example, insubordination, violating our alcohol and drug policy, abusing travel privileges, aircraft damage, violations of the work environment policy, and job actions could be grounds for immediate termination, depending on the severity of the incident and the employee's record. Hate-related conduct and dishonesty will always result in termination. In cases when immediate termination may be appropriate but additional information is needed, the employee may be withheld from service while an investigation is conducted.

9. At all times material to the instant case, Petitioners' regular shifts were eight and a half hours, including an unpaid, thirty minute "meal period" (to which TWU-represented bargaining unit members were entitled under Article 36 of the TWU Contract).

10. Although they were paid to perform eight hours of work during their eight and a half hour shifts, TWU-represented bargaining unit members, including Petitioners, were, in practice, allowed to take up to an hour for their meals, without penalty.

11. TWU-represented bargaining unit members "clocked in" at the beginning of their shift and "clocked out" at the end of

their shift. They were expected to remain "on the clock" during their "meal periods" (which, as noted above, were to be no longer than one hour).

12. During his eight and a half hour shift which began on July 30, 2004, Petitioner Castellanos was assigned to perform a "routine 'A' [safety] check" on a Boeing 757 aircraft, an assignment it should have taken a "well qualified [aviation maintenance technician] working quickly but carefully" approximately four hours to complete.

13. At the time he left MIA that evening to go to the Quench nightclub, Mr. Castellanos was two hours and 15 minutes into his shift.

14. During his eight and a half hour shift which began on July 30, 2004, Petitioner Pena was assigned to perform "PS checks" on two Boeing 737 aircraft, an assignment it should have taken a "well qualified [aviation maintenance technician] working quickly but carefully" at least six hours to complete.

15. At the time he left MIA that evening to go to the Quench nightclub, Mr. Pena was three hours and 45 minutes into his shift.

16. Walter Philbrick, an investigator in American's corporate security department, covertly followed Petitioners when they left MIA that evening and kept them under surveillance until their return almost four hours later.

17. Petitioners did not clock out until following the end of their shifts on July 31, 2004. In so doing, they effectively claimed full pay for the shifts, notwithstanding that, during the shifts, they had been off the worksite, engaged in non-work-related activity, for well in excess of the one hour they were allowed for "meal periods."

18. Mr. Philbrick prepared and submitted a report detailing what he had observed as to Petitioners' movements and conduct during the time that they had been under his surveillance.

19. Mike Smith is American's maintenance department station manager at MIA. He is "responsible for the entire [American] maintenance operation in Miami."

20. Mr. Smith assigned his subordinate, Anthony DeGrazia, a day shift production manager at MIA, the task of looking into, and taking the appropriate action on behalf of management in response to, the matters described in Mr. Philbrick's report.

21. Neither Mr. Smith nor Mr. DeGrazia is Hispanic.

22. Mr. DeGrazia met separately with both Mr. Pena and Mr. Castellanos. The meetings were held in accordance with the provisions of Article 29(f) of the TWU Contract.

23. Before conducting the meetings, Mr. DeGrazia had reviewed Mr. Philbrick's report.

24. Mr. Castellanos stated, among other things, the following in his meeting with Mr. DeGrazia: on the evening in question, he was trying to complete his assignment as fast as possible because he wanted to have an alcoholic beverage; that evening, he was "away from work" for approximately four hours, which he knew was wrong; and he and Mr. Pena had engaged in similar activity on perhaps six or seven previous occasions.

25. Mr. Pena stated, among other things, the following in his meeting with Mr. DeGrazia: on the evening in question, he was "off the field" for three to four hours, which he knew was not "okay"; this was something he had done "sometimes" in the past; and American was a "great company" to work for.

26. Based on his review of Mr. Philbrick's report and the information he had obtained from Petitioners, Mr. DeGrazia concluded that Petitioners had committed "time clock fraud" in violation of Rule 34 of American's Rules of Conduct and that they therefore, in accordance with American's policy that "dishonesty will always result in termination" (as expressed in the PPC Policy), should be terminated.

27. Before taking such action, Mr. DeGrazia consulted with Mr. Smith and "someone" from American's human resources department, who both "concurred" with Mr. DeGrazia that termination was the appropriate action to take against Petitioners.

