STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBINSON NELSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-1436
	)	
ALUTIIQ-MELE, LLC,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on June 11, 2008, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Erwin Rosenberg, Esquire
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For Respondent: Christine L. Wilson, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent unlawfully discriminated against Petitioner on the basis of his race in violation of the Florida Civil Rights Act, when Petitioner was an employee of Respondent.

PRELIMINARY STATEMENT

In November 2005, Petitioner Robinson Nelson filed a Charge of Discrimination with the Florida Commission on Human Relations ("FCHR"), and also with the Equal Employment Opportunity Commission ("EEOC"). In his Charge, Mr. Nelson claimed that Respondent Alutiiq-Mele, LLC had committed two acts of unlawful racial discrimination against him during his tenure as an employee of Respondent.

The EEOC investigated the case but was unable to decide whether Respondent had violated Mr. Nelson's civil rights. Because more than 180 days had elapsed since Mr. Nelson had filed his Charge and no determination had been made concerning the merits thereof, the FCHR issued a "Right to Sue" letter on March 4, 2008. Mr. Nelson elected to pursue administrative remedies, timely filing a Petition for Relief with the FCHR on or about March 17, 2008.

The FCHR transmitted the Petition for Relief to the Division of Administrative Hearings on March 18, 2008, and an administrative law judge ("ALJ") was assigned to hear the case. The ALJ scheduled the final hearing for May 12, 2008. At Respondent's request, the final hearing was continued until June 11, 2008.

At the hearing, Mr. Nelson testified on his own behalf and offered Petitioner's Exhibits 6 and 7, which were admitted into

evidence. During its case, Respondent called as a witness Lanett T. Russell, who was, as of the hearing, an employee of Respondent. Respondent's Exhibits 1-4, 7, 9-29, and 31-36 were received in evidence as well.

The final hearing transcript was filed on July 11, 2008. Each party filed a Proposed Recommended Order before the deadline established at hearing, which was July 21, 2008.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2007 Florida Statutes.

FINDINGS OF FACT

1. From November 2004 until early 2008, which period includes all times relevant to this case, Petitioner Robinson Nelson ("Nelson") worked for Respondent Alutiiq-Mele, LLC ("AML") as a security guard.

2. Nelson, who is black, alleges that on two discrete occasions, AML unlawfully discriminated against him based on race, once denying him an overtime shift which he requested, and the other time refusing to assign him "equal work hours."

3. The first incident allegedly took place on "or about March 1, 2005." According to Nelson, he called his supervisor that day, using a telephone at his workstation, to ask that he be scheduled to work overtime on his day off. The supervisor, Nelson claims, told him that overtime had been "eliminated" and denied Nelson's request. Shortly thereafter, as Nelson tells

it, the supervisor called Nelson's coworker, Nadja Abreu, and offered her the overtime that Nelson had just been denied.

4. Nelson's story cannot be squared with AML's records, which the undersigned considers reliable and truthful and hence credits. Nelson's timesheet for the week of February 27 through March 5, 2005, shows (and it is found) that he worked all seven days that week, putting in 40 regular hours and 26 overtime hours. Ms. Abreu's timesheet for the same period shows (and it is found) that she worked four days, accruing 40 regular hours and four overtime hours.

5. At hearing, Nelson claimed (apparently for the first time) that the telephone conversation with his supervisor regarding overtime had not occurred on or about March 1, 2005——as he had alleged originally in his Charge of Discrimination (signed on November 20, 2005) and maintained as recently as the Joint Prehearing Stipulation (dated May 30, 2008)——but rather some two weeks later, on or about March 15, 2005. Again, however, credible contemporaneous records belie Nelson's claim. A payroll document shows (and it is found) that Nelson and Ms. Abreu each worked 40 regular hours during the week of March 13, 2005——and neither put in overtime. (Moreover, Nelson did not work on March 15 and 16, 2005, which means that, if Nelson called his supervisor on March 15, as he asserted at hearing, then he likely would not have been at his workstation at the

time, which is inconsistent with his testimony that he placed the call while at work.)

6. Regarding the second alleged incident of discrimination, Nelson claims that on Monday, October 31, 2005, shortly before 9:00 a.m., he received a telephone call at home from his supervisor, who wanted to know why Nelson had failed to report for work that morning. Nelson says he told his supervisor that he had not been scheduled to work that day, and he could not work because he was babysitting. Nelson complains that, in connection with this situation, AML "denied" him regular work hours because of his race.

