

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ROBERT FERNANDEZ,)
)
 Petitioner,)
)
 vs.) Case No. 09-4009
)
 SPRINT/UNITED MANAGEMENT CO.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

As previously scheduled, a hearing by telephone was held before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings on October 7, 2009, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Stanley Kiszkiel, Esquire
Stanley Kiszkiel, P.A.
9000 Sheridan Street, Suite 92
Hollywood, Florida 33024

For Respondent: Heather R. Gil, Esquire
6450 Sprint Parkway
Mail Stop KSOPHN0304-3B461
Overland Park, Kansas 66215

STATEMENT OF THE ISSUE

Whether Respondent retaliated against Petitioner by requesting that he not physically work at Respondent's Fort Myers site in violation of the Florida Civil Rights Act and, if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

Petitioner was terminated from employment by Respondent on March 1, 2006. Alleging discrimination based on his national origin, Hispanic, Petitioner filed a complaint with the Equal Employment Opportunity Commission (EEOC) which, in December 2006, found no cause to believe the allegations were true.

Petitioner filed a lawsuit against the Respondent in March 2007, alleging discrimination. The case was settled on March 27, 2008, when the parties jointly stipulated to the dismissal of the case with prejudice. As part of the stipulation, Petitioner agreed not to work physically at Respondent's Fort Myers facility.

In this case, Petitioner alleges that Respondent's request that he be removed from the Fort Myers site before he agreed to the stipulation constituted retaliation for filing the lawsuit. The Florida Commission on Human Relations (FCHR) entered a no cause determination on June 22, 2009, and transmitted the Petition for Relief to the Division of Administrative Hearings (DOAH) on July 28, 2009.

At the final hearing, Petitioner testified on his own behalf and offered no exhibits, except to provide a more legible copy of Respondent's Exhibit 4. Respondent presented the testimony of two witnesses, Bill Flint and John Glover, and

offered Respondent's Exhibits 1-13, all of which were admitted into evidence except Respondent's Exhibit 13.

The Transcript was filed October 22, 2009. After a brief extension of time requested by Respondent, Proposed Recommended Orders were filed on December 2 and 3, 2009.

FINDINGS OF FACT

1. Petitioner, Robert Fernandez (Petitioner or Mr. Fernandez), worked for Respondent, Sprint United Management Company (Respondent or Sprint) for approximately six years until he was terminated from employment on March 1, 2006. At that time, he was a switch operations manager, supervising switch technicians at Sprint's Fort Myers facility.

2. When one of the technicians resigned, Mr. Fernandez took him and three others for a four-hour, going-away lunch during which four of the five men, including Mr. Fernandez, drank three or four pitchers of beer. Mr. Fernandez paid the food and alcohol bill with a Sprint credit card. Two of the men drove Sprint vehicles after consuming beer.

3. Sprint determined that Mr. Fernandez violated policies in the Code of Conduct in the Sprint Employee Guide, the Standard Shift Change and Unmanning Procedures for Switch Sites, and the Vehicle Administrative Procedures. On March 1, 2006, Sprint terminated Mr. Fernandez's employment.

4. Mr. Fernandez charged Sprint with discrimination based on his national origin, Hispanic. The Lee County Division of Equal Opportunity investigated the charge of discrimination and found no cause to believe that the allegations were true, a determination that was adopted by the EEOC.

5. In March 2007, Mr. Fernandez filed a lawsuit against Sprint alleging discrimination.

6. In October 2007, Mr. Fernandez was employed by Nortel, a vendor for Sprint, as a network integration engineer. He was assigned to work at a Sprint site in Birmingham, Alabama for two weeks, in Fort Myers for two weeks, then in Miami and Deerfield in late 2007 and early 2008.

7. In February 2008, attorneys for Mr. Fernandez and Sprint were engaging in settlement discussions. In February 2008, Nortel also assigned Mr. Fernandez to work at the Sprint facility in Fort Myers. Sprint managers and directors contacted their human resources department and then their legal department concerning their desire to have Mr. Fernandez removed from the Fort Myers site, claiming that his presence was disruptive.

8. In an email dated February 12, 2008, Bill Flint, Sprint's area director of field services, was provided, apparently at his request, a summary of current and planned Nortel projects for Mr. Fernandez. The email from John Glover, at Nortel included the following offer to replace Mr. Fernandez

"If this is still a concern we will have to search for a replacement candidate with the appropriate skillsets to tackle these activities. That may take some time." Mr. Glover also noted that Mr. Fernandez's supervisors rated him as "doing a great job."