28. On August 12, 2004, Mr. DeGrazia issued Final Advisories terminating Petitioners' employment.

29. The Final Advisory given to Mr. Castellanos read, in pertinent part, as follows:

> On Friday, July 30, 2004, your scheduled tour of duty was 2230-0700. During your scheduled shift you were assigned to complete an A-check on a 757 aircraft.
>
> At approximately 0045, Corporate Security observed you leaving the premises and going into a nightclub in Coconut Grove. While there, you were observed at the bar drinking from a plastic cup. You were observed leaving the nightclub at 0315 and driving towards the airport. By your own account, you returned to the airport approximately 0400.
>
> During a company investigation, you admitted to leaving the premises, during your scheduled tour of duty and going to a restaurant/bar. Further, you admitted to consuming alcoholic beverages. Additionally, when asked how it was possible for you to complete your assignment in such a short amount of time you stated that you were, "trying to complete the job as fast as I can because I was getting the urge of getting a drink."
>
> Based on the above information I have concluded that your actions fall far short of that which may be reasonably expected of our employees and are a direct violation of American Airlines' Rules of Conduct, Rules 3, 4, 17, and 34 . . . .
>
> In view of the above rule violations your employment with American Airlines is hereby terminated effective today, August 12, 2004.

* * *

30. The Final Advisory given to Mr. Pena read, in pertinent part, as follows:

> On Friday, July 30, 2004, your scheduled tour of duty was 2100-0530. During your scheduled shift you were assigned to complete two PS-checks on 737 aircraft.
>
> At approximately 0045, Corporate Security observed you leaving the premises and going into a nightclub in Coconut Grove. While there, you were observed at the bar drinking from a plastic cup. You were observed leaving the nightclub at 0315 and driving towards the airport. By your own account, you returned to the airport approximately 0400.
>
> During a company investigation, you admitted to leaving the premises, during your scheduled tour of duty and going to a restaurant/bar. Further, you admitted to consuming alcoholic beverages. Additionally, when you[] were asked if it is acceptable to go to lunch for 3-4 hours you stated, "no, according to Company Rules, it's not OK."
>
> Based on the above information I have concluded that your actions fall far short of that which may be reasonably expected of our employees and are a direct violation of American Airlines' Rules of Conduct, Rules 3, 4, and 34 . . . .
>
> In view of the above rule violations your employment with American Airlines is hereby terminated effective today, August 12, 2004.

* * *

31. That Petitioners were Hispanic played no role whatsoever in Mr. DeGrazia's decision to terminate them.

Mr. DeGrazia terminated Petitioners because, and only because, he believed that they had engaged in dishonesty by committing "time clock fraud."

32. Mr. DeGrazia has never encountered another situation, in his capacity as a production manager for American, where an aviation maintenance technician over whom he had disciplinary authority engaged in conduct comparable to the conduct for which he terminated Petitioners.

33. No one has ever reported to him, nor has he ever observed, any aviation maintenance technician other than Petitioners taking "meal periods" that were longer than an hour while remaining "on the clock."

34. Petitioners both grieved their terminations pursuant to Article 31 of the TWU Contract. Neither of them advanced any allegations of anti-Hispanic discrimination in his grievance.

35. Petitioners' grievances were ultimately denied on September 9, 2004, by William Cade, American's managing director for maintenance.

36. Petitioners appealed the denial of their grievances to the American and TWU Area Board of Adjustment for Miami, Florida (Board), in accordance with Article 32 of the TWU Contract, which provided for "final and binding" arbitration of disputes arising under the contract.

37. A consolidated evidentiary hearing was held before the Board on April 28, 2005. At the hearing, Petitioners were represented by counsel. Through counsel, they called and cross-examined witnesses, submitted documentary evidence, and presented argument. Neither of them testified.

38. The Board issued a decision on June 27, 2005, denying Petitioners' grievances. The TWU Board member dissented. The Discussion and Opinion portion of the decision read, in pertinent part, as follows:

> There is no dispute that the rule violations by grievants['] actions on July 30, 2004 constituted time card fraud and violation of rules relating to remaining at work. This was not some minor taking of time, such as overstaying lunch for a shortened period. It was a well-planned event. They had with them a change of clothes - in effect "party clothes" apropos to a late night-early morning South Florida nightclub. They had even done this several times before.
>
> Once at this nightclub they actually drank very little. Grievant Pena had two drinks and grievant Castellanos appeared to have just one. In fact, when he was later tested after his return to work almost five hours later, the result was negative for drugs and alcohol. Clearly, they failed to remain at work for their tours of duty in violation of Rules 3 and 4. These rules, however, do not by themselves call for immediate discharge nor do any of the Company documents relating to rules, such as its PPC, refer to them as serious violations that would incur discharge.
>
> The seriousness here concerns the grievants' badging out after their eight-hour tour and

being paid for eight hours, almost five of which they did not work. There is no question that this is time card fraud and as such it involves dishonesty that is covered by Rule 34's "dishonesty of any kind." Numerous arbitrators for the parties have found such conduct to be violative of Rule 34 and have concluded that stealing time from the Company is dishonesty that requires immediate dismissal.

