STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DARYL ROYSTER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 07-1527
	)	
PATE STEVEDORE CO., INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal hearing before P. Michael Ruff duly-designated Administrative Law Judge of the Division of Administrative Hearings in Pensacola, Florida, on November 8, 2007. The appearances were as follows:

APPEARANCES

For Petitioner: Darryl Royster, pro se
4406 Chantilley Way
Pensacola, Florida 32505

For Respondent: Amy M. Klotz, Esquire
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STATEMENT OF THE ISSUES:

The issues to be resolved in this proceeding concern whether the Petitioner, Darryl Royster, was subjected to employment discrimination, by allegedly being terminated on the basis of his race or disability/handicap, by denial of a promotion and training, being subjected to discriminatory terms and conditions

of employment, and by retaliation.

PRELIMINARY STATEMENT

This cause arose when the Petitioner, Darryl Royster, filed a charge concerning employment discrimination with the Florida Commission on Human Relations (Commission) on August 31, 2006. The Commission entered a Determination of Reasonable Cause on the issue raised concerning retaliation and "No Cause" on the issues of race discrimination and disability discrimination. The Petitioner filed a Petition for Relief which was duly transmitted to the Division of Administrative Hearings and ultimately to the undersigned Administrative Law Judge.

The case was noticed for hearing and the hearing was conducted on the above date. The Petitioner presented the testimony of three witnesses, including his own testimony. Additionally, the Petitioner's Exhibits A through G were admitted into evidence. The Respondent presented the testimony of three witnesses and six exhibits, all of which were admitted into evidence.

Upon concluding the proceeding, the parties were given the opportunity to submit proposed recommended orders after the filing of a transcript. The Proposed Recommended Orders have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner was employed by Pate Steveodore Company, Inc., (Pate) at times pertinent hereto. The Petitioner is an African-American male.

2. Pate is a licensed Stevodore Company operating at the Port of Pensacola. Pate typically handles loading or unloading of various types of cargo, including soy beans, frozen food products, and other materials from railroad cars located in the port or onto ships berthed at the port. Pate has a staff of six permanent employees, including a president, vice-president, office manager, accounting clerk, and pier superintendent, as well as a part-time payroll clerk. Depending on the amount of work available at any particular time, Pate employs from 0 to 60 longshoremen, the majority of whom are African-American.

3. The Petitioner was first employed by Pate in September 2005, as a longshoreman, responsible for loading and unloading box cars. Scott Miller is the former supervisor of the Petitioner. In his testimony he established that, typically, two teams of three longshoremen each would be assigned to load or unload each box car. The members of such teams work together to load or unload cargo from pallets, typically completing the unloading of two cars in a morning and two cars in the afternoon. The employees typically take breaks from the work in between pallets or box cars, but are allowed to take breaks whenever they feel the need. They arrange the schedule for taking breaks among themselves and without direction from supervisors.

4. The Petitioner was working on August 2, 2006. On that date he contends that he suffered a back injury while lifting a 110 pound sack of beans. He states that he attempted to inform his supervisor, Mr. Miller, of the alleged injury, but was instructed to either return to work that day, or to leave if he

was unable to do so. Mr. Miller was apparently frustrated with the Petitioner on that day because the Petitioner had left the work area on two occasions that morning for prolonged periods of time. The first time was when he went to the main office of Pate to discuss the fact that his child support payments were being withheld from his checks and to demand that the money be returned to him. The Petitioner wanted Pate to reimburse him for the withheld amounts and Pate explained to the Petitioner that they were legally required to make the deductions from his payroll. The second time that day he went to the main office to inform Mr. Pate that he had a job interview with an insurance company and would not be returning to work that afternoon after lunch. The Petitioner told Mr. Pate that he had already informed Mr. Miller that he would not be working that afternoon. Actually, he had never told Mr. Miller he was going to be absent in the afternoon. Because Mr. Miller did not have a replacement for the unexpected absence of the Petitioner, Mr. Miller had to perform the Petitioner's job loading and unloading cargo, during both the morning and afternoon absences. Mr. Miller told Mr. Pate of his dissatisfaction with the unexcused absences and having to perform the Petitioner's work himself.

