

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GARY POWELL,)
)
 Petitioner,)
)
 vs.) Case No. 10-2488
)
 SPANISH TRAIL LUMBER COMPANY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on July 2, 2010, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gary Powell, pro se
6782 Bumpy Lane
Grand Ridge, Florida 32442

For Respondent: Eric J. Holshouser, Esquire
Fowler White Boggs, P.A.
50 North Laura Street, Suite 2800
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner based on his race contrary to Section 760.10, Florida Statutes (2009).

PRELIMINARY STATEMENT

On or about June 30, 2009, Petitioner Gary Powell (Petitioner) filed a Charge of Discrimination with the Florida Commission on Human Relations (FCHR). The charge alleged that Respondent Spanish Trail Lumber Company (Respondent) had discriminated against Petitioner based on his race.

On April 30, 2010, FCHR issued a Determination: No Cause. On May 7, 2010, Petitioner filed a Petition for Relief with FCHR. The petition was referred to the Division of Administrative Hearings on May 11, 2010.

A Notice of Hearing dated May 20, 2010, scheduled the hearing for July 2, 2010.

During the hearing, Petitioner testified on his own behalf and presented the testimony of three witnesses. Petitioner did not offer any exhibits for admission into the record as evidence.

Respondent presented the testimony of one witness and offered three exhibits that were accepted as evidence.

The Transcript was filed on July 20, 2010. Respondent filed its Proposed Recommended Order on July 28, 2010. As of the date that this Recommended Order was issued, Petitioner had not filed proposed findings of fact and conclusions of law.

Except as otherwise noted, all references hereinafter shall be to Florida Statutes (2009).

FINDINGS OF FACT

1. Respondent operates a lumber mill in a community known as Cypress near Marianna, Florida. In 2007, Respondent hired Petitioner, an African-American male, to operate a 966 Caterpillar loader (the loader) at the mill.

2. Melvin Lewis is an African-American male. Mr. Lewis is a second-shift supervisor. At all times relevant here, Mr. Lewis was Petitioner's immediate supervisor.

3. Mr. Lewis reports directly to Ross Jackson, a white male. Mr. Jackson has been Respondent's general manager since January 2008.

4. In May 2008, Mr. Lewis told Petitioner that the loader was slowly leaking brake fluid. Mr. Lewis instructed Petitioner to always check the loader to ensure that it had brake fluid.

5. On or about Thursday, May 28, 2009, between 2:30 a.m. and 3:00 a.m., Petitioner was involved in an accident while operating the loader. Petitioner told Mr. Lewis that a log fell onto the loader, the brakes failed, and the loader went over a retaining wall.

6. After the accident, Mr. Lewis immediately checked the brake fluid reservoir. He found the reservoir empty.

7. Petitioner knew or should have known the standard procedure to follow when, and if, a log rolled onto a loader.

In that event, the loader operator was supposed to immediately call his supervisor on the two-way radio and request help.

8. At the time of the accident, Petitioner and Mr. Lewis had working two-way radios. Petitioner used the radio to call Mr. Lewis right after the accident. He did not call for help when the log first rolled onto the loader.

9. On May 28, 2009, Petitioner was operating the 966 loader on a ramp that is 75-feet long and 40-feet wide with a retaining wall on each side of the ramp. At the high end of the ramp is a flat area where Petitioner was picking up logs from a pile.

10. To get off of the flat part of the ramp, Petitioner had to accelerate backwards to then go down the ramp. When the accident occurred, Petitioner had traveled almost all of the way down the 75-foot ramp and then turned the loader 90 degrees toward the retaining wall. To go over the one and one-half foot retaining wall, the loader must have been traveling at a fairly high rate of speed.

11. The accident tore the transmission off of the loader. The loader was inoperable and had to be repaired. The cost of the repairs was over \$14,000.

12. After the accident, Mr. Lewis told Petitioner that "this is really bad." Mr. Lewis first directed Petitioner to

clock-out and go home. Mr. Lewis then told Petitioner to stay until Mr. Jackson arrived at work at 5:00 a.m.

