STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RALPH ALEXANDER, Petitioner, vs. SOLID WALL SYSTEMS, INC., Respondent.	)	Case No. 07-4020
STEVIE DANIELS, Petitioner, vs. SOLID WALL SYSTEMS, INC., Respondent.	)	Case No. 07-4021
ERNEST WEST, JR., Petitioner, vs. SOLID WALL SYSTEMS, INC., Respondent.	)	Case No. 07-4022
CARLOS COLE, Petitioner, vs. SOLID WALL SYSTEMS, INC., Respondent.	)	Case No. 07-4385

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in these cases on November 27 and 28, 2007, in Viera, Florida.

APPEARANCES

For Petitioners: Adrienne E. Trent, Esquire
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For Respondent: Chelsie J. Roberts, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent discriminated against Petitioners based on their race in violation of Chapter 760, Florida Statutes (2006) ("Florida Civil Rights Act").

PRELIMINARY STATEMENT

On February 2, 2007, Petitioners Ralph Alexander, Stevie Daniels, and Ernest West, Jr., each filed a claim with the Florida Commission on Human Relations ("Commission") alleging that Respondent, Solid Wall Systems, Inc., had unlawfully discharged each of them based on their race. On March 7, 2007, Petitioner Carlos Cole, filed a claim with the Commission alleging that Respondent had unlawfully discharged him based on his race. Each Petitioner received a Notice of Determination:

No Cause, from the Commission and timely filed a Petition for Relief.

On September 6, 2007, the Commission forwarded the Petitions for Relief of Petitioners Ralph Alexander, Stevie Daniels, and Ernest West, Jr., to the Division of Administrative Hearings; on September 21, 2007, Petitioner Carlos Cole's, Petition for Relief was forwarded to the Division of Administrative Hearings. Initial Orders were sent to all parties. Each Initial Order was forwarded on the same day the Division of Administrative Hearings received the Petitions for Relief from the Commission.

On September 14, 2007, the cases of Ralph Alexander, Stevie Daniels, and Ernest West, Jr., were consolidated. On October 4, 2007, Petitioner Cole's case was consolidated with the other three cases. On that same day, October 4, 2007, the case was scheduled for final hearing on November 27 and 28, 2007.

The cases were presented as scheduled. Petitioners presented 12 witnesses: Ralph Alexander; Stevie Daniels; Ernest West, Jr.; Carlos Cole; Ernest Mitchell, Jr.; Ronald Christmas; Kenneth Sloane; Harry Walker; Robert Kalina; Roy Brock; Vince Hauser; and Kyle Cross. Petitioner had 13 exhibits admitted into evidence, which were marked Petitioner's Exhibits 1 through 13. Respondent presented one witness, Anthony Daniels,

and had five exhibits admitted into evidence, which were marked Respondent's Exhibits 1 through 5.

The three-volume Transcript was filed with the Clerk of the Division of Administrative Hearings on January 16, 2008. Both parties timely filed Proposed Recommended Orders.

All references are to 2006 Florida Statutes, unless otherwise indicated.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the following Findings of Fact are made:

1. All Petitioners are African-American males; all were employed by Respondent. Petitioners Alexander, Daniels and West were discharged on September 20, 2006. Petitioner Cole was laid off on August 25, 2006.

2. Respondent, Solid Wall Systems, Inc., is an employer as defined by the Florida Civil Rights Act; it constructs cast-in-place solid concrete wall structures for the production home industry. This construction methodology is typically employed in large residential developments, and the construction "critical path" requires timely completion of each construction progression. For example, if walls are not timely completed, roof truss installation will be delayed, erection equipment will be idle, follow-up subcontractors are delayed, and money is lost.

3. Petitioner, Ralph Alexander, was employed by Respondent in July 2004, as a laborer, being paid $9.00 per hour. He received pay raises and a promotion to leadman during the next several years. At his discharge, he was a leadman being paid $14.00 per hour.

4. Petitioner, Stevie Daniels, was employed by Respondent in March 2004, as a laborer, being paid $9.00 per hour. He received pay raises and a promotion to leadman during the next several years. At his discharge, he was a leadman being paid $13.00 per hour.

5. Petitioner, Ernest West, Jr., was employed by Respondent in October 2004, as a laborer and paid $9.00 per hour. He received pay raises during the next several years. At his discharge, he was being paid $11.00 per hour.

6. Petitioner, Carlos Cole, was hired in September 2003, as a yard helper with Space Coast Truss, a subsidiary of Respondent's corporate owner, being paid $6.50 per hour. In October 2003, he was transferred to Respondent and received $9.00 per hour. He received pay raises and a promotion to leadman during the next several years. At his discharge, on August 25, 2006, he had been promoted to leadman and was being paid $15.00 per hour, but was working as a laborer.