5. Pate did not hear from the Petitioner again until August 8, 2006, when Michael Pate, the company president, and Rosalee Garrett, the office manager, received a fax from the Petitioner requesting that they pass along certain information to the company's workers' compensation carrier, so that the Petitioner could be paid for the time he had been off work. The Petitioner

informed Pate that he would be retuning to work the following week and attached a note from a medical clinic asking that he be excused from work until August 14, 2006.

6. Ms. Garrett responded to the request and forwarded the requested information to the company's workers' compensation carrier. She also requested that the Petitioner report to the office so that he could complete an accident report form so that his workers' compensation claim could be properly processed. Pate's workers' compensation carrier's coverage policy and the workers' compensation law requires that an accident report be submitted by the claimant.[1/]

7. On August 11, 2006, the Petitioner wrote to Mr. Pate and Ms. Garrett informing them that he would not be able to return to work until October 20, 2006, because he was still experiencing back pain and rectal bleeding. The Petitioner wanted to wait until he could be seen by a doctor so that he could determine the source of those two problems. The Petitioner informed Mr. Pate and Ms. Garrett that he could perform light-duty work that did not involve bending or heavy lifting, such as running errands for the company, supervising other employees, and that he could also do work on the computer.

8. Thereafter, on August 28, 2006, the Petitioner came to Pate's main office, again requesting light-duty work. There was no such work available, however, and Mr. Pate so informed the Petitioner. At that point the Petitioner became very upset and belligerent and began cursing Mr. Pate. Mr. Pate regarded that as threatening behavior and insubordination and was unwilling to

tolerate such conduct. Mr. Pate escorted the Petitioner out of the office to converse with him outside, away from the other employees, because of his behavior, but was unsuccessful and thereupon terminated him. He told him to leave the premises, but ultimately had to call the port security office to have the port security personnel escort the Petitioner off the premises and outside the secure area of the Port of Pensacola. The testimony of Ms. Garrett corroborates that of Mr. Pate in establishing

that the Petitioner was terminated because he became threatening, argumentative, and insubordinate toward Mr. Pate.

9. In terms of his claim regarding racial discrimination, based upon allegedly different terms and conditions of employment imposed upon him, the Petitioner claims that he and other African-American employees were not allowed to take breaks or to train for and become forklift operators. The testimony of three witnesses, however, established that African-American employees are granted the same breaks as white employees and are otherwise treated the same with respect to the terms and conditions of their employment. The Petitioner was allowed to, and did take breaks during his employment with Pate. Moreover, contrary to the Petitioner's position, it was established, by persuasive, credible testimony, that in terms of the alleged issue concerning African-American employees not being allowed to become forklift drivers, that Pate conducted training so that such employees could become forklift drivers. Some employees took advantage of that training and became forklift drivers. In fact, the majority

of Pate's forklift drivers are African-American.

10. The Petitioner also contended that he was discriminated against in terms of his race for failure of Pate to promote or train him or other African-American employees. According to the preponderant, persuasive testimony and evidence presented at the hearing, however, there was no open position available at Pate, during the Petitioner's employment time there, to which he could have been promoted, nor had he ever applied for a promotion position. There was no denial of training opportunities because there was no training offered to any employee during the period of time of the Petitioner's employment with Pate and there was no evidence to show that the Petitioner ever requested training for any position at Pate. As found above, before the Petitioner became employed there, Pate did offer training for forklift drivers and trained some employees as forklift drivers, the majority of whom were African-American.

CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

12. In discrimination cases predicated on circumstantial evidence, as this one is, since no evidence was offered of direct discrimination by the employer, the standard of proof established by the United States Supreme Court in the decision of McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973) applies. This standard requires that a Petitioner initially

establish a prima facie case of discrimination. If a prima facie case is established, then the burden of going forward with evidence to meet that prima facie case shifts to the Respondent employer to articulate some evidence of a legitimate, non-discriminatory reason for the employment action taken. McDonnell-Douglas Corp., supra at 802-803; Combs v. Plantation Patterns, 106 F.3d 1519, 1528 (11th Cir. 1997). The burden on an employer or Respondent is "exceedingly light" in this regard. The Respondent's burden would be satisfied if it produced evidence which, if taken as true, would permit a conclusion that there was a non-discriminatory reason for the adverse action. See Meeks v. Computer Associates International, 15 F.3d 1013, 1019 (11th Cir. 1994); St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). The Respondent need not persuade the court that it was actually motivated by the proffered reasons for the employment action taken, it is sufficient if the evidence raises a genuine issue of fact as to whether the action was based upon discriminatory motives. See Chapman v. A1 Trasport, 229 F.3d 1012, 1024 (11th Cir. 2000); Combs supra at 1528. If a Respondent satisfies its burden of going forward with evidence of a non-discriminatory reason for the termination, it then becomes incumbent upon the Petitioner to prove by preponderant evidence that the reasons offered by the Respondent were pretextual in nature. Silvera v. Orange County School Board,

244 F.3d 1253, 1258 (11th Cir. 2001).

13. In order to establish a prima facie case of racial discrimination the Petitioner must establish (1) that he is a member of a protected class (African-American); (2) that he suffered an adverse employment action; (3) that his employer treated similarly situated employees of other races more favorably than the Petitioner; and (4) that he was qualified to do his job. See Hollifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

14. In terms of establishing a prima facie case of racial discrimination, the Petitioner established that he belonged to a protected class and that he was subjected to an adverse employment action. He did not, however, establish that the employer treated similarly situated employees of other races more favorably than it did the Petitioner. This is because there were no employees, for instance white employees, who were shown to be similarly situated. There was no evidence that any other employee had engaged in the belligerent, threatening, and insubordinate conduct, much less one who had done so and who was subjected to a lesser discipline or no discipline. The Petitioner's evidence only showed that the Petitioner had engaged in such conduct which resulted in his termination.

15. Arguably, the Petitioner may have shown that he was

qualified to do his job because he was performing as a longshoreman, except for the fact that he had left his job on several occasions on the date referenced in Mr. Miller's testimony. This was unsatisfactory performance to the extent that Mr. Miller, the supervisor, had to perform the Petitioner's work for him when he was absent on at least two occasions that date, without authorization from his supervisor.

16. In any event, the prima facie case of racial discrimination was not established in terms of the termination, or in terms of the alleged imposition of different terms and conditions of employment applicable to African-Americans and the alleged failure to provide training and promotion. In fact, as found above, there were no training opportunities available for any employees during the period the Petitioner was working for Pate. Pate, however, had provided training for forklift drivers in the past, and a number of its employees had taken advantage of that training and secured positions as forklift drivers. Most of those workers were African-American, and the majority of Pate's forklift drivers at the time of the hearing were African-American.

17. Moreover, the unrefuted, persuasive evidence shows that all employees, African-American and otherwise, are permitted to take breaks when needed throughout the day, and are encouraged to do so. The Petitioner was allowed to and did in fact take breaks during his employment with Pate as well. Thus the Petitioner's claim that he was subjected to different terms and conditions of

employment because of his race or was terminated because of his race must fail for lack of establishing a prima facie case.

18. Assuming arguendo that a prima facie case was established on the question of racial discrimination, the Respondent employer must rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the employment action, as concluded above. In this regard, it is well-settled that "an employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for not reason at all, as long as its action is not for a discriminatory reason." See Truss v. Harvey, 179 F. App. 583, 587 (11th Cir. 2006). Nix v. W.L.C.Y. Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984). "In other words, '[i]f the proffered reason is one that might motivate a reasonable employer, a plaintiff cannot recast the reason but must meet it head on and rebut it[;] . . . [q]uarrelling with that reason is not sufficient.'" Truss supra. (Quoting Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1088 (11th Cir. 2004)).

