STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MAURICE ALLEN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-2551
	)	
GOLD'S GYM,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

On September 23, 2009, a hearing was held in Tallahassee, Florida, before Administrative Law Judge Lisa Shearer Nelson, assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Carolyn D. Cummings, Esquire
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For Respondent: Deborah Stephens Minnis, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent has committed an unlawful employment practice in violation of Chapter 760, Florida Statutes (2007), and if so, what remedy should be ordered?

PRELIMINARY STATEMENT

On October 8, 2008, Petitioner filed a complaint of discrimination with the Florida Commission on Human Relations (FCHR), alleging that Respondent, Gold's Gym, had discriminated against him because of his race. On April 2, 2009, FCHR issued a Determination: No Cause and a Notice of Determination: No Cause. Petitioner filed his Petition for Relief May 7, 2009, and on May 14, 2009, the case was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was assigned originally to Administrative Law Judge T. Kent Wetherell, II, who on May 26, 2009, issued a Notice of Hearing scheduling the matter for July 27, 2009. On July 22, 2009, Respondent filed an Uncontested Motion for Continuance, which was granted by Order dated that same day. The matter was rescheduled for hearing September 23, 2009, and proceeded as scheduled.

In September 2009, T. Kent Wetherell, II, was appointed to the First District Court of Appeal, and this case was transferred to the undersigned before hearing. At the hearing, Petitioner presented the testimony of Maurice Allen and Petitioner's Exhibits 1-4 were admitted into evidence. Respondent presented the testimony of Annette Garrett, Donna Berryman, Jared Duncan, James Burgin and Jimmy Burtoft, and Respondent's Exhibits 1-7

were admitted. Anton Ackerman and Maurice Allen presented rebuttal testimony for Petitioner.

The two-volume Transcript of the proceedings was filed October 19, 2009. At Petitioner's request, the time for submitting proposed recommended orders was extended to November 10, 2009. Respondent filed its Proposed Recommended Order November 2, 2009, and Petitioner filed his Proposed Recommended Order November 12, 2009. Both submissions have been carefully considered in the preparation of this Recommended Order. Unless otherwise indicated, all references to Florida Statutes are to the 2007 codification of the Florida Statutes.

FINDINGS OF FACT

1. Petitioner, Maurice Allen (Allen), is an African-American male who was employed by Respondent, Gold's Gym (Gold's) as a personal trainer from October 2005 to October 22, 2007. Allen is also currently a senior at Florida A&M University, majoring in biochemistry and business.

2. Respondent is a personal fitness gym with three locations or "clubs" and one affiliate club in the Tallahassee area. The three clubs are Apalachee Parkway (the Downtown Club), Capital Circle Northeast (North Club), and Pensacola Street, with the affiliate club, Women's World, on Thomasville Road. Gold's is an employer under the Florida Civil Rights Act, Chapter 760, Florida Statutes.

3. Allen was hired by Gold's as a personal trainer, whose primary duties were to perform personal fitness assessments with body fat measurements and blood pressure readings, for club members; to assist members in establishing fitness goals; and to assist in workout sessions with the members for the achievement of these goals.

4. The parties did not dispute that Allen was qualified to perform these duties, and was one of the highest producing trainers on Gold's staff.

5. Gold's has a discrimination and harassment policy applicable to all of its locations. The policy, which has been in effect during the entirety of the period relevant to this proceeding, is provided to every employee at the time of employment. The policy is also included in Gold's employee handbook, a copy of which is kept at each facility.

6. The discrimination and harassment policy provides that an employee with a complaint of harassment or discrimination must bring it to the attention of his or her supervisor, the owner, Jim Burtoft, and Donna Berryman, the human resources director. The policy also directs that all complaints should be in writing. Allen signed acknowledgment forms, attesting to having received the discrimination and harassment policy.

7. Allen was initially assigned to the Downtown Club and later reassigned to the North Club. Allen's immediate supervisor was Tim Kane, the North Club Athletic Director. Kane's immediate

supervisor was Jarred Duncan, the General Manager, who reported directly to Jim Burtoft, the owner. Kane, Duncan, and Burtoft are all white.

8. Allen's Petition for Relief deals with three basic allegations: 1) that there was a hostile work environment, including racial slurs by other trainers and supervisors, and an uneven distribution of walk-in clients based upon the race of both the trainers and the clients; 2) that he was terminated based upon his race, when the white male involved in an altercation immediately following Allen's termination was not fired; and 3) that he was retaliated against for speaking out about the disparate assignment of clients. Only the first two assertions were contained in the complaint that was investigated by the Commission.