7. In addition to being facially illogical, Nelson's claim of discrimination is contradicted by reliable and persuasive documentary evidence. First, AML's payroll record shows (and it is found) that Nelson worked four hours on Sunday, October 30, and seven-and-a-half hours each day the next Tuesday through Friday, making a total 34 regular hours during the week of October 30, 2005. While this was not quite a full-time workweek, that Nelson worked fewer than 40 hours one week is not, of itself, proof that AML "denied" him six hours of work.

8. In fact, AML did *not* "deny" Nelson a work opportunity, as other contemporaneous documents——not to mention Nelson's own testimony——show. In evidence are two work schedules pertaining to the week of October 30, 2005. One was printed on October 28,

2005, and the other on October 30, 2005. There are a number of differences between them; each, however, notes that "scheduled hours are subject to change as needed." On the earlier schedule, Nelson was to be off on Monday, October 31, 2005. On the subsequent schedule, he was to work from 9:00 a.m. to 4:00 p.m. that day. Had Nelson reported to work on October 31, 2005, as (ultimately) scheduled——and as he was asked to do——Nelson would have worked more than 40 hours the week of October 30, 2005.

Ultimate Factual Determinations

9. Taken as a whole, the evidence in this case is either insufficient to establish that AML discriminated unlawfully against Nelson on the basis of his race; or it proves, affirmatively, that AML did *not*, in all likelihood, unlawfully discriminate against him. Either way, it is determined, as a matter of ultimate fact, that AML did not violate the civil rights laws in its treatment of Nelson while he was an employee of AML.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569, and 120.57(1), Florida Statutes.

11. The Florida Civil Rights Act of 1992 ("FCRA") is codified in Sections 760.01 through 760.11, Florida Statutes.

When "a Florida statute [such as the FCRA] is modeled after a federal law on the same subject, the Florida statute will take on the same constructions as placed on its federal prototype." Brand v. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994). Therefore, the FCRA should be interpreted, where possible, to conform to Title VII of the Civil Rights Act of 1964, which contains the principal federal anti-discrimination laws.

12. Section 760.10, Florida Statutes, provides, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

13. A complainant alleging unlawful discrimination may prove his case using direct evidence of discriminatory intent. Direct evidence is evidence that, if believed, would prove the existence of discriminatory intent without resort to inference or presumption. Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001); Holifield v. Reno, 115 F.3d 1555, 1561 (11th Cir. 1997). Courts have held that "only the most blatant remarks, whose intent could be nothing other than to

discriminate," satisfy this definition. See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358-59 (11th Cir. 1999)(internal quotations omitted), cert. denied, 529 U.S. 1109, 120 S. Ct. 1962, 146 L. Ed. 2d 793 (2000). Often, such evidence is unavailable, and in this case, Nelson presented none.

14. As an alternative to relying exclusively upon direct evidence, the law permits a complainant to profit from an inference of discriminatory intent, if he can adduce sufficient *circumstantial* evidence of discriminatory animus——such as proof that the charged party treated persons outside of the protected class, who were otherwise similarly situated, more favorably than the complainant was treated. Such circumstantial evidence, when presented, constitutes a prima facie case.

15. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court articulated a scheme for analyzing employment discrimination claims where, as here, the complainant relies upon circumstantial evidence of discriminatory intent. Pursuant to this analysis, the complainant 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), aff'd, 679 So. 2d 1183 (Fla. 1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958

(Fla. 2d DCA 1987)). If, however, the complainant succeeds in making a prima facie case, then the burden shifts to the accused employer to articulate a legitimate, non-discriminatory reason for its complained-of conduct. This intermediate burden of production, not persuasion, is "exceedingly light." Turnes v. Amsouth Bank, N.A., 36 F.3d 1057, 1061 (11th Cir. 1994). If the employer carries this burden, then the complainant must establish that the proffered reason was not the true reason but merely a pretext for discrimination. St. Mary's Honor Center v. Hicks, 509 U.S. 502, 516-518, 113 S. Ct. 2742, 2752-53, 125 L. Ed. 2d 407, 422-23 (1993). At all times, the "ultimate burden of persuading the trier of fact that the [charged party] intentionally discriminated against" him remains with the complainant. Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1258 (11th Cir. 2001), cert. denied, 534 U.S. 976, 122 S. Ct. 402, 151 L. Ed. 2d 305 (2001), reh'g denied, 535 U.S. 1013, 122 S. Ct. 1598, 152 L. Ed. 2d 513 (2002).

