STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

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| MICHAEL HOGG,<br><br>Petitioner,<br><br>vs.<br><br>ARENA SPORTS CAFE,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | <br><br><br><br>Case No. 09-5221 |

RECOMMENDED ORDER

A hearing was held pursuant to notice, on February 2, 2010, in Deland, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge, Barbara J. Staros.

APPEARANCES

For Petitioner: David Glasser, Esquire
Glasser & Handel
116 Orange Avenue
Daytona Beach, Florida 32114

For Respondent: Steven deLaroche, Esquire
1005 South Ridgewood Avenue
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Complaint of Discrimination filed by Petitioner on April 22, 2009.

## PRELIMINARY STATEMENT

On April 22, 2009, Petitioner, Michael Hogg, filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that Arena Sports Cafe violated Section 760.10, Florida Statutes, by discriminating against him on the basis of race and retaliation, which resulted in his termination. The Employment Complaint of Discrimination alleged that Petitioner was subjected to a disparaging racial slur, complained about it, and was ultimately terminated and replaced by a Caucasian male.

The allegations were investigated and on August 17, 2009, FCHR issued its Determination: No Cause. A Petition for Relief was filed by Petitioner on September 21, 2009.

FCHR transmitted the case to the Division of Administrative Hearings on or about September 23, 2009. A Notice of Hearing was issued setting the case for formal hearing on December 3 and 4, 2009. A Motion for Continuance was granted and the case rescheduled for February 2 and 3, 2010. The hearing proceeded as scheduled, and concluded in one day.

At hearing, Petitioner testified on his own behalf and presented the testimony of Robert Preeper. Petitioner's Exhibits numbered 1 through 3 were admitted into evidence. Respondent presented the testimony of Anthony Cyr,

Warren Fisher, Joe Rotondi, and Trisha Lawrence. Respondent's Composite Exhibit 1 was admitted into evidence.

The hearing was not transcribed. The parties timely filed Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

1. Petitioner is an African-American male who was employed by Respondent from August 2008 until his termination on or about January 9, 2009.

2. Respondent, Arena Sports Café (Arena), is an employer within the meaning of the Florida Civil Rights Act. Arena is a restaurant/night club which offers the viewing of televised sporting events, and is generally known as a sports bar. Arena is adjacent to The Coliseum, another establishment with the same owners, Trisha Lawrence and Randy Berner. The owners are Caucasian. The Coliseum is an entertainment venue with live and recorded music, dancing, and stage acts. The Coliseum does not serve food, and does not have a kitchen.

3. When hired in August 2008, Petitioner worked as a prep cook as part of the kitchen staff. He performed various duties including preparation of meals in the kitchen as well as preparing food for Respondent's large salad bar. Petitioner holds a Food Handling Certificate and a Safe Serve Certificate, which he attained through a local college. Petitioner was paid

$12.00 per hour, and generally worked a 40-hour work week. At the time Petitioner was hired, the Arena was brand new and very popular.

4. When the Arena opened in August 2008, it featured lunch and dinner seven days per week. Weekends were particularly busy because college and pro football games were televised in the fall. However, the Arena saw a drop in demand for weekday lunches.

5. During the fall of 2008, Anthony Cyr, a Caucasian, was employed by Arena as its general manager. Petitioner was already employed by Respondent when Mr. Cyr began employment there.

6. According to Petitioner, Mr. Cyr used the word "nigger" (the "N" word) in the context of telling a joke on three occasions in October and November 2008. Mr. Cyr used this word in the presence of the kitchen staff, including Petitioner. Petitioner informed Mr. Cyr that this was offensive and objected. Mr. Cyr did not use the "N" word other than these three occasions, and did not use it again after Petitioner objected. Petitioner did not report this incident to anyone, including the owners of Arena.

7. As one of the owners of Arena, Ms. Lawrence would sometimes eat meals at Arena. At some point in January 2009, she voiced her displeasure to Mr. Cyr as to meals which she

believed to have been prepared by Petitioner. She was never made aware of Petitioner's allegations regarding the use of racial slurs by Mr. Cyr.