19. The Petitioner testified that he was terminated because the Respondent did not want to place him on light duty work with regard to his workers' compensation claim and offered no other evidence concerning any reason for his termination. He never testified or adduced evidence that he was terminated because of his race. He in other words failed to establish a prima facie case of discharge based upon racial discrimination. Even had he done so, the claim would fail because Mr. Pate, in his testimony, which is deemed persuasive and credible, established that he

terminated the Petitioner because he became arugmentative and belligerent towards him. This testimony was corroborated by Ms. Garrett's testimony concerning the reason for termination. The Respondent thus articulated a legitimate, non-discriminatory reason for the Petitioner's termination. The Petitioner failed to offer testimony to show that articulated, evidential reason was pretextual and was really based upon discriminatory motives. Whether one might agree with the reason or not, it was not shown that the proffered reason by Pate for the termination was not one that might motivate a reasonable employer in that situation, under the above-cited decisional authority. It does not matter that the Petitioner might quarrel with that reason and have a different opinion, such is not sufficient and will not rebut the reason shown by the employer. Thus the Petitioner's claim for discriminatory discharge based upon his race has not been proven.

20. The Petitioner's discrimination claim based upon alleged different terms and conditions of employment applicable to him must fail also, for the reasons concluded above. The Petitioner offered no evidence at hearing to establish such discriminatory terms and conditions of employment. The Respondent established that all employees were granted the same opportunity for breaks from work, whether they were white or black, and were otherwise treated the same with respect to the

terms and conditions of employment. Pate established that it had trained a number of its longshoreman/laborer employees to become forklift drivers in the past and a fair number had done so. The majority of those forklift drivers are African-American. There were simply no such training or promotion opportunities available at the time the Petitioner was employed at Pate for any employees, not just the Petitioner and not just the Petitioner's fellow protected-class members. There has simply been no persuasive evidence to show that the Petitioner was subjected to different terms and conditions of employment because of his race and that claim must therefore be dismissed.

21. In order to prevail on a claim for failure to promote or train, the Petitioner must prove that he is a member of a protected class; that he was qualified for and applied for a promotion position; that he was rejected from that position and that other less qualified or equally qualified employees who were not members of his protected class were promoted or received the training. See Joseph v. Publix Supermarket, Inc., 151 F. App. 760, 765-66 (11th Cir. 2005); Celestine v. Petroleos De Venezuella Sa, 266 F.3d 343, 354-55 (5th Cir. 2001) (noting that the elements of a failure to promote and failure to train claim are the same). The Petitioner proved in this regard that he is a member of the protected class, as found above. He did not, however, prove any of the remaining elements of a claim for

failure to promote or train. According to the persuasive, preponderant evidence presented there was no position available at Pate during the Petitioner's employment to which anyone, regardless of race, could have been promoted, much less for which the Petitioner actually applied. Likewise, there was no training being offered to any employees, regardless of race, during his employment period at Pate and no evidence that he had requested any training for any position at Pate. Therefore, his claims for failure to promote and train must be dismissed for lack of proof as well.

22. Concerning the retaliation claim, the Petitioner must show that he was engaged in a statutorily protected activity or expression; that the Respondent employer took an adverse employment action against him; and that a causal connection or link exists between the protected activity or expression and the adverse employment action taken. See Maniccia v. Brown, 171 F.3d 1364, 1369 (11th Cir. 1999); Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997); Goldsmith v. City of Atmore, 996 F.2d 1155, 1163 (11th Cir. 1993). After a prima facie case concerning retaliation is shown, the burden will shift to the employer to proffer a legitimate, non-discriminatory reason for the adverse employment action. If the employer offers such a reason the Petitioner must then demonstrate that the proffered non-discriminatory reason is pretextual and a ruse designed to

mask retaliation. (Farley v. Nationwide Mutual Insurance Company, 197 F.3d 1322, 1336 (11th Cir. 1999).