16. To establish a prima facie case of discriminatory treatment, Nelson was required to show that: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; (3) his employer treated similarly situated employees outside of his protected class more favorably than he was treated; and (4) he was qualified to do the job. Mathis v. Wachovia Bank, 255 Fed. Appx. 425, 429-30 (11th Cir. 2007);

Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir. 2006).

17. It is not disputed that Nelson belongs to a protected class, or that he was qualified for the job of security guard. Nelson failed, however, to produce persuasive evidence showing that *any* employee——much less one outside of the protected class, who was similarly situated to him in all relevant aspects——was treated more favorably than he was with regard to work hours.

18. Further, Nelson offered no persuasive evidence that he suffered a *legally cognizable* adverse employment action. As mentioned, a prima facie case requires proof of "adverse employment action." "An adverse employment action [for the purposes of a discrimination claim] is an ultimate employment decision, such as discharge or failure to hire, or other conduct that alters the employee's compensation, terms, conditions, or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee." Gupta v. Fla. Bd. of Regents, 212 F.3d 571, 587 (11th Cir. 2000), cert. denied, 531 U.S. 1076, 121 S. Ct. 772, 148 L. Ed. 2d 671 (2001) (internal quotations and citations omitted). "[The Eleventh Circuit] has never adopted a bright-line test for what kind of effect on the [complainant's] 'terms, conditions, or privileges' of employment the alleged discrimination must have for it to be actionable; nor would such

a rigid test be proper." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001) (citing Gupta, 212 F.3d at 586). "It is clear, however, that not all conduct by an employer negatively affecting an employee constitutes adverse employment action." Id. "Title VII is neither a general civility code nor a statute making actionable the ordinary tribulations of the workplace." Id. at 1239 (internal quotations and citations omitted).

19. The Eleventh Circuit has stated generally that "to prove adverse employment action in a case under Title VII's anti-discrimination clause, an employee must show a *serious and material* change in the terms, conditions, or privileges of employment." Id. at 1239 (emphasis in original). "Moreover, the employee's subjective view of the significance and adversity of the employer's action is not controlling; the employment action must be materially adverse as viewed by a reasonable person in the circumstances." Id.

20. None of the treatment Nelson claims was discriminatory constituted adverse employment action. Concerning overtime hours, the evidence shows *at most* that Nelson was disappointed *on one occasion* when his request to work an extra shift was denied. To be clear, there is no evidence whatsoever that Nelson suffered a *material* loss of overtime, which could be an adverse employment action. See Shannon v. Bellsouth

Telecommunications, Inc., 292 F.3d 712, 714, 716-17 (11th Cir. 2002)(plaintiff, who was "totally blackballed" from overtime opportunities and consequently lost approximately 90 percent of the annual overtime compensation he had earned previously, presented sufficient evidence of unlawful retaliation).

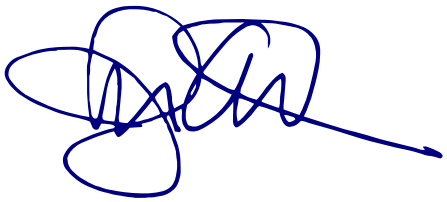
21. As for the alleged denial of "equal" hours the week of October 30, 2005, the evidence shows *at most* a miscommunication between AML and Nelson, which resulted in Nelson's being unable to work a shift, as scheduled, on October 31, 2005. Viewed objectively, this singular event cannot be deemed a materially adverse change in the terms or conditions of Nelson's employment.

22. Because Nelson failed to establish a prima facie case of discriminatory treatment, he did not create a presumption of discrimination under the McDonnell Douglas framework, and the burden never shifted to AML to rebut the presumption by articulating legitimate, non-discriminatory reasons for its actions. It was therefore not necessary to make any findings of fact in this regard.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the FCHR enter a final order finding AML not liable to Nelson for racial discrimination.

DONE AND ENTERED this 23rd day of July, 2008, in Tallahassee, Leon County, Florida.



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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.