STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LARRY MCCRARY,)
)
Petitioner,)
)
vs.) Case No. 06-3880
)
REICHOLD, INC.,)
)
Respondent.)
)

RECOMMENDED ORDER

Pursuant to Notice, a formal hearing was conducted in this case before Diane Cleavinger, a duly-designated Administrative Law Judge with the Division of Administrative Hearings (DOAH) on April 5, 2007, in Pensacola, Florida.

APPEARANCES

For Petitioner: R. John Westberry, Esquire
1308 Dunmire Street, Suite B
Pensacola, Florida 32504

For Respondent: Phillip J. Strach, Esquire
Ogletree, Deakins, Nash, Smoak
and Stewart, P.C.
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STATEMENT OF THE ISSUE

Whether the Respondent, Reichhold, Inc., has committed an unlawful employment practice contrary to Section 760.11, Florida Statutes.

PRELIMINARY STATEMENT

On May 4, 2006, Petitioner, Larry McCrary filed a charge of discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Reichhold discharged Petitioner based on his race, African-American, and age. FCHR investigated the charge. On September 13, 2006, FCHR issued a determination that no reasonable cause exists to believe that an unlawful employment practice occurred. Thereafter, Petitioner filed a Petition for Relief based upon the same allegations as contained in the original Charge of Discrimination and requested a formal administrative hearing. The case was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified on his own behalf. Respondent presented the testimony of three witnesses and offered 81 exhibits into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order on June 1, 2007. Likewise, Respondent filed a Proposed Recommended Order on June 1, 2007.

FINDINGS OF FACT

1. Respondent owns a chemical plant that produces resins, copolymers, polymers, alkyds, amines and hardeners, for various applications in paints and coatings. It is an equal opportunity employer. Its policy prohibiting discrimination is posted on the company's intranet site, to which all employees have access.

2. In order to produce its products, Respondent uses a variety of chemicals in its production process. The chemicals used in the plant are volatile substances which, if dealt with improperly, can cause explosions, flashes, or fires, endangering plant employees and the surrounding community. These chemicals are expensive, dangerous, and are subject to tight safety and environmental regulation. In addition, many of the products are created under heat and pressure conditions inside a closed mixing and/or distilling chamber known as a reactor or kettle. The reactors are connected in a production line by a system of pipes. Each reactor has a set of controls which allow the reactor to be opened and closed for the addition of chemicals to the reactor. Failure to close other reactors in the line can cause a chemical to be added to the wrong reactor.

3. Respondent has developed a number of written procedures that operators must follow when mixing chemicals or performing certain tasks, such as cleaning the reactors products. Written procedures for operating a reactor are known as Standard Operating Procedures and are available at all times for operators to consult in performing their duties.

4. Operators must also follow a recipe for a product known as a batch ticket. The batch ticket provides the formula for a given product, including quantities of specific materials, plus

instructions on when and how to add chemicals to the mix to produce the desired product.

5. If the responsible operator follows the batch ticket for a given product, the resulting batch of chemicals should meet all applicable quality standards for that product. If the operator does not follow the batch ticket, then the product will not meet quality standards. A non-conforming product can sometimes be salvaged by adding additional raw materials to bring it within product specifications. Such corrections increase the price of the batch. However, it is not always possible to salvage a non-conforming product. This results in a loss of raw materials and sometimes causes disruption in product delivery schedules and significant clean-up costs for the Respondent. Therefore, it is very important for operators to follow operating and batch ticket procedures precisely and to communicate immediately with their supervisors if they notice any problems with the batches they are working.

6. The production system at the plant is continuously monitored by a computer system that logs actions taken by an operator for a line of reactors. The system also monitors the internal environment of the kettle such as temperature and pressure and sets off alarms when certain processes are not met. Inventory logs are also maintained by computer via operator

input. Individual reactors are also monitored by the assigned operators.

