STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WADE HAMILTON, Petitioner, vs. THE TALKING PHONE BOOK, Respondent.	)	Case No. 07-2417

RECOMMENDED ORDER

A hearing was held pursuant to notice, on August 8, 2007, in Gainesville, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: Wade Hamilton, *pro se*
3800 Southwest 20th Avenue
Apartment 406
Gainesville, Florida 32607

For Respondent: Jeffrey B. Jones, Esquire
Littler Mendelson, P.C.
4767 New Broad Street
Orlando, Florida 32814

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Charge of Discrimination filed by Petitioner on November 16, 2005.

PRELIMINARY STATEMENT

On September 28, 2005, Petitioner, Wade Hamilton, filed an employment Charge of Discrimination with the Florida Commission on Human Relations (FCHR) which alleged that Respondent, The Talking Phone Book (TPB) violated Section 760.10, Florida Statutes, by discriminating against him on the basis of race and national origin, which resulted in his termination.

The allegations were investigated and on April 19, 2007, FCHR issued its Determination: No Cause and Notice of Determination: No cause. A Petition for Relief was filed by Petitioner on May 23, 2007.

FCHR transmitted the case to the Division of Administrative Hearings on or about May 30, 2007. A Notice of Hearing was issued setting the case for formal hearing on August 8, 2007. The hearing proceeded as scheduled. The parties filed a Joint Pre-Final Hearing Statement on August 6, 2007.

At hearing, Petitioner testified on his own behalf. Petitioner's Exhibit numbered 1 was admitted into evidence. Petitioner's Exhibits numbered 2 and 3 were rejected. Respondent presented the testimony of Terry Strickland and Susan Ruhland. Respondent's Exhibits numbered 1 through 37 were admitted into evidence.

A one-volume transcript was filed on August 22, 2007. Respondent filed a Proposed Recommended Order, which has been

considered in the preparation of this Recommended Order. Petitioner did not file a post-hearing submission.

FINDINGS OF FACT

Stipulated Facts

1. Petitioner was hired by TPB as a premise sales representative for TPB's office in Gainesville, Florida on or about April 3, 2006.

2. Petitioner and other new hires attended TBP's new hire sales training course in Jacksonville, Florida, on or about April 3, 2006.

3. Petitioner and the other newly hired employees were required to establish employment eligibility in accordance with the Employment Eligibility Verification Form, Form I-9.

4. For Form I-9 purposes, Petitioner produced a driver's license and social security card. The social security card had the following notation: "For Social Security and Tax Purposes: Not for identification."

5. TPB informed Petitioner that it could not accept the social security card he produced for purposes of fulfilling his Form I-9 requirements.

6. TPB asked Petitioner to provide it with any other document(s) to satisfy his Form I-9 requirements.

7. TPB informed Petitioner that he could go to the local social security office in Jacksonville to request a new social security card and/or obtain a letter from the social security office that indicated he had applied for same.

8. No other new hire in Petitioner's training class provided TPB with a social security card with the same notation that appeared on Petitioner's card.

9. TPB requested Petitioner to provide an acceptable document from List A, B, or C found on the back of Form I-9. Petitioner provided TBP with a copy of a Birth Registration Form.

10. The Birth Registration Form was not a document listed in List A, B, or C referenced on Form I-9.

11. At the time Petitioner was hired by Respondent, TPB had policies that prohibited, among other things, discrimination on the basis of race and national origin. Petitioner was aware that TPB had anti-discrimination policies in place.

12. Petitioner's employment with TBP ended on or about April 6, 2006. TPB informed Petitioner that his employment was terminated because he was unable to provide sufficient proof of employment eligibility with regard to Form I-9.

13. Petitioner cannot identify any similarly situated TPB employees outside of his protected class who were treated more favorably.

Facts Based Upon the Evidence of Record

14. Petitioner is a black male who was born in Jamaica. He became a citizen of the United States sometime after arriving in this country in 1978.[1/]

15. Respondent, TPB, is an employer within the meaning of the Florida Civil Rights Act. TPB is the brand name or logo for White Directory Publishers, which publishes telephone directories.

16. At the time Petitioner was hired, Terry Strickland was a regional sales trainer for TPB. He conducted the training course in Jacksonville for the group of new hires which included Petitioner. At the time of the training session, Mr. Strickland was not aware of Petitioner's national origin.

17. During the training course in Jacksonville, all new hires, including Petitioner, were required to complete a human resources packet and review PowerPoint presentations regarding TPB policies, including its anti-discrimination policy. The human resources packet included Form I-9.

18. When Mr. Strickland received Petitioner's social security card and observed the notation on the bottom, he informed Petitioner that TPB would not be able to accept the card for Form I-9 purposes. He then informed Petitioner that he could go to the local social security office during lunch to apply for a new card.

19. While Petitioner went to the local social security office, he was unable to obtain a new card or a letter from that office as he did not have proper documentation with him to secure a new card.

20. Mr. Strickland handled this matter with other new hires in other training sessions in the same manner. That is, any time he was presented with a social security card with the notation "not for identification purposes," he has informed the person that the card is not an acceptable document for Form I-9 purposes and that other acceptable documents would have to be provided.

21. Mr. Strickland also informed Petitioner that a birth certificate would be acceptable. However, when presented with Petitioner's Birth Registration Form, he noted that it did not have a seal. Therefore, he faxed it to Susan Ruhland at TPB's corporate headquarters in Buffalo, New York.

