

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CARLOS T. MODLEY,)
)
 Petitioner,)
)
 vs.) Case No. 08-1118
)
 THE FRESH MARKET,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on April 30, 2008, in Shalimar, Florida.

APPEARANCES

For Petitioner: Carlos T. Modley, pro se
Post Office Box 430
Shalimar, Florida 32579

For Respondent: Regina Alberini Young, Esquire
Rogers Towers, P.A.
1301 Riverplace Boulevard, Suite 1500
Jacksonville, Florida 32207

STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice.

PRELIMINARY STATEMENT

On October 10, 2007, Petitioner Carlos T. Modley (Mr. Modley) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission). Mr. Modley complained that Respondent Fresh Market, Inc. (The Fresh Market), discriminated against him because he is an African-American. Mr. Modley asserted that the discrimination was manifested by The Fresh Market's failure to promote him and by ultimately discharging him.

Subsequent to its investigation, the Commission issued a "Notice of Determination: No Cause." On February 28, 2008, Mr. Modley filed a Petition for Relief. The Commission forwarded the Petition for Relief and allied papers to the Division of Administrative Hearings, and the Division filed it March 4, 2008.

The case was set for hearing on April 30, 2008, and heard as scheduled.

At the hearing, Mr. Modley testified on his own behalf and offered four exhibits. Three of the four were accepted into evidence. Respondent presented the testimony of four witnesses and offered ten exhibits that were accepted into evidence.

No Transcript was filed. After the hearing, Respondent moved to extend the time for filing the proposed recommended orders. The time was enlarged until May 22, 2008. Respondent

timely filed a Proposed Recommended Order on May 19, 2008. Petitioner timely filed a Proposed Recommended Order on May 22, 2008. Both Proposed Recommended Orders were considered in the preparation of this Recommended Order.

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

FINDINGS OF FACT

1. Mr. Modley is a resident of Shalimar, Florida. He is an African-American male, who at the time of the hearing was 35 years of age. At the time of the hearing, he was employed by Winn Dixie, Inc., as a meat cutter.

2. The Fresh Market is in the grocery business, operates many stores, and is an employer as that term is defined in Subsection 760.02(7), Florida Statutes. The Fresh Market operates a store in Destin, Florida.

3. On November 8, 2006, Mr. Modley applied for a "meat/seafood" position in the Destin store. Mr. Modley had previous experience in similar positions at Publix and Sam's Club. This position required Mr. Modley to process meat and seafood to be sold at retail and to provide customer service.

4. The application submitted by Mr. Modley had upon it a question that stated, "Have you been convicted of a crime in the past 10 years?" Mr. Modley typed in "No."

5. The application also had upon it the following statement, in pertinent part: "I certify that the facts set forth in my application for employment are true and complete. I understand that, if employed, false statements on this application shall be considered sufficient cause for dismissal. I authorize The Fresh Market, Inc. to verify all statements contained in this application and to make any necessary reference checks except as limited above for my present employer."

6. The Fresh Market employed Mr. Modley as a meat cutter subsequent to his application. Mr. Modley was aware at the inception of his employment on January 19, 2007, that a person from the southern part of the state would soon arrive and assume the position of meat manager. Mr. Modley assumed, without any foundation whatsoever, that he was next in line to become meat manager.

7. Saul Zaute, an experienced meat manager, who had been working for The Fresh Market in South Florida, assumed the position of meat manager shortly after Mr. Modley began working as a meat cutter.

8. After 90 days of employment, Mr. Modley became eligible for certain fringe benefits. During an open enrollment period for insurance benefits, Mr. Modley sought insurance coverage for his wife and his "domestic partner." On May 7, 2007, Mr. Modley

completed and signed a Declaration of Domestic Partnership Form declaring "under penalty of perjury" that he and his "domestic partner" were "not married to anyone" and that he and his "domestic partner" met all criteria for "domestic partnership." On this application he did not mention his wife.

