STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL L. PERRY, Petitioner, vs. EMBRY-RIDDLE AERONAUTICAL UNIVERSITY, Respondent.	)	Case No. 06-1988

RECOMMENDED ORDER

This cause came on for formal hearing before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on March 12 and 13, 2007, in Tallahassee, Florida, and on March 26 and 27, 2007, in Daytona Beach, Florida.

APPEARANCES

For Petitioner: Bill Reeves, Esquire
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For Respondent: Thomas J. Leek, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice by discriminating against Petitioner on the

basis of race in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

Petitioner, Michael L. Perry, filed a charge of discrimination with the Florida Commission on Human Relations ("FCHR") alleging that Respondent, Embry-Riddle Aeronautical University ("Embry-Riddle"), discriminated against him on the basis of race. Specifically, Petitioner asserts that Respondent discriminated against him: 1) because he was forced to immediately resign from his position and was accused of fraud in connection with a cellular telephone contract entered into with Nextel; 2) because he believes he was the only African-American male serving as a "satellite campus manager" and "one of very few other African-Americans serving in high-level management positions"; and 3) because he was "not afforded the opportunity of a valid investigation of [complaints of sexual harassment] consistent with proper Embry-Riddle policies and procedures." At the final hearing, Petitioner asserted that "he was, in fact, discriminated against in connection with the sexual harassment investigation, and also his termination because of an alleged cellular telephone contract and the employer's conclusion that he defrauded Embry-Riddle University."

After investigating Petitioner's charges, FCHR issued a Determination: No Cause on April 28, 2006, in which it found

there was no reasonable cause to believe that an unlawful employment practice had occurred. Petitioner filed a petition for relief on June 2, 2006, requesting that a formal administrative hearing be conducted, and the case was referred by FCHR to the Division of Administrative Hearings on June 6, 2006. On February 6, 2006, an Order Granting Hearing and Re-scheduling Hearing was issued, and a hearing took place over four days, March 12 and 13 in Tallahassee, Florida, and March 26 and 27 in Daytona Beach, Florida.

At the hearing, Petitioner testified on his own behalf and presented the testimony of Albert Borovich, Linda Mobley, and Deric Mordica, and offered Exhibits 1 through 22 and 24, all of which were received into evidence. Respondent presented the testimony of Katrina Alexander and Rick Snodgrass and offered Exhibits 1 through 16, all of which were received into evidence, with the exception of a portion of Exhibit 1.

A Transcript was filed on April 11, 2007. After the transcript was filed, Petitioner and Respondent filed their Proposed Findings of Fact and Conclusions of Law on May 4, 2007.

References to statutes are to Florida Statutes (2006) unless otherwise noted.

FINDINGS OF FACT

Facts Stipulated to By the Parties

1. Embry-Riddle is an independent, nonsectarian, not-for-profit, co-educational university. Embry-Riddle serves culturally diverse students seeking careers in aviation, aerospace, engineering, and related fields, with residential campuses in Daytona Beach, Florida, and Prescott, Arizona, and an extended campus (a/k/a Worldwide Campuses) consisting of 156 teaching sites in the United States and Europe.

2. Michael Perry began his employment with Embry-Riddle on November 30, 2001, as a part-time associate center director at Embry-Riddle's Tallahassee teaching site. His job responsibilities were to market Embry-Riddle's programs, enroll students and provide some student services, the timely completion of registration forms and matriculation applications, and basic administrative duties.

3. Petitioner did not have authority to enter into a contract for cellular phone service on behalf of Embry-Riddle that Embry-Riddle would be obligated to pay.

4. Embry-Riddle's Tallahassee teaching site is on the campus of Tallahassee Community College ("TCC"), along with the extended campuses of other higher-education institutions, including Flagler College-Tallahassee and Barry University.

5. In February 2003, Petitioner began to work full-time with the same job title and responsibilities.

6. In February 2004, Petitioner was promoted from assistant center director to associate center director. He received a pay increase, and was given the additional responsibility of supervising an assistant and a Veterans' Affairs ("VA") student employee.

7. At all times, Petitioner's assistant was Katrina Alexander, an African-American female.

8. At all times relevant to this claim, Petitioner's VA student employee was Kiesha Moodie, an African-American female.

9. The Tallahassee teaching site was overseen by Center Director Albert Borovich from a remote site in the panhandle of Florida.

