STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOE PABON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-2622
	)	
CARLTON ARMS OF OCALA,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A duly-noticed final hearing was held in this case by Administrative Law Judge T. Kent Wetherell, II, on August 5, 2008, in Ocala, Florida.

APPEARANCES

For Petitioner: Joe Pabon, pro se
10435 Southwest 49th Avenue
Ocala, Florida 34476

For Respondent: John P. McAdams, Esquire
Carlton Fields
4221 West Bay Scout Boulevard
Post Office Box 3239
Tampa, Florida 33607

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice against Petitioner.

PRELIMINARY STATEMENT

On or about November 8, 2007, Petitioner filed an employment discrimination complaint against Respondent with the

Florida Commission on Human Relations (Commission). The Commission investigated the complaint, and on May 6, 2008, the Commission issued a "no cause" determination. On May 27, 2008, Petitioner timely filed a Petition for Relief with the Commission.

On May 28, 2008, the Commission referred the petition to the Division of Administrative Hearings (DOAH). The referral was received by DOAH on May 30, 2008.

The final hearing was scheduled for and held on August 5, 2008. At the hearing, Petitioner testified in his own behalf, and Respondent presented the testimony of Laura Smith, Willie Hutchinson, Cindy McMillen, David Kinman, and Rafael Vega. Petitioner's Exhibits P1 through P4 and P6 through P11 were received into evidence, as were Respondent's Exhibits 5, 14, 18, 19, 21, and 23.

The Transcript of the final hearing was filed on August 22, 2008. The parties were given 14 days from that date to file proposed recommended orders (PROs). Petitioner filed a PRO on August 19, 2008. Respondent filed a PRO on September 5, 2008. The PROs have been given due consideration.

Petitioner filed a "response" to Respondent's PRO on September 11, 2008. On that same date, Respondent filed a motion to strike that filing. The motion is granted, and Petitioner's "response" to Respondent's PRO is stricken. The

Uniform Rules of Procedure do not contemplate the filing of "responses" to PROs, and the undersigned did not authorize such filings in this case.

FINDINGS OF FACT

1. Petitioner is a Hispanic male.

2. Respondent is an 860-unit apartment complex in Ocala.

3. Petitioner was employed by Respondent as a full-time maintenance technician from 2001 through September 28, 2007. His job responsibilities included performing repairs and general maintenance work on the insides of the apartments.

4. Petitioner's starting wage in 2001 was $9.00 per hour. He received annual raises from 2001 to 2004, at which point his wage was $11.75 per hour.

5. Petitioner did not receive any raises from 2004 through 2007. He was still earning $11.75 per hour when he was fired on September 28, 2007.

6. Starting in 2004, Respondent did not give raises to any maintenance technicians who were not HVAC-certified. This policy applied equally to all maintenance technicians, including non-Hispanics, and was intended to encourage them to get HVAC-certified.

7. HVAC certification was important to Respondent because the air conditioning systems at the apartment complex were getting older and were requiring more frequent repairs.

8. Respondent provided the necessary study materials for the HVAC certification exam and paid for the exam.

9. Petitioner is not HVAC-certified. He took the certification exam once, but he did not pass. He did not take the exam again, even though Respondent would have paid for him to do so as it did for other maintenance technicians.

10. HVAC certification is not required to perform all types of work on air conditioners, and Petitioner continued to do some work on the air conditioners at the apartment complex after 2004 even though he was not HVAC-certified.

11. Petitioner was characterized as a "fair" employee who did "okay" work. His supervisor, a Hispanic male, testified that there were some jobs that he did not assign to Petitioner, that Petitioner frequently got help from other employees, and that he received a couple of complaints from other maintenance technicians about Petitioner's work.

12. Respondent does not have an employee handbook, and the only written policy that Respondent has is a policy prohibiting sexual and other harassment. Respondent's executive director, Laura Smith, testified that she expected employees to use "common sense" regarding what they can and cannot do at work.

13. Respondent utilizes a system of progressive discipline, which starts with warnings (oral, then written) and culminates in dismissal. However, the nature of the misconduct

determines the severity of the discipline imposed, and a serious first offense may result in dismissal.

