STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HENRY WOODIE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-1750
	)	
INDEPENDENT GROUP HOME LIVING,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on July 14, 2008, in Viera, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Reverend Henry Woodie, pro se
1067 Marlin Drive
Rockledge, Florida 32955

For Respondent: Kristyne E. Kennedy, Esquire
Jackson & Lewis
390 North Orange Avenue, Suite 1285
Orlando, Florida 32801

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner was wrongly terminated from employment by Respondent, and, if so, whether monetary damages are warranted.

PRELIMINARY STATEMENT

On or about August 2, 2007, Petitioner was terminated from employment by Respondent. Petitioner timely filed a Petition for Relief with the Florida Commission on Human Relations, which thereafter issued a Notice of Determination: No Cause, followed by a Determination: No Cause.

Petitioner timely filed a request for an administrative hearing, which was then forwarded to the Division of Administrative Hearings (DOAH) on April 10, 2008. At the final hearing held pursuant to that request, Petitioner testified on his own behalf and called two additional witnesses: Darlene Reynolds, direct care counselor (DCC), with Respondent during the events in question; and Mrs. Kathey Woodie, Petitioner's wife. Petitioner adopted the exhibits which had been pre-numbered by Respondent. Petitioner offered Exhibits 11 and 18 into evidence during his case-in-chief. Exhibits 1, 3 through 5, 7, 9, 10, and 28 through 30 were offered by Respondent during Petitioner's case-in-chief. Respondent presented the testimony of two witnesses: Sarah McElvain, an assistant residential manager (ARM), with Petitioner during the events at issue; and Joyce Herman, residential director of Individual Residential Alternatives for Respondent. Respondent offered Exhibits 8, 12, 13, 16, 17, 19 and 27 during its case-in-chief.

The parties also entered a joint exhibit, a Joint Stipulation setting forth agreed-upon facts, procedural matters and applicable law relating to the instant action.

The parties advised the undersigned that a transcript would be ordered of the final hearing. The parties requested and were given 30 days from the date the transcript was filed at DOAH to submit proposed recommended orders. Petitioner filed a Proposed Recommended Order on August 14, 2008, although no transcript had been filed at DOAH by that date. The Transcript was ultimately filed at DOAH on August 20, 2008. Respondent timely filed its Proposed Recommended Order on September 22, 2008, a Monday.[1]

FINDINGS OF FACT

1. Petitioner, Henry Woodie, is a 66-year-old African-American man. He has a bachelor's degree in math and education, a bachelor's degree in accounting, and a master's degree in business administration. Petitioner first became employed by Respondent in August 2004, as a DCC at Ranier House, a group home owned and operated by Respondent, Independent Group Home Living (IGHL).

2. In February 2007, Petitioner was promoted to the position of overnight (or nighttime) ARM for Ranier House. This promotion occurred after Petitioner filed a lawsuit against Respondent for discrimination. A fellow employee (Sarah McElvain, a white female) had been promoted to ARM for Ranier

House some months earlier. Petitioner felt slighted because he had not been granted an interview, although he had more formal education than McElvain. However, McElvain had considerably more experience in the healthcare industry than Petitioner at that time.

3. Nonetheless, Respondent created a position for Petitioner equal in status to the position McElvain obtained. In February 2007, Petitioner was made the overnight ARM; he and McElvain were then co-managers of the Ranier House as McElvain took the day shift. Neither had supervisory status over the other. Each was responsible for assisting developmentally-disabled adults at Ranier House by providing hands-on assistance with daily living activities.

4. Petitioner worked from approximately midnight until 8:00 a.m. as the nighttime ARM. McElvain's hours were generally 9:00 a.m. until 5:00 p.m. The two managers' paths did not cross very frequently, although McElvain would come in early on many occasions to have her morning coffee and chat with the DCC workers. She may or may not have contact with Petitioner during those visits.