9. Following open enrollment periods, the Fresh Market's Benefits Department conducts a review of all applications for domestic partner benefits to ensure that the applicants meet the criteria specified on the Declaration of Domestic Partnership Form. The employee assigned to accomplish this was Martha Holt. Ms. Holt worked in Greensboro, North Carolina, and she was not acquainted with Mr. Modley.

10. Ms. Holt reviewed the 14 domestic partner applications received during open enrollment by The Fresh Market. She did this by conducting a public records search on the internet. Ms. Holt noted the first application for insurance benefits listed a spouse. Ms. Holt was unable to find any record of Mr. Modley having divorced his wife.

11. While searching for information that might illuminate Mr. Modley's marital status, Ms. Holt discovered that he had a criminal history. This became important because of Mr. Modley's assertion on his employment application that he had not been convicted of a crime in the past 10 years. It is noted at this point that Mr. Modley had not been convicted of any crime

because judgment was withheld on his several criminal cases. When a judge withholds adjudication, the defendant has not been convicted, even though he may have been found guilty.

12. Ms. Holt relayed the discovery of Mr. Modley's criminal history to her supervisor who informed Bill Bailey, Vice President of Human Resources for The Fresh Market, and Christine Caldwell, Regional Human Resources Coordinator. Mr. Bailey conducted his own Internet research and discovered that Mr. Modley was serving a two-year supervised probation for a felony, which was committed on November 30, 2005. Mr. Bailey erroneously concluded that Mr. Modley had falsified his application for employment.

13. At the request of Mr. Bailey, District Manager Debbie Smart asked Mr. Modley directly if he had been convicted of a felony. Mr. Modley denied having any felony convictions. Mr. Modley, while not exactly dissembling, was not being helpful in illuminating this conundrum. A more honest answer would have informed Ms. Smart that he had been found guilty of several felonies, but had never been adjudicated and, therefore, convicted.

14. Subsequent to Ms. Smart's request, on August 23, 2007, Mr. Modley signed a consent form authorizing The Fresh Market to employ an outside agency to conduct a more detailed criminal background check.

15. The background check, conducted by an outside agency named Insight, resulted in a report indicating guilty findings with resultant sentences of 14 counts of uttering, larceny, procuring for prostitution, using false information to obtain a driver's license, and a failure to appear. Nothing in the Insight report indicates that Mr. Modley was found adjudicated of a felony.

16. Melvin Hamilton was the regional vice-president charged with supervising the store in which Mr. Modley worked. When he was informed of the perceived discrepancy regarding Mr. Modley's job application, he decided to terminate Mr. Modley. No evidence was produced that indicated Mr. Hamilton was aware of Mr. Modley's race, and, in fact, Mr. Hamilton is an African-American.

17. Mr. Hamilton's decision to discharge Mr. Modley was based on information that, at least in a technical sense, was incorrect. However incorrect the basis, the decision was not grounded in racial discrimination.

18. During the time period December 2005 and February 2008, The Fresh Market terminated seven employees for falsifying their employment applications. Of those seven employees, four were white and three were African-American.

19. When Saul Zaute left in late July 2007, The Fresh Market advertised a vacancy for the position of meat manager.

This was done by a posting in the store and an advertisement in a local newspaper. This is the method normally used by The Fresh Market when seeking applicants for a position.

20. At no time did Mr. Modley apply for the job of meat manager even though the position was advertised similarly to other positions. It appears that he continued under the erroneous belief that when he began his employment, The Fresh Market was aware that he eventually desired to be meat manager. How he came to that conclusion was not explained.

21. The employee hired as meat manager was Gary Arnold. Mr. Arnold had many years of experience as a meat manager. Mr. Arnold had owned and operated a meat market for 17 years and had served as meat manager for two facilities totaling 19 years.

22. The Fresh Market has an active anti-discrimination program and maintains policies and procedures to effect that program. Mr. Modley did not complain about any discrimination pursuant to those policies or in any other manner during the time he was employed by The Fresh Market.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) and 760.11(7), Fla. Stat.