14. On October 5, 2006, Petitioner was given an oral warning for "improper conduct" for visiting with a housekeeper multiple times a day for as long as 20 minutes at a time. The housekeeper also received an oral warning for this conduct.

15. On May 15, 2007, Petitioner was given a written warning for the same "improper conduct," i.e., wasting time by going into an apartment to visit with a housekeeper.

16. Petitioner acknowledged receiving these warnings, but he denied engaging in the conduct upon which they were based. His denials were contradicted by the more credible testimony of his supervisor and Ms. Smith.

17. Petitioner was fired on September 28, 2007, after a third incident of "improper conduct."

18. On that day, Petitioner left the apartment complex around 10 a.m. to get gas in his truck. He did not "clock out" or get permission from his supervisor before leaving the apartment complex. Petitioner was away from the apartment complex for at least 15 minutes, but likely no more than 30 minutes.

19. Even though Respondent does not have written policies and procedures, Petitioner understood, and common sense dictates

that he was supposed to get his supervisor's approval and "clock out" before he left the complex on a personal errand.

20. Petitioner also understood the procedure to be followed to get the 14 gallons of gas per week that Respondent provided for maintenance technicians. The procedure required the employee to get the company credit card from the bookkeeper, get the gas from a specific gas station, and then return the credit card and a signed receipt for the gas to the bookkeeper.

21. Petitioner did not follow any aspect of this procedure on the day that he was fired. He had already gotten the 14 gallons of gas paid for by Respondent earlier in the week.

22. Petitioner's supervisor, a Hispanic male, compared Petitioner's actions to "stealing from the company" because he was getting paid for time that he was not at the apartment complex working. He also expressed concern that Respondent could have been held liable if Petitioner had gotten in an accident on his way to or from getting gas because he was still "on the clock" at the time.

23. Petitioner testified that he and other maintenance technicians routinely left the apartment complex to fill up their cars with gas without "clocking out" or getting permission from their supervisor. This testimony was corroborated only as to the 14 gallons of gas paid for each week by Respondent.

24. There is no credible evidence that other employees routinely left the apartment complex to do personal errands without “clocking out,” and if they did, there is no credible evidence that Respondent’s managers were aware of it.

25. There is no credible evidence whatsoever that Petitioner’s firing was motivated by his national origin. His supervisor is Hispanic, and he and Ms. Smith credibly testified that the fact that Petitioner was Hispanic played no role in her decision to fire Petitioner.

26. Petitioner claimed that he was “harassed” by Ms. Smith and that she accused him of having sex with a housekeeper in the vacant apartments. No persuasive evidence was presented to support Petitioner’s “harassment” claim, which was credibly denied by Ms. Smith.

27. Petitioner also claimed that he was disciplined differently than similar non-Hispanic employees, namely James Stroupe, Jason Head, and Willie Hutchinson.

28. Mr. Stroupe is a white male. He worked on the grounds crew, not as a maintenance technician. In May 2007, Mr. Stroupe was given a written warning based upon allegations that he was making explosive devices at work, and in September 2007, he was given an oral warning for “wasting time” by hanging out in the woods with Mr. Head.

29. Mr. Head is a white male. He worked on the grounds crew, not as a maintenance technician. In September 2007, he received a written warning for "wasting time" by hanging out in the woods with Mr. Stroupe.

30. Mr. Hutchinson is a white male, and like Petitioner, he worked as a maintenance technician. In September 2007, he was arrested for DUI. Mr. Hutchinson was not disciplined by Respondent for this incident because it did not happen during working hours and it did not affect his ability to perform his job duties as maintenance technician.

31. The grounds department (in which Mr. Stroupe and Mr. Head worked) was responsible for maintaining the landscaping around the apartment complex, whereas the maintenance department (in which Petitioner and Mr. Hutchinson worked) was responsible for maintaining the insides of the apartments. The departments had different supervisors.

32. Petitioner was initially denied unemployment compensation by Respondent after he was fired, but he successfully appealed the denial to an Appeals Referee. Petitioner received unemployment compensation through April 2008.