10. On or about May 18, 2005, Ms. Alexander reported that Ms. Moodie advised her that she was uncomfortable about some interaction she had with Petitioner in his office. The precise nature of the interaction is in dispute.

11. At some point after May 23, 2005, Mr. Borovich was given certain memoranda by Dr. Barbara Sloan, advising him of the complaints of sexual harassment by certain unnamed employees of TCC.

12. On June 6, 2005, Mr. Borovich received a copy of a memorandum from Maura Freeberg Wilson to Joketra Hall advising

of complaints by female employees of Flagler College-Tallahassee about Petitioner.

13. On June 10, 2005, Debbie Wiggins, the Southeast Regional Director of Operations for Embry-Riddle, and the direct supervisor of Mr. Borovich, provided copies of the alleged victim's statements to Petitioner for response.

14. Petitioner responded to the charge by a report, dated June 15, 2005, denying the claims of sexual harassment and inappropriate behavior.

15. Respondent has a human resources department housed in its headquarters in Daytona Beach, Florida. The human resources department is responsible for investigating complaints of sexual harassment and inappropriate behavior by an employee. The human resources department had not started its investigation of the complaints against Petitioner at the time Ms. Wiggins gave the alleged victim's statements to Petitioner.

16. Rick Snodgrass was appointed by Linda Mobley to investigate the claims of sexual harassment and inappropriate behavior on behalf of Respondent's human resources department.

17. Ms. Mobley was a human resource professional in Respondent's human resource department in Daytona Beach, Florida.

18. Mr. Snodgrass was a human resource professional in Respondent's human resources department in Daytona Beach, Florida.

19. On June 20, 2005, a telephone call was received at the Tallahassee teaching site from Nextel Partners Recovery concerning a delinquent account ("the Nextel Account").

20. On June 20, 2005, Mr. Borovich called Respondent's payroll department and asked whether Petitioner's paycheck could be held, but was advised that it was too late.

21. At this time, Petitioner had made two payments to Nextel Partners on the Nextel Account at issue. The funds used to make this payment came directly from Petitioner and were not Embry-Riddle funds.

22. On June 21, 2005, Mr. Borovich called Petitioner about the Nextel Account.

23. On June 21, 2005, Petitioner was placed on administrative leave without pay.

24. Petitioner told Mr. Borovich that he had opened the account at issue, that it was in his name, and that he had been paying the bills.

25. The Nextel Subscriber Agreement lists "Embry-Riddle" in the section labeled "Full Customer Name."

26. The Nextel Subscriber Agreement lists the address of the Tallahassee teaching site of Embry-Riddle in the section labeled "Mailing Address."

27. The Nextel Subscriber Agreement lists Petitioner's home address in the section labeled "Shipping Address."

28. The Nextel Subscriber Agreement has Petitioner's signature in the section labeled "Customer Signature."

29. The Nextel Subscriber Agreement has "Assist. Dir. Oper." in the section labeled "Title."

30. The Nextel New Customer Checklist lists "Embry-Riddle/TCC" in the section labeled "Customer/Company Name."

31. The Nextel New Customer Checklist lists "Michael" in the section labeled "Contact."

32. The Nextel New Customer Checklist has Petitioner's signature in the section labeled "NEXTEL Customer Signature."

33. Petitioner provided his driver's license to Nextel Partners in conjunction with opening the Nextel Account.

34. Petitioner provided his Embry-Riddle identification card to Nextel Partners in conjunction with opening the Nextel Account.

35. Petitioner provided his Embry-Riddle business card to Nextel Partners in conjunction with opening the Nextel Account.

36. Petitioner provided the address of Embry-Riddle's main campus in Daytona Beach to Nextel Partners in conjunction with opening the Nextel Account.

37. Petitioner provided the address of Embry-Riddle's Tallahassee teaching site for billing purposes in conjunction with opening the Nextel Account.

38. Petitioner directed that the bills be sent to Respondent's Tallahassee teaching site, "Attn: Michael L. Perry," in conjunction with opening the Nextel Account.

39. Petitioner provided Respondent's Consumer Certificate of Exemption (Embry-Riddle's certificate of tax exemption) to Nextel Partners in conjunction with opening the Nextel Account.

40. On June 20, 2005, Nextel Partners asserted that $936.55 was past due and owing on the Nextel Account.

41. The alleged past due balance was sent to collection by Nextel Partners.

42. The debt collection firm of Lamon, Hanley & Assoc., Inc., sought payment of the alleged past due amount from Embry-Riddle.

