STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JUSTO J. CARRION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-5487
	)	
ENERGY SAVINGS SYSTEMS,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on January 12, 2009, in Orlando, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Justo J. Carrion, pro se
P.O. Box 141112
Orlando, Florida 32814

For Respondent: Priscilla Rivers, Esquire
Arthur J. Ranson, III, Esquire
Shuffield, Lowman & Wilson, P.A.
P.O. Box 1010
Orlando, Florida 32802-1010

STATEMENT OF THE ISSUE

The issue is whether Respondent committed unlawful employment practices contrary to Section 760.10, Florida Statutes (2008),[1] by discriminating against Petitioner based on his national origin (Hispanic), by limiting, segregating, or

classifying employees in a discriminatory fashion, or by retaliating against Petitioner for his opposition to unlawful employment practices.

PRELIMINARY STATEMENT

On or about November 19, 2007, Petitioner Justo J. Carrion ("Petitioner") dually filed with the Florida Commission on Human Relations ("FCHR") and the federal Equal Employment Opportunity Commission ("EEOC") a Charge of Employment Discrimination against Respondent Energy Savings Systems of Central Florida, Inc. ("Respondent"). Petitioner alleged that he was harassed and intimidated due to his national origin, and was ultimately terminated in retaliation for his complaints regarding the discriminatory treatment.

On October 10, 2008, the FCHR issued a Right to Sue letter. The letter stated that the EEOC investigated the case pursuant to a work sharing agreement with the FCHR, and that the EEOC determined that it was "unable to conclude that the information obtained during its investigation established violations of the statutes. The Right to Sue letter informed Petitioner of his hearing rights, including the right to pursue the case in the Division of Administrative Hearings ("DOAH") by timely filing a Petition for Relief with the FCHR. On October 30, 2008, Petitioner timely filed a Petition for Relief with FCHR.

On November 3, 2008, FCHR referred the case to the Division of Administrative Hearings. The hearing was scheduled to be held on January 12, 2009. At the hearing, Petitioner testified on his own behalf. Petitioner's Exhibits A, C through J, L through S, and U through W were admitted into evidence. Respondent presented the testimony of Daniel Alexander, Dale T. Aldrich, Jr., Adam Sorkness, Andy Weatherby, Julio Oliva, Isaiah Fields, Jr., Edgar Mullenhoff, Ben P. Davis, and William K. Aldrich. Respondent's Exhibits 3 through 6 were admitted into evidence.[2]

No transcript of the hearing was ordered by the parties. Petitioner timely filed his Proposed Recommended Order on January 20, 2009. Respondent timely filed its Proposed Recommended Order on January 22, 2009.

FINDINGS OF FACT

1. Respondent is an employer as that term is defined in Subsection 760.02(7), Florida Statutes. Respondent is a family owned company based in Winter Park that installs residential and commercial insulation and acoustical ceilings and tiles. The company is divided into two divisions. The Insulation Division is headed by William Aldrich. The Acoustic/Ceiling Division is headed by Dale Aldrich, Jr., who was Petitioner's ultimate supervisor. Subsequent references to "Mr. Aldrich" are to Dale Aldrich, Jr.

2. Petitioner, a Hispanic male originally from the U.S. Virgin Islands, was hired by Respondent in February 2006 to work in the Acoustic/Ceiling Division. He was hired as a tile installer, the entry-level position in the Acoustic/Ceiling Division. A tile installer drops ceiling tiles into the gridwork installed by a ceiling mechanic. With experience, a tile installer may work his way up to ceiling mechanic.

3. "Ceiling mechanic" is not a licensed position, and there is no formal progression through which an employee works his way up to this more skilled, higher paid position. Advancement depends on management's recognition that an employee's skills have advanced to the point at which he can be entrusted with the mechanic's duties. Three to four years' experience is generally required to advance from tile installer to ceiling mechanic.

4. By all accounts, including those of the ceiling mechanics who supervised him at job sites and that of Mr. Aldrich, Petitioner was more than competent as to his actual job skills. During the approximately thirteen months he worked for Respondent, Petitioner received four pay raises. He was making $14.00 per hour at the time of his termination in August 2007.

