STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BRUNEL DANGERVIL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-0691
	)	
MIAMI-DADE COUNTY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings for final hearing on May 7, 2009, in Miami, Florida.

APPEARANCES

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

The issue in this case is whether Respondent engaged in an unlawful employment practice against Petitioner on the basis of race and national origin in violation of the Civil Rights Act.

PRELIMINARY STATEMENT

On November 20, 2008, Petitioner Brunel Dangervil (hereinafter "Dangervil" or "Petitioner") dual-filed a discrimination charge with the Florida Commission on Human Relations (hereinafter "FCHR") and the Equal Employment Opportunity Commission (hereinafter "EEOC") alleging that Respondent Miami-Dade County (hereinafter "County" or "Respondent"), through its agent Joe Wolfe, had discriminated against him because of his race and national origin causing the termination of Petitioner's employment.

The EEOC investigated the case but was unable to decide whether Respondent had violated Dangervil's civil rights. Thereafter, the FCHR issued a "Right to Sue" letter on January 29, 2009. Dangervil elected to pursue administrative remedies, timely filing a Petition for Relief with the FCHR on or about February 8, 2009.

The FCHR transmitted the Petition for Relief to the Division of Administrative Hearings (hereinafter "DOAH") on February 10, 2009, and the undersigned was assigned to hear the case. The final hearing was scheduled for May 7, 2009, and this proceeding followed.

At the formal hearing, the parties offered one Joint Exhibit which was accepted into evidence. Petitioner testified on his own behalf and presented the testimony of two witnesses,

Joseph Wolfe and Maxito Francois (testimony by transcript). Respondent called as witnesses Joseph Wolfe and David Thibaudeau. Respondent also offered Respondent's Exhibits 1 through 6 which were received into evidence.

A Transcript of the proceeding was filed June 10, 2009. The deadline for the filing of post-hearing submittals was set for June 22, 2009.

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.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

FINDINGS OF FACT

1. Respondent has a department General Services Administration (hereinafter "GSA") responsible for providing security to County departments and facilities. GSA provides security services by contracting with private vendors. Two of the private security vendors are Delad Security (hereinafter "Delad") and Forrestville Security (hereinafter "Forrestville").

2. In 2005, GSA, on behalf of Respondent, entered into a contract with Delad and Forrestville to assign security guards at County posts. The "General Terms and Conditions" of the contract provide in pertinent part:

> 1.16 Responsibility As Employer
>
> 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. Even though Delad and Forrestville as vendor companies provide security officers through a contract with Miami-Dade County, only the vendor companies have the authority to terminate one of its employees. Dangervil secured his security officer position by applying for employment through the vendor companies who set his schedule, administered his leave time, paid his salary and taxes, monitored his actions to ensure compliance with the terms and conditions of the contract, as well as provided his job duties and assignments.

4. Dangervil is a black male whose national origin is Haitian.

5. On June 27, 2007, Dangervil was working for Delad assigned to the 140 West Flagler Building for his security post. His job duties were patrolling the parking lot and checking the floors in the building.

6. Joseph Wolfe (hereinafter “Wolfe”), a white male, is the GSA supervisor responsible for County facilities. On June 27, 2007, he reported to the 140 West Flagler Building location to look into a complaint about a possible disturbance

on the 16th floor during a code compliance hearing. When he arrived on the 16th floor, Wolfe met Dangervil who was dressed in a uniform Wolfe determined had a sweat-stained shirt.

7. Wolfe began to ask Dangervil a series of questions regarding his being assigned to the disturbance location, but was unable to ascertain why Dangervil was there. Dangervil did tell him "I don't work here." Wolfe determined that Dangervil was not properly prepared for the security detail and that Dangervil lacked the requisite ability to effectively communicate using the English language.

8. After the incident, Wolfe contacted a Delad supervisor who confirmed that Dangervil had been instructed thru the chain of command to go to the hearing location for his post June 27, 2007.

9. Section 3.41 of the security contract with Delad provides an English proficiency qualification for security personnel and states in relevant part:

* * *

> C) Ability to Communicate in English
>
> . . . <u>all Contractor Security personnel must be fully literate in the English language</u>, (e.g., able to read, write, speak, understand, and be understood). Oral command of English must be sufficient to permit full communication. . . .

The contract further allows a security guard to be removed from the contract if s/he has difficulty understanding or speaking English.

10. Wolfe subsequently wrote a Guard Infraction Report against the security vendor directing that Dangervil be removed from the Delad contract with the County stating:

> I was dispatched to location ref a code compliance hearing and protesters carrying signs criti[c]izing Dade County. Upon arrival to the 16th floor I met with S/O Dangervil, Brunel. Dangervil was unable to tell me why he was there, stating, "I don't work here." Then he asked someone on their way to attend hearing to help me as if he thought they were a county employee. It was determined the officer was not pro[p]erly briefed prior to being sent to the detail. The officer was allowed to work with what appeared to be a sweat stained uniform shirt.

Dangervil's removal from the Miami-Dade contract did not affect Dangervil's employment status with Delad.

11. On October 26, 2007, GSA dispatched Wolfe to the Opa Locka Elderly Facility, a County public housing facility, to investigate a complaint that a Forestville security officer did not want to work his assigned post.

12. David Thibaudeau (hereinafter “Thibaudeau”), Wolfe's supervisor and GSA Deputy Chief, and GSA Supervisor Sanchez also reported to the Opa Locka Elderly Facility after receiving a call from the dispatch center. There had been several reports

from security vendors that officers were being assaulted and Thibaudeau and Sanchez went to the location to help resolve the problem regarding the security officer assigned to the post and the supervisor refusing to work at the post.