9. Allen complains that his direct supervisor, Timothy Kane, and James Burgin, the athletic director of the Downtown Club, made what he considered to be racist remarks. For example, Kane told him, "you look like a person who will wear a long chain" (which Allen interpreted as referring to a rapper), and Duncan referred to Allen and another African-American trainer on one occasion as "the African Connection" and commented, "I know how much you brothers like barbeque," when Gold's provided food from "Famous Dave's" Barbeque one afternoon. He also complained that Sally Burgin, another Gold's employee and James Burgin's daughter, cursed and yelled at him on one occasion and was

deliberately rude to another African-American trainer on a separate occasion.

10. After Mr. Kane's comments, Allen complained to Jarred Duncan. There is no evidence that any further racist comments were made about or to Allen by Kane. Allen told Duncan he was offended by Duncan's comments, and after the barbeque comment, attempted to call Mr. Burtoft about them. However, when he left messages for Mr. Burtoft, he did not indicate in the message that he was complaining about racial comments made by supervisors. He simply stated that he wanted to talk to him about a "very important matter." There was no evidence that Sally Burgin's actions were motivated by racism as opposed to being simply rude. Allen admitted that he never filed a written complaint with the Human Resource Officer, as contemplated by Gold's policy.

11. Personal trainers received clients one of two ways: either by assignment from Gold's management or by acquiring clients on their own. Clients assigned by Gold's were assigned based on when the client came in and when the trainers were listed as being available. All clients were required to be Gold's club members, and payment for personal training came through Gold's.

12. Allen believed that he and other African-American trainers were not receiving as many walk-in clients through Gold's, and were receiving fewer white clients than their white counterparts. However, no documentation was presented to support

this "feeling." Allen voiced his opinion on the matter during a staff meeting, and was told by management that the assignment procedure would be reviewed.

13. Allen also believed that he was treated differently in terms of his use of the facilities. On one occasion, Allen was working with a client at the Downtown Gold's location. After finishing with his client and waiting for the next client to arrive, he engaged in a personal workout. Allen began his personal workout during the lunch hour, or a time considered to be during "peak hours." Burgin saw him working out on the first floor of the club and directed him to stop because staff was not allowed to work out during peak hours.

14. At approximately the same time, a white Gold's employee, Chris Stewart, was working out on the second level of the club. Allen saw him and told Burgin that Stewart was working out as well. Unbeknownst to Allen, Stewart received a written reprimand for working out during peak hours. Allen received only a verbal warning.

15. In the fall of 2007, Allen had a female client who did not appear for all of her workouts. The most credible evidence presented is that the problem at the heart of her "no shows" was a scheduling problem, although there may also have been a misunderstanding between the client and Allen about the difference between pushing a client hard to perform and bullying. Allen was out of the gym for a week, due to an illness in the

family, and during that time, the client was reassigned to another trainer.

16. Gold's management indicated that the client asked to be transferred because Allen was sexually harassing her. However, this reason for the transfer was never explained to Allen, and there is no documentation to support such an allegation. Further, no notation was ever placed in Allen's file regarding what could only be described as a serious complaint. The assertion that Allen was engaging in sexual harassment and that the client made such a complaint is not credible.

17. When Allen returned to work the week of October 15, 2007, he realized that he was not being paid for workouts attributable to this female client. When he asked Kane about it, he was told to check with Duncan. When he asked Duncan, he was told to check with Kane.

18. On Wednesday, October 17, 2007, Allen was training a young lady in the early hours of the morning. Allen passed by Kane, who was training another client, and when he did, he asked if he was going to get paid for the previous sessions. Kane reacted negatively to the question, and became angry.

19. While both men were in the lobby area of the gym, an altercation ensued between Kane and Allen, and the police were called. While the police report chronicles widely differing accounts of the event, those accounts are clearly hearsay and none of the people interviewed testified in this proceeding

except Petitioner. The only competent evidence presented indicates that Kane was clearly the aggressor, a conclusion that is corroborated by the police report, and that during the altercation, he told Allen that he was fired. Kane was subsequently charged with assault and battery as a result of the altercation. It is unclear what, if any, disciplinary action was taken by Gold's against Kane. No charges were brought against Allen.

20. After the police were called, Jim Burtoft arrived at the gym. He did not witness the altercation between Kane and Allen. He told Allen to go home for the rest of the week, and they would talk later. Subsequently, Allen was told to attend a meeting with Mr. Burtoft on Monday, October 22, 2007, which he did.

21. The meeting consisted of Mr. Burtoft, Allen, and Donna Berryman. At that time, Allen was advised that he was being terminated from his position at Gold's. Allen was requested to sign a personal action form, which stated:

> After reviewing his employee file, Gold's Gym management stands by Mr. Tim Kane's decision to dismiss Mr. Allen. The termination is for insubordination based on the facts contained in Mr. Allen's personnel file and is no way influenced by the incidents following his dismissal by Mr. Kane (see attached sheets). (Emphasis supplied.)

22. Allen asked to be able to see his personnel file so that he could understand the reason for his termination. He was told that his file was not available.