5. In mid-July 2007, Petitioner noticed that there was a shortage of available food products at Ranier House. Inasmuch as Petitioner was responsible for preparing bag lunches for the customers (residents of the house), he purchased some lunch

meats and other products from his personal account on July 30, 2007, at 2:39 p.m., i.e., outside his normal work hours. It was understood that any such purchases would be reimbursed.

6. Petitioner contends the food shortage existed because McElvain was overspending the funds budgeted for food, thus resulting in shortages. However, McElvain made food purchases using a WalMart debit card provided by Respondent. The card was replenished with funds each month by Respondent's corporate offices in New York. If the card was not timely replenished, McElvain could not make food purchases. This is the more reasonable and likely explanation of why shortages sometimes occurred.

7. Any time a food shortage occurred, one of the ARMs could make a purchase with their own money (if they were able) and then obtain reimbursement from the corporate office.

8. At 10:41 p.m. on July 30, 2007, some nine hours after Petitioner had made a food purchase using his own money, McElvain made a very large purchase ($711.11) of food and other items using the corporate WalMart card. McElvain was also shopping outside her normal work hours.

9. McElvain brought the groceries to Ranier House at around 11:30 p.m., i.e., just prior to Petitioner coming on duty for his regular night shift. McElvain and DCC LaShonda Hemley sorted the purchase by item type. They then distributed the

items to the rooms or areas where those items would ultimately be put away for storage. For example, cleaning products were left near the storage closet; food was left near the refrigerator or pantry; household goods were left in the kitchen, etc.

10. After the food items had been distributed, McElvain saw Petitioner in passing and told him the goods needed to be put away. She then left the Ranier House. Petitioner does not specifically remember being told to put away the groceries. He does remember being told that the groceries were being distributed around the house so they could be put away, but assumed that someone else would do that job.[2]

11. McElvain and Hemley did not put the groceries away because of several stated reasons: McElvain had been working and going to classes all day and she was tired; the night shift was coming on duty and would be paid to put the groceries away, whereas McElvain and Hemley would have to be paid overtime to do that job; and McElvain made a presumption that Petitioner would follow through on her statement that "the food needs to be put away."

12. Neither Petitioner, nor his DCC staff put away the food and supplies. As a result, dangerous chemicals were left sitting in the hallway all night long. Perishable foods were

left in the garage (right next to the refrigerator) all night long and spoiled.

13. Petitioner did not put away the food because of two stated reasons: Usually the person who buys the groceries puts them away; further, he had previously suffered a stroke and did not feel fully recovered. As for his medical condition, his physician had released Petitioner to work as of July 9, 2007 (several weeks prior to the incident in question), but Petitioner did not personally believe he was fully able to perform his duties. He did not make a request to his employer for a lighter work load or relief from his duties, however. Further, the final hearing was the first time Petitioner raised his health concerns as a reason why he did not put the groceries away. That testimony is not credible and flies in the face of the fact that Petitioner said he put away the groceries that he had purchased.

14. Petitioner does not remember McElvain asking or telling him to put away the groceries. He says he would have, had he been asked. This statement is not credible since the groceries were in full view throughout Petitioner's shift, but he did not put them away.

15. At some point during the night of July 30 or 31, 2007, Petitioner opened some of the bags containing perishable foods and used some of them to make sandwiches for the customers. He

did not put the opened packages or any of the other bags of groceries into the refrigerator at that time. Petitioner does not accurately remember, but believes the lunch meats he used may have come from food he had bought (and put away) earlier in the day.

16. Besides the perishable foods, there were also some bleach and cleaning supplies left unattended. These items were placed on the floor in a hallway immediately adjacent to a locked storage closet where they are to be stored. The closet was locked and the keys were located in the office at Ranier House. Petitioner maintained at final hearing that he did not see the items even though they were right next to customer rooms (which are supposed to be checked every 15 minutes throughout the night). It is hard to reconcile Petitioner's statement with the pictures of the bleach introduced into evidence at final hearing. The location of the bleach is patently obvious to even the most casual observer.