7. The United Steel Workers Union represents the operators at the Pensacola plant. The collective bargaining agreement between the union and Reichhold contains a non-discrimination clause. All employees in the unit, including Petitioner, have the right to file a grievance whenever they believe that the company has violated a provision of the collective bargaining agreement. Petitioner has not filed any grievance regarding any alleged discriminatory action discussed in this order.

8. The union collective bargaining agreement also provides for the discipline of employees through a progressive disciplinary system. The progressive disciplinary system was instituted at the Pensacola facility in 2004 after consultations with the President of the United Steel Workers Union and eventually placed in the union contract.

9. The policy defines four categories of misconduct: minor, major, severe, and termination. The category of "major misconduct includes "violation of product quality standards," "violation of safety procedures," and "activities that create product delivery problems." The category of "severe" misconduct includes a " mischarge or mispump" and a "misadjustment." A "mischarge" occurs when the wrong material is added to a batch.

10. After implementation of the progressive discipline policy, discipline began to be administered more frequently in the Pensacola plant. The increased level of discipline affected everyone regardless of race. The record contains 36 exhibits reflecting disciplinary actions issued to both white and black employees during and after 2004.

11. Petitioner is a black male. Petitioner was hired by the Respondent at its Pensacola plant, on September 7, 1993. Petitioner was terminated from his job on April 3, 2006. At the time of his termination, he was 54 years old.

12. Petitioner began his employment with Respondent as a laborer. He worked as a laborer until January 1994.

13. In January 1994, Petitioner was promoted to a material handler position, also known as a "C" operator. The primary responsibility of a material handler is to load chemicals into the reactors. Petitioner held this position for approximately one year. Eventually, Petitioner was promoted to the position of an "A" operator and was an "A" operator at the time of his discharge.

14. "A" operators are the highest level operators in the plant. The principal responsibility of an "A" operator is to monitor the reactors to which he has been assigned at the beginning of his shift.

15. On October 22, 2004, Petitioner was working the night shift with two other operators, Ernest Anderson (African-American) and John Monti (White). Petitioner was assigned to monitor two reactors during his shift on October 22, 2004. Monitoring a reactor requires the operator to monitor the Johnson Yokagawa Control (JYC) system for any alarms or adverse conditions it detects in the reactors. All three of the operators on the night shift were responsible for monitoring the JYC system.

16. During Petitioner's shift on October 22, 2004, the temperature in one of the tanks tripped the alarm. The alarm was shut-off without any action being taken to address the issue of the elevated temperature in the tank. Over the next ten hours, the alarm continued to sound every ten minutes and was continuously manually silenced without any steps being taken to resolve the underlying problem that was causing the elevated temperature. When the day shift arrived, an "A" operator noticed the problem, immediately stopped the reaction and called an outside contractor to come in and repair a chiller that had broken and had caused the elevated temperature in the reactor tank. Had the overheating tank not been caught by the day shift employees, it could have exploded, causing major damage to the plant and the surrounding community.

17. During most of the shift, but not all, Petitioner had been cleaning a filter on one of his reactors and was away from the room where the JYC system is housed. He, therefore, did not see or hear the alarm. Petitioner admits that he did not monitor the JYC system for both of his reactors throughout his shift as procedures require him to do.

18. The company investigated the incident. None of the operators admitted to hearing or silencing the alarm. Because all three operators failed to respond to the alarm and because of the very serious potential consequences of their failure, Respondent issued a suspension for negligence to all three operators on duty during the night shift on October 22, 2004.

19. There was no evidence that any other employee who failed to report a JYC alarm were not disciplined. The evidence did not demonstrate that Respondent's disciplinary action was unreasonable or discriminatory.

20. On March 17, 2005, Petitioner was responsible for adding VMP solvent to help cool product 16901-00, lot #217946, for the second stage reflux distillation. During this process, the disc in the reactor ruptured because of a build-up of pressure and temperature due to moisture entering the reactor. The JYC log showed that the pressure in the reactor had reached 25.24 psi and the column temperature had reached 125 C. As a

consequence of the rupture, the sight glass gasket on the column was damaged and had to be replaced.

