

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FELIXBERTO A. LLEVADO, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 08-4553  
 )  
 SANDESTIN GOLF AND BEACH )  
 RESORT, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on November 17, 2008, in Shalimar, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Felixberto A. Llevado, pro se  
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For Respondent: Brian S. Duffy, Esquire  
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent discriminated against Petitioner based on national origin and disability.

PRELIMINARY STATEMENT

On October 27, 2007, Petitioner, Felixberto A. Llevado (Mr. Llevado), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission), alleging that Respondent, Sandestin Golf and Beach Resort (Sandestin Resort), as his employer discriminated against him based on his national origin and his disability. On July 30, 2008, the Commission issued a Notice of Determination: No Cause, finding that there was no reasonable cause to believe that an unlawful employment practice had occurred. Mr. Llevado filed a Petition for Relief with the Commission on August 27, 2008.

On September 17, 2008, the Petition was filed with the Division of Administrative Hearings by the Commission, requesting that an Administrative Law Judge be assigned to conduct a final hearing. The case was originally assigned to Administrative Law Judge Suzanne Hood, but was transferred to Administrative Law Judge Susan B. Harrell to conduct the final hearing.

At the final hearing, Victor Villarama interpreted the proceedings for Mr. Llevado. Mr. Llevado testified in his own behalf and presented Petitioner's Exhibits 1, 2, 3, 4, 6, 12, 16, 27, 32, 34, 35, 39, 48, 49, 51, 52, 53, and 62, which were admitted in evidence. During the presentation of his case,

Mr. Llevado read extensively from prepared notes. To aid the undersigned, the notes were admitted as Administrative Law Judge Exhibit 1.

At the final hearing, Sandestin Resort called the following witnesses: Barry Sayers, Terry Clemons, Jake Lehman, and Colette Quinn. Respondent's Exhibits 25, 34, 56, 57, and 59 were admitted in evidence.

The Transcript was filed on December 22, 2008. The parties agreed to file their proposed recommended orders within ten days of the filing of the Transcript. Mr. Llevado filed a post-hearing submittal on December 29, 2008. Sandestin Resort filed its Proposed Recommended Order on January 5, 2009. Both submittals have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Mr. Llevado was born in the Philippines and is a naturalized citizen of the United States. In 1995, Mr. Llevado began working for Sandestin Resort as an equipment operator at the Burnt Pine Golf Course. Mr. Llevado's duties included mowing greens, raking bunkers, and other tasks related to the maintenance of a golf course.

2. Mr. Llevado was part of a golf maintenance team. The members of the team are cross-trained so that they are able to do all the tasks necessary to maintain the golf course. None of

the team members receive extra compensation for doing a particular task. The assignment for each team member is posted at the beginning of the work day, which is 6:00 a.m., on a chalkboard in the break room. The assignment of the tasks is based on the tasks that are needed to be completed and the personnel working each day.

3. Mr. Llevado's supervisors were Barry Sayers, who was the assistant superintendent of golf maintenance at the Burnt Pine Golf Course, and Jake Leham, who was the director of golf maintenance. Both Mr. Sayers and Mr. Leham considered Mr. Llevado to be a good employee, who could perform all the necessary tasks of an equipment operator.

4. During his employment with Sandestin Resort, Mr. Llevado kept a diary. He noted in his diary that, in April 2001, Mr. Sayers said bad words to him. Mr. Llevado did not specify what the bad words were, but the interpreter at the final hearing interpreted it to mean the words were probably curse words. Mr. Sayers did not recall the incident. No evidence was presented that Mr. Llevado was the only employee to whom Mr. Sayers may have said bad words.

5. On August 22, 2002, Mr. Llevado received an Employment Communication Notice, suspending him for one day without pay. The offense was failing to complete his work as instructed and leaving grass clippings in a bunker.

6. Two times during his employment with Sandestin Resort, Mr. Llevado received an Employment Communication Notice concerning his failure to abide by the company's policy for requesting leave time. The first occurrence was on September 26, 2003, and the second occurrence was on January 8, 2006. He was suspended two days for the first occurrence, and no disciplinary action was taken for the second occurrence.

7. On October 25, 2006, Mr. Llevado received his annual performance evaluation. He met or exceeded expectations in all categories except following instructions, where it was noted he needed to improve. As a result of his evaluation, Mr. Llevado was given a raise.

8. On October 26, 2006, Mr. Llevado reported to work and found that he was assigned to mow the greens. Two employees failed to come to work, and it was necessary to assign Mr. Llevado the task of mowing greens. Mr. Llevado did not like to mow greens and preferred to rake the bunkers. He requested Mr. Sayers to allow him to rake the bunkers instead of mowing the greens. Mr. Sayers refused and explained the reason why Mr. Llevado was assigned to mow the greens.

9. Mr. Llevado refused to mow the greens. It was 7:00 a.m., and Mr. Sayers had to leave the maintenance building to begin the work of the day. He left Mr. Lehman to deal with Mr. Llevado. Mr. Lehman discussed the mowing of the greens with

Mr. Llevado, who requested to be paid more than his hourly wages if he had to mow the greens. Mr. Lehman refused to pay him additional money, and Mr. Llevado accused Mr. Lehman of discriminating against him.