23. In the evidence offered by the Petitioner, he only implied that he felt he was retaliated against for filing his workers' compensation claim. He made no mention in his testimony, and offered no evidence, that he had been retaliated against because of his race or the filing of any claim concerning his race or any disability. There was no testimony or evidence offered in support of his retaliation claim other than his stated belief that it was because he filed and was prosecuting a workers' compensation claim. There is no evidence, however, that he was terminated for any reason related to his workers' compensation claim. To the contrary, the un-rebutted testimony and evidence offered by the Respondent, through the testimony of both Mr. Pate and Ms. Garrett, indicated that the Petitioner was terminated because of his conduct in the company's office on the day of termination, after Mr. Pate informed him that he had no light duty work available. The Petitioner therefore failed to establish any causal link between any protected activity or expression he engaged in and the adverse employment action. Therefore, a prima facie case of retaliation was not proven, and, if it had been, the Respondent established a legitimate, non-discriminatory business reason for the employment action taken. There was no showing, by any

credible, persuasive evidence, that it was pretextual for what really amounted to retaliation. It cannot be concluded that the Respondent unlawfully retaliated against the Petitioner.

24. The Petitioner has also claimed to have been discriminated against based upon an alleged disability. In order to prevail on such a claim he must show (1) that he has a disability; (2) that he is a qualified individual who can perform the essential functions of his job either with or without a reasonable accommodation; (3) that his employer had actual or constructive knowledge of his disability or considered him to be disabled; (4) that there was a reasonable accommodation that would allow him to perform his job duties and he identified that accommodation to his employer; and (5) that he actually suffered discrimination because of his disability. See Sheets v. Florida Each Coast Railway Company, 132 F.2d 1031, 1034 (So. Dist. of Fla. 2001).

25. The Petitioner's disability claim must fail because he did not establish a prima facie case of disability discrimination. He failed to establish that he is disabled. See Willis v. Conopco, Inc., 108 F.3d 282, 284-85 (11th Cir. 1997). "Merely proving the existence of a physical impairment, without addressing any limitation on major life activities, is not sufficient to prove disability." See also Standard v. Abel Services, Inc., 161 F.3d 1318, 1327 (11th Cir. 1998). "A physical impairment does not substantially limit the major life activity of working merely because it precludes the performance of one particular job." Id. (Citing 29 C.F.R. §

1630.2(j)(3)(i)). "'Instead, the impairment must significantly restrict the ability to perform either a class of jobs or a broad range of jobs in various classes, as compared to the average person having comparable training, skills and abilities.'" Id.

26. The Petitioner proved that he was placed on a light duty work restriction for some two weeks by his physician, but failed to prove that he was substantially limited in the major life activity of working. He presented no evidence that he was substantially limited in any other major life activity other than working. As the court noted in Butler v Greif Brothers Services Corp., 231 F. App. 854, 856-57 (11th Cir. 2007), "'[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.'" (Citing 29 C.F.R. § 1630.2(j)(3)(i)). According to the United States Supreme Court, "'[t]o be substantially limited in the major life activity of working, . . . one must be precluded from more than one type of job, a specialized job, or a particular job of choice. If jobs utilizing an individual's skills (but perhaps not his or her unique talents) are available, one is not precluded from a substantial class of jobs. Similarly, if a host of different types of jobs are available, one is not precluded from a broad range of jobs.'" Id. (Quoting Sutton v. United Airlines, Inc., 527 U.S. 471, 492 (1999)).

27. The Petitioner has five years of college education and was capable at all times of performing work that did not require heavy lifting. Following his alleged injury, he sought light duty work from both an insurance company and from Pate. The

Petitioner currently works as a janitor. As in the Butler case, the Petitioner's "ability to perform such jobs indicates that he was not substantially limited from a class of jobs or a broad range of jobs as compared to the average person having comparable training, skills, and abilities." 231 F. App. at 857. Thus, the Petitioner has not established that whatever physical impairment he might have constituted or imposed a disability, as that has been defined in Chapter 760 Florida Statutes, and the above decisional authority. Because he did not prove disability, he did not prove a prima facie case for disability discrimination. Even if he had done so, the Respondent proved a legitimate, non-discriminatory business reason for his termination, to which he responded with no evidence which might indicate any pretextual motive.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and the arguments of the parties, it is, therefore,

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

DONE AND ENTERED this 19th day of March, 2008, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF

Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 19th day of March, 2008.

ENDNOTE

1/ Section 440.185(1) and (2), Florida Statutes (2006).

COPIES FURNISHED:

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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.