21. As a result, Respondent incurred significant costs in repairing the blown disc and sight glass. These costs included the actual cost of the disc and the sight glass gasket. In addition, the reactor could not be operated during the repairs, which cost the company production time.

22. Respondent also conducted an investigation of this incident. The investigation revealed that the decanter was found to be over half full of resin.

23. Based upon the investigation, the JYC information and the nature of the chemical distillation process, Respondent concluded that Petitioner either: (1) did not control the cooling solvent for the second stage of cooling and caused a violent reaction that triggered an overflow and pressure build-up that resulted in the blown disc; or (2) failed to properly drain all of the water from the decanter before adding the VMP, which caused an overflow back into the reactor and the blown disc. Petitioner thought the water may have been in the solvent pipes used to pump the chemicals into the reactor.

24. Under any scenario, Petitioner failed to follow the operating procedures for his reactor and he failed to take appropriate action to prevent the failure of a pressure relief device.

25. On April 5, 2005, due to the progressive disciplinary policy and the serious nature of uncontrolled temperature and pressure build-ups in a reactor, Respondent placed Petitioner on a three-day suspension for negligence. The written notification given the Petitioner stated: "Any recurrence of this or any other poor work performance will result in termination from Reichhold, Inc."

26. At the hearing, Petitioner was unable to specifically identify any other white or younger employee who blew a rupture disc and was not disciplined. Although Petitioner claims that other employees blew rupture discs, his knowledge is based on hearsay or speculation. The one instance that Petitioner was aware of occurred after Petitioner's discharge, but prior to the hearing in this matter. In that instance a rupture disc blew on a reactor being operated by a white employee. However, the disc blew because the disc was faulty, not because of operator error. The disc was not supposed to rupture until ten pounds or more of pressure occurred in the reactor. According to the computer log, the disc ruptured prematurely at only 6.7 pounds of pressure. Because there was clearly no operator error no discipline was imposed. The incident is not comparable to Petitioner's situation and there was no evidence that showed Respondent's disciplinary action was unreasonable or discriminatory.

27. On July 23, 2005, Petitioner was working with two "D" operators, Robert Atkins (African-American) and Ralph Davis (African-American), all of whom were responsible for a batch of 16827-00, lot 215786, a type of chemical that Respondent mixed for sale to a customer. During the process, Petitioner added too much Pentaerythritol Pure Mono to the batch causing a mischarge of the product.

28. Later, Petitioner sampled the product and found that it was running high in acid value and was out-of-specification. He added glycerin to the reactor to try to bring the product back into specification. Petitioner's action, however, was not sufficient to correct the problem and the product remained out-of-specification. In the end, the product could not be salvaged and two shipments to the customer were missed.

29. Respondent conducted an investigation into this incident and concluded that Petitioner was responsible for the mischarge and had failed to follow the batch ticket recipe.

30. Petitioner admitted that he was responsible for this mistake.

31. Even though Petitioner could have been discharged under the progressive disciplinary policy, he was not. By disciplinary action issued on August 3, 2005, the company issued Petitioner a three-day suspension for negligence. The written notification received by Petitioner again stated: "any

recurrence of this or any other poor work performance will result in termination from Reichhold, Inc."

32. The two "D" Operators, who were substantially younger than Petitioner, received final written warnings for the same incident. Final written warnings are lower levels of discipline under the progressive disciplinary policy. They received less discipline because it is ultimately the "A" operator's duty to ensure the correct material is charged into the reactor.

33. There was no evidence of any other employees who committed mischarges and who were not disciplined. On the other hand, there was evidence that Respondent has disciplined white operators for similar mistakes. For example, on January 25, 2006, Doyle Caudell was responsible for a mischarge to reactor number two. Like Petitioner, he was issued a three-day suspension for the mischarge. There was no competent evidence that the discipline imposed on Petitioner was unreasonable, discriminatory or pretextual.