23. There is no insubordination documented in Allen's personnel file.

24. There are only two documents that could be considered disciplinary actions included in the file. Personal action forms used by Gold's Gym provide for a signature by the recipient, as well as signatures by the manager and, if necessary, a witness. The two disciplinary action forms in his file do not contain Allen's signature, and he denies ever seeing either form before being terminated. His testimony is credited.

25. The first form is dated May 8, 2007, and indicates that it is a final warning for training a client out of uniform. The form indicates that failure to follow procedure in the future will result in termination. Under "remarks," the form indicates that "employee refused to sign." As stated above, it is found that Allen never saw this form. He does acknowledge, however, that there were times when he trained "out of uniform" because he sought and received permission to do so when, for example, he took clients running off the premises. He was supposed to return to uniform once he returned to the gym.

26. The second form is dated September 14, 2007, more than a month before the altercation. The form indicates that it was issued for using an unauthorized price sheet. While there is a purported signature on the line for an employee's signature, it does not bear any resemblance to the other signatures by Allen contained in the file. Allen acknowledged that there was an

issue dealing with use of a proper price sheet, but did not recall receiving any written disciplinary action.

27. Neither of these personal action forms mention anything with regard to insubordination, and neither was generated near the time of Allen's termination. Mr. Burtoft's statement that the termination had nothing to do with the altercation with Kane is not credible, and is rejected.

28. Also contained in Allen's personnel file at the time of hearing is a lengthy memorandum purportedly dated December 29, 2006, that states at the top, "This attached Statement is a documented part of the Personal Action Form Gold's Gym Tallahassee, Florida, dated December 29, 2006 concerning Personal Trainer, Maurice Allen." The document lists certain concerns with Allen's performance, dealing with his appearance and demeanor, interactions with co-workers, and issues regarding paperwork for clients.

29. The December 29, 2006, memo is among the documents that counsel for Gold's represented were added to Allen's personnel file after his termination, as part of the FCHR investigation into Allen's complaint of discrimination. There is nothing in the memorandum that indicates Allen was ever provided a copy of it. No explanation was given as to why such a significant memo would be placed in Allen's file, not at the time it was supposedly generated, but after an investigation related to his termination was initiated. Nor was any reasonable explanation

given as to why there is nothing in the file immediately following the purported generation of the memo, to indicate that there was any sort of follow-up action. Whether or not the December 29, 2006, memo was actually generated at that time, it was not in Allen's personnel file at the time he was fired.

30. Mr. Burtoft indicated at hearing that Allen would be eligible for rehire six months after his termination, and that he either told him so or "never said he wasn't available for rehire." There is nothing on the notice of his termination that indicates Allen would be eligible for rehire.

31. Based upon the totality of the credible, admissible evidence presented, Allen was not terminated based upon the documentation in his file. He was terminated because of the altercation with his supervisor, Timothy Kane, a long-time employee at the gym who had known Mr. Burtoft for 15 years.

32. Subsequent to Allen's termination, Mr. Kane was involved in another altercation with Ali Alawieh, an employee of Gold's Gym, in the parking lot of the North location. This employee was a personal trainer, like Allen, and was also Kane's roommate. Alawieh, who is of a different ethnic background than both Kane and Allen, was given the option of transferring to another Gold's location. Allen was not given that option. Gold's did not consider this incident to be employment related because it occurred in the parking lot (which Gold's does not own) as opposed to on the premises, and because of the personal

relationship between Kane and Alawieh. It is doubtful that patrons of the gym observing the altercation would have recognized or appreciated the difference. Kane's employment was terminated subsequent to both incidents for reasons that appear to be unrelated to either incident.

CONCLUSIONS OF LAW

33. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with Sections 120.569, 120.57(1), and 760.11(6), Florida Statutes (2009).

34. Section 760.10, Florida Statutes, 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.

35. 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).

36. As a preliminary matter, Allen's Petition for Relief raises a claim of retaliation for speaking out against uneven treatment in assigning new clients to personal trainers. This

claim was not included in his original complaint to the Commission. Accordingly, it is beyond the scope of this proceeding and will not be discussed further. Scholz v. RDV Sports, Inc., 710 So. 2d 618 (Fla. 5th DCA 1998). Even assuming that the claim of retaliation was raised in the original Complaint to the Commission, the facts presented do not support the claim, inasmuch as no evidence was presented to establish a time-frame between Allen's complaints and his termination.

Wrongful Termination Claim

37. As with most cases, Petitioner relies on circumstantial evidence to establish his claims. 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 claims under Title VII and relying on circumstantial evidence to establish discrimination. 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).

38. 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.

It is a burden of production, not persuasion. 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.