5. The evidence produced at the hearing demonstrated that Petitioner had problems controlling his temper on the job. He

was generally negative and quick to take offense at perceived slights, especially when he inferred they were due to his national origin. During his employment with Respondent, Petitioner was involved in at least three altercations with fellow employees and/or general contractors for whom Respondent worked as a subcontractor.

6. The earliest incident occurred in October 2006. Petitioner was working on a job site at which Respondent was a subcontractor for Harkins Development Corporation. Petitioner testified that a Harkins supervisor named Harley was "commanding" him to perform tasks on the job site. Petitioner was affronted, because he was not Harley's employee and because Harley, who was white, did not appear to be giving commands to the white employees of Respondent.

7. After lunch, Harley feigned that he was about to throw a soft drink at Petitioner. In fact, the Wendy's cup in Harley's hand was empty, though a drop or two of condensation from the outside of the cup may have landed on Petitioner.

8. In Petitioner's version of the story, Petitioner then stood up and asked Harley if he would enjoy being on the receiving end of such treatment. Petitioner then phoned Mr. Aldrich and asked to be sent to a different job site. Mr. Aldrich refused, and instead scolded Petitioner. Petitioner believed that Mr. Aldrich was retaliating for his complaint.

Petitioner walked off the job site for the rest of the day, and worked at a different site the next day.

9. Petitioner entered into evidence the written statement of his co-worker, Eddy Abud. Mr. Abud is Hispanic, with a national origin in the Dominican Republic. Mr. Abud witnessed the confrontation between Petitioner and Harley. Mr. Abud stated that Harley shook his cup and a "couple drops" of water splashed on Petitioner, who "went ballistic." Petitioner used obscenities against Harley and invited him to fight. Harley threw Petitioner off the job, an action with which Mr. Abud agreed.

10. Petitioner entered into evidence the written statement of his co-worker, Robert "Pappy" Amey. Mr. Amey is white, and wrote that Petitioner "acted like a man all the time" except for the incident with Harley. Mr. Amey's statement reads as follows, in relevant part:

> Harley had a big drink cup and he turned around and flipped it, playing, nothing came out. Justo lit up [and] called him a mother fucker a dozen times. He said if I find you on the street, I'll kill you. I leaned to him and I said, "Justo, shut up." He did not, he cussed Harley out the door. It was Harley's job. This was unprofessional behavior by Justo. It was just horseplay and it was empty. No reason to act like that.

11. Despite his overall respect for Petitioner, Mr. Amey stated that Petitioner should have been fired for his actions.

12. Mr. Aldrich testified that Harley called him and told him that Petitioner had threatened him. Petitioner told Harley that he would not do anything on the job, but would "kick his ass" if he saw him away from the job. Mr. Aldrich stated that Harkins was one of Respondent's largest, longest-standing accounts, and that he knew Harley as a "stand up guy" who would have no reason to lie about such an incident.

13. The second incident occurred later in the same month, on October 31, 2006. Petitioner was working for Respondent on a project at the University of Central Florida. A ceiling mechanic named Adam Sorkness was in charge of the project. Petitioner testified that Mr. Sorkness had already angered him in September 2006 by making racial jokes about black employees, and that Mr. Aldrich had separated Petitioner from Mr. Sorkness on subsequent jobs up to October 31, 2006.

14. At first, there were no problems on the University of Central Florida job. Petitioner accepted his assignment from Mr. Sorkness. On this day, every man on the job was installing ceiling tile, which involved wearing stilts.

15. According to Petitioner, two white employees arrived later in the morning and decided to work together, leaving Petitioner to work with Isaiah Fields, a black employee whom Petitioner alleged was the butt of Mr. Sorkness' earlier racial

jokes. Petitioner became agitated because it appeared the two white employees were doing no work.

16. Mr. Fields testified that he and Petitioner were working around a corner from Mr. Sorkness. They heard loud laughter from around the corner. Mr. Fields said that the laughter was not directed at him or Petitioner, but that it appeared to anger Petitioner, who said, "Wait a minute," and headed around the corner on his stilts. Mr. Fields stayed put and thus did not see the subsequent altercation.

