STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT L. TUCKER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-1225
	)	
BUILDERS FIRST SOURCE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of this case for the Division of Administrative Hearings (DOAH) on June 3, 2008, in Sanford, Florida.

APPEARANCES

For Petitioner: Jerry Girley, Esquire
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For Respondent: Alfred Truesdell, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of race or sex in violation of Section 760.10, Florida Statutes (2006).[1]

PRELIMINARY STATEMENT

Petitioner filed complaints of discrimination with the Florida Commission on Human Relations (FCHR)[2] and the Equal Employment Opportunity Commission (EEOC). Both complaints alleged that Respondent discriminated against Petitioner on the basis of Petitioner's race and sex.

Pursuant to a Work-Sharing Agreement between the FCHR and the EEOC, the EEOC investigated the alleged discrimination. The EEOC was unable to conclude that a violation occurred, and the EEOC and the FCHR each issued a right to sue notice on February 19, 2008. On March 12, 2008, Petitioner filed a Petition for Relief with the FCHR, and the FCHR referred the matter to DOAH, which assigned an ALJ to conduct an administrative hearing.

At the hearing, the parties jointly submitted 37 exhibits for admission into evidence. Petitioner testified and called four additional witnesses. Respondent called five witnesses.

The identity of the witnesses and exhibits and the rulings regarding each are reported in the official record of the hearing. Neither party requested a transcript of the hearing. Petitioner and Respondent filed their respective PROs on June 16 and 13, 2008.

Respondent moved to admit one composite exhibit after the hearing. The motion is denied.

FINDINGS OF FACT

1. Respondent is an employer within the meaning of Subsection 760.02(7). Respondent employs approximately 50 employees in its facility in Sanford, Florida (the facility).

2. Respondent employed Petitioner at the facility from July 30, 2002, through February 15, 2007. Petitioner is a member of a protected class. Petitioner is an African-American male.

3. On February 15, 2007, Petitioner suffered an adverse employment action. Respondent terminated Petitioner's employment for violating Respondent's zero tolerance smoking policy.

4. Respondent maintains a written zero tolerance smoking policy. The policy prohibits smoking anywhere in the facility other than in designated smoking areas and other than during designated smoking breaks.

5. Respondent prohibits smoking for the health and safety of its employees. Respondent manufactures components, such as roof trusses and other lumber products, for sale to contractors who construct residential housing. Fire is a significant threat in the manufacture of lumber products at the facility. Dry lumber and sawdust are present throughout the facility.

6. The zero tolerance smoking policy prohibits smoking, among other places, in the front lot inside the entrance gate,

in the office where the time clock is located for employees to begin and end their workdays, and in any production area. On February 15, 2007, Petitioner walked inside the front gate smoking a cigarette. Petitioner continued smoking the lighted cigarette in the plant yard and inside the office where the time clock is located.

7. Petitioner continued smoking while he clocked in to begin his work day and continued smoking in non-designated areas. Petitioner smoked the cigarette during a time that was not a designated smoking break.

8. Respondent adequately informed Petitioner of the zero tolerance smoking policy and the consequences of any violation. On February 6, 2007, Respondent provided all employees, including Petitioner, with written copies of the zero tolerance smoking policy. Each employee, including Petitioner, signed an acknowledgment that he or she had received a written copy of the zero tolerance smoking policy.

9. The written policy expressly provides that any employee who violates the zero tolerance smoking policy will be fired. The policy provides that termination of employment will occur without further warnings and without second chances.

10. Petitioner violated the written smoking policy on February 15, 2007, nine days after he attended a zero tolerance

meeting. During that meeting, Respondent explained the zero tolerance policy to its employees, including Petitioner.

11. The zero tolerance smoking policy superseded the previous smoking policy. Petitioner had twice violated the previous smoking policy. On August 16, 2006, Respondent issued a written reprimand to Petitioner for violating the previous smoking policy on August 15, 2006.

12. The violation on August 15, 2006, was Respondent's second violation. The written reprimand for the violation on August 15, 2006, notified Petitioner that he would be suspended for three days if he subsequently violated the policy.

13. After the written reprimand, the plant manager instituted the zero tolerance smoking policy that was required by direct orders from her superiors. Respondent adequately informed all employees at the facility, including Petitioner, of the new zero tolerance policy.