39. 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. As stated in Thomas v. Nicholson, 263 Fed. Appx. 814, 816 (11th Cir. 2008),

> Thomas must demonstrate that the proffered reason was not the true reason for the employment decision either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Courts are not concerned with whether an employment decision is prudent or fair, but only with whether it was motivated by unlawful animus. We have held that the employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. (Citations and internal quotation marks omitted).

40. 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).

41. Petitioner has demonstrated a prima facie case. He is an African American, which is a protected class under Chapter 760, Florida Statutes. He was not only well qualified for his job, he was a top producer for his employer. He suffered an adverse employment action, in that his employment was terminated. Finally, he was able to establish that he was treated less favorably than similarly situated persons outside his protected class. Both Tim Kane and Ali Alawieh, employees of different races than Allen, were involved in altercations (Kane involved in both) and were allowed, at least for the time being, to remain in Gold's employ.

42. Respondent has argued that Allen and Kane were not similarly situated, in that one was a supervisor and one was a subordinate employee. In this instance, that distinction makes no difference. There is no demonstration that supervisory employees are or should be held to a different standard when it comes to physical altercations with other employees. Moreover, the same cannot be said of Alawieh. He was involved in a

physical altercation with the same supervisor and allowed to transfer as opposed to being fired.

43. Because Petitioner has established a prima facie case of discrimination, it is incumbent upon Respondent to produce a legitimate, non-discriminatory reason for the action taken against Petitioner. Here, Respondent asserts that Petitioner was terminated based upon his disciplinary history.

44. Insubordination is a legitimate, non-discriminatory basis for termination. However, Respondent's explanation regarding Allen's disciplinary history is not credible. First, there is no documentation in Allen's personnel file indicating that he was ever disciplined for insubordination, the stated reason for his termination. The two disciplinary notices contained in the file, which are not signed by Petitioner, took place five months and one month prior to his termination. Respondent's claim that Allen's termination was not caused or affected by the altercation with Tim Kane is rejected.

45. That being said, Petitioner is still required to demonstrate that the motive for his termination was discrimination based upon his race, and has not done so. Instead, it appears that Gold's management made a conscious choice that it would be unworkable to continue to employ both Kane and Allen after the altercation on October 17, 2007. It also made the choice to side with Tim Kane, a long-time employee known to Jim Burtoft for 15 years, as opposed to siding with

Petitioner, a young employee of relatively short duration. The decision might be wrong, unfair, and even bad management, but there was no competent, persuasive evidence that Respondent's decision had anything to do with Allen's race.

Hostile Work Environment

46. Petitioner also claims that he was subject to a hostile work environment. To prove such a claim, Petitioner must establish that the workplace "is permeated with discriminatory intimidation, ridicule and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993). To establish a hostile work environment claim, Petitioner must establish 1) that he or she belongs to a protected class; 2) that he or she has been subject to unwelcome harassment; 3) that the harassment was based on a protected characteristic of the employee; 4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and 5) that the employer is responsible for the environment, by either vicarious or direct liability. Cooley v. Great Southern Wood Preserving, 138 Fed. Appx. 149 (11th Cir. 2005), citing Miller v. Kenworth of Dothan, Inc., 277 F.3d 1269, 1275 (11th Cir. 2002).

47. Whether harassing conduct was "sufficiently severe or pervasive to alter the terms of conditions of his employment" involves both an objective and a subjective component. Miller, 277 F.3d at 1276. The objective severity of harassment should be judged from the perspective of a reasonable person in the Petitioner's position, considering "all of the circumstances." Mendoza, 195 F.3d at 1246. In determining "objective severity," consideration is given to 1) the frequency of the conduct; 2) the severity of the conduct; 3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and 4) whether the conduct unreasonably interferes with the employee's job performance." Id.

48. Viewing the evidence in the light most favorable to Petitioner, there were approximately four incidents where inappropriate comments were made to or about Allen and/or one of his African-American colleagues. With respect to at least one of those incidents, i.e., the rude behavior of Sally Burgin, there is no evidence that the behavior had anything to do with race as opposed to bad behavior. The other comments, while boorish and offensive, stopped upon Allen's verbal complaint.

49. Indeed, applying the factors set forth in Mendoza, Petitioner did not assert that the offensive conduct was physically threatening or humiliating, or that it interfered with his job performance. Petitioner failed to show that any of the alleged conduct, including the racial comments, was so "common"

or "severe" that it created an atmosphere charged with hostility. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not amount to discriminatory changes in the terms and conditions of employment; these standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a "general civility code"). Petitioner has not proven the facts necessary for his hostile work environment claim.

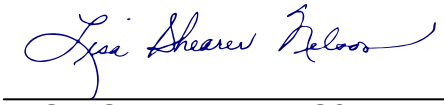
RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED:

That a final order be entered dismissing Petitioner's Petition for Relief in its entirety.

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



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Filed with the Clerk of the
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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.