STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MELVIN LEE BUTLER,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-5374
	)	
CARDINAL STAFFING SERVICES,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to written notice, the above matter was heard before the Division of Administrative Hearings by Administrative Law Judge, Diane Cleavinger, on April 7, 2009, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Melvin Lee Butler, pro se
40 Jack Scott Road
Quincy, Florida 32351

For Respondent: Robert E. Larkin, III, Esquire
Shaina Brenner, Esquire
Allen Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner was the subject of an unlawful employment practice by Respondent.

PRELIMINARY STATEMENT

On May 3, 2008, Melvin Lee Butler (Petitioner), filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR), alleging that Respondent, Cardinal Staffing Services of Tallahassee, Inc. (Respondent or Cardinal Staffing), discriminated against him on the basis of race and/or in retaliation for his participation in an activity protected under Chapter 760, Florida Statutes. Specifically, Petitioner alleged he was discriminated against when he was terminated from employment with a client of Cardinal Staffing and/or when he did not receive the opportunity to be reassigned to another job.

The allegations of discrimination were investigated by FCHR. On October 8, 2008, FCHR issued its Determination, finding "No Cause."

On October 21, 2008, Petitioner filed his Petition for Relief. In his petition, he reiterated the charges set forth in his original Charge of Discrimination. The petition was forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified in his own behalf and offered Exhibits 1, 2, and 5 into evidence. Respondent called the following witnesses: Diane Jarrett, Regional Sales Manager of Respondent; and Annis Henderson, former Human Resources Assistant of Respondent. Respondent also offered into evidence Exhibits A, B, C, and H.

After the hearing, Respondent filed a Proposed Recommended Order on May 12, 2009. By letter, Petitioner filed a Proposed Recommended Order on April 21, 2009.

FINDINGS OF FACT

1. Petitioner is a Black male.

2. Respondent is a staffing company that contracts with third party employers. Over 80 percent of Respondent's employees are Black. After Respondent matches a candidate with a job opening, the third-party employer interviews the candidate for employment. If the candidate is employed by the third party, the employee must abide by the third-party employer's policies as well as the employment policies of Respondent.

3. Petitioner was hired by Respondent some time in January 2008.

4. Respondent requires all employees to notify Respondent of his or her absence prior to that employee's scheduled report time for their employment. Respondent also requires that all employees report to work at their scheduled report time. Failure to either call in or show up for work is known as a 'no call/no show'. The employment policies of Respondent reflect that a "no call/no show" is grounds for termination.

5. Petitioner received a copy of Respondent's employee handbook, which included the "no call/no show" provision. He was also aware of Respondent's "no call/no show" policy.

6. Around January 14, 2008, Respondent successfully matched Petitioner with a position at BR Williams Trucking Company (BR Williams). Like Respondent, BR Williams maintains a policy of termination when an employee fails to show up for work or does not call in prior to the start of the work day to report their absence. Petitioner's scheduled report time for BR Williams was 7:00 a.m.

7. On March 3, 2008, Petitioner contacted Respondent's Regional Sales Manager, Diane Jarrett, to report that he had overheard a racial slur that a White employee, Harry Hingson, had made to another employee. Like Petitioner, Mr. Hingson had been placed at BR Williams by Respondent and was an employee of both Respondent and BR Williams.

8. Ms. Jarrett sent Respondent's Human Resources Assistant, Annis Herndon, to BR Williams to terminate Mr. Hingson for having made the racial slur. She met with Mr. Wilkinson, BR Williams' manager. Mr. Hingson was terminated from BR Williams. Neither Ms. Jarrett nor Ms. Herndon disclosed that Petitioner had reported Mr. Hingson's racial slur to her.

9. After the termination, Mr. Wilkinson mentioned to a group of employees, including Petitioner, that he hated to fire Mr. Hingson because "everybody needs a job." The evidence did not demonstrate that Mr. Wilkinson said that "once he found out who did this, they will pay." Petitioner felt that

Mr. Wilkinson was talking to him or targeting him because Mr. Wilkinson looked him in the eyes during the meeting. Mr. Wilkinson did not testify at the hearing. As a consequence, there is no competent evidence regarding Mr. Wilkinson's intent showing any look he may or may not have given Petitioner.

10. On March 24, 2008, Petitioner worked his regular shift at BR Williams. On the evening of March 24, 2008, Petitioner was arrested for driving while intoxicated (DUI) and was held in jail overnight. He was released two days later on March 26, 2008.

11. On March 25, 2008, Petitioner was scheduled to begin his shift at 7 a.m. Petitioner did not report to work as scheduled because he was in jail. Petitioner also did not call Respondent to report his absence prior to the beginning of his shift or during the morning of March 25, 2008.

12. Mr. Wilkinson called Respondent around 9:00 a.m. and reported that Petitioner was not at work and had not called in. He did not know where Petitioner was. Respondent could not locate Petitioner at his home. Mr. Wilkinson instructed Respondent that if he or Respondent did not hear from Petitioner before noon, Petitioner was terminated for not showing up at work and not calling in.