33. On April 11, 2008, Petitioner started working for Holiday Inn as a maintenance technician. He is employed full time and his wage is $11.50 per hour.

34. Respondent placed an advertisement in the local newspaper after Petitioner was fired in order to fill his position in the maintenance department. The advertisement stated that Respondent was looking for an applicant who was HVAC-certified.

35. Respondent hired Javier Herrera to fill the position. Mr. Herrera, like Petitioner, is a Hispanic male.

CONCLUSIONS OF LAW

36. DOAH has jurisdiction over the parties to and subject-matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11(7), Florida Statutes.[1/]

37. The Florida Civil Rights Act (FCRA) provides that it is an unlawful employment practice for an employer to "discharge . . . or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . national origin . . . ." See § 760.10(1)(a), Fla. Stat.

38. The FCRA was patterned after Title VII of the federal Civil Rights Act, and, therefore, case law construing Title VII is persuasive when construing the FCRA. See Florida State University v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996).

39. Anti-discrimination laws such as the FCRA and Title VII do not give the courts, the Commission, or the undersigned

the authority to sit as a kind of "super-personnel department" and second-guess an employer's business decisions. See Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991). These laws are not concerned with whether an employment decision is prudent or fair, but only with whether it was motivated by unlawful animus. Id. See also Ptasznik v. St. Joseph Hosp., 464 F.3d 691, 697 (7th Cir. 2006) ("Federal courts have authority to correct an adverse employment action only where the employer's decision is unlawful, and not merely when the adverse action is unwise or even unfair. 'We do not sit as a super-personnel department with authority to review an employer's business decision as to whether someone should be fired or disciplined because of a work-rule violation.'"); Damon v. Fleming Supermarkets, Inc., 196 F.3d 1354, 1361 (11th Cir. 1999) ("We are not in the business of adjudging whether employment decisions are prudent or fair. Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision.").

40. Petitioner's discrimination claim, which is not based upon any direct evidence of discrimination,[2/] must be analyzed under the framework established in McDonnell Douglass Corporation v. Green, 411 U.S. 792 (1973).

41. Under that framework, Petitioner has the initial burden of establishing by a preponderance of the evidence a

prima facie case of unlawful discrimination. See McDonnell Douglass, 411 U.S. at 802.

42. In order to establish a prima facie case of wrongful discharge, which is Petitioner's primary claim,[3/] Petitioner must establish that (1) he belongs to a group protected by the FCRA; (2) he was qualified for the job from which he was discharged; (3) he was discharged; and (4) his former position was filled by a person outside of his protected class or that he was disciplined differently than a similarly-situated employee outside of his protected class. See Jones v. Lumberjack Meats, Inc., 680 F.2d 98, 101 (11th Cir. 1982); Scholz v. RDV Sports, Inc., 710 So. 2d 618, 623 (Fla. 5th DCA 1998); Cesarin v. Dillards, Inc., Order No. 03-037 (FCHR Apr. 29, 2003) (adopting the Recommended Order in DOAH Case No. 01-4805, but clarifying what must be established as the first element of the prima facie case).

43. If Petitioner establishes a prima facie case, the burden shifts to Respondent to produce evidence that the adverse employment action was taken for legitimate non-discriminatory reasons. See McDonnell Douglas, 411 U.S. at 802-03. If Petitioner fails to establish a prima facie case, the burden never shifts to Respondent.

44. Once a non-discriminatory reason is presented by Respondent, the burden then shifts back to Petitioner to

demonstrate that the reason is merely a pretext for discrimination. See McDonnell Douglas, 411 U.S. at 804.

45. The ultimate burden of persuasion remains with Petitioner throughout the case to demonstrate a discriminatory motive for the adverse employment action. Id. See also St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507-08, 510-11 (1993).

46. In order to meet this ultimate burden of proof, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." St. Mary's Honor Center, 509 U.S. at 519 (emphasis in original).