17. Petitioner approached Mr. Sorkness, who was also on stilts. Petitioner complained about the job assignments. Mr. Sorkness replied that everyone was doing the same job and that Petitioner could leave if he didn't like it. Petitioner became more incensed, calling Mr. Sorkness a "sorry white faggot." Petitioner took off his stilts, then confronted Mr. Sorkness at very close range. Mr. Sorkness pushed Petitioner away. Petitioner then charged Mr. Sorkness and they engaged in a brief fight. Ben Davis, a white ceiling mechanic who witnessed the altercation, called it a "scuffle."[3]

18. Mr. Aldrich investigated the matter and determined that Petitioner was the instigator of the fight. He suspended Petitioner for three days, and gave Mr. Sorkness a verbal warning. Mr. Aldrich issued a "written warning" to Petitioner cautioning him that he was subject to termination. Mr. Aldrich

wrote the following comments: "Justo has been given 3 days off without pay. Normally an employee would be fired for this action. Justo has NO MORE chances. Next offense will result in immediate termination of employment with Energy Savings Systems." The document was signed by Mr. Aldrich and Petitioner.[4]

19. Petitioner claimed that Mr. Aldrich cut his hours in retaliation for the UCF incident, and it took several months for his hours to come back up to 40 per week. The time sheets submitted by Petitioner showed fluctuations in his work hours before and after the incident, which is consistent with Mr. Aldrich's testimony that he only cuts hours when work is slow for the company.

20. The evidence demonstrated that Petitioner's hours were reduced at times because he would refuse to take certain jobs, either because of their location or because Petitioner did not want to work with certain people, such as Mr. Sorkness.

21. The third and final incident occurred on August 20, 2007. Petitioner was working on a job for which Respondent was a subcontractor to Alexander-Whitt Enterprises, a general contractor. Alexander-Whitt's superintendent on the job was Dan Alexander. Mr. Alexander asked Petitioner to clean up. Petitioner resented either the order itself or Mr. Alexander's method of delivering it, in light of a brief altercation between

the two men on the job site three days earlier. Petitioner threatened to slap Mr. Alexander.

22. Mr. Aldrich testified that he received several calls from Mr. Alexander complaining about Petitioner over the course of this job. Petitioner had an "attitude" about Mr. Alexander's instructing him on the job. Mr. Aldrich apologized. After Petitioner's threat, Mr. Alexander called yet again and told Mr. Aldrich that he wanted Petitioner off the job. After this call, Mr. Aldrich fired Petitioner.

23. Aside from his own suspicions and resentments, Petitioner offered no evidence that his termination had anything to do with his national origin or was retaliation for his complaints about the company's discriminatory practices. In fact, Petitioner never made a formal complaint while he was employed by Respondent. His only "complaints" were to certain co-workers that he was being discriminated against because he was Hispanic.

24. Andy Weatherby, a ceiling mechanic who at times was Petitioner's field superintendent, recalled Petitioner telling him that he felt disadvantaged on the job for being Hispanic, but that Petitioner described no specific incidents of discrimination.

25. Julio Oliva, a junior ceiling mechanic with Respondent, is of Puerto Rican descent. Mr. Oliva testified

that he saw no discrimination at the company. He worked often with Petitioner, whom he described as having a negative attitude. Mr. Oliva testified that it was difficult to merely pass the time in conversation with Petitioner, because Petitioner always had something negative to say.

26. Edgar Mullenhoff, also Puerto Rican, has worked for Respondent since 1982 and is the field superintendent for the insulation side of the company. Mr. Mullenhoff described the company as "like a family" and stated that he never felt a victim of discrimination.

27. Mr. Abud's written statement attests that he has had no problems working for Respondent, and that "we have great bosses."

28. Petitioner noted what he termed a discriminatory pattern in the ethnic diversity of the Insulation Division versus the Acoustic/Ceiling Division. While conceding that most of Respondent's employees are Hispanic, Petitioner notes that the great majority of the Hispanics work in the lower paying, less skilled Insulation Division. Petitioner further argued that those few Hispanics hired in the Acoustic/Ceiling Division are given no opportunity to advance to the position of ceiling mechanic.

29. William Aldrich, the head of the Insulation Division, testified that there is a much higher turnover in insulation,

and that for the last four years or so the only applicants for the positions have been Hispanic. He credibly testified that he hires anyone who appears capable of doing the job.

30. As to Petitioner's lack of advancement, it must be noted that he worked for Respondent for just a little over one year. Mr. Oliva testified that he has worked for Respondent for five and one-half years. He spent the first two years performing menial tasks and learning on the job. Mr. Oliva stated that Respondent's ceiling mechanics were helpful to him in learning the trade, and he felt no barriers due to his national origin.