14. Respondent treated similarly situated employees in a similar manner. Under the previous smoking policy, Respondent issued a written reprimand to an employee identified in the record as Mr. Joel Suarez. Although Mr. Suarez is Hispanic, he is also Caucasian.[3] Each employee that Respondent disciplined for violation of the smoking policy was a member of a production crew.

15. Petitioner alleges that Respondent treated Petitioner disparately from a similarly situated employee who was not a member of a protected class. Petitioner alleges that Respondent allowed Mr. Bill Thomas, a Caucasian employee, to smoke whenever and wherever Mr. Thomas wished and did not fire Mr. Thomas.

16. Mr. Thomas was not similarly situated with Petitioner. Unlike Petitioner, Mr. Thomas is not a member of a production crew. Rather, Mr. Thomas is responsible for maintenance of the equipment used by production crews. Mr. Thomas frequently must work when production crews are not working, either because the crew is on break or the equipment used by the crew is not functioning, and Mr. Thomas must take smoking breaks at different times than production crews. Mr. Thomas smoked only during authorized smoking breaks and within designated smoking areas.

17. Petitioner also complains that, prior to the termination of his employment, he suffered an adverse employment action sometime during the second half of 2006 when Respondent allegedly demoted Petitioner based on Petitioner's sex.

18. Prior to the alleged demotion, Petitioner worked as a sawyer. A sawyer operates a saw that cuts lumber for products, including roof trusses, that are used in residential construction. Sometime in the second half of 2006, Respondent transferred Petitioner to a position as a loader.

19. Petitioner's co-worker, Ms. Nora Dowling, retained her position as a sawyer. The plant manager, Ms. Tammi Pettis, is a Caucasian female and approved the transfer.

20. The transfer was not an adverse employment action. Although Respondent considers a sawyer to be a position that requires more skill than a loader and compensates the two positions differently, the transfer did not result in a serious and material change in the terms, conditions, and privileges of employment for Petitioner. Petitioner did not suffer any reduction in pay or benefits, and the change in job responsibilities was not a material change in the terms, conditions, and privileges of employment.

21. The transfer from sawyer to loader was not motivated by sexual bias. Although Petitioner had more experience than Ms. Dowling and provided Ms. Dowling with some training as a sawyer, production efficiency reports maintained by Respondent and personal observations of supervisors support a finding that Ms. Dowling was more productive than Petitioner, based on both quantitative and qualitative measures.

22. The production manager was the primary decision-maker in the transfer of Petitioner as well as the termination of Petitioner's employment. The production manager is Mr. Myriel Reid, an African-American male. Ms. Pettis, the plant manager,

merely approved the recommendation of Mr. Reid to transfer Petitioner and to terminate his employment.

23. The decision to transfer Petitioner was based, in addition to production efficiency data, on economic conditions and a desire to retain both Petitioner and Dowling as employees at the facility. During the second half of 2006, Respondent experienced a decrease in business due to a significant slowdown in the housing industry. A work force reduction policy implemented in 2006 reduced employment at the facility from more than 100 employees to fewer than 50 employees.

24. Respondent determined that it could spare both Petitioner and Ms. Dowling from layoff by reassigning Petitioner to an open position of loader. A loader must operate a forklift, and, between Petitioner and Ms. Dowling, Petitioner was the only employee with forklift experience and certification.[4] Petitioner's forklift experience and certification and Dowling's performance efficiency were the two factors managers considered in transferring Petitioner.

25. Ms. Dowling did not replace Petitioner. Ms. Dowling operated a saw before Petitioner was transferred in the fall of 2006. Ms. Dowling continued in the same sawyer position after Petitioner's transfer.

26. Respondent maintains an equal employment opportunity policy. The policy is set forth in Respondent's employee handbooks.

27. Petitioner signed acknowledgments that he received, read and understood Respondent’s employee handbooks for the years 2002, 2003, 2004, 2005 and 2006. The employee handbooks include policies forbidding discrimination and harassment on the basis of race, gender, and other protected classes, as well as complaint procedures for employees.

28. Respondent adequately explained its policy to Petitioner. Petitioner signed an acknowledgment that Respondent’s equal employment opportunity policy was explained to him on his first day of work.

29. Except as stated otherwise in these Findings, Petitioner has a satisfactory record of job performance. Respondent hired Petitioner as an Assembler of wooden trusses and quickly promoted Petitioner to a sawyer. Petitioner earned five raises during his employment with Respondent. The raises were effective on October 23, 2003; March 27, 2004; March 26, 2005; June 4, 2005; and March 26, 2006.