* * *

[T]he grievants engaged in this misconduct on multiple occasions that involved more than half of their shift being spent at a nightclub. And they knew it was wrong as they readily admitted when finally caught. Mitigation based on the grievants' EAP involvement is insufficient to overcome and reduce in any fashion their core responsibility to be honest employees and abide by all Company rules and regulations. The Company made this clear enough in its current Drug and Alcohol policy, and, as seen, other Boards have found it reasonable, as does this Board.

To all of this the Union argues that there are other mitigating factors - seniority, disparate treatment, failure to consider employment records and a common practice permitting employees to extend lunch breaks. As to the latter, there is no evidence that any employee has been allowed to stay away from work for almost five hours with the knowledge or consent of management at any level. There is some evidence of employees overstaying the break by 30 minutes, of employees going for food for the crew and arriving back late and even some two-hour absences. None of this is comparable to the grievants' conduct.

Nor is the evidence concerning supervisor Delgadillo enough to warrant the finding of a practice. She was not Pena's supervisor.

She called grievant Castellanos' cell, but that alone does not mean that she knew he was off several hours at that point socializing and drinking in Coconut Grove on July 30 or at other times. She may have gone out with them while she was a mechanic, but the evidence does not show that she went for these long journeys to drink and socialize at a night club. Most importantly, the grievants never claimed a practice existed but instead readily admitted at the 29(f)s that their conduct was wrong and they violated Company rules.

As to the disparate treatment incidents, although the dishonesty issue appears similar, different treatment only becomes disparate when the employees being compared also have factual situations and records that are similar. The comparators here did not leave work on more than one occasion, or on any occasion, for four hours or more to drink and socialize in a nightclub. Thus, Mora's 45-minute late punch-in resulted from his retrieving his drivers' license; he then immediately informed management of what he did. He did not have to be put under security surveillance for this type of conduct occurring in the past. Although his 30-minute extended lunch was part of the practice referred to above, it hardly qualifies as like conduct when compared to the grievants' activities.

The claim by Vizcaino that he was sick when he used his Company travel privilege is the type of violation referred to the Travel Abuse Committee under a rule penalizing employees by suspending their travel privileges. The facts of that incident and the reasoning of this committee are not known to make any clear and relevant comparison. Even if accepted as a valid comparison, it is only one employee incident that by itself is insufficient to show that management disparately treated these grievants. Nor is their any proof that Rule

> 34 was involved in either of these situations.
>
> Manager DeGrazia disclosed that he did not consider the grievants' prior record or their seniority. He explained that the seriousness of their conduct was sufficient for his decision. The Board fully recognizes that the grievants cooperated during the investigation, had no prior discipline, and had seniority from 1989 and 1996. Each of these factors is significant in assessing the suitability of the penalties. But it is well established by the parties and even in arbitration cases involving outside parties, that in light of the gravity of time card fraud, these factors need not be evaluated. The Chairman notes nonetheless, that seniority and work records cannot be entirely ignored. But here, the grievants' propensity in the past to engage in this same outlandish conduct, and to do so undetected, significantly minimized, for mitigation purposes, much of their good record and seniority.

39. Petitioners subsequently filed employment discrimination charges with the FCHR, alleging for the first time that their terminations were products of anti-Hispanic discrimination.

40. There has been no persuasive showing made, in support in these allegations, that the decision to terminate them was motivated by anything other than legitimate business considerations.

CONCLUSIONS OF LAW

41. The Florida Civil Rights Act of 1992 (Act) is codified in Sections 760.01 through 760.11, Florida Statutes, and Section

509.092, Florida Statutes. It "is patterned after Title VII of the [federal] Civil Rights Act of 1964, 42 U.S.C. §2000e-2" and therefore "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).

42. 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 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.

43. 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 Equal Employment Opportunity Commission, 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. This 365-day period is a "limitations period" that can be "be equitably tolled, but . . . only [based on the] acts or circumstances . . . enumerated in section 95.051," Florida

Statutes. Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997).

44. "[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).

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

> It is an unlawful employment practice for an employer:[3]
>
> (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.

46. In the instant consolidated cases, Petitioners have alleged that American committed such "unlawful employment practices" when it terminated their employment based on their "national origin (Hispanic)."