17. Further, a letter written by Petitioner to an unknown recipient clearly states, "When I came to work at Mid-night [sic], I noticed about 50 bags of groceries spread out on the floors of different rooms." This letter, which Petitioner admits writing, contradicts his contention that he did not see the goods.

18. One of the concerns about the bleach was that one customer was prone to getting up at night and finding something to drink. He would apparently drink anything, including bleach. Knowing that, it is unconscionable that Petitioner would allow the bleach to sit in close proximity to the customer bedrooms over an entire eight-hour shift.

19. On July 31, 2007, McElvain came to work around 8:30 a.m. When she passed Petitioner on her way in, he said something akin to "I'm out of here" and left. McElvain then spotted the spoiled food and other items which had not been put away. She became extremely angry about that negligence.

20. McElvain sorted through the food products and identified $167.27 worth of groceries that were no longer edible. She took pictures of the bags of groceries that were placed in different areas around the house. Then she called her supervisor, Joyce Herman, to lodge a complaint. McElvain told Herman that she (McElvain) had instructed Petitioner to put away the food items or, at least, had told Petitioner that the items needed to be put away.

21. Herman contacted Petitioner at his home, inquiring as to why he had not put the groceries away. He said that he had not been told to do so. Herman says that the job descriptions for ARMs would suggest that someone needed to put the groceries away; if one ARM didn't, the other should. She places the

primary blame in this case on Petitioner because the groceries were left out for his entire shift.

22. Herman instructed Petitioner not to contact McElvain, but he did so anyway. Petitioner left a message on McElvain's home phone and then one on her cell phone. The messages were not preserved and could not be played at final hearing. However, a transcript of the home phone message, which both parties indicated was an accurate reflection of what was said, reads as follows: "Yes, Sarah, this is [Petitioner]. I was wondering why you told Joyce [Herman] that lie that you told me to put the groceries away and I didn't. Number one, you don't tell me what to do and number two, you could have put the groceries away yourself. Give me a call." McElvain says part of the message was stated in a "nasty tone," but Petitioner disagrees.

23. McElvain contacted Herman and forwarded Petitioner's voicemail message so Herman could listen to it. Both McElvain and Herman describe the tone in Petitioner's voice as angry and confrontational.

24. The voicemail was alternatively described by Respondent as "threatening," "confrontational" or "upsetting." Petitioner admits that he was angry when he made the call and might not have made the call had he not been angry. Petitioner

and McElvain did not appear to have had a smooth or cordial working relationship, although they were peers.

25. Upon hearing the voicemail and considering the facts as to what had occurred, Herman and her subordinate, Doris Diaz, made the decision to terminate Petitioner's employment. The basis of the termination was violation of the IGHL Code of Conduct, specifically the following language: "[D]ecisions on disciplinary action to be taken will be up to and including discharge. The following are examples of unacceptable behavior. . . . Confrontation with customers or co-workers." Petitioner acknowledged receipt and understanding of the Code of Conduct.

26. Petitioner requested of Respondent a letter setting out the reason for his discharge. He was told that IGHL policy did not allow for a written statement; however, a letter was thereafter sent to him stating the basis for Respondent's action. The letter is unequivocal that the employer's reliance on confrontation with a co-worker was the basis for terminating Petitioner's employment.

27. Petitioner presented no competent substantial evidence to support his claim of race, gender, or age discrimination as the basis for his termination from employment.

28. Petitioner was promoted from DCC worker to nighttime ARM by IGHL. His promotion included a substantial salary increase, but not much change in his duties or responsibilities.