30. Petitioner presented no evidence that he sustained any lost wages as a result of the alleged discrimination by Respondent. Petitioner is currently employed, and there is no

evidence that Petitioner has received less compensation at his new jobs or that he incurred any lost wages.

31. The evidence does not establish a prima facie case of discrimination. However, that does not require a finding that Petitioner initiated this proceeding for a frivolous or improper purpose.

32. Several justiciable issues of fact and law preclude a finding that Petitioner initiated this proceeding for a frivolous or improper purpose, including the issues resolved in paragraph 21 of these Findings of Fact. Two smoking policies were in effect between August 2006 and February 15, 2007, when Respondent terminated Petitioner's employment. The plant manager readily admits that she did not enforce the previous smoking policy with any consistency.

33. Respondent conducted a meeting on October 25, 2006, in an attempt to stress the importance of complying with the former smoking policy. Respondent admits in paragraphs 36 and 40 of its PRO that a meeting to explain the new zero tolerance policy did not occur until February 6, 2007, approximately nine days before Respondent terminated Petitioner's employment.

34. In the six months preceding the termination of his employment, Respondent transferred Petitioner to a loader position that Petitioner viewed as far beneath his experience and skills. The plant manager, a female, kept another female in

the sawyer position. Petitioner felt that he should have kept his sawyer position because he had more training and experience than the female sawyer. Petitioner had helped train the female sawyer. Petitioner had an excellent employment history with Respondent and had consistently earned raises during each year of employment. Petitioner felt ambushed by the termination of his employment; felt that the smoking violation was a pretext, in light of the lax enforcement of the historical policy that preceded the zero tolerance policy; and reasonably alleged discrimination.

35. The fact-finder resolved the foregoing factual issues in favor of Respondent. However, that does not mean that the issues presented by Petitioner were not justiciable issues. For example, the efficiency production reports are not readily discernable without witness explanation and, without that explanation, lend themselves to more than one interpretation. The fact-finder resolved the issue in favor of Respondent, but that does not deprive the issue of its justiciability.

CONCLUSIONS OF LAW

36. DOAH has jurisdiction over the subject matter and parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007). DOAH provided the parties with adequate notice of the administrative hearing.

37. No direct evidence of discrimination exists in this case. A finding of discrimination, if any, must be based on circumstantial evidence.

38. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Federal discrimination law may be used for guidance in evaluating the merits of claims arising under Chapter 760. Tourville v. Securex, Inc., 769 So. 2d 491 (Fla. 4th DCA 2000); Greene v. Seminole Electric Co-op. Inc., 6701 So. 2d 646 (Fla. 5th DCA 1997); Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

39. Petitioner has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)). Petitioner also has the burden to show that he was similarly situated to a comparator outside the protected class. Ren v. University of Central Florida Board of Trustees, 390 F. Supp. 2d 1223, 1228 (M.D. Fla. 2005).

40. If Petitioner were to succeed in making a prima facie case, the burden shifts to Respondent to articulate some legitimate, nondiscriminatory reason for its conduct. If

Respondent carries this burden of rebutting Petitioner's prima facie case, Petitioner must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03.

41. The issue of intent is covered in the McDonnell Douglas procedure. The procedure allows a court to analyze circumstantial evidence by creating inferences of discriminatory intent. Scholz v. RDZ Sports, Inc., 710 So. 2d 618, 624 (Fla. 5th DCA 1998).

42. For reasons stated in the Findings of Fact and not repeated here, Petitioner did not make a prima facie showing of discrimination. Respondent reasonably believed that Petitioner violated the zero tolerance smoking policy on February 15, 2007, and that belief was the sole basis for the adverse employment action. The ALJ has no authority to examine the wisdom of an employer's business decision, including the decision to strictly enforce a zero tolerance smoking policy. Davis v. Town of Lake Park, Florida, 245 F.3d 1232, 1245 (11th Cir. 2001).

43. The transfer of Petitioner to a loader position is not an adverse employment action under the facts and circumstances of this proceeding. The transfer did not result in a serious and material change in the terms, conditions, and privileges of employment, as viewed by a reasonable person. Davis, 245 F.3d at 1239.