31. Mr. Sorkness testified that it took him between four and five years to become a mechanic. Mr. Davis testified that it took him between three and four years to work his way up to ceiling mechanic.

32. The greater weight of the evidence establishes that Petitioner was terminated from his position with Respondent due to misconduct on the job.

33. The greater weight of the evidence establishes that Respondent has not discriminated against Petitioner or any other employee based on national origin.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

35. The Florida Civil Rights Act of 1992 (the Florida Civil Rights Act or the Act), Chapter 760, Florida Statutes, prohibits discrimination in the workplace. Subsection 760.11(1), Florida Statutes, provides that any person aggrieved by a violation of the Act must file a complaint within 365 days of the alleged violation.

36. Subsection 760.10(1)(a), Florida Statutes, states the following:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any 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.

37. Respondent is an "employer" as defined in Subsection 760.02(7), Florida Statutes, which provides the following:

> (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.

38. Florida courts have determined that federal case law applies to claims arising under the Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under Section 760.10, Florida Statutes. See Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Florida State University v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

39. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to Respondent, as the employer, to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that Respondent's offered reasons for its adverse employment decision were pretextual. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

40. In order to prove a prima facie case of unlawful employment discrimination under Chapter 760, Florida Statutes, Petitioner must establish that: (1) he is a member of the protected group; (2) he was subject to adverse employment action; (3) he was qualified to do the job; and (4) his employer treated similarly-situated employees of other national origins more favorably. See, e.g., Williams v. Vitro Services Corporation, 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Management Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

41. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

42. Petitioner established that he is a member of a protected group, in that he is a Hispanic male. Petitioner was subject to an adverse employment action insofar as he was terminated. Petitioner was qualified to perform the job of tile installer, and had the ability to advance to the position of ceiling mechanic.

43. However, Petitioner presented no evidence that his national origin played any role in his termination or in his failure to ascend to the position of ceiling mechanic. No similarly situated employee was treated any differently or better than was Petitioner. Having failed to establish this

element, Petitioner has not established a prima facie case of employment discrimination.

44. Even if Petitioner had met the burden, Respondent presented evidence of legitimate, non-discriminatory reasons for terminating Petitioner, thereby rebutting any presumption of national origin discrimination. The evidence presented by Respondent established that Petitioner was terminated for misconduct on the job, and that he was given the opportunity to remain employed and to amend his behavior even after physically assaulting his supervisor on the job at the University of Central Florida.

45. Petitioner failed to prove that Respondent's reasons for firing him are pretextual.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Energy Savings Systems of Central Florida, Inc. did not commit any unlawful employment practices and dismissing the Petition for Relief.

DONE AND ENTERED this 24th day of February, 2009, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
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 24th day of February, 2009.

ENDNOTES

[1/] Citations, hereinafter, shall be to Florida Statutes (2008) unless otherwise specified.

[2/] Respondent's proposed recommended order states that Respondent's Exhibit 2 was admitted into evidence. The undersigned's notes indicate that Respondent's Exhibit 2 was not admitted because it was identical to Petitioner's Exhibit H, which was admitted into evidence.

[3/] Mr. Davis testified that the scuffle would not have happened had Petitioner stayed on his stilts.

[4/] Petitioner denied having signed the written warning, though he did not deny receiving it. He testified that he refused to sign it in protest because Mr. Aldrich would not allow him to write his own comments on the document. It is found that Petitioner's recollection of the incident must be faulty. While there is no reason to think that Petitioner is purposely lying about refusing to sign the document, there is also no reason to think anyone associated with Respondent would forge Petitioner's signature on a document that Petitioner readily concedes he read and received. Mr. Aldrich testified that he did nothing to prevent Petitioner from writing his own comments on the document and that he had no idea know why Petitioner did not.

COPIES FURNISHED:

Derick Daniel, Executive Director
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

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

Justo J. Carrion
P.O. Box 141112
Orlando, Florida 32814

Priscilla Rivers, Esquire
Arthur J. Ranson, III, Esquire
Shuffield, Lowman & Wilson, P.A.
P.O. Box 1010
Orlando, Florida 32802-1010

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.