34. On June 25, 2005, Petitioner was responsible for batch 16070-00, lot 239480. During his shift, Petitioner mistakenly entered 1,919 pounds of castor oil, code 4016 to the company's inventory tracking system known as "SAP." The amount that should have been entered was 2,919 pounds of castor oil that he actually used in the production process. One of the responsibilities of an "A" operator is to accurately enter all

raw materials into the company's computer system to ensure other Reichhold employees order the necessary supplies for upcoming production needs. Because of Petitioner's error, the company's inventory showed that it had 1,000 more pounds of castor oil than it actually possessed.

35. Petitioner's error was not discovered until August 8, 2005, when Respondent planned to mix another batch of 16070-00. The company did not have enough castor oil on hand to mix the batch. As a result, Respondent was forced to delay production of 16070-00, until enough castor oil could be delivered to the plant.

36. On August 18, 2005, Petitioner was not discharged, but issued a final written warning for negligence. The disciplinary notice again stated: "any recurrence of this or any other poor work performance will result in termination from Reichhold, Inc."

37. The evidence showed that Respondent has disciplined a white operator for the same type of mistake. Jimmy Dickens received a one-day suspension for transposing numbers on a calculation which shorted inventory and created an off specification batch. There was no evidence that Respondent's disciplinary action was unreasonable, discriminatory or pretextual.

38. On March 17, 2006, Petitioner was responsible for the production of batch 16827-00, lot 309864 in Reactor 7(R7). During the processing and sampling of the product, Petitioner found that it was running high in acid value. He added two 700 pound hits of glycerin to the reactor to try to bring the product into specification. The product, however, could not be saved and was placed into storage until the company could prepare a plan to try to salvage the materials.

39. While Petitioner was working on his batch of 16827-00 in R7, a batch of 16406, lot 309785 was processing in Reactor 1 (R1), a different reactor on the same line as R7. During the sampling of R1 batch, it was observed to be running low on viscosity and acid value. As a result, 2,421 pounds of Phthalic Anhydride was added to R1 to bring batch 16406 back into specification.

40. Respondent investigated the problem. The computer log showed that Petitioner had logged that he added 2,393 pounds of glycerin to R7. However, Respondent tested the Hydroxyl values of both batches (16827-00 and 16406) which did not corroborate the addition of the glycerin to R7. The process information (PI) data showed a drop of 17 degrees in R1 during the time the glycerin was supposed to be cooling R7, showing that the glycerin had been charged or fed into the wrong reactor on the line.

41. The only way the glycerin was able to enter R1 was because Petitioner failed to close the glycerin valve on R1 prior to attempting to pump the glycerin into R7. Thus the glycerin flowed into R1 instead of R7.

42. Within the 18-month period prior to his discharge, Petitioner had engaged in conduct prompting three suspensions and a final written warning. Based upon Petitioner's mischarge on March 17, 2006, and his prior record of negligence in performing his duties, Respondent terminated Petitioner on March 30, 2006. There was no evidence of any other employees with five similar disciplinary actions within an 18-month period that were not discharged.

43. Petitioner was replaced by Phillip Nared (Black). Mr. Nared voluntarily resigned after 120 days and was replaced by Jason McGruder, also Black.

44. Petitioner testified that Terry King caused a spill from a monomer tank and was not disciplined. Terry King is a White A operator at the Pensacola plant.

45. However, Petitioner does not know when the alleged spill occurred, and did not witness Terry King engage in any conduct that caused the spill. Rather, Petitioner walked up on the spill after it had already occurred. All of Petitioner's knowledge regarding this incident is based on either speculation or hearsay. Petitioner did not present any other evidence

corroborating his allegations regarding Terry King. Therefore, this evidence is inadmissible and insufficient as comparator evidence.

46. Moreover, Petitioner introduced no other competent evidence about Mr. King's disciplinary history or other alleged incidents he was involved in for which he received no discipline. Therefore, no meaningful comparison of the disciplinary histories of Mr. King and Petitioner can be made.