10. When Mr. Llevado accused Mr. Lehman of discriminating against him, Mr. Lehman told Mr. Llevado that he would need to speak to personnel in the human resources department. The human resources department did not begin work until 8:30 a.m. Mr. Lehman indicated that he would arrange a meeting with Sylvia Hanks, the director of human resources. Mr. Lehman told Mr. Llevado to clock out and go home until the meeting could be arranged. Mr. Lehman told Mr. Llevado that he would be compensated for the lost time, if Mr. Lehman erroneously told Mr. Llevado to go home.

11. Mr. Llevado called his sister to come and get him. Mr. Lehman instructed Mr. Llevado to wait in the break room for his ride home from work. Mr. Llevado returned to the break room to wait. While Mr. Llevado was in the break room, he was struck on his head.

12. Terry Clemons, who is the administrative assistant to Mr. Lehman, got to work around 7:00 a.m. on October 26, 2006. When she came in the building, she saw Mr. Llevado sitting in the break room. Approximately 15 minutes later, Mr. Llevado came to her with a bleeding head and said that he had been hit

and someone was behind the door. Mr. Llevado had called Sandestin Resort's security office and reported the incident.

13. Mr. Llevado claims that he saw three men in uniforms running away from the building after he had been hit. Personnel from security were unable to locate anyone described by Mr. Llevado as running from the building. The door to the break room was a swinging door, and it is possible that Mr. Llevado pushed the door, hitting someone behind the door, and causing the door to swing back and hit him in the head.

14. The incident was reported to the Walton County Sheriff's Office. Mr. Llevado told the investigating officer that he was attempting to exit the building through the swinging door, and someone was on the other side of the door, and he was hit in the head. Mr. Llevado claimed that he passed out as soon as he was hit. If Mr. Llevado passed out as soon as he was hit, it is difficult to reconcile his claim that he saw three uniformed men running away from the building. The greater weight of the evidence does not establish that Mr. Llevado was attacked by employees of Sandestin Resort.

15. It is undisputed that Mr. Llevado did sustain an injury in the break room of the Sandestin Resort on October 26, 2006. Mr. Llevado was treated at the emergency room for his injuries.

16. Mr. Llevado came back to work the day after his injury but left by midday, complaining that his head hurt.

17. Within a day or two of the incident, Mr. Llevado, his sister, Mr. Lehman, and Mr. Sayers met with Ms. Hanks to discuss the situation. At the meeting, Mr. Llevado indicated that he thought that Mr. Lehman had fired him on October 26, 2006. Mr. Llevado was assured that Mr. Lehman had no authority to fire him and that he was not fired.

18. Mr. Llevado did not return to work after October 27, 2006. He requested and received workers' compensation benefits related to his injury.

19. By letter dated March 22, 2007, the human resources office for Sandestin Resort advised Mr. Llevado that Mr. Llevado's physician had released Mr. Llevado to return to work and that Sandestin Resort had a job available for him. Mr. Llevado was told to report to work on March 28, 2007. By letter dated March 26, 2007, Mr. Llevado advised Sandestin Resort that he was aware that his physician had released him to return to work, but that he was still experiencing headaches and dizziness. Mr. Llevado also advised that he was seeking further medical treatment.

20. By June 12, 2007, Mr. Llevado had not returned to work at Sandestin Resort. By letter dated June 12, 2007, Sandestin Resort advised Mr. Llevado that he had been on leave of absence



since November 28, 2006, and that he had exceeded Sandestin Resort's leave policy. Mr. Llevado was advised that if he was able to return to work that he would need to submit a full release from his medical provider. Mr. Llevado was also advised that if he did not return to work by June 18, 2007, that his employment would be terminated. Mr. Llevado never submitted a medical release and never returned to work.

21. Sandestin Resort's Employee Handbook provides that an eligible employee may take up 12 weeks of unpaid medical leave during any "rolling" 12-month period. The handbook further provides that an employee who exceeds the 12-week medical leave may be subject to termination of employment.

22. Mr. Llevado claims that on December 19, 2005, Mr. Sayers told him that he was an illegal alien and that he should go back to the Philippines. Mr. Sayers denied ever telling Mr. Llevado that he should go back to the Philippines. The greater weight of the evidence does not establish that Mr. Lehman made the statement. Both Mr. Sayers and Mr. Lehman have participated in discrimination prevention training. Sandestin Resort employs many persons who have foreign nationalities. Mr. Sayers has personally worked with many people with varying nationalities.

23. Sandestin Resort gives each of its employees an Employee Handbook, which describes the procedure an employee can

follow to report a claim of discrimination. If an employee feels that he or she has been discriminated against, the employee is to bring it to the attention of the employee's supervisor. If the supervisor is the subject of the claim of discrimination, the employee may contact either the manager of the human resources department or the vice president for human resources. Mr. Llevado received the handbook. His personnel file does not indicate that he made any claim of discrimination to his supervisor or the human resources officer prior to October 26, 2006.