7. On September 11, 15 and 19, 2006, Petitioners Alexander, Daniels and West were "written-up." That is, they

were disciplined for failing to follow the specific instructions of supervisors.

8. On September 11, 2006, Petitioners Alexander, Daniels and West were on a "stripping" crew working at Wedgefield in East Orange County. Alexander was advised that the job had to be completed that day, because trusses were scheduled to be installed the following day. Notwithstanding direction to the contrary, the crew left the job without completing the stripping.

9. The time cards of Petitioners Alexander, Daniels and West indicate that these Petitioners "clocked-out" at between 5:24 p.m. and 5:30 p.m. It is between 30 and 45 minutes from the job site and Respondent's yard. Petitioners would have spent several additional minutes cleaning up before "clocking-out." Not only did Petitioners fail to complete the job, they left the job site early.

10. Petitioner Ernest West, Jr., had a part-time job working for Space Coast Cleaning, a janitorial service, from 6:00 p.m. to 9:00 p.m., Monday, Wednesday and Friday. The job was located in Viera approximately 15 to 20 minutes from Respondent's yard. September 11, 2006, was a Monday and a work day for West's part-time job. Petitioner West told Respondent's operations manager that they left the job site so that he could get to his part-time job on time.

11. On September 15, 2006, Petitioners Alexander, Daniels and West were assigned to strip a multi-unit job site in Titusville. The crew was told to complete the stripping before they left the job site. Time cards indicate that Petitioners "clocked-out" between 3:30 p.m. and 4:00 p.m. Petitioners left the job unfinished, because they thought they would be unable to complete the job that day.

12. On September 19, 2006, Petitioners Alexander, Daniels and West were assigned to strip a building at Viera High School. After a building is stripped, crews have standing orders not to leave any "cap" forms on the job site. This is a particular type of form that crews are specifically instructed to return to the main yard immediately after use and re-stock in bins for use on subsequent projects. On this day, Petitioner Alexander called Roy Brock, a field manager, and inquired regarding the "cap" forms. He was instructed to bring all forms to the yard.

13. Brock visited the Viera High School job site after the stripping crew had returned to the yard and found several caps that had been left at the site. He loaded them on his truck and returned them to the yard.

14. As a result of these three incidents, which were deemed acts of insubordination, Petitioners Alexander, Daniels and West were terminated on September 20, 2006.

15. In May, June, and July 2006, the housing construction market suffered a significant decline. This was reflected by Respondent having a profit of $10,000 in May, a profit of $2,000 to $3,000 in June, and a $60,000 loss in July. In August, there was literally "no work." Respondent's employees were being sent home every day because there was no work.

16. As a result of the decline in construction, Vince Heuser, Respondent's operations manager, was directed to lay off employees. Petitioner Cole was among five employees laid off on August 25, 2006. Of the five, three were African-American, one was Caucasian, and one was Hispanic.

17. Seven Hispanic laborers were hired on July 5 and 6, 2006. Respondent had taken over the cast-in-place wall construction portion of two large projects from a subcontractor named "JR." The general contractor/developer, Welch Construction, requested that these seven Hispanic individuals, who had been "JR" employees, and had done all the stripping on these two Welch Construction jobs, be hired to complete the jobs. Hiring these seven individuals to continue to work on the jobs was part of the take-over agreement.

18. In September 2006, three Hispanic laborers were hired. Two were hired to work on "amenity walls" which require a totally different forming process than does the standard solid-

wall construction. The third was hired to work on the Welch jobs as he had worked with the "JR" crew previously.

CONCLUSIONS OF LAW

19. The Division Of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Sections 120.569 and 760.11 and Subsection 120.57(1), Florida Statutes (2007).

20. The Florida Civil Rights Act of 1992, as amended (Chapter 760, Florida Statutes), was patterned after Title VII of the Civil Rights Act of 1964 and Federal case law interpreting Title VII is applicable to cases arising under the Florida Act. Green v. Burger King Corp., 728 So. 2d 369 (Fla. 3d DCA 1999); Laborers' Int'l Union of N. Am., Local 478 v. Burroughs, 522 So. 2d 852 (Fla. 3d DCA 1987); School Board of Leon County v. Hargis, 400 So. 2d 103 (Fla. 1st DCA 1981).

21. Petitioners have the burden of proving by the preponderance of the evidence that Respondent committed an unlawful employment practice(s) as alleged in their Petitions for Relief. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

22. It is an unlawful employment practice for an employer to discharge or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges

of employment, because of such individual's race or color. § 760.10(1)(a), Fla. Stat.