He was, by his own admission, probably overpaid for the job he was performing. He claims that his termination from employment was for the purpose of eliminating this particular position. There is no evidence to support that contention.[3]

29. Petitioner claims retaliation may have occurred because of the fact that he pointed out McElvain's failure to stay within her prescribed food budget. There is no evidence that McElvain strayed from her budget. Rather, the evidence shows a failure on the part of IGHL's corporate offices to stay current when replenishing the WalMart card used for making purchases.

30. The 90-day evaluation for Petitioner after his promotion to ARM is acceptable, but is considerably less laudatory in nature than McElvain's evaluation. It is clear Petitioner did have some minor issues relating to other employees, but that is often the case when someone is promoted from within an organization.

31. If Petitioner is claiming retaliation based on his previous claim of discrimination against his employer, that claim is not supported by the evidence. As a matter of fact, Petitioner was promoted, not fired, as a result of the prior claim he filed.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Section 120.569 and Subsection 120.57(1), Florida Statutes (2008).

33. The Florida Civil Rights Act of 1992 (the "Act") is codified in Sections 760.01 through 760.11 and 509.092, Florida Statutes (2007). Among other things, the Act makes certain actions by employers "unlawful employment practices" and gives the Commission authority--following an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes (2007)--to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." §§ 760.10 and 760.11(6), Fla. Stat. (2007).

34. Petitioner has the burden of proof that he was the victim of a discriminatory act. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996), wherein the Court stated: "The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."

35. At final hearing, Petitioner did not allege or present evidence to prove the existence of race, age, or gender

discrimination. Petitioner dropped each of those bases in favor of a claim of discrimination based upon retaliation. Petitioner believes his employer was acting in a retaliatory manner because the employer had previously promoted Petitioner to ARM status, but then later wanted to eliminate the position by firing Petitioner. The promotion was a positive action performed by the employer. Under Petitioner's theory, the employer would effectively be retaliating against itself.

36. Petitioner relies generally upon Chapter 10 from a legal treatise, Employment Discrimination Laws and Litigation, edited by Merrick T. Rossein, as support for his claim of retaliation discrimination. The treatise discusses a number of issues relating to discrimination and cites to state and federal case law. However, Petitioner did not cite to any particular case or holding within the treatise, and nothing found therein by the undersigned supports Petitioner's claims in the instant case.

37. In order to establish a claim of retaliatory conduct, Petitioner must prove that: (1) he engaged in a statutorily protected expression; (2) the employer took an adverse employment action against him; and (3) there is a causal connection between the protected activity and the adverse employment action. Shannon v. BellSouth Telecommunications, Inc., 292 F.3d 712, 715 (11th Cir. 2002). Petitioner's

promotion to ARM was not statutorily protected; the action taken by the employer was positive, not adverse; and there is no causal connection between the promotion and Petitioner's termination for confronting another employee. Petitioner did not, therefore, prove even a prima facie case of retaliation by Respondent.

38. Petitioner did not meet his burden of proof in this matter. Petitioner did not establish a prima facie case that his employer retaliated against him in any fashion, thus, the employer was not required to establish legitimate, non-retaliatory reasons for its termination of Petitioner. There is no evidence of discrimination.

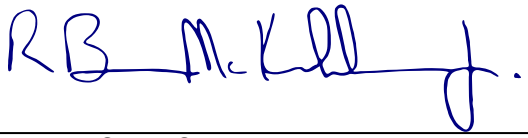
39. There is no evidence to support an award of damages against Respondent.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations finding Respondent not guilty of an unlawful employment practice and dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 29th day of September, 2008, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 2008.

ENDNOTES

[1/] The Proposed Recommended Order was actually faxed to DOAH on Friday, September 19, 2008, but arrived in full after business hours and so was clocked in officially on the next business day, September 22, 2008.

[2/] Petitioner believed that whoever purchased the groceries should put them away. There was no policy or written protocol to that effect, however.

[3/] In fact, IGHL has closed and/or sold Ranier House and its other properties in Florida. Thus, Petitioner's position was in jeopardy notwithstanding any issue in the present proceeding.

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.