47. Petitioner also testified about David Blair. David Blair is a white A operator at the Pensacola plant. Petitioner contends that Mr. Blair also caused a spill from the monomer tank. However, the spill was caused by faulty equipment.

48. As with Mr. King, Petitioner did not see Mr. Blair engage in any conduct that caused the spill. Rather, he saw the spill after it had already happened and was unaware of its cause. Therefore, Petitioner's evidence of Mr. Blair's alleged involvement in the spill is not based on his own personal knowledge but rather is speculation.

49. Again, Petitioner introduced no evidence about Mr. Blair's disciplinary history or other alleged incidents he was involved in for which he received no discipline. Therefore, no meaningful comparison of the disciplinary histories of Mr. Blair and Petitioner can be made.

50. Doyle Caudell is another white A operator at the Pensacola plant that Petitioner felt received more favorable disciplinary treatment than he did. Petitioner contends that Mr. Caudell was not disciplined for (1) and alleged mischarge to the monomer tank; and (2) a flash fire incident in May 2005.

51. Petitioner learned about the alleged mischarge to the monomer tank based on a statement from Carl Martion who was repeating an alleged statement from Doyle Caudell. Petitioner introduced no other evidence regarding this alleged mischarge. Consequently, it is based on uncorroborated hearsay and is not as comparator evidence.

52. Similarly, Petitioner was not working when the flash fire incident occurred, and again, his knowledge of the incident is based on uncorroborated hearsay.

53. Respondent investigated the flash fire incident. The incident occurred when a reaction inside a reactor caused the reactor to "flash" while two operators, one of whom was Doyle Caudell, were in the process of charging (loading) the reactor. The force of the flash knocked one of the operators backwards, causing injury to the operator.

54. Respondent concluded that the flash fire was not caused by operator error but rather by a faulty nitrogen valve and faulty procedures regarding when to apply heat to the reactor. The company changed its procedures after the incident

to specify that heat should not be applied to the reactor during the charging process. As a result of the investigation, the operators were not disciplined for the incident. Respondent concluded that Mr. Caudell did not violate any operating procedures and was not responsible for the flash fire.

55. Petitioner introduced no competent evidence to rebut the Company's conclusion that the flash fire was caused by faulty equipment and procedures. Petitioner testified that he was trained by Respondent that heat should never be applied to a reactor while loading chemicals because the pressure created by the added heat could cause the chemical being added to "blow back" out of the reactor. However, the evidence showed that this "Procedure" was not consistent or in place for all types of batches made by the Pensacola plant. Such procedures varied depending on the product being made. Therefore Petitioner's testimony is insufficient to overcome the data records maintained by the Respondent for the batch that caused the flash fire.

56. Moreover, Mr. Caudell's disciplinary history was not comparable to Petitioner's record. In the same 18-month period, Mr. Caudell only received two disciplinary actions. Thus, even if Mr. Caudell had been disciplined for the flash fire incident, his disciplinary record still would not have been as extensive as Petitioner's record.

57. Petitioner also testified that in June 2006, Jimmy Dickens (white) falsified company records. Again Petitioner was not present during the time of the alleged falsification.

58. The evidence showed that Mike Weaver, Mr. Dickens supervisor, suspected Jimmy Dickens of falsifying company records. The records did not affect safety or production issues. Mr. Weaver investigated but did not find sufficient evidence of falsification and did not feel comfortable with drawing a formal conclusion that Mr. Dickens had, in fact, falsified records. Therefore, Mr. Weaver verbally counseled Mr. Dickens and documented the incident in Mr. Weaver’s own files.

59. There was no evidence that Mr. Weaver’s actions were unreasonable or that Mr. Dickens alleged falsification was similar to Petitioner’s actions. Likewise, this one incident does not support a finding of preferential treatment for white employees over black employees.