47. Petitioners had the burden of proving, at the administrative hearing held in these cases, that they were the victims of such discriminatorily motivated action. 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.'"); 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."); and Mack v. County of Cook, 827 F. Supp. 1381, 1385 (N.D. Ill. 1993)("To prevail on a racially-based discriminatory discharge claim under Title VII, Mack must prove that she was a victim of intentional discrimination.").

48. "Discriminatory intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001); see also United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 (1983)("As in any lawsuit, the plaintiff [in a Title VII action] may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.").

49. "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 (Fla. DOAH February 19, 2003)(Recommended Order). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination." Maynard v. Board of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

50. "[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).

51. "[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).

52. 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.[4] 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, 168 F.3d at 1267 (citations omitted). "The analysis of pretext focuses only on what the decisionmaker, and not anyone else, sincerely believed." Little v. Illinois Department of Revenue, 369 F.3d 1007, 1015 (7th Cir. 2004); see also Schaffner v. Glencoe Park District, 256 F.3d 616, 622 (7th Cir. 2001)("[T]the Park District stated that it did not promote Schaffner because it believed she was unable to work well with others. Schaffner argues that there is a genuine issue of material fact regarding

whether she could work well with others. The district court agreed with her, based on the affidavit of one of her co-workers and the affidavits of several parents whose children had participated in the Kids' Club. However, the issue is not whether Schaffner worked well with others, but whether the Park District honestly believed that she did not. In order to rebut the Park District's articulated reason, Schaffner must present evidence that it did not believe its own assessment. . . . The affidavits of parents and of Schaffner's coworkers simply do not contradict whether the Park District honestly believed Schaffner worked well with others. . . . Because Schaffner did not present any evidence to contradict the Park District's honest, albeit possibly mistaken belief (as opposed to the underlying truth of that belief), she may not overcome the Park District's second articulated reason for not promoting her."); Komel v. Jewel Cos., 874 F.2d 472, 475 (7th Cir. 1989)("[T]he fact that the employee takes issue in general terms with the employer's overall evaluation is not sufficient to create a triable issue on pretext. As we have recently stated, the employee's 'own self-interested assertions [even where accompanied by the conclusory statements of a co-worker] concerning her abilities are not in themselves sufficient to raise a genuine issue of material fact.'"); and Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980)("Smith, of course, testified that he had versatility,

and that his competence as an analyst was not confined to the field of logistics. Smith's perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant.").

53. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times with the plaintiff." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Brand v. Florida Power Corp., 633 So. 2d 504, 507 (Fla. 1st DCA 1994)("Whether or not the defendant satisfies its burden of production showing legitimate, nondiscriminatory reasons for the action taken is immaterial insofar as the ultimate burden of persuasion is concerned, which remains with the plaintiff.").

54. "In a case alleging discriminatory discharge or termination, [establishing a prima facie case] may be accomplished by showing the following: (1) [the discharged employee] is a member of a protected class; (2) she was qualified for the position from which she was terminated; (3) she was terminated; and (4) she was replaced by someone who was not a member of her protected class or a similarly situated employee who was not a member of her protected class engaged in comparable conduct and was not discharged." Boex v. OFS Fitel, LLC, 339 F. Supp. 2d 1352, 1360 (D. Ga. 2004); see also Maynard,

342 F.3d at 1289 ("To prevail on a claim for discrimination under Title VII based on circumstantial evidence, Maynard must show that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) he was replaced by a person outside his protected class or was treated less favorably than a similarly-situated individual outside his protected class.").

55. "To show that employees are similarly situated, the [complainant] must establish that the employees are 'similarly situated in all relevant respects.' The comparator must be [shown to be] 'nearly identical' to the [complainant] to prevent courts from second-guessing a reasonable decision by the employer." Hammons v. George C. Wallace State Community College, No. 05-14962, 2006 U.S. App. LEXIS 6396 *10 (11th Cir. March 16, 2006)(citation omitted). "This normally entails a showing that the two employees [the complainant and the comparator] dealt with the same supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." Radue v. Kimberly-Clark Corp., 219 F.3d 612, 617-618 (7th Cir. 2000); see also Lopez v. Micro Center Sales Corp., 109 Fed. Appx. 114, 117 (7th Cir. 2004)("In determining whether employees are similarly situated, courts balance a number of factors including whether

employees were disciplined by a common decisionmaker. But as the district court noted, Lopez was terminated by Myers and Miller, not Stiles. . . . None of the other employees whom Lopez asserts were similarly situated were terminated by Myers and Miller.")(citations omitted); and Patterson v. Avery Dennison Corp., 281 F.3d 676, 680 (7th Cir. 2002)("It is clear that Meyer was not similarly situated to Patterson because they reported to different supervisors and had different levels of experience and job responsibilities.").

