STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAXITO FRANCOIS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-4874
	)	
MIAMI-DADE COUNTY, FLORIDA,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 23, 2009, by video teleconference between Miami and Tallahassee, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Erwin Rosenberg, Esquire
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For Petitioner: William X. Candela, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent engaged in an unlawful employment practice by discriminating against Petitioner in violation of the Florida Civil Rights Act of 1992 (Sections 760.01 through 760.11, Florida Statutes.)[1]

PRELIMINARY STATEMENT

On February 20, 2008, Petitioner dual-filed a discrimination charge with the Florida Commission on Human Relations (FCHR) and the Equal Employment Opportunity Commission (EEOC) alleging that Respondent (at times referred to as County) had discriminated against him because of his race and national origin. On May 6, 2008, the EEOC issued its determination that it was unable to conclude that the information obtained during its investigation established a violation of any relevant statute and issued its Right to Sue letter.

On September 28, 2008, Petitioner filed the subject Petition for Relief (the Petition) with the FCHR. The Petition alleged the following as the basis for the claim of discrimination:

> Respondent discriminated against Petitioner on the basis of Race and National Origin (Haitian) in that Respondent via its agent Joe Wolf [sic][2] caused the termination of employment of [Petitioner] in significant part because of [Petitioner's] Race and National Origin.

The Petition set forth the following as being the disputed issues of material fact:

> Whether Mr. Wolf's [sic] intention [sic] was motivated in significant part by [Petitioner's] Race and/or National Origin.

The Petition set forth the following as the ultimate facts alleged and entitlement to relief:

> [Respondent] via Joe Wolf [sic] was motivated in material part by [Petitioner's] Race and National Origin in causing the termination of [Petitioner's] employment on the [Respondent's] contract of security services.

On September 29, 2008, the matter was referred to DOAH, and this proceeding followed.

At the formal hearing, the parties offered two sequentially-numbered Joint Exhibits, which were accepted into evidence. Petitioner testified on his own behalf and presented the additional testimony of Michael Breaux, Joe Wolfe, and Brunelle Dangerville. Mr. Breaux and Mr. Wolfe are employed by Respondent's General Services Administration (GSA). Mr. Dangerville filed a Charge of Discrimination against Respondent that Petitioner argued was similar to the one at issue filed by Petitioner.[3] Petitioner presented three sequentially-numbered exhibits, which were admitted into evidence. Respondent presented the testimony of Eric Camacho, who is an employee of Security Alliance, a security company that provides services to Respondent. Respondent offered eight sequentially-numbered exhibits beginning at Respondent Exhibit 3 and ending at Respondent Exhibit 10.[4]

A Transcript of the proceeding was filed February 24, 2009. The deadline for the filing of post-hearing submittals was set for ten days following the filing of the transcript. Respondent

timely filed a Proposed Recommended Order (PRO), which has been duly-considered by the undersigned in the preparation of this Recommended Order. Petitioner has not filed a PRO as of the entry of this Recommended Order.

FINDINGS OF FACT

1. Respondent is a political subdivision of the State of Florida with over 50 departments and 30,000 employees. GSA is the Respondent's department responsible for providing security to other county departments and facilities. GSA provides security services by contracting with private vendors. At the times relevant to this proceeding, GSA had contracts with approximately seven separate vendors to provide security guards where needed. One of the vendors is Security Alliance, which is a private company that provides security guards to both public and private entities.

2. In 2004, GSA, on behalf of Respondent, entered into a contract with Security Alliance. The "General Terms and Conditions" of the bid document, which were incorporated into the contract between Respondent and Security Alliance, pertained to the responsibility of the vendor as an employer and provided as follows in Section 1.16:

> The employee(s) of the successful Bidder shall be considered at all times its employee(s) and not employee(s) or agent(s) of the County or any of its departments. . . . The County may require the successful

> bidder to remove any employee it deems unacceptable. . . .

3. Security Alliance hired the security guards that were assigned to County posts. Only Security Alliance had the authority to terminate one of its employees. Respondent had no authority to terminate the employment of any Security Alliance employee. Security Alliance paid the salaries and the employment taxes of the security guards it employed to work on County posts. Security Alliance administered their annual and sick leave. Security Alliance supervisors monitored the daily activities of the Security Alliance security guards assigned to the various County facilities. Security Alliance employed approximately 250 security guards to service the contract it had with Respondent.