60. Lastly, in 2006, Respondent terminated Jimmy Dortch, a white manager who was over 40 for poor performance. Petitioner offered no competent evidence on the issue of age discrimination and the evidence does not demonstrate that Petitioner was discriminated against or that Respondent’s disciplinary actions were a pretext to cover up discrimination. Therefore the Petition For relief should be dismissed.

CONCLUSIONS OF LAW

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

62. Respondent is an employer as defined by Section 760.02(7), Florida Statutes.

63. It is an unlawful employment practice for an employer to discharge or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race. § 760.10(1)(a), Fla. Stat.

64. In cases of discrimination, Petitioner has the burden of proving by a preponderance of the evidence that Respondent committed an unlawful employment practice. Fla. Dept. of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

65. The provisions of Chapter 760, Florida Statutes, are analogous to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et. seq. Cases interpreting Title VII are, therefore, applicable to Chapter 760, Florida Statutes. See School Bd. v. Hargis, 400 So. 2d 103, 108 and n.2 (Fla. 1st DCA 1981); and Bryant 586 So. 2d at 1209; Scelta v. Delicatessen Support Servs., 146 F. Supp. 2d 1255, 1261 and n.5 (M.D. Fla. 2001).

66. In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the United States Supreme Court set forth the requirements for proving a prima facie case of discrimination, which can vary depending on the type of discrimination case. McDonnell Douglas Corp. v. Green, 411 U.S. at 802 n. 13; Schwartz v. State of Florida, 494 F. Supp. 574, 583 (N.D. Fla. 1980). McDonnell Douglas supra provides:

> That a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the (Civil Rights) Act (of 1964." Teamsters v. United States, 431 U.S. 324, 358 (1977).

67. If the plaintiff proves a prima facie case of discrimination, the burden shifts to the employer "to articulate some legitimate nondiscriminatory reason" for the adverse employment action. McDonnell Douglas Corp. v. Green, 411 U.S. at 802.

68. In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742,2747 (1993), the Court held that once the employer succeeds in carrying his burden of producing a nondiscriminatory reason for the challenged action, the employee must show that the employer's reason is pretextual. The final and ultimate

burden of persuading the trier of fact, by a preponderance of the evidence, remains at all times, with the employee. St. Mary's Honor Center v. Hicks, 113 S. Ct. at 2747.

69. The employee's ultimate burden of persuasion may be satisfied by direct evidence showing that a discriminatory reason, more likely than not, motivated the decision involved, or by indirect evidence showing that the proffered reasons of the employer are not worthy of belief. Department of Corrections v. Chandler, 528 So. 2d 1183, 1186 (Fla. 1st DCA 1991). In Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000), the U.S. Supreme Court resolved a conflict among the circuits about the standard for establishing pretext fueled by the court's earlier decision in St. Mary's Honor Center v. Hicks, 509 U. S. 133 (1993), and made it clear that "pre-text plus" was not the standard to be used. Reeves established the pretextual standard as a permissive, case-by-case approach in "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false and . . . permit the trier of fact to conclude that the employer unlawfully discriminated." Id. at 148. Justice O'Connor's opinion for a unanimous court carefully explained why evidence of pretext with the prima facie case may be sufficient to find discrimination:

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. . . Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely explanation, especially since the employer is in the best position to put forth the actual reasons for the decision . . .

Reeves, 530 U. S. at 147. See also Dept. of Corrections v. Chandler, 582 So. 2d 1186 (Fla. 1st DCA 1991) and Chapman, supra.

70. On the other hand, "[a] plaintiff is not allowed to recast an employer's proffered nondiscriminatory reason or substitute [his] business judgment for that of the employer." Chapman, 229 F.3d at 1030. Rather, "an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Id.

71. To establish a prima facie case of discrimination based on disparate treatment, a complainant must show the following: (a) complainant belongs to a protected class; (b) complainant was subjected to an adverse employment action; (c) complainant was qualified for the position; and (d) the employer treated similarly situated employees outside the protected class more favorably. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997); Jones v. Gerwens, 874 F.2d 1534, 1539-42 (11th Cir. 1989).