23. A prima facie case of discrimination based upon race may be established in one of three ways: First, through direct evidence of discriminatory intent by the employer; second, through statistical proof that a neutral policy has an adverse impact on a protected group; or third, by meeting the familiar disparate treatment test set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Holifield v. Reno, 115 F.3d 1555, 1561-62 (11th Cir. 1997); Carter v. City of Miami, 870 F.2d 578, 581 (11th Cir. 1989).

24. Under the McDonnell Douglas model of proof, the petitioner bears the initial burden of establishing a prima facie case of discrimination. Proof of a prima facie case under McDonnell Douglas raises a presumption that the employer's decision was motivated by discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993).

25. Under McDonnell Douglas, a prima facie case of race discrimination may be established by showing the following: (1) Petitioner belongs to a racial minority or is a person of color; (2) Petitioner was subjected to adverse job action; (3) Petitioner's employer treated similarly-situated employees outside Petitioner's classification more favorably; and (4) Petitioner was qualified to do the job. Demonstrating a

prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination. McDonnell, supra, at 802; Holifield, supra.

26. Once this presumption is raised, the respondent is able to rebut it by introducing admissible evidence of a reason, which if believed by the trier of fact, supports a finding that discrimination or retaliation was not the cause of the challenged employment action. Grigsby v. Reynolds Metals Co., 821 F.2d 590, 594 (11th Cir. 1987); and Equal Employment Opportunity Commission v. Navy Federal Credit Union, 424 F.3d 397, 405 (4th Cir. 2005). The employer is required only to "produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 257 (1981). The employer "need not persuade the court that it was actually motivated by the proffered reasons . . . [i]t is sufficient if the [employer's] evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 254. This burden is characterized as "exceedingly light." Perryman v. Johnson Products Co., Inc., 698 F.2d 1138, 1142 (11th Cir. 1983).

27. Where the defendant meets this burden, the plaintiff has the opportunity to demonstrate that the defendant's

articulated reason for the adverse employment action is a mere pretext for discrimination. McDonnell Douglas Corp. v. Green, supra, at 804; Roberts v. Gadsden Memorial Hospital, 835 F.2d 793, 796 (11th Cir. 1988). This demonstration merges with the plaintiff's ultimate burden of showing that the defendant intentionally discriminated against the plaintiff. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993); Pignato v. American Trans Air, Inc., 14 F.3d 342, 347 (7th Cir. 1994). Put another way, once the employer succeeds in carrying its intermediate burden of production, the ultimate issue in the case becomes whether the plaintiff has proven that the employer intentionally discriminated against him because of his race. Turnes v. AmSouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). Once the employer produces evidence of a legitimate, nondiscriminatory reason for the challenged action, any presumption of discrimination or retaliation arising out of the prima facie case "drops from the case." See Navy Federal Credit Union, 424 F.3d at 405; Krieg v. Paul Revere Life Ins. Co., 718 F.2d 998, 1001 (11th Cir. 1983), cert. denied 466 U.S. 929 (1984). The ultimate burden remains upon the complainant to prove that the employer intentionally discriminated. Burdine, supra, 450 U.S. at 256. Stated another way, "'the ultimate question in a desperate treatment case is not whether the plaintiff establish a prima facie case or demonstrate a pretext,

but 'whether the defendant intentionally discriminated against the plaintiff.'" Pashoian v. GTE Directories, 208 F. Supp. 2d 1293, 1308 (M.D. Fla. 2002).

28. Petitioners have established that they are members of a protected class by virtue of their race and were well-qualified for their positions. Further, Petitioners were the subject of adverse employment action, termination. They have failed to demonstrate that Respondent's reasons for termination are pretextual or that they were subjected to racial discrimination that resulted in their terminations.

29. "Insubordination," the reason presented for the termination of Petitioners Alexander, Daniels and West, may be a stretch of the definition, but Petitioners did on three occasions within the span of several work days, disregard specific directions from supervisors. On two occasions, because of the construction technique employed by Respondent, Petitioners' failure to complete work as directed, critically affected construction progression. Petitioner Carlos Cole was terminated as part of a lay-off.

30. Respondent did hire several Hispanic employees during the relevant time period (seven in July and three in September); however, there were appropriate business-related reasons for these new hires. The July hires were in conjunction with taking over an existing subcontract where the developer/contractor

requested these specific individuals. The September hires were to perform unique concrete wall-forming.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter final orders dismissing the Petitions for Relief for Petitioners Ralph Alexander, Stevie Daniels, Ernest West, Jr., and Carlos Cole.

DONE AND ENTERED this 31st day of January, 2008, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2008.

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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.