8. According to Ms. Lawrence, she instructed Mr. Cyr to terminate Petitioner from employment because of his cooking abilities. Mr. Cyr informed Petitioner that his employment was terminated, and informed him that it was due to his job performance. Mr. Cyr also informed Petitioner that the decision to terminate Petitioner was Ms. Lawrence's, not his.

9. Mr. Cyr's testimony regarding using the "N" word contradicts Petitioner's testimony, and is somewhat inconsistent with Ms. Lawrence's testimony regarding the reason Petitioner was fired. That is, Mr. Cyr denies using the "N" word in front of Petitioner. As for the reason he fired Petitioner, Mr. Cyr testified that it was due to a reduction in business following football season. There is no dispute, however, that Ms. Lawrence was the decisionmaker regarding the decision to fire Petitioner.

10. Regarding the conflicting testimony as to whether Mr. Cyr used the "N" word, the undersigned finds Petitioner's testimony in this regard to be credible and more persuasive. That is, the undersigned finds that Mr. Cyr did use the "N" word in front of Petitioner in the workplace.

11. As for the reason Petitioner was fired, Ms. Lawrence did acknowledge that business slowed down at Arena around the time she instructed Mr. Cyr to fire Petitioner, and that the salad bar was phased out the month after Petitioner was terminated. However, she insists that she instructed Mr. Cyr to fire Petitioner because of the quality of his cooking. In any event, there does not appear to be a dispute that Mr. Cyr told Petitioner that he was being fired due to job performance issues. At some time after Petitioner was terminated, Mr. Cyr was terminated from Arena because, in Ms. Lawrence's words, he "was not that great."

12. When Petitioner was terminated, two Caucasian cooks remained employed at Arena. While Petitioner was not actually replaced, his duties were assumed by the remaining Caucasian staff.

13. Since his termination, Petitioner has worked for approximately three weeks at another eating establishment. Otherwise, he has been unsuccessful finding employment despite his efforts.

14. Respondent employs minorities and non-minorities in positions with both Arena and The Coliseum. The undersigned has reviewed the evidence of record, oral and written, as to the number of minority and non-minority employees and as to whether

Respondent hired primarily non-minority persons in the better paying positions. The evidence of record is insufficient to support a finding that Respondent engaged in racially motivated hiring practices.

15. There is no evidence that Petitioner complained to Ms. Lawrence or the other owner of Arena that he was being discriminated against on the basis of race. When he complained to Mr. Cyr, the offending remarks stopped.

16. There was no competent evidence presented that Ms. Lawrence knew of the racial slur used by Mr. Cyr in the workplace in Petitioner's presence. There is no evidence that Ms. Lawrence's decision to terminate Petitioner from employment was related in any way to any racial remark used by Mr. Cyr.

## CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and subject matter in this case. §§ 120.569 and 120.57, Fla. Stat. (2009).

18. Section 760.10(1), Florida Statutes (2008), states that it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of race.

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

Florida Power Corporation, 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

20. Discriminatory intent can be established through direct or circumstantial evidence. See Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. See Maynard v. Board of Regents of the Division of Universities of the Fla. Dept. of Education, 342 F.3d 1281, 1289 (11th Cir. 2003).

21. "Racially derogatory statements can constitute direct evidence of discrimination if the comments were (1) made by the decisionmaker responsible for the alleged discrimination and (2) made in the context of the challenged decision. However, if an alleged statement fails either prong it is considered a 'stray remark' and does not constitute direct evidence of discrimination." Vickers v. Federal Express Corp., 132 F. Supp. 2d 1371 (S.D. Fla. 2000), citing Wheatley v. Baptist Hospital of Miami, 16 F. Supp. 2d 1356, 1359-60, aff'd 172 F.3d 882 (11th Cir. 1999).