72. In this case, Petitioner has satisfied the first three elements of the prima facie case. Petitioner is black and over 40-years-of-age, was terminated from his position, and was qualified for his position.

73. Petitioner, however, has not satisfied the fourth element of the prima facie case.

74. It is established law under Title VII that "to make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all relevant respects." Holifield, 115 F.3d at 1562. In this case, Petitioner has not identified any non-minority or younger employee who is similarly situated in all relevant respects. The evidence showed both white and black employees were subject to discipline. Undoubtedly, Petitioner truly believes that black employees, including himself, were reported to the management more often for discipline by the shift supervisors. Such beliefs, even though sincere, cannot form the basis for a finding of discrimination. Such findings must be based on competent evidence. Here, there was no evidence that such non-reporting was occurring. The instances that were testified about were either based on hearsay and not corroborated by any evidence, so lacking in facts so as to not be identifiable or were properly reported to management.

75. Moreover, the other employees identified by Petitioner as receiving more favorable treatment were not similarly situated employees who can be compared to the Petitioner. See Jian-Jian Ren v. Univ. of Cent. Fla. Trs., 390 F. Supp. 2d 1223, 1230-31 (M.D. Fla. 2005), aff'd, 179 Fed. Appx. 680, 2006 U.S. App. LEXIS 11451 (11th Cir. 2006). None of the individual's referenced in this order had disciplinary records as extensive as Petitioner's record of five incidents in an 18-month period.

76. Petitioner has failed to establish a prima facie case of race or age discrimination because he has failed to prove by a preponderance of the evidence that similarly situated, non-minority or younger employees were treated more favorably after engaging in similar conduct.

77. Even assuming, arguendo, Petitioner established a prima facie case of discrimination, Respondent has articulated a legitimate, non-pretextual reason for his termination. The string of errors and mistakes made by Petitioner while operating his assigned reactors were generally serious. The discipline imposed by Respondent was legitimate and reasonable. Petitioner cannot prevail simply by showing that Respondent incorrectly concluded that he violated operating procedures. So long as Respondent honestly believed that Petitioner caused these incidents, no pretext is shown. Forrester v. Rawland-Bog Corp., 453 F.3d 416, 418 (7th Cir. 2006) (the question is never whether

the employer was mistaken, cruel, unethical, out of his head, or downright irrational in taking the action for the stated reason, but simply whether the stated reason was his reason: not a good reason, but the true reason); Jones, 874 F.2d 1534, 1540 (11th Cir. 1989) ("[t]he law is clear that, even, if a Title VII claimant did not commit the violation with which he is charged, an employer successfully rebuts any prima facie case of disparate treatment by showing that it honestly believed the employee committed the violation); Damon v. Fleming Supermarkets, Inc., 196 F.3d 1354, 1363 n.3 (11th Cir. 1999) ("[a]n employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct") (citation and quotation omitted), cert. denied, 529 U.S. 1109, 120 S. Ct. 1962, 146 L. Ed. 2d 793 (2000); Herron v. DaimlerChrysler Corp., 388 F.3d 293, 299 (7th Cir. 2004) (the pretext inquiry focuses on whether employer's explanation was a "a lie rather than an oddity or an error").

78. Finally, the people who sequentially replaced Petitioner were both black, indicating that racial discrimination was not the motive for terminating Petitioner.

79. In summary, Petitioner offered no competent evidence on the issue of age discrimination. The evidence does not demonstrate that Petitioner was discriminated against on the

basis of his race or that Respondent's disciplinary actions were a pretext to cover up such discrimination. Therefore the Petition For Relief should be dismissed.

RECOMMENDATION

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

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief in its entirety.

DONE AND ENTERED this 2nd day of August, 2007, in Tallahassee, Leon County, Florida.

Diane Cleavinger

DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
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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.