43. The debt collection firm of J.J. MacIntyre Co., Inc., sought payment of the alleged past due amount from Embry-Riddle.

44. Mr. Snodgrass was charged with investigating the events surrounding the Nextel Account by Ms. Mobley. The

investigations of the claims of sexual harassment and the Nextel Account occurred simultaneously.

45. Mr. Snodgrass traveled to Tallahassee on June 23, 2005, during which he met with several individuals regarding the claims of sexual harassment.

46. The complainants from TCC, Flagler College-Tallahassee, and Barry University declined to participate in the investigation on the advice of their legal counsel.

47. Ms. Moodie indicated to Mr. Snodgrass that she had addressed her concerns directly with Petitioner, and she withdrew her complaint.

48. Mr. Snodgrass interviewed Petitioner last, in the presence of Mr. Borovich. Mr. Borovich was not present during the interviews of the female witnesses.

49. At that time, Mr. Borovich found that there was insufficient evidence to make a finding on the claims of sexual harassment, and he recommended no direct discipline of Perry on the claims of sexual harassment.

50. Mr. Snodgrass also discussed the Nextel Account with Petitioner during the meeting of June 23, 2005.

51. Petitioner again asserted that the Nextel Subscriber Agreement was an agreement personal to him, and not an agreement between Nextel Partners and Embry-Riddle.

52. Petitioner was advised that his employment was being terminated because of the actions surrounding the Nextel Account, but he was offered the opportunity to resign instead.

53. Petitioner chose to resign his employment with Embry-Riddle.

54. Petitioner's termination was involuntary.

55. Respondent employs African-Americans in its extended campuses across the United States, including faculty, center directors, and associate center directors.

Additional Findings of Fact Not Stipulated to By the Parties

56. Petitioner is a 49-year-old African-American male, who has always lived in the southern United States.

57. Petitioner was qualified for his position and had not been the subject of discipline in connection with his employment until January 2005, when he received a letter of reprimand from his supervisor, Mr. Borovich.

58. In addition to his employment at Embry-Riddle, Petitioner has served as a minister, and has had experience counseling others who have been the victims of racial discrimination.

59. Petitioner testified to his belief that Respondent discriminated against him by automatically concluding that he was guilty of committing fraud by obtaining the Nextel cellular phone because he was an African-American male.

60. Petitioner testified to his experience, and as a minister counseling other victims of discrimination, that African-American males are considered guilty regardless of proof, and may still be considered guilty if they stand up for their rights.

61. Petitioner believes that society generally feels that African-American males cannot tell the truth.

62. Petitioner also testified that he was hurt the most by being accused by Respondent of being a thief without the opportunity to provide documents to rebut Respondent's accusation.

63. Petitioner testified to his experience and belief that African-Americans, who have been the victims of racism in the South, have often been put in the position of having no chance to present evidence disproving the charges levied against them.

64. Petitioner testified that he received a telephone call from Mr. Borovich, on May 23, 2005, ordering him to immediately apologize to the three alleged victims of sexual harassment or inappropriate conduct. He believed he was not given an opportunity to dispel Mr. Borovich of any notion that he had acted inappropriately towards the three women, nor had any investigation been performed at that point.

65. Petitioner complied with the order to apologize to the three alleged victims of the sexual harassment, and testified he

felt humiliated as a result of the experience. He believes he was "taken back" to a time in our society when he would have been guilty just because a white man said he was guilty.

66. Mr. Borovich testified at the hearing that he did not recall ever speaking with Petitioner on May 23, 2005, nor did he recall "ordering" Petitioner to apologize to the alleged victims.

67. Petitioner testified that he complained about the fact that he was forced to apologize to the three alleged victims of sexual harassment, and that his complaints were ignored by his superiors.

68. Respondent is an equal opportunity employer that regularly trains its employees in seminars about equal opportunity employment, sexual harassment, and disability.

69. Respondent maintains extensive employment policies in a policy manual referred to as both a POM and an APPS. These policies are reviewed with Embry-Riddle personnel at orientation, and made available to all personnel electronically through an intranet site at any time from any computer. Respondent has policies prohibiting sexual harassment and racial discrimination.

70. Respondent's policies and procedures provide that individuals reporting sexual harassment should contact human resources, which would then conduct an investigation. This

investigation is then conducted according to Respondent's policies and procedures.

