STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PHILLIP MCTAGGART,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-1182
	)	
PENSACOLA BAY TRANSPORTATION COMPANY,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on May 11, 2010, in Pensacola, Florida.

APPEARANCES

For Petitioner: Ryan M. Barnett, Esquire
Whibbs & Stone, P.A.
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Pensacola, Florida 32501

For Respondent: Elizabeth Darby Rehm
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STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner based on Petitioner's race.

PRELIMINARY STATEMENT

At the hearing, Petitioner testified on his own behalf and presented the testimony of Shelia Justice, Margie Wilcox, Tammie Nelms, Brenda Lewis, and Beverly Moorer. Respondent presented testimony through the witnesses called by Petitioner, recalled Tammie Nelms in its case-in-chief, and offered one exhibit into evidence.

Neither party requested a transcript. After the hearing, Petitioner and Respondent filed their Proposed Recommended Orders on May 26, 2010.

References to statutes are to Florida Statutes (2009) unless otherwise noted.

FINDINGS OF FACT

1. Petitioner, Phillip McTaggart, is a white male who retired after more than 20 years in the United States Air Force (including the reserves), and 18 years with Delta Airlines.

2. Respondent, Pensacola Bay Transportation Company, specializes in the transportation of people with special transportation needs, including the elderly, disabled, and economically disadvantaged.

3. Respondent contracts with the Escambia Area Transit Service, the local coordination board of the Florida Commission for the Transportation Disadvantaged, to provide these services. Many of Respondent's customers are wheel-chair bound or

otherwise need assistance with transportation. Respondent uses both automobiles and specially designed buses for the transportation of wheel-chair bound customers.

4. Petitioner applied for a job with Respondent by filling out an application on January 20, 2009. His application did not specify for which position he was applying.

5. Respondent had hired a white driver just days before Petitioner's application. Respondent hired three African-American drivers after Petitioner applied. Each of the hired drivers stated on their applications that they were applying for driver positions. The last driver hired by Respondent in 2009 was on April 13.

6. All of the drivers hired after Petitioner applied had submitted their application before Petitioner applied. Each of the hired drivers' application reflected previous wages in line with wages paid to other drivers in the Pensacola area. Petitioner's application showed he had earned wages at his previous jobs that significantly exceeded the wages Respondent was paying its drivers.

7. Petitioner testified that he either re-applied or updated his application for a driver position in May 2009, but Respondent has no record of the subsequent application.

8. Petitioner contends, through the use of a vocational expert, that Respondent hires minority candidates for its driver

workforce at a rate that far exceeds the demographics of the Pensacola area. Also, a large number of the drivers are minority women, who statistically receive lower wages than white male employees based upon national Department of Labor figures.

9. Petitioner contends that he was discriminated against by being a white male with a history of receiving higher wages than the typical driver employed by Respondent. Some companies refuse to hire individuals they believe are overqualified for the position for which they apply. The reasons for this failure to hire the "overqualified" are that they command higher wages, as well as a general fear they will leave to seek higher-paying employment.

10. Petitioner listed on his application his previous experience in the Air Force as an aircraft mechanic. He listed his previous experience with Delta Airlines as a customer service agent in public relations, baggage, and ticketing. Nowhere did Petitioner hint at previous experience as a driver.

11. Petitioner's updated resume, which he testified he supplied to Respondent with his application failed to make mention of any professional driving experience. He testified at hearing, however, that when he went to update his application in May 2009, he told Respondent's personnel that he had driving experience from his time serving in the Air Force.

12. Respondent is a unionized company that operates under a collective bargaining agreement (CBA). Its wages are set by the CBA. Petitioner's vocational expert was not aware of the company's union status when she performed her wage study for the Pensacola area.

13. Respondent inherited many of its employees from a company it acquired in 2001. The company was required to keep these employees at the wages they were already receiving under the CBA.

14. Respondent had never hired a driver with an employment background matching Petitioner's. Tammie Nelms, the human resources manager for Respondent, liked the fact that Petitioner had such a stable work history. She would have called him back had she known he was seeking a driver position.

15. Although Respondent has a box full of driver applications (about 50 applied in 2009 alone), few whites apply for driver positions at Respondent's Pensacola location. The company has three white maintenance workers in the Pensacola location. White drivers more commonly apply at Respondent's Santa Rosa County location.

16. Respondent has a policy of non-discrimination in the hiring of employees.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.569, 120.57(1), and 760.11, Fla. Stat.

18. Pursuant to Subsection 760.10(1), Florida Statutes, it is unlawful for an employer to discharge, refuse to hire, or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment, based on the employee's race, gender, or national origin.

19. Federal discrimination law may properly be used for guidance in evaluating the merits of claims arising under Section 760.10, Florida Statutes. See Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994); Fla. Dep't of Cmty. Affairs v. Bryant, 586 So. 2d 1205, 1209 (Fla. 1st DCA 1991).

20. In McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973), the Supreme Court articulated a burden of proof scheme for cases involving allegations of discrimination under Title VII, where the plaintiff relies upon circumstantial evidence. The McDonnell Douglas decision is persuasive in this case, as is St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993), in which the Court reiterated and refined the McDonnell Douglas analysis.

21. Pursuant to this analysis, the plaintiff (Petitioner herein) has the initial burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n. 6 (Fla. 1st DCA), aff'd, 679 So. 2d 1183 (1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987)).

22. If, however, the plaintiff succeeds in making a prima facie case, then the burden shifts to the defendant (Respondent herein) to articulate some legitimate, nondiscriminatory reason for its complained-of conduct. If the defendant carries this burden of rebutting the plaintiff's prima facie case, then the plaintiff must demonstrate that the proffered reason was not the true reason, but merely a pretext for discrimination. McDonnell Douglas, 411 U.S. at 802-03; Hicks, 509 U.S. at 506-07.