22. "For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." Wheatley, supra at 1360,

quoting Trotter v. Board of Trustees of Univ. of Alabama, 91 F.3d 1449, 1453-54 (11th Cir. 1996).

23. Despite Mr. Cyr's having been in a position of management when he informed Petitioner of his termination from employment, Mr. Cyr was not the decisionmaker. There is no dispute that Ms. Lawrence was the decisionmaker and there is no evidence that she was aware that a racial slur took place. Nor is there any evidence that Mr. Cyr approached Ms. Lawrence or in any way suggested to her that Petitioner be fired. Mr. Cyr fired Petitioner because he was told to do so by Ms. Lawrence, and told Petitioner it was because of his job performance. Thus, it is concluded that Petitioner has not presented direct evidence of racial discrimination.

24. Having failed to produce direct evidence of racial discrimination, Petitioner bears the burden of proof established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under this well established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Department of

Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only persuade the finder of fact that the decision was non-discriminatory. Id. Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are a pretext for discrimination. "The employee must satisfy this burden by showing directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Department of Corrections v. Chandler, supra at 1186; Alexander v. Fulton County, Georgia, supra. Petitioner has not met this burden.

25. To establish a prima facie case, Petitioner must prove that (1) he is a member of a protected class (e.g., African-American); (2) he was subject to an adverse employment action; (3) his employer treated similarly situated employees, who are not members of the protected class, more favorably; and (4) he was qualified for the job or benefit at issue. See McDonnell, supra; Gillis v. Georgia Department of Corrections, 400 F.3d 883 (11th Cir. 2005).

26. Petitioner has met the first and second elements to establish a prima facie case of discrimination in that he is a member of a protected class and was subject to an adverse employment action, i.e., termination. Arguably, Petitioner has proven the third element, that his employer treated similarly situated employees who are not members of the protected class more favorably. That is, the remaining members of the kitchen staff were Caucasian.

27. As to the fourth element, Petitioner was initially hired for the job, but did not perform his job as expected by his employer. Thus, he did not prove the fourth element of establishing a prima facie case regarding his being qualified for the job.

28. Applying the McDonnell analysis, Petitioner did not meet his burden of establishing a prima facie case of discriminatory treatment. Assuming that Petitioner had demonstrated a prima facie case of discriminatory conduct, Respondent demonstrated a legitimate, non-discriminatory reason for Petitioner's termination. That is, the owner and decisionmaker was dissatisfied with his job performance.

29. Even if it were necessary to go to the next level of the McDonnell analysis, Petitioner did not produce any evidence that Respondent's legitimate reasons were pretext for discrimination. Therefore, Petitioner has not met his burden of

showing that a discriminatory reason more likely than not motivated the actions of Respondent toward Petitioner or by showing that the proffered reason for the employment decision is not worthy of belief. Consequently, Petitioner has not met his burden of showing pretext. "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." Department of Corrections v. Chandler, supra at 1187, quoting Nix v. WLCY Radio/Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984).

30. In summary, Petitioner has failed to carry his burden of proof that Respondent engaged in racial discrimination toward Petitioner when it terminated him.

31. To make a prima facie case of retaliation, Petitioner must show that he engaged in protected activity, that he suffered adverse employment action, and that there is some causal relation between the protected activity and the adverse employment action. Casiano v. Gonzales, 2006 U.S. Dist. Lexis 3593 (N.D. Fla. 2006); Jeronimus v. Polk County Opportunity Council, Inc., 2005 U.S. App. Lexis 17016 (11th Cir. 2005). The evidence established that he complained to Mr. Cyr, the person who made the racial remark, two months before the decision was made to terminate him. However, he did not complain to Ms. Lawrence (about unlawful discriminatory

treatment), the decisionmaker. Petitioner has not established that there is a causal relationship between the protected activity (complaining about the remark to Cyr) and the adverse employment action.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 31st day of March, 2010, in Tallahassee, Leon County, Florida.

BARBARA J. STAROS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 31st day of March, 2010.

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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.