4. As noted above, the contract between Respondent and Security Alliance gave Respondent the authority to require Security Alliance to remove a security guard from a County post if Respondent deemed the security guard’s performance to be unacceptable. Respondent could require that a particular security guard not be assigned to specific County posts. Respondent could also require that a particular security guard not be assigned to any County post. Security Alliance could assign the security guard to other duties with Respondent

(depending on the Respondent's instructions to Security Alliance) or with other clients.

5. Petitioner is a black male whose national origin is Haitian. In 2003, Security Alliance hired Petitioner as a security guard and assigned him to work at facilities operated by Respondent's Water and Sewer Authority (WASA). Petitioner was one of between 30-to-50 security guards assigned by Security Alliance to WASA facilities.

6. The Preston Water Treatment Plant (Preston Plant) is a water purification and distribution facility operated by WASA. The Preston Plant runs around the clock and is considered by Respondent to be critical infrastructure. Security must be maintained at the Preston Plant at all times because of the need for a safe water supply and because dangerous chemicals are maintained there.

7. On October 16, 2006, Michael Breaux, a white male, was employed by WASA as a Security Supervisor. His duties included monitoring the performance of guards assigned to security posts at WASA facilities.

8. On October 16, 2006, Mr. Breaux conducted a routine check of the security posts at the Preston Plant. Mr. Breaux observed the security guard at the front gate slumped over his chair with his back to the gate. That security guard was subsequently identified as Petitioner. Mr. Breaux observed that

Petitioner was inattentive. Mr. Breaux testified, credibly, that Petitioner's lack of attention to duty posed a security risk. Nick Chernichco, Mr. Breaux's supervisor, told Mr. Breaux to report his observations to Mr. Wolfe, who was the GSA security manager. Mr. Breaux reported his observations to Mr. Wolfe orally and in writing. Mr. Wolfe is a white male.

9. When he reported his observations to Mr. Wolfe, Mr. Breaux did not know Petitioner's national origin. Petitioner failed to establish that Mr. Breaux's actions following his observations of Petitioner at the guard station were motivated by Petitioner's race or national origin.[5]

10. Mr. Wolfe did not meet with or talk to Petitioner in October 2006. After speaking to Mr. Breaux and reviewing the written report Mr. Breaux generated, Mr. Wolfe instructed the Security Alliance manager (Al Martin) not to assign Petitioner to a WASA facility. Mr. Wolfe took that action based on Mr. Breaux's opinion that Petitioner's lack of attention created a security risk.

11. Petitioner failed to establish that Mr. Wolfe's action was motivated by Petitioner's race or national origin.[6]

12. After Mr. Wolf's instruction to Mr. Martin, Security Alliance could have assigned Petitioner to any County facility other than a WASA facility or to another Security Alliance client.

13. On May 17, 2007, Mr. Wolfe conducted rounds to check on security personnel at various County facilities. He came upon a security guard at the pump station located at 911 Northwest 67th Avenue, Miami, which is a WASA facility. The greater weight of the credible evidence established that Mr. Wolfe did not remember Petitioner, who was the security guard he met. Mr. Wolfe observed that Petitioner was in violation of the uniform policy and had unauthorized reading material at his post. Mr. Wolfe returned to his office and proceeded to reduce to writing what he had observed. While preparing his memorandum Mr. Wolfe realized that Respondent had instructed Security Alliance not to use Petitioner at any WASA facility. Because of that prior order, with which Security Alliance had failed to comply, Mr. Wolfe informed Security Alliance of his observations, instructed Security Alliance not to use Petitioner as a security guard for any County post, and imposed a fine against Security Alliance in the amount of $1,800.00.

14. Mr. Wolfe had no interest whether Petitioner retained his employment with Security Alliance and he did not intend to interfere with that employment, as long as Security Alliance did not assign Petitioner to a County post. Petitioner failed to establish that Mr. Wolfe's actions following his observations on

May 17, 2007, were motivated by Petitioner's race or national origin.

15. On or shortly after May 17, 2007, Security Alliance terminated Petitioner's employment for failing to adhere to its policies.

16. Brunelle Dangerville filed a Charge of Discrimination against Respondent. That complaint, together with Mr. Dangerville's testimony, established that Mr. Dangerville and Petitioner were not similarly situated employees. Consequently, the claims raised by Mr. Dangerville's Charge of Discrimination are irrelevant to this proceeding.