23. In Hicks, the Court stressed that even if the trier-of-fact were to reject as incredible the reason put forward by the defendant to justify its actions, the burden nevertheless would remain with the plaintiff to prove the ultimate question of whether the defendant intentionally discriminated against him. Hicks, 509 U.S. at 511. "It is not enough, in other words, to disbelieve the employer; the fact

finder must believe the plaintiff's explanation of intentional discrimination." Id. at 519.

24. Petitioner complains that Respondent's failure to hire him was motivated by his race. This is a disparate treatment claim. To present a prima facie case of disparate treatment using the indirect, burden-shifting method just described, Petitioner needed to prove, by a preponderance of the evidence, that "(1) [he] belongs to a racial minority; (2) [he] was subjected to adverse job action; (3) [his] employer treated similarly situated employees outside [his] classification more favorably; and (4) [he] was qualified to do the job." Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).

25. Here, Petitioner failed to establish a prima facie case of unlawful discrimination using circumstantial evidence. He produced no credible evidence that similarly situated applicants for employment outside his classification were treated more favorably than he, as was his burden under McDonnell Douglas. See Campbell v. Dominick's Finer Foods, Inc., 85 F. Supp. 2d 866, 872 (N.D. Ill. 2000) ("To establish this element, [the claimant] must point to similarly situated non-[minority] employees who engaged in similar conduct, but were neither disciplined nor terminated."). By not stating in his application that he was applying for a driver position, and making no mention of commercial driving experience in his

resume, Petitioner failed to demonstrate that he was even applying for the position he sought, let alone that he was qualified. Further, at the time of Petitioner's application, Respondent had recently hired a driver who was white. By the time Petitioner allegedly updated his application in May 2009 to add driving experience, Respondent had filled the three remaining driver positions available at the time of Petitioner's employment application. Petitioner's claim that he was passed over in Respondent's hiring process for drivers is not supported by the evidence at hearing.

26. The fact that Petitioner is white does not preclude him from pursuing a claim of discrimination. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280-81 (1976) ("Title VII prohibits racial discrimination against the white petitioners in this case upon the same standards as would be applicable were they [African-American] and Jackson white."). However, in order to sustain a claim for "reverse discrimination," Petitioner must demonstrate that "'but for' his race – white – [Petitioner] would not have been [discriminated against]." Riviera Beach v. Langevin, 522 So.2d 857,860 (Fla. 4th DCA 1987), citing McDonald v. Santa Fe Transp. Co., supra. Petitioner offered no evidence to prove that "but for" his race, he would have been hired for the available driver positions at the time he filed his application in January 2009. Petitioner offered no evidence

that proved Respondent was even aware of his desire to become a driver when he applied for a position. Petitioner's employment history, as set forth in his resume, indicates that he has been employed in the past as an aircraft mechanic and as a customer service representative. No information regarding an employment history as a driver was supplied to Respondent while any driver positions were available.

27. Assuming, for the sake of argument, that Petitioner could establish a prima facie case of failure to hire, he nevertheless did not prove that Respondent's legitimate business reasons for not hiring him are a pretext for unlawful racial discrimination. See Issenbergh v. Knight-Ridder Newspaper Sales, Inc., 97 F.3d 436, 444 (11th Cir. 1996) ("Conclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [a defendant] has offered extensive evidence of legitimate, non-discriminatory reasons for its actions.") (quoting Young v. General Food Corp., 840 F.2d 825, 830 (11th Cir. 1988) ("Once a legitimate, non-discriminatory reason for dismissal is put forth by the employer, the burden returns to the plaintiff to prove by significant probative evidence that the proffered reason is a pretext for discrimination."). The most persuasive evidence indicates that Respondent had legitimate, non-discriminatory reasons for not hiring

Petitioner. Respondent simply was not aware that Petitioner sought employment as a driver when it conducted its hiring of three drivers between January and April 2009. Petitioner's claim that he updated his application and resume in May 2009, even if proven, occurred after Respondent had filled the available positions and at a time when no additional drivers were needed.

28. Moreover, it is not the role of the courts to second guess an employer's business judgment. In Chapman v. AI Transport, 229 F.3d 1012, 1031 (11th Cir. 2000), the 11th Circuit reiterated that:

> [f]ederal courts do not sit as a superpersonnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior. See also Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991); Nix v. WLCY Radio-Rahall Communications, 738 F.2d 1181, 1187 (11th Cir. 1984) (An "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.").

29. Accordingly, Petitioner failed to meet his ultimate burden of proving that Respondent engaged in unlawful racial discrimination by denying him employment. At most, Petitioner has produced nothing more than his own belief and speculation

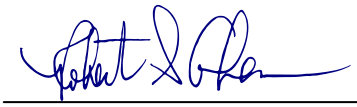
concerning the motives for Respondent's actions. This alone is not sufficient to satisfy Petitioner's burden of proving intentional discrimination. Avril v. Village S., Inc., 934 F. Supp. 412, 417 (S.D. Fla. 1996) ("[a] plaintiff's mere belief, conjecture, or speculation that he or she was discriminated against is not sufficient to support an inference of discrimination or to satisfy the plaintiff's burden"). Respondent had legitimate, non-discriminatory reasons for not hiring Petitioner. The greater weight of the evidence clearly indicates that Respondent did not engage in an unlawful employment practice.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

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

DONE AND ENTERED this 1st day of June, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 1st day of June, 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.