9. On February 13, 2009, Mr. Flint wrote Mr. Glover, "I am waiting on a reply from our legal department. No action necessary until they advise." Then, on February 28, 2008, Mr. Flint wrote Mr. Glover, "Sorry for the delay in getting back with you concerning this matter. Sprint has one request regarding Robert Fernandez -- Do not assign him to any project that requires him to physically work at the Fort Myers, Florida site.

10. Mr. Glover forwarded Mr. Flint's request to Mr. Fernandez's supervisors, stating, "Gentlemen, So I have finally received the request back regarding Robert Fernandez. Can we please align our resourcing so that Robert is not required to work in the Fort Myers office. This will be sufficient for Sprint and I think we have more than enough work elsewhere to keep him gainfully employed."

11. Nortel immediately reassigned Mr. Fernandez to work at the Miami/Deerfield Sprint sites.

12. On March 17, 2008, an attorney for Sprint acknowledged acceptance of an agreement with Mr. Fernandez's attorney to

settle the lawsuit with Mr. Fernandez's agreement not to work the Sprint Fort Myers facility. The Joint Stipulation for Dismissal was filed with the court on March 27, 2008.

13. Mr. Fernandez continued to work for Nortel with no demotion or reduction in compensation at Sprint's Miami/Deerfield area sites from February through December 2008, when Nortel's work with Sprint ended. He has been unemployed and has suffered significant economic losses since that time.

ULTIMATE FINDINGS OF FACT

14. Sprint was given the opportunity to have Nortel terminate Mr. Fernandez's employment with Nortel, but did not do so.

15. Sprint's legal department was, in late February and early March 2008, negotiating an agreement with Petitioner's attorney to have him removed from the Fort Myers site. Although that agreement was not yet final, and filed with the court when he was reassigned, the evidence supports a conclusion that the agreement, not retaliation, was the basis for Mr. Fernandez's reassignment.

CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding, pursuant to Sections 760.11 and 120.569, Florida

Statutes (2009), and Subsection 120.57(1), Florida Statutes (2009).

17. In this de novo proceeding, the Petitioner has the burden to prove the allegations in the Petition by a preponderance of the evidence. § 120.57(1)(K) and (j), Fla. Stat. (2009).

18. Section 760.10, Florida Statutes (2009), provides in relevant part:

(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.

* * *

(7) It is an unlawful employment practice for an employer . . . 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.

19. Because the provision of Section 760.10(7), Florida Statutes, is "almost identical to its federal counterpart, 42 U.S.C. § 2000e-3(a), Florida courts generally follow federal case law to consider similar state claims. Hinton v.

Supervision Int'l, Inc., 942 So. 2d 986, 989 (Fla. 5th DCA 2006)." Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009).

20. To establish a prima facie case of retaliation under Subsection 760.10(7), Florida Statutes (2009), Petitioner "must demonstrate: (1) that he or she engaged in statutorily protected activity; (2) that he or she suffered adverse employment action; and (3) that the adverse employment action was causally related to the protected activity." See Anduze v. Florida Atlantic University, 151 Fed. Appx. 875 (11th Cir) (2005), cert denied, 547 U.S. 1193, 126 S. Ct. 2865, 165 L. Ed. 2d 896 (2006).

21. By making his complaint to the EEOC in 2006, and filing a lawsuit alleging discrimination in 2007, Petitioner engaged in statutorily protected activities establishing therefore, the first element of a prima facie case.

22. The second element, an adverse employment action, is not demonstrated by Respondent's request, on February 28, 2008, that Petitioner be relocated to a different work site in advance of the March 17, 2008, date when attorneys for the parties agreed to the relocation as a part of the settlement of the lawsuit, and the March 27, 2008, filing of the agreement with the court.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Sprint/United Management Company did not retaliate against Robert Fernandez in violation of the Florida Civil Rights Act of 1992, as amended, and dismissing his petition for relief.

DONE AND ENTERED this 12th day of January, 2010, in Tallahassee, Leon County, Florida.



ELEANOR M. HUNTER
Administrative Law Judge
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Filed with the Clerk of the
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this 12th day of January, 2010.

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.