13. About 1:00 p.m., after Petitioner was terminated by BR Williams, Petitioner called Respondent collect from jail. He

was advised that he had been terminated from BR Williams. After speaking with Petitioner, Respondent called BR Williams to report that Petitioner had called in after noon and that she had told him that he had been terminated from BR Williams. Respondent did not tell Petitioner that he was terminated from Cardinal Staffing.

14. BR Williams' decision to terminate Petitioner was not based on his race or his complaint regarding Mr. Hingson's racial slur. Indeed, there was no competent evidence to suggest that Petitioner was terminated from BR Williams for any reason other than he was in jail, and did not report to work as scheduled. Petitioner was not terminated from Cardinal Staffing.

15. Petitioner left a message on Respondent's answering machine on March 27 or March 28, 2008. Return calls by Respondent could not be left at the numbers that Respondent had for Petitioner. He did not contact Respondent again until August 2008, at which time there were no positions available for him.

16. Importantly, Petitioner was not terminated from Respondent. As with all Respondent's employees, Petitioner had the responsibility of calling Respondent as often as possible to check if other employment opportunities were available. If Petitioner had contacted Respondent to seek placement during

April–June, 2008, and if a placement for which Petitioner was qualified had been available, Respondent would have sent him for an interview with the prospective employer. Indeed, it was Petitioner's lack of action that caused him to miss any employment opportunities that may have been available to him during April – June, 2008. After August 2008, Petitioner did not contact Respondent to seek other employment opportunities.

17. Petitioner identified two non-minority employees that were terminated from their third-party employer jobs and received new assignments with another of Respondent's clients. The two employees were Jason Whibble and Sherita Cheshire. Neither of these employees was similarly situated to Petitioner. Mr. Whibble was terminated for having a felony conviction involving multiple traffic tickets. Ms. Cheshire was terminated because she could not perform her job duties. After termination, both employees called in on a daily or weekly basis to check to see if any job openings were available.

18. In this case, Petitioner was terminated for a very different reason from BR Williams. Petitioner also did not frequently call Respondent to check for job openings that might be available to him. Indeed, Petitioner has not identified any similarly situated non-Black employee of Respondent's who was terminated from an employment assignment on the basis of an employer's "no call/no show" policy and was treated more

favorably than Petitioner. The evidence was clear that Petitioner was not terminated from Cardinal Staffing and failed to maintain frequent contact with them. Clearly, Respondent did not discriminate against Petitioner. Given these facts, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 760.11(6), 120.569, and 120.57, Fla. Stat.(2008)

20. Section 760.10, Florida Statutes (2008), provides that it is an unlawful employment practice for an employer

> (1) (a) . . . [t]o discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensations, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
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> * * *
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> (7) . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

21. FCHR and the Florida courts have determined that federal discrimination law should be used as guidance when construing provisions of Section 760.10, Florida Statutes. See

Brand vs. Florida Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Florida Dept. of Community Affairs vs. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); and Scott v. Fla. Dept. of Children & Family Services, 19 Fla. L. Weekly Fed D.268 (N.D. Fla. 2005).

22. The Supreme Court of the United States established in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the analysis to be used in cases alleging discrimination under Title VII. This analysis was reiterated and refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). See also Zappa v. Wal-Mart Stores, Inc., 1 F. Supp. 2d 1354, 1356 (M.D. Fla. 1998), and Standard v. A.B.E.L. Svcs., Inc., 161 F.2d 1318 (11th Cir. 1998).

23. Under McDonnell-Douglas, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent must articulate some legitimate, non-discriminatory reason for the action taken against Petitioner. Once this non-discriminatory reason is offered by Respondent, the burden then shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated in Hicks, before finding discrimination, "[t]he fact finder must believe the plaintiff's

explanation of intentional discrimination." Hicks, 509 U.S. at 519.

24. In Hicks, the Court stressed that even if the fact-finder does not believe the proffered reason given by the employer, the burden remains with Petitioner to demonstrate a discriminatory motive for the adverse employment action. Id.

25. In order to establish a prima facie case of discrimination, Petitioner must demonstrate that:

a. Petitioner is a member of a protected class;

b. Petitioner is qualified for the position;

c. Petitioner was subject to an adverse employment decision; and,

d. Petitioner was treated less favorably than similarly situated persons outside the protected class.

Canino v. EEOC, 707 F.2d 468 (11th Cir. 1983); Smith v. Georgia, 684 F.2d 729 (11th Cir. 1982); Lee v. Russell County School Board, 684 F.2d 769 (11th Cir. 1984); and Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir 1997).

26. In this case, Petitioner has alleged that Respondent unlawfully discriminated against him on the basis of his race and in retaliation for engaging in a protected activity. He alleges that such discrimination occurred on two separate occasions. The first occasion allegedly occurred when he was terminated from BR Williams. The second occasion allegedly

occurred when Respondent did not locate another position for him and allegedly took him off its employment roles.