13. On duty at the location was Dangervil, the assigned security officer. Upon arriving, Thibaudeau had a conversation with Dangervil, Wolfe, and two Forrestville supervisors. The Forrestville supervisor explained that Dangervil did not want to work the post and was going to leave. Dangervil explained to Thibaudeau that he didn't want to work the location because he heard bad things happened at the location.[1] Subsequently, Thibaudeau instructed the Forrestville Supervisor to work the post since Dangervil was leaving. The supervisor also refused to work the facility but ultimately agreed when Thibaudeau explained that he would have to call their company to get the project manager to resolve the issue.

14. Wolfe recognized that Dangervil was the same Delad security officer he had dealt with in June 2007 at the 140 West Flagler incident. Dangervil had been placed on a “do not hire” list by Wolfe because of the previous incident that took place at the 140 building.

15. Wolfe wrote up a second Guard Infraction Report which directed that Dangervil be removed from the Forrestville contract. The report narrative stated:

> While conducting an inspection of the post during an afternoon to mid shift change I recogni[z]ed the on coming [sic] midnight shift officer as being previ[o]usly removed from the contract by me while he was employed by Delad security. Prior to being removed again S/O Dangervil refused to stay at post because of the previous incidents.

Dangervil was not removed from the contract because he was Haitian or Black.

CONCLUSIONS OF LAW

16. 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.

17. The Florida Civil Rights Act of 1992 (Act), is codified in Sections 760.01 thorough 760.11, Florida Statutes, and Section 509.092, Florida Statutes. § 760.01(1), Fla. Stat.

18. A "discriminatory practice," as defined in the Act, "means any practice made unlawful by the Florida Civil Rights Act of 1992." § 760.02(4), Fla. Stat.

19. Section 760.01 of the Act explains that the general purpose of the Act is to:

> . . . [S]ecure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the sate their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote

> the interests, rights, and privileges of individuals within the state." [Emphasis added.]

20. Petitioner has the burden of proving that Respondent discriminated against him as alleged in the Petition by a preponderance of the evidence. 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).

21. 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).

22. In order to prove discrimination violative of Chapter 760, Florida Statutes, Petitioner may demonstrate his case through direct evidence of discrimination or circumstantial evidence of discrimination. Denny v. City of Albany, 247 F.3d 1182 (11th Cir. 201); Holifield v. Reno, 115 F.3d. 1555, 1561 (11th Cir. 1997). Direct evidence of discrimination, which is "composed of only the most blatant remarks, where intent could be nothing other than to discriminate," Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999), is not at issue in this case. There is no direct evidence that any action by the

Respondent was motivated by Petitioner's race or national origin.

23. In order to prove a prima facie case of unlawful employment discrimination under Chapter 760, Florida Statutes, by indirect or circumstantial evidence, Petitioner must establish 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).

24. In this matter, Petitioner relied upon circumstantial evidence in an attempt to establish his claim(s) that Respondent committed an unlawful employment practice against him. However, Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

25. Petitioner established that he is a member of a protected group, in that he is a Haitian black male. However, Petitioner did not establish that Respondent subjected him to an adverse employment action.

26. 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.

27. Respondent argues that it is not the employer in this matter. As in Williams v City of Montgomery, 742 F.2d 586, 589 (11th Cir. 1984), the undersigned finds that Dangervil's employers are Delad and Forestville since Respondent retained no control over the traditional rights, and the vendor companies hired, paid his wages and taxes, retained the power for termination, provided leave, made job assignments and monitored his work.

28. Even if Respondent were the employer, Petitioner failed to show an adverse employment action occurred. The evidence failed to prove why Dangervil left Delad's employment and ended up re-employed with Forestville. Respondent's action of placing Petitioner on the "do not hire" list was not an adverse employment action because the vendor security companies were not required to terminate Petitioner's employment just to reassign Dangervil to other contracts other than Miami Dade County.

29. Additionally, Petitioner did not establish that Respondent treated similarly situated employees outside of his protected class more favorably than he was treated. Petitioner presented no evidence that his national origin played any role in his removal from the contracts. No evidence was presented to demonstrate any non-Haitian or non-Black employee was treated any differently or better than Petitioner.[2] Having failed to establish this element, Petitioner has not established a prima facie case of employment discrimination.

30. Further, even if Petitioner had met the burden, Respondent presented evidence of legitimate, non-discriminatory reasons for removing Petitioner from vendor contracts, thereby rebutting any presumption of national origin or race discrimination. The evidence presented by Respondent established that Petitioner was removed from County contracts for violating policies, and that Dangervil could have continued working for Delad and Forestville just not on Respondent's contracts. Accordingly, Petitioner also failed to prove that Respondent's reasons for removing him from the contracts were pretextual.

31. Based on the findings of fact herein and a consideration of totality of circumstances, there is insufficient evidence, whether direct or circumstantial, that Respondent 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 Florida Commission on Human Relations issue a final order finding that Respondent did not commit any unlawful employment practices and dismissing the Petition for Relief.

DONE AND ENTERED this 20th day of July, 2009, in Tallahassee, Leon County, Florida.

JUNE C. McKINNEY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2009.

ENDNOTES

[1]/ Petitioner's testimony that he didn't refuse to work at the Opa Locka facility is rejected as not credible due to the combination of Wolfe and Thibaudeau testifying that they were both being called to the location because the assigned security

officer refused to work his post and the fact that the Forestville supervisor ultimately worked the assignment.
[2]/ Petitioner attempted and failed to demonstrate similarly situated individuals were discriminated against with the questioning of Respondent's witness about Michele Franklin and Yanic St. Charles. Additionally, Petitioner asserted that the case of Maxito Francois was a case that demonstrated that the County discriminated against the class of black males born in Haiti, but no discrimination was found in that case (Recommended Order Mar. 17, 2009; Final Order issued June 4, 2009).

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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.