17. Taken as a whole, the evidence in this case is insufficient to establish that Respondent was Petitioner's employer or that it, acting through Mr. Wolfe or otherwise, unlawfully discriminated against Petitioner on the basis of his race or national origin.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

19. Petitioner, who is asserting the affirmative of the issues in this case, has the burden of proving by a preponderance of the evidence that Respondent discriminated against him as alleged in the Petition. See Balino v. Department of Health and

Rehabilitative Services, 348 So. 2d 349, 350 (Fla. 1st DCA 1977) and Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

20. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000).

21. 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 an 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.

22. Respondent is an "employer" within the meaning of Section 760.02(7), Florida Statutes, which defines the term "employer" to mean:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

23. 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. Absent direct evidence, a complaining party, such

as Petitioner, may prove intentional discrimination using circumstantial evidence. See Denney v. City of Albany, 247 F.3d 1172, 1182 (11th Cir. 2001). Petitioner offered no direct evidence that any action by Respondent, Mr. Breaux, or Mr. Wolfe, was motivated by Petitioner's race of national origin.

24. Petitioner relied upon circumstantial evidence in an attempt to establish his claim(s) that Respondent committed an unlawful employment practice against him. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973), the U.S. Supreme Court established the methodology to be used in 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. If the complaining party does establish a prima facie case, the burden shifts to the responding party to establish that it had a legitimate, non-discriminatory reason for its actions. If the responding party makes such a showing, the burden shifts back to the complaining party to demonstrate that the articulated reason was a pretext for discrimination. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255-56 (1981).

25. To establish a prima facie case of discriminatory treatment, Petitioner 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. See Knight v. Baptist Hospital of Miami, 330 F.3d, 1313, 1315-1316 (11th Cir. 2003) and Burke-Fowler v. Orange County, Fla., 447 F.3d 1319, 1323 (11th Cir. 2006).

26. Petitioner failed to establish a prima facie case of discrimination against Respondent based on circumstantial evidence.

27. Petitioner established that he is a member of a protected group and was capable of performing the job of security guard.

28. Petitioner did not establish that Respondent subjected him to an adverse employment action. The adverse employment action in this case was the termination of Petitioner's employment by Security Alliance because Petitioner failed to follow their policies. Respondent's placing Petitioner on the "do not use" list was not an adverse employment action because Security Alliance could have continued Petitioner's employment, but reassigned him to other duties.

29. Petitioner did not establish that Respondent treated similarly situated employees outside of his protected class more favorably than he was treated.

30. Even if one were to conclude that Petitioner had established a prima facie case of discrimination, Respondent established a legitimate, non-discriminatory reason for the actions that underpin the allegations of discrimination. The burden of producing a legitimate, non-discriminatory reason was

described as being "exceedingly light" by the Eleventh Circuit in Perryman v. Johnson Products Company, Inc., 698 F.2d 1138, 1142 (11th Cir. 1983). Because Petitioner did not show that the articulated reason was a pretext for discrimination, it must be concluded that Respondent is not guilty of the alleged unlawful employment practice(s). See Burdine, supra, 450 U.S. at 254.

31. There was insufficient evidence, whether direct or circumstantial, that Respondent, Mr. Breaux, or Mr. Wolfe took any action against Petitioner based on his race or national origin. Petitioner failed to establish that Respondent committed an unlawful employment practice against him within the meaning of the Florida Civil Rights Act of 1992.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the FCHR enter a final order finding Respondent not liable to Petitioner for the alleged discriminatory employment practice(s).

DONE AND ENTERED this 17th day of March, 2009, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of March, 2009.

ENDNOTES

[1]/ All statutory references are to Florida Statutes (2008).

[2]/ The correct spelling is Wolfe.

[3]/ The spelling of the witness's name in the Transcript is "Brunell Dangerville." The spelling of his name on the Charge of Discrimination he filed (Petitioner exhibit 2) is "Brunel Dangervil."

[4]/ Pre-marked Respondent Exhibit 1 was admitted as Joint Exhibit 1. An addendum was attached to pre-marked Respondent Exhibit 2 before it was admitted as Joint Exhibit 2.

[5]/ Petitioner disputed that he was inattentive while on duty on October 16, 2006. Even if that were the case, there is no doubt that Mr. Breaux's actions were motivated by what he believed he had seen. His actions were not motivated by Petitioner's race or national origin.

[6]/ In making this finding, the undersigned has considered the fact that prior to the incident involving Petitioner in October 2006, Mr. Wolfe had instructed Security Alliance not to assign seven or eight ineffective security guards to certain County posts. The undersigned has also considered the fact that Mr. Wolfe's wife is Haitian.

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.