71. At all times relevant to this matter, Respondent had three employees physically located in the administrative offices of the Tallahassee teaching site: Petitioner, Ms. Alexander, and Ms. Moodie.

72. According to Mr. Borovich, Petitioner was a good marketer, but had some difficulty in meeting deadlines.

73. Ms. Alexander determined that her interaction with Petitioner on May 18, 2005, fit within Respondent's definition of sexual harassment.

74. Respondent's policy requires that a supervisor who is made aware of sexual harassment must report the incident. Ms. Alexander attempted to contact Mr. Borovich on May 18, 2005, but he was not in his office. She, thereafter, consulted the policy and procedures manual and determined she was to contact the faculty chair when the center director was unavailable, which she did.

75. Once he received the complaint from Ms. Alexander, Mr. Borovich began gathering information from the people involved, and then he reported the alleged sexual harassment to Respondent's human resources department pursuant to Embry-Riddle policy.

76. Ms. Moodie told Ms. Alexander that she did not believe she was sexually harassed, but that she felt uncomfortable standing on top of a table and writing on a white board while Petitioner and Mr. Deric Mordica, a student, watched her from behind.

77. Petitioner believes that Ms. Moodie's complaint to Ms. Alexander "started this whole thing." Both Ms. Moodie and Ms. Alexander are African-American.

78. Maura Freeberg Williams, during the relevant time period, was employed in a supervisor capacity by Flagler College, whose offices were located in the same building as Embry-Riddle's Tallahassee teaching site.

79. Joketra Hall, during the relevant time period, was employed in a supervisor capacity by TCC on whose campus Respondent is located.

80. Debbie Wiggins, during the relevant time period, was the Southeast Regional Director of Operations for Respondent, and Mr. Borovich's direct supervisor. Her office was not located on the Tallahassee teaching site.

81. When Ms. Wiggins provided Petitioner with copies of the alleged victims' statements on June 10, 2005, she was told by Ms. Mobley that she had breached investigative protocol which dictated that the human resources department was to interview Petitioner prior to him seeing the statements. This is done in

order to maintain the anonymity of the victim until human resources has had the opportunity to investigate.

82. Ms. Mobley directed Ms. Wiggins to refrain from involving herself in the investigation, which was to be conducted by the human resources department. These discussions were memorialized in electronic mail between Ms. Mobley and Ms. Wiggins.

83. Mr. Snodgrass testified that this breach in protocol nearly compromised the investigation, but it was caught in time to conduct a proper investigation.

84. Mr. Snodgrass determined how the investigation would be handled, decided whom Respondent would interview, and decided which statements from individuals would be taken. Mr. Snodgrass also determined the outcome of the investigation.

85. Mr. Snodgrass made a trip to Tallahassee on June 23, 2005, during which he met with and questioned several individuals regarding the claims of sexual harassment.

86. Since Ms. Moodie refused to discuss the alleged incident because she had already discussed it with Petitioner and withdrawn her complaint, and since the employees of TCC, Flagler College-Tallahassee, and Barry University declined to speak with Mr. Snodgrass, he concluded the sexual harassment complaints could not be sustained.

87. Mr. Snodgrass met with Petitioner during his June 23 trip to Tallahassee and requested that Mr. Borovich attend the meeting as a witness. Mr. Snodgrass performed the questioning without comment by Mr. Borovich.

88. The first part of the meeting dealt with the sexual harassment claims. Following the questioning, Mr. Snodgrass determined that the evidence was insufficient to make a finding of sexual harassment. He put aside his folder concerning this claim.

89. The second part of the meeting concerned the Nextel cellular phone contract. Mr. Snodgrass asked Petitioner how he came to have two phones in Embry-Riddle's name. Petitioner repeated the information he had given to Mr. Borovich.

90. Mr. Snodgrass presented the documents concerning the Nextel Account to Petitioner. Mr. Snodgrass believed that the Nextel documents were more credible than Petitioner's answers to his questions concerning the Nextel Account.

91. Petitioner testified that he contracted with Nextel to obtain personal cellular telephones for himself and his wife.

92. Petitioner entered into the Nextel contract to receive a discount being offered to public employees and people working for universities which he learned about through a document that was faxed to the machine he shared with others at TCC.

93. Petitioner met with the Nextel representative at his office to complete the paperwork.

94. Petitioner agreed to have his monthly bills sent to his office where he also received other personal bills.

95. Petitioner paid for his cellular telephone usage with his own funds.

96. Petitioner received the benefit of using Respondent's tax exempt certificate on his contract with Nextel.

97. Petitioner entered into a dispute with Nextel over the quality of his telephone service, which led to the matter being turned over by Nextel to its collection agents.