44. The issue of whether a transfer is an adverse employment action is determined by an objective standard. A transfer is not an adverse employment action merely because an employee is unhappy or disagrees with the change. Doe v. DeKalb School District, 145 F.3d 1441, 1449 (11th Cir. 1998). See also Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996)(mere fact that employee dislikes an employer's action is not sufficient to establish adverse employment action).

45. Even if the transfer were a demotion, such a demotion could not form the basis of a claim of discrimination because Petitioner suffered no loss of pay or benefits in Hudson v. Southern Ductile Casting Corp., 849 F.2d 1372, 1375 (11th Cir. 1988). A mere loss of prestige as perceived subjectively by the employee, without more, does not create an adverse action sufficient to support a discrimination claim. Davis, 245 F.3d at 1242.

46. Subsection 760.11(6) authorizes FCHR, in its discretion, to allow the prevailing party a reasonable attorney's fee. The exercise of agency discretion is guided by findings concerning the issue of whether Petitioner initiated this proceeding for a frivolous or improper purpose.

47. Participation in a proceeding is frivolous whenever a finding is made that there is a complete absence of a justiciable issue of either law or fact. Whitten v. Progressive

Casualty Insurance, Co., 410 So. 2d 501, 505 (Fla. 1982); Allen v. Estate of Dutton, 384 So. 2d 171 (Fla. 5th DCA 1980). The Florida Supreme Court stated in Whitten that the purpose of awarding attorney's fees is to:

> . . . discourage baseless claims, stonewall defenses and sham appeals . . . by placing a price tag through attorney's fees awards on losing parties who engage in these activities. Such frivolous litigation constitutes a reckless waste of judicial resources as well as the time and money of prevailing litigants.

Whitten, 410 So. 2d at 505.

48. A determination of whether a claim is baseless, depends upon the evidence presented by the nonprevailing adverse party and that party's conduct during the proceeding. When the nonprevailing adverse party fails to call witnesses in that party's own behalf, nominally attempts to create an issue by cross-examining witnesses for the opposing party, or otherwise fails to show facts needed to sustain the pleadings, courts have found the purpose to be baseless and frivolous. Hernandez v. Leiva, 391 So. 2d 292 (Fla. 3d DCA 1980); Kisling v. Woolridge, 397 So. 2d 747, 748 (Fla. 5th DCA 1981); White v. The Montebello Corporation, 397 So. 2d 326 (Fla. 5th DCA 1981). Petitioner's prosecution of his claim in this proceeding did not evidence a baseless, frivolous, or improper purpose.

49. The issue of whether a party participates in a proceeding for a frivolous, improper, or baseless purpose is an issue of fact. Burke v. Harbor Estates Associates, Inc. and Department of Environmental Regulation, 591 So. 2d 1034, 1037 (Fla. 1st DCA 1991); accord Dolphins Plus v. Residents of Key Largo Ocean Shores, Clarence Hobdy, and State of Florida Department of Environmental Regulation, 598 So. 2d 1992 (Fla. 3d DCA 1992). The fact-finder is entitled to rely upon permissible inferences. Burke, 591 So. 2d at 1037.

RECOMMENDATION

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

RECOMMENDED that the FCHR issue a final order dismissing Petitioner's claim of discrimination and denying Respondent's request for attorney's fees.

DONE AND ENTERED this 16th day of July, 2008, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2008.

ENDNOTES

[1/] References to Subsections, Sections, and Chapters are to Florida Statutes (2006) unless otherwise stated.

[2/] Petitioner filed a Charge of Discrimination with the FCHR on March 16, 2007.

[3/] Counsel asked two separate witnesses if they knew the race of Mr. Suarez. Each said, "Yes," and in response to the follow up question testified that Mr. Suarez is "Puerto Rican." The ALJ instructed the witnesses that Puerto Rican is not a race. The witnesses amended their answer to testify that Mr. Suarez is Hispanic. The ALJ acknowledged that the U.S. Census Bureau identifies Hispanic as a race but further instructed the witnesses that being from Spain or England is not a race. The witnesses amended their answers to identify Mr. Suarez as Caucasian and not African-American. The evidence shows that Respondent subsequently fired an Asian employee for violation of the zero tolerance smoking policy.

[4/] Although 10 employees at the facility had the necessary forklift credentials, Petitioner was the only employee between Petitioner and Ms. Dowling with the requisite forklift qualifications.

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.