13. When Mr. Jackson came in to work, he told Petitioner that he would be suspended until Mr. Jackson and Mr. Lewis had a chance to review the situation. Mr. Jackson told Petitioner to report back on Monday, June 1, 2009.

14. Mr. Lewis decided that Petitioner should not be allowed to operate equipment for the following reasons:

(a) Petitioner failed to keep brake fluid in the loader as instructed; (b) Petitioner failed to call for help on his radio when the log rolled onto the loader; and (c) with the log on the loader, Petitioner accelerated backward down the ramp, turned the loader 90 degrees, and drove the loader fast enough to hit the retaining wall and bounce over it.

15. Mr. Lewis recommended termination of Petitioner's employment. Mr. Jackson concurred. Petitioner was terminated on June 1, 2009.

16. No evidence indicates that the decision to terminate Petitioner's employment was based on his race. There was no persuasive evidence that Respondent gave any white employee more favorable treatment under similar circumstances.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569, 120.57(1), and 760.11, Florida Statutes.

18. It is unlawful for an employer to discriminate against an individual based on the individual's race. See § 760.10(1)(a), Fla. Stat.

19. The Florida Civil Rights Act (FCRA), Sections 760.01 through 760.11, Florida Statutes, as amended, was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp., 728 So. 2d 369, 370-371 (Fla. 3d DCA 1999); Florida State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

20. Petitioner can establish a case of racial discrimination through statistical, direct, or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997). In this case, Petitioner presented no statistical or direct evidence of discrimination.

21. An employment discrimination case based on circumstantial evidence involves the following burden-shifting analysis: (a) the employee must first establish a prima facie

case of discrimination; (b) the employer may then rebut the prima facie case by articulating a legitimate non-discriminatory reason for the employment action in question; and (c) the employee then bears the ultimate burden of persuasion to establish that the employer's proffered reason for the action taken is merely a pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973).

22. To establish discrimination in discipline or by unlawful termination, Petitioner must show the following: (a) he belongs to a protected group such as a minority race; (b) he was qualified for the job; (c) he was subjected to an adverse employment action; and (d) a similarly-situated employee, who is not a member of the protected group, engaged in the same or similar misconduct, but did not receive similar discipline or termination. See Nicholas v. Board of Trustees, 251 Fed. Appx. 637, 642 (11th Cir. 2007).

23. To determine whether employees are similarly situated, one must consider whether "the employees are involved in or accused of the same or similar conduct and are disciplined in different ways." See Maniccia v. Brown, 171 F.3d 1364, 1368 (11th Cir. 1999). In order to make that determination, courts "require that the quantity and quality of the comparator's misconduct be nearly identical to prevent . . . second-guessing

employers' reasonable decisions and confusing apples with oranges." Id. at 1368.

24. During the hearing, Petitioner testified that a white employee, Joe Todd, was treated differently after causing an accident. It is true that Mr. Todd was involved in a minor accident, but unlike Petitioner, Mr. Todd did not cause any damage whatsoever to Respondent's equipment.

25. Mr. Todd's accident was more like Petitioner's two prior accidents. Discipline was unnecessary for the minor accidents because Respondent's equipment was not being operated recklessly.

26. On the other hand, Respondent presented evidence that Petitioner was not the only employee to have been terminated by Mr. Jackson for reckless operation of equipment. Mr. Jackson terminated a white man, Doug Snoke, for reckless operation of equipment.

27. Petitioner failed to show that he was similarly situated with any other non-African-American. Petitioner caused significant and costly damage to a piece of valuable machinery.

28. Assuming that Petitioner established a prima facie case, Respondent produced evidence of a legitimate and nondiscriminatory reason for its action, i.e. Petitioner's improper operation of the loader. Petitioner did not show that

this reason was a pretext for intentional racial discrimination.
Petitioner has not met his burden of proof in this case.

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 dismissing the Petition for Relief.

DONE AND ENTERED this 10th day of August, 2010, in
Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of August, 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.