27. As a Black individual, Petitioner is a member of a protected class. Additionally, Petitioner was qualified for the position to which Respondent assigned him at BR Williams. The evidence also demonstrated that he suffered an adverse employment action when he was terminated from his position by BR Williams.

28. However, it was BR Williams and not Respondent who terminated Petitioner from the trucking company when he did not report to work on March 25th. Indeed, BR Williams terminated Petitioner prior to the time he called Respondent from jail.

29. There was no competent evidence in the record that demonstrated that Petitioner's termination from BR Williams was related to his earlier complaint about a racial slur. Indeed, the evidence demonstrated that administrative staff at BR Williams was not told that Petitioner had complained to Respondent about another employee's racial slur. Petitioner's speculation about a "look" he received from a manager in a meeting about the employee's termination is insufficient evidence to demonstrate that management at BR Williams terminated Petitioner because of his complaint. Petitioner was in jail and failed to report to work. He was terminated for that failure. There was no evidence to suggest that those

reasons were invalid or a pretext to hide discrimination on the part of BR Williams. Petitioner's theory that a typographical error in a written statement to FCHR by Respondent's attorney shows an intent to falsify records is simply misplaced and not supported by any evidence. Additionally, there was no evidence that would tie BR Williams' decision to terminate Petitioner to Respondent. Given these facts, Petitioner has not presented competent, substantial evidence to demonstrate that he was terminated from his employment at BR Williams by Respondent.

30. Moreover, even assuming arguendo, that Petitioner established that he was terminated from his employment at BR Williams by Respondent, Petitioner did not establish that there were any individuals outside of his protected class who engaged in similar misconduct and who were not terminated by BR Williams. BR Williams was strict at enforcing its no show/no call policy.

31. The burden of proof is on Petitioner to identify a similarly situated employee who was treated more favorably despite having engaged in similar misconduct and who is outside of Petitioner's protected class. Davis v. City of Panama City, Fla., 510 F. Supp. 2d 671, 686 (N.D. Fla. 2007). In making the comparison, the quality of the misconduct must rise to the level of being nearly identical. See Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

32. Petitioner has not identified a single similarly situated employee of BR Williams outside of his protected class who committed a "no call/no show" violation and was not terminated. Therefore, Petitioner has failed to prove the elements of a prima facie case of discrimination as to his termination from BR Williams.

33. Likewise, Petitioner did not adduce any evidence to support the allegation in his Petition for Relief that he was discriminated or retaliated against when he "did not receive the opportunity to be re-assigned to another job" by Respondent. In order to rise to the level of an adverse job action, Petitioner must show that Respondent caused serious and material changes to the terms and conditions of his employment. See Davis v. Town of Lake Park, 245 F.3d 1232, 1239 (11th Cir. 2001).

34. To establish a prima facie case of retaliation under Section 760.10(7), Florida Statutes, Petitioner must prove that he engaged in a statutorily protected activity, that an adverse employment action occurred, and that the adverse action was causally related to his protected activity. Little v. United Technologies, 103 F.3d 956, 959 (11th Cir. 1997).

35. As previously discussed, Petitioner did not suffer any adverse action as to Respondent. He was not terminated by Respondent.

36. Petitioner was terminated from his employment with BR Williams subsequent to his complaint regarding Mr. Hingson. There was no evidence to establish a causal connection between his protected conduct and his subsequent failure to be reassigned to another job. Indeed, it was Petitioner's own lack of action that caused his failure to receive further job opportunities from Respondent. See Crawford v. City of Fairburn, 482 F.3d 1305, 1308 (11th Cir. 2007); Raney v. Vinson Guard Service, Inc., 120 F.3d 1192, 1196 (11th Cir. 1997).

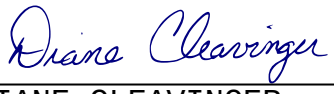
37. Finally, in relation to Cardinal Staffing, Petitioner again did not identify any similarly situated non-minority employee who was treated more favorably than Petitioner. The two employees suggested by Petitioner as similar were not terminated for the same reason and maintained regular and frequent contact with Respondent. Again, the burden of proof is on Petitioner to identify a similarly situated employee who was treated more favorably despite having engaged in similar misconduct and who is outside of Petitioner's protected class. Davis v. City of Panama City, Fla., 510 F. Supp. 2d 671, 686 (N.D. Fla. 2007). In making the comparison, the quality of the misconduct must rise to the level of being nearly identical. See Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999).

38. Since Petitioner did not meet this burden, the Petition for Relief should be dismissed.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a Final Order dismissing the Petition for Relief with prejudice.

DONE AND ENTERED this 29th day of May, 2009, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2009.

COPIES FURNISHED:

Walter Jan Pietruszka, Esquire
Shumaker Loop & Kendrick
101 East Kennedy Boulevard, Suite 2800
Tampa, Florida 33602

Melvin Lee Butler
40 Jack Scott Road
Quincy, Florida 32351

Robert E. Larkin, III, Esquire
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

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.