22. Susan Ruhland is the human resources manager for Respondent. Ms. Ruhland was contacted by Mr. Strickland regarding Petitioner's social security card. Ms. Ruhland spoke to Petitioner by phone and explained to him that his social security card was not acceptable based on requirements of the Department of Homeland Security. She also informed Petitioner that there are other means of identification or documentation that can be provided to satisfy Form I-9 requirements.

Ms. Ruhland was not aware of Petitioner's national origin when she spoke to him by telephone.

23. Ms. Ruhland contacted the Department of Homeland Security to verify her understanding that Petitioner's social security card was unacceptable for Form I-9 purposes. She received confirmation that her understanding was correct.

24. Other than the Birth Registration Form supplied by Petitioner, Petitioner was not able to provide any other document to satisfy the Form I-9 requirements. He had recently applied for a passport and had sent original documents with his passport application.

25. Ms. Ruhland could not accept the Birth Registration Form provided by Petitioner because it was not issued by a state, county, municipal authority or outlying possession of the United States, and it lacked an official seal. She informed Petitioner that if he could not provide the acceptable documentation within three days, that he would have to be dismissed.

26. Employees of TPB in previous training courses of different races and national origins who submitted social security cards with the same notation that appears on Petitioner's were treated in the same manner as Petitioner. Specifically, during the period of 2004 to August 2007, 17 new employees of TPB were asked to submit another document that

fulfilled the Form I-9 requirements or go to the social security office to apply for a new card. Of those 17 employees, 12 were Caucasian, three were African-American, one Hispanic, and one American Indian/Alaskan Native.

27. Mr. Strickland informed Petitioner on or about April 6, 2007, that TPB had to terminate his employment because he was unable to provide sufficient proof of employment eligibility with regard to Form I-9.

28. There was no competent evidence presented that establishes that Petitioner's termination was based on race or national origin.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat.

30. Section 760.10(1), Florida Statutes, states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race or national origin.

31. In discrimination cases alleging disparate treatment, the Petitioner generally bears the burden of proof established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981).[2/] Under this well

established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id. Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Department of Corrections v. Chandler, supra at 1186; Alexander v. Fulton County, Georgia, supra. Petitioner has not met this burden.

32. To establish a prima facie case, Petitioner must prove that (1) he is a member of a protected class; (2) he was subject to an adverse employment action; (3) his employer treated

similarly situated employees, who are not members of the protected class, more favorably; and (4) he was qualified for the job or benefit at issue. See McDonnell, supra; Gillis v. Georgia Department of Corrections, 400 F.3d 883 (11th Cir. 2005).

33. Petitioner has met the first and second elements to establish a prima facie case of discrimination in that he is a member of two protected classes and was subject to an adverse employment action.

34. However, he has not proven the third element, that his employer treated similarly situated employees who are not members of the protected class more favorably. The preponderance of the evidence established that he was treated the same way that other employees were treated regarding the Homeland Security requirements in regard to Form I-9, regardless of race or national origin. There is no evidence that establishes that race or national origin played any part in his termination, nor whether anyone of another race or national origin replaced him. Petitioner has not provided any evidence that any non-minority employees with whom he compares his treatment were similarly situated yet treated more favorably. See Holifield v. Reno, 115 F.3d 1555 (11th Cir. 1997).

35. Moreover, Petitioner did not present competent evidence to prove the fourth component of establishing a prima facie case regarding his being qualified for the job, except that he was hired for the job.

36. Applying the McDonnell analysis, Petitioner did not meet his burden of establishing a prima facie case of discriminatory treatment. Even assuming that Petitioner had demonstrated a prima facie case of discriminatory conduct, Respondent demonstrated a legitimate, non-discriminatory reason for Petitioner's termination, that is, Respondent's actions were based on federal requirements applicable to all employers and applied identically to all employees of Respondent.

37. Even if it were necessary to go to the next level of the McDonnell analysis, Petitioner did not produce any evidence that Respondent's legitimate reasons were pretext for discrimination. Therefore, Petitioner has not met his burden of showing that a discriminatory reason more likely than not motivated the actions of Respondent toward Petitioner or by showing that the proffered reason for the employment decision is not worthy of belief. Consequently, Petitioner has not met his burden of showing pretext.

38. In summary, Petitioner has failed to carry his burden of proof that Respondent engaged in racial or national origin discrimination toward Petitioner when it terminated him.

39. Respondent seeks an award of attorney's fees pursuant to Section 760.11(6), Florida Statutes, which reads in pertinent part as follows:

> (6) Any administrative hearing brought pursuant to paragraph (4)(b) shall be conducted under ss. 120.569 and 120.57 . . . . In any action or proceeding under this subsection, the commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal law involving a Title VII action.

40. In this proceeding, the final order will be issued by FCHR. The prevailing party cannot be determined until the final order is issued. Further, in reading the above-quoted statutory language, it appears to the undersigned that it is FCHR, not the undersigned, that has the jurisdiction to consider any such award of attorney's fees.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

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

DONE AND ENTERED this 17th day of October, 2007, in Tallahassee, Leon County, Florida.

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BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of October, 2007.

ENDNOTES

1/ Petitioner's Certificate of Citizenship is barely legible. It contains the dates of September 5, 1978, and February 17, 1982. It cannot be determined from the face of the certificate which is the actual date of Untied States citizenship. In any event, he was a United States citizen at all times material to this proceeding.

2/ FCHR and Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See Brand v. Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

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.

CECIL HOWARD GEN CO
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