24. Part of Mr. Llevado's claim of discrimination is based on an alleged disability. However, Mr. Llevado failed to establish that he had a disability or that Sandestin Resort perceived him to have a disability. Prior to his injury on October 26, 2006, Mr. Llevado performed his work in a satisfactory manner. He never asked Sandestin Resort for any type of accommodation for his alleged disability. Mr. Llevado contends that he is unable to work because of the injury he sustained on October 26, 2006, and that he has not sought work since the incident. However, Mr. Llevado did not present any medical evidence to establish that he is disabled.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2008).

26. Mr. Llevado contends that Sandestin Resort discriminated against him because of his national origin and a disability. Subsection 760.10(1)(a), Florida Statutes (2006),<sup>1</sup> provides:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail to refuse to hire any individual, or otherwise 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.

27. The Florida Civil Rights Act of 1992, Section 760.01, et seq., Florida Statutes, is modeled after Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000, et seq.; therefore, case law interpreting Title VII is also relevant to cases brought under the Florida Civil Rights Act. Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

28. The Florida Civil Rights Act of 1992, Section 760.01, et seq., Florida Statutes, is construed in accordance with the Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101,

et seq., when the charge of discrimination is based on a disability. Razner v. Wellington Regional Medical Center, Inc., 837 So. 2d 437, 440 (Fla. 4th DCA 2002); McCaw Cellular Communications of Florida, Inc. v. Kwaitek, 763 So. 2d 1063 (Fla. 4th DCA 1999); Greene v. Seminole Electric Co-op, Inc., 701 So. 2d 646 (Fla. 5th DCA 1997).

29. To be eligible for relief based on a claim of handicap discrimination, a petitioner must satisfy the same evidentiary burdens demanded by similar statutes addressing claims of employment discrimination. See Earl v. Mervyns, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000); Hilburn v. Murata Elecs. North America, Inc., 181 F.3d 1220, 1226 (11th Cir. 1999). The burden-shifting analysis of Title VII employment discrimination claims is applicable to claims based on handicap discrimination. Earl, 207 F.3d at 1365.

30. In a discrimination case, the petitioner has the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). If the petitioner proves a prima facie case of discrimination, the burden shifts to the employer to proffer a legitimate, non-discriminatory reason for the action it took. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The employer's burden is always one of production,

not persuasion, as it always remains the petitioner's burden to persuade the fact finder that the proffered reason is a pretext and that the employer intentionally discriminated against the petitioner. Id. at 252-256.

31. In order to establish a prima facie case of discrimination, Mr. Llevado must establish the following: (1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he is qualified for the job at issue; and (4) similarly situated employees outside the protected class were treated more favorably. Kelliher v. Veneman, 313 F.3d 1270, 1275 (11th Cir. 2002).

32. No evidence was presented that Mr. Llevado had any disability prior to October 26, 2006, or that Sandestin Resort perceived him to have a disability prior to that date. If Mr. Llevado contends that he is disabled because he has headaches and is dizzy, he has failed to demonstrate that he has a disability or that Sandestin Resort perceived him to have a disability. No medical evidence was presented to show that Mr. Llevado was disabled, and Mr. Llevado admitted that by March 22, 2007, his physician had released him to return to work. Mr. Llevado has failed to establish the first prong of a prima facie case of discrimination based on disability.

33. Regarding his claim of discrimination based on national origin, Mr. Llevado has established that he is a member

of a protected class. He was born in the Philippines. He has established that he suffered an adverse employment action. He was terminated from his employment. Prior to October 26, 2006, there is no dispute that Mr. Llevado was qualified to do the job of an equipment operator. According to Mr. Llevado, he is no longer able to perform the functions of an equipment operator. He did not establish what, if any, accommodations would enable him to work as an equipment operator. However, there is no medical evidence to establish that as of the date of his termination that Mr. Llevado could work as an equipment operator. No evidence was presented to demonstrate how similarly situated employees outside the protected class were treated. No evidence was established to show that there was a causal connection between Mr. Llevado's national origin and his termination.

34. Sandestin Resort terminated Mr. Llevado for legitimate, nondiscriminatory reasons. He was terminated because he did not return to work when requested after having exceeded the 12-week medical leave policy.

35. In his post-hearing submittal, Mr. Llevado appears to be requesting compensation for the pain and suffering that he sustained as a result of the injury that occurred on October 26, 2006. No evidence was presented to establish that the injury that he sustained on October 26, 2006, was in any way related to

Mr. Llevado's national origin or any disability. The greater weight of the evidence did not establish that the injury was an intentional injury caused by any employee of Sandestin Resort.

36. Mr. Llevado has failed to establish that Sandestin Resort committed an unlawful employment practice against him by discriminating against him based on his national origin or a disability.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Sandestin Golf and Beach Resort did not discriminate against Mr. Felixberto A. Llevado based on national origin or disability and dismissing the Petition for Relief.

DONE AND ENTERED this 14th day of January, 2009, in Tallahassee, Leon County, Florida.



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SUSAN B. HARRELL  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of January, 2009.

ENDNOTE

<sup>1/</sup> Unless otherwise indicated, all references to the Florida Statutes are to the 2006 version.

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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.