47. Pretext can be established by showing that the reason proferred by the employer is "false" or "unworthy of credence." See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147-49 (2000). Pretext can also be established through circumstantial evidence that the plaintiff was treated less favorably than other employees who were "similarly situated . . . 'in all relevant respects.'" See, e.g., Dept. of Children & Family Servs. v. Garcia, 911 So. 2d 171, 173 (Fla. 3d DCA 2005) (citing cases).

48. Likewise, in determining whether other employees are similarly situated for purposes of Petitioner's prima facie case,

> it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways. The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed. We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges.

Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999) (citations and internal quotations omitted).

49. Petitioner established the first three elements of a prima facie case of discrimination. He is Hispanic, he was qualified for the maintenance technician position, and he was fired by Respondent.

50. Petitioner failed to establish the fourth element of a prima facie case. His former position was filled by another Hispanic male, and there is no credible evidence that Petitioner was disciplined differently than similarly situated non-Hispanic employees.

51. The comparators identified by Petitioner were not similarly situated to him "in all relevant respects." Two of the comparators -- Mr. Shoupe and Mr. Head -- worked in a different department and performed different jobs than Petitioner and none of the comparators engaged in the same improper conduct for which Petitioner was fired, i.e., leaving

the apartment complex without permission and without "clocking out." Also, the comparators did not have multiple incidents of "improper conduct" for which they were progressively disciplined, as was the case with Petitioner.

52. Even if Petitioner had established a prima facie case of discrimination, Respondent met its burden to produce a legitimate, non-discriminatory reason for Petitioner's discharge, i.e., leaving work without permission and without "clocking out" to run a personal errand.

53. Petitioner failed to prove that this reason was false, unworthy of credence, or otherwise merely a pretext for unlawful discrimination. Indeed, Petitioner admitted to this conduct.

54. Therefore, even if it were somehow determined that Petitioner established a prima facie case, he failed to carry his ultimate burden of persuasion.

55. In reaching this conclusion, the undersigned did not overlook the fact that Petitioner successfully appealed Respondent's denial of his unemployment compensation benefits. However, the legal standards in that case -- whether Petitioner was discharged for "misconduct" as defined by the statutes and case law governing unemployment compensation -- is different from the legal standards governing this case.

56. In the unemployment compensation case, Respondent had the burden to prove "willful or wanton disregard of [its]

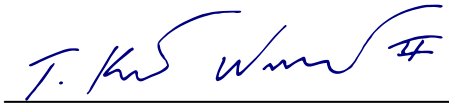
interests" by Petitioner or "negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design." See, e.g., Hall v. Unemployment Appeals Comm'n, 700 So. 2d 107, 109 (Fla. 1st DCA 1997) (quoting the definition of "misconduct" in Section 443.036(26), Florida Statutes, and citing cases construing the definition). By contrast, in this case, Petitioner had the burden to prove that his firing was motivated by unlawful discrimination as described above.

RECOMMENDATION

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

RECOMMENDED that the Commission issue a final order dismissing the Petition for Relief with prejudice.

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



T. KENT WETHERELL, II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of September, 2008.

ENDNOTES

[1/] All statutory references are to the 2007 version of the Florida Statutes.

[2/] Direct evidence of discrimination is:

> evidence which, if believed, would prove the existence of a fact in issue without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate . . . constitute direct evidence of discrimination. For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision. Remarks by non-decisionmakers or remarks unrelated to the decisionmaking process itself are not direct evidence of discrimination.

Bass v. Board of County Commissioners, 256 F.3d 1095, 1105 (11th Cir. 2001).

[3/] Petitioner also claims to have been subjected to sexual harassment, harassment, and disparate terms, conditions, and wages. See Petitioner's PRO. These claims are not separately analyzed in this Recommended Order because no credible evidence was presented to show that Respondent treated Petitioner any differently than non-Hispanic maintenance technicians in any respect or that Petitioner was subjected to harassment of any kind.

COPIES FURNISHED:

John P. McAdams, Esquire
Carlton Fields
4221 West Bay Scout Boulevard
Post Office Box 3239
Tampa, Florida 33607

Joe Pabon
10435 Southwest 49th Avenue
Ocala, Florida 34476

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

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.