24. The Fresh Market is an employer pursuant to Subsection 760.02(7), Florida Statutes. Mr. Modley is an aggrieved person pursuant to Subsection 760.02(10), Florida Statutes.

25. It is an unlawful employment practice, according to Subsection 760.10(1), Florida Statutes, to discharge or fail to promote a person because of his or her race.

26. Because no direct evidence of discrimination was adduced, Mr. Modley, if he is to prevail, must prove disparate treatment by indirect evidence. In order to do so, Mr. Modley bears the ultimate 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). Under this well established model of proof, the charging party, Mr. Modley, bears the initial burden of establishing a prima facie case of discrimination.

27. If Mr. Modley is able to make out a prima facie case, the burden to go forward shifts to The Fresh Market 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).

28. The Fresh Market then has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). Then

Mr. Modley, in order to prevail, 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.

The alleged failure to promote

29. Mr. Modley claims that he was not promoted to the position of meat manager because of his race. The record is devoid of any evidence that Mr. Modley applied for the job of meat manager. The Fresh Market advertised the position in the manner it normally uses. Thus Mr. Modley had the same opportunity as other employees to apply. However, it was proven by Mr. Modley's own testimony that he did not apply. Apparently he believed, without any foundation, that The Fresh Market was capable of determining intuitively that he desired the job.

30. If one were to conclude, in the face of all evidence to the contrary, that Mr. Modley applied for the position of meat manager, then it would become necessary to establish a prima facie case by showing that: (1) he is a member of a protected minority; (2) he was qualified and applied for the promotion; (3) he was rejected despite his qualifications; and

(4) other equally or less qualified employees who are not members of the protected minority were promoted. See Taylor v. Runyon, 175 F3d 861 (11th Cir. 1999).

31. Mr. Modley proved he was in a protected minority. However, he did not prove that he was qualified and that he applied for the promotion. He was not rejected because of his lack of qualification; he was rejected because no one at the Fresh Market knew he coveted the job, but it is clear that The Fresh Market also considered him unqualified. Moreover, the white person that was hired was highly qualified.

32. Mr. Modley did not prove a prima facie case. Even if one assumes that he did prove a prima facie case, The Fresh Market had abundant nondiscriminatory reasons for not promoting him, and there was no evidence tending to show these reasons to be pretextual.

The alleged unlawful termination

33. With regard to his termination, Mr. Modley, in order to prove a prima facie case of discrimination based on race, must prove that: (1) he is a member of a protected minority; (2) he performed his job satisfactorily; (3) he suffered an adverse employment action; and (4) other similarly situated employees outside of his protected category were treated more favorably than he was. See McDonnell, supra.

34. Mr. Modley is a member of a protected minority. His performance was not judged as satisfactory in that he attempted to cheat when trying to obtain benefits and he was less than forthcoming when inquiries were made with regard to his criminal record. He suffered an adverse employment action when he was discharged. However, he was treated in the same manner as others that were discovered to have committed felonies. Accordingly, Mr. Modley did not prove a prima facie case.

35. Even if one assumes that Mr. Modley proved a prima facie case, the evidence is clear that The Fresh Market's reasons for discharging him were nondiscriminatory. Mr. Modley's assertions that he had not been convicted of the crimes of which he was found guilty are correct. Nevertheless, it is abundantly clear that Mr. Hamilton did not want a person with Mr. Modley's criminal record to be an employee of The Fresh Market, and that is why he was discharged.

36. An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Abel v. Dubberly, 210 F.3d 1334, 1339 (11th Cir. 2000). The employment action taken by The Fresh Market was based on managerial decisions having nothing to do with discrimination based on race.

RECOMMENDATION

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

RECOMMENDED that the Petition of Carlos T. Modley be dismissed.

DONE AND ENTERED this 10th day of June, 2008, in Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
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this 10th day of June, 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.