56. Where the administrative law judge does not halt the proceedings "for lack of a prima facie case and the action has been fully tried, it is no longer relevant whether the [complainant] actually established a prima facie case. At that point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination. . . . [W]hether or not [the complainant] actually established a prima facie case is relevant only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Green v. School Board of Hillsborough County, 25 F.3d 974, 978 (11th Cir. 1994)(citation omitted); see also Aikens, 460 U.S. at 713-715 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they

have unnecessarily evaded the ultimate question of discrimination vel non. . . . [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection [as a candidate for promotion], the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.' After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. The District Court was then in a position to decide the ultimate factual issue in the case. . . . Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'")(citation omitted); Beaver v. Rayonier, Inc., 200 F.3d 723, 727 (11th Cir. 1999)("As an initial matter, Rayonier argues it is entitled to judgment as a matter of law because Beaver failed to establish a prima facie case. That

argument, however, comes too late. Because Rayonier failed to persuade the district court to dismiss the action for lack of a prima facie case and proceeded to put on evidence of a non-discriminatory reason--i.e., an economically induced RIF--for terminating Beaver, Rayonier's attempt to persuade us to revisit whether Beaver established a prima facie case is foreclosed by binding precedent."); and Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1129 (11th Cir. 1984)("The plaintiff has framed his attack on the trial court's findings largely in terms of whether the plaintiff made out a prima facie case of discrimination. We are mindful, however, of the Supreme Court's admonition that when a disparate treatment case is fully tried, as this one was, both the trial and the appellate courts should proceed directly to the 'ultimate question' in the case: 'whether the defendant intentionally discriminated against the plaintiff.'").

57. In the instant case, Petitioners produced no direct evidence to support their claims that they had been the victims of intentional national origin discrimination on the part of American. They therefore had to rely on circumstantial evidence to prove their claims. A review of the evidentiary record reveals that Petitioners did not present sufficient circumstantial evidence to even establish a prima facie case of discrimination. Their evidentiary presentation was devoid of

any persuasive evidence that either of them was "replaced by someone who was not a member of [their] protected class" or that "a similarly situated employee who was not a member of [their] protected class engaged in comparable conduct and was not discharged." Both Petitioners testified that they felt that they were terminated because they were Hispanic. Under no circumstances, however, 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 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."); and Shiflett v. GE Fanuc Automation, 960 F. Supp. 1022, 1031 (W.D. Va. 1997)("[A]ll too many leaps and unjustifiable inferences must be made before one can reasonably conclude that any causal connection exists between plaintiff's termination and his disability. Nothing in the record, apart from plaintiff's private speculation, provides any reason to

believe there is such a connection. But '[m]ere unsupported speculation, such as this, is not enough to defeat a summary judgment motion.'").

58. American, for its part, not only advanced a legitimate, non-discriminatory reason for terminating Petitioners, to wit: Petitioners' having committed "time clock fraud,"[5] it affirmatively established that this reason was not pretextual, but rather was the real reason that Mr. DeGrazia decided to terminate their employment, and that Petitioners' being Hispanic was not a factor in his decision.

59. Under such circumstances, American cannot be found to have committed the unlawful employment practices alleged in the employment discrimination charges filed by Petitioners, and said charges should therefore be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding the American not guilty of the unlawful employment practices alleged by Petitioners and dismissing their employment discrimination charges.

DONE AND ENTERED this 15th day of May, 2006, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of May, 2006.

ENDNOTES

1 All references to Florida Statutes in this Recommended Order are to Florida Statutes (2005).

2 The undersigned has accepted these factual stipulations. See Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative, 52 So. 2d 670, 673 (Fla. 1951)("When a case is tried upon stipulated facts the stipulation is conclusive upon both the trial and appellate courts in respect to matters which may validly be made the subject of stipulation. Indeed, on appeal neither party will be heard to suggest that the facts were other than as stipulated or that any material facts w[ere] omitted."); Schrimsher v. School Board of Palm Beach County, 694 So. 2d 856, 863 (Fla. 4th DCA 1997)("The hearing officer is bound by the parties' stipulations."); and Palm Beach Community College v. Department of Administration, Division of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991)("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

3 An "employer," as that term is used in the Act, is defined in Section 760.02(7), Florida Statutes, as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person."

4 "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.

5 Had Petitioners' made a prima facie showing of discrimination, the presumption of discrimination arising from such a showing would have been overcome by American's advancing this legitimate, non-discriminatory reason for their terminations.

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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.