98. Petitioner never resolved the matter of his dispute with Nextel over the quality of his telephone service.

99. After Petitioner's termination from employment, Respondent paid the past due amount for Petitioner's phone to Nextel out of funds owed to Petitioner for unused leave time during his employment.

100. Mr. Snodgrass advised Petitioner at the time of termination of his employment that he had violated school policy by entering into the cellular phone contract. Petitioner was informed that his "employment was being terminated due to the fact that he opened [the Nextel] account without proper permission."

101. Petitioner did not have contracting authority to bind Respondent.

102. Respondent provides cellular telephone allowances for some of its employees who travel a great deal. None of Respondent's employees have cellular telephones that are owned or contracted for by Respondent.

103. The decision to terminate Petitioner was made by Ms. Mobley. Mr. Borovich was not involved in the decision to terminate Petitioner.

104. Ms. Mobley was not aware of Petitioner's race until she reviewed the documents regarding the Nextel Account, which included a photocopy of Petitioner's identification card.

105. Ms. Mobley testified that the investigative protocols used concerning Petitioner were the same she would use regardless of the employee's race or gender.

106. Following Petitioner's resignation, Ms. Alexander performed Petitioner's prior duties, and was the only person designated to the Tallahassee teaching site for the next 18 months. At that time, the position formerly held by Petitioner was given to a white female.

107. Petitioner sought unemployment benefits, giving as his reason for his termination a "permanent layoff" due to "reduction in force due to lack of student enrollment."

108. Ms. Alexander testified that she worked closely with Petitioner and Mr. Borovich, and that she socialized outside of work with Mr. Borovich. Ms. Alexander never witnessed Mr. Borovich act in a racially discriminatory manner towards her or Petitioner.

109. Petitioner was not aware of any African-American males employed at his level or higher in the organizational structure of Embry-Riddle.

110. Embry-Riddle employs 190 African-Americans out of 1,500 total employees in its worldwide campuses, including faculty, center directors, and associate center directors. Ninety percent of those African-American individuals were in positions equal to or higher than that held by Petitioner.

CONCLUSIONS OF LAW

111. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11 Fla. Stat.

112. Pursuant to Subsection 760.10(1), Florida Statutes, it is unlawful for an employer to discharge, refuse to hire, or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin.

113. Federal discrimination law may properly be used for guidance in evaluating the merits of claims arising under

Section 760.10, Florida Statutes. See Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

114. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

115. Pursuant to this analysis, the plaintiff (Petitioner herein) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n. 6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

116. If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent herein) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this

burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

117. In Hicks, the Court stressed that even if the trier-of-fact were to reject as incredible the reason put forward by the defendant in justification for its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question of whether the defendant intentionally had discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

118. In cases involving alleged racial bias in the application of discipline for violation of work rules, the plaintiff, who must be a member of the protected class, must demonstrate: 1) that he did not violate the work rule, or 2) that he engaged in misconduct similar to that of a person outside of the protected class, and that the disciplinary measures enforced against him were more severe than those enforced against other persons who engaged in similar conduct. McCalister v. Hillsborough County Sheriff, 211 Fed. Appx. 883, 2006 U.S. App. LEXIS 31617 (11th Cir. Dec. 20, 2006); Jones v. Gerwens, 874 F.2d 1534, 1540 (11th Cir. 1989). This is, more

generally stated, "to present a prima facie case of racial discrimination, an employee must show that: 1) he is a member of a protected class; 2) he was subjected to an adverse employment action; 3) his employer treated similarly situated employees outside of the protected class more favorably than he was treated; and 4) he was qualified to do the job." A plaintiff is similarly situated to another employee only if "the quantity and quality of the comparator's misconduct [are] nearly identical." Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir. 2006).

119. In order to prove intentional discrimination, Petitioner must prove that Respondent intentionally discriminated against him. It is not the role of this tribunal (or any court, for that matter) to second-guess Respondent's business judgment. As stated by the court in Chapman v. AI Transport, 229 F.3d 1012, 1031 (11th Cir. 2000), "courts do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how mistaken the firm's managers, the [Civil Rights Act] does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior (citations omitted). An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason."

120. Petitioner claims to have been the only African-American male serving as either an assistant center director or an associate center director. This would appear to be a disparate treatment claim, but cannot be since the evidence clearly established that Respondent has numerous employees holding the same or higher position as Petitioner. The fact that most of the 190 employees of Respondent who are African-American hold Petitioner's position or a higher one defeats this claim. Petitioner has failed to prove that his claims with respect to his position with Respondent somehow led to the termination of his employment on the basis of his race.

121. Petitioner asserted he was not afforded the opportunity of a "valid" investigation of the complaints of sexual harassment against him that were "consistent with Embry-Riddle policies and procedures." Respondent conducted its investigation based upon statements, which were made orally or via e-mail, from employees of Embry-Riddle and other institutions co-located on the TCC campus. While Petitioner takes issue with the mechanics of the investigation, including the interference in the investigation by Ms. Wiggins, his concerns should have been allayed by the results of the inquiry. The amply proven fact that the claims of sexual harassment were not substantiated, and that no action was taken against Petitioner on the basis of these claims, defeats his assertion

of racial discrimination. Simply stated, Petitioner failed to prove that his termination was based in any fashion upon the allegations of sexual harassment made against him.

122. Additionally, Petitioner has failed to demonstrate that the investigation conducted by Respondent would have been handled differently had he been white or a female. Ms. Mobley testified that the investigative protocol would have been the same, and no evidence was produced to the contrary. The reason given by Ms. Mobley for not sharing the alleged victims' statements with Petitioner prior to his being interviewed was to guard against the alleged perpetrator's fabricating his story and to protect the anonymity of the alleged victims. This is a legitimate, non-discriminatory reason for Respondent's actions in the investigation, and Petitioner's claims that this demonstrates discrimination against him are no more than his subjective beliefs.

123. Petitioner asserts that he was humiliated by being "ordered" by Mr. Borovich to apologize to three of the alleged victims of the sexual harassment. At the hearing, Mr. Borovich could not recall ever ordering or even requesting Petitioner to make these apologies. The evidence is not sufficient to make a finding on either side of this issue, but since I have concluded that the alleged sexual harassment was not the basis for

Petitioner's termination from employment, this point is insignificant to the ultimate ruling here.

124. Petitioner believes that his entering into the cellular telephone contract in the name of Respondent should not have been grounds for his termination. In his words, he may have erred in judgment, but did not intend to create an obligation for Embry-Riddle since he was merely signing up for a promotional offer with Nextel for government employees and employees of colleges and universities, which he interpreted to mean public as well as private universities. Petitioner was well aware that Respondent is a private university, and he understood the difference between public and private employees.

125. Petitioner's motives in terms of not taking advantage of the university's name in receiving a promotional deal appear to be sincere. He sought to take advantage of a promotional offer made to him by a representative of Nextel. He never misled the Nextel representative since he allowed her to copy his identification card from Embry-Riddle, as well as the university's tax exempt certificate. The fact that he meant no harm, however, does not allow Petitioner to regain his position with Respondent. As stated previously, pursuant to Chapman v. AI Transport, 229 F.3d at 1031, "[n]o matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the Civil

Rights Act does not interfere. Rather, our inquiry is limited to whether the employer gave an honest explanation of its behavior." Here, Respondent reviewed the information it possessed concerning the Nextel Account and concluded that Petitioner violated university policy in obtaining the cellular phone account. Given the information available to Respondent's personnel, including the use of the tax exempt certificate, this was a reasonable conclusion.

126. Petitioner contends that Respondent's decision to terminate him for entering into the Nextel Account was not reasonable because he did not intend to obligate the university on the account. Even if Respondent was mistaken in its conclusion, this fact does not establish that Petitioner was discriminated against on the basis of his race. Petitioner asserts that, had the investigation been performed differently, a different conclusion might have been reached. To quote Chapman v. AI Transport again, Respondent "may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." 229 F.3d at 1031. See also Elrod v Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991); Nix v. WLCY Radio-Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984).

127. Petitioner is sincere in his belief that Respondent's actions evidenced discrimination against him because he is an African-American male. The evidence produced at hearing, however, failed to support his claims. Respondent provided legitimate, non-discriminatory reasons for Petitioner's termination from his employment. The greater weight of the evidence indicates that Respondent did not commit an unlawful employment practice.

RECOMMENDATION

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

RECOMMENDED that FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 15th day of June, 2007, in Tallahassee, Leon County, Florida.

S

ROBERT S. COHEN
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.