

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VICTOR R. BRACAMONTE,)
)
 Petitioner,)
)
 vs.) Case No. 10-2593
)
 COMMERCIAL INTERIOR CONTRACTOR)
 CORP.)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A final hearing was held in this case on September 29, 2010, by video teleconference between sites in Tallahassee and Miami, Florida, before Administrative Law Judge Eleanor M. Hunter.

APPEARANCES

For Petitioner: Zandro E. Palma, Esquire
Zandro E. Palma, P.A.
3100 South Dixie Highway, Suite 202
Miami, Florida 33133

For Respondent: Aaron Reed, Esquire
Littler Mendelson, P.C.
One Biscayne Tower
Two South Biscayne Boulevard, Suite 1500
Miami, Florida 33131

STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice, discrimination based on age and/or national origin, and/or retaliation against Petitioner.

PRELIMINARY STATEMENT

Petitioner, Victor Bracamonte (Petitioner or Mr. Bracamonte), filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) dated August 11, 2009. The EEOC transferred the matter for to the Florida Commission on Human Relations (FCHR). Bracamonte claimed discrimination based on his national origin (Hispanic Peruvian) and age (53, with a date of birth of September 14, 1955), occurring from September 2007 through January 21, 2009. He also claimed that he suffered retaliation for not issuing warnings to or firing other employees because of their national origins. Bracamonte, did not check the word "retaliation" on the EEOC form. The FCHR investigated the complaint and, on April 9, 2010, issued its "Notice of Determination: No Cause," meaning that it found no reasonable cause to believe that an unlawful employment practice had occurred. Bracamonte filed a Petition for Relief with the FCHR on May 12, 2010. The Petition was received at the Division of Administrative Hearings (DOAH) on May 14, 2010.

Because Bracamonte did not check "retaliation" on the EEOC form, Respondent, on June 30, 2010, moved to dismiss that portion of the petition for relief. In response, Petitioner noted that he made clear and unequivocal factual allegations of retaliation on the same form. The motion was denied.

As requested in Petitioner's Response to Initial Order, the case was set for hearing on July 14, 2010. In its subsequently filed Response to Initial Order, Respondent requested that the hearing be set in August or September to allow more than the usual time for discovery. The case was re-scheduled for August 6, 2010. Following the filing of Petitioner's Unopposed Motion for Continuance, the case was re-scheduled for and held on September 29, 2010.

The Transcript of the hearing was filed November 5, 2010. Proposed Recommended Orders were filed November 8, 2010.

At the final hearing, Petitioner presented the testimony of Marco Samanamoud, Roberto Santiestiban, Adriano Solar, Feliberto Delgado, and Victor Bracamonte. Respondent presented the testimony of Ray Mesa, Hovav Frenkel, and Eloise Gonzalez.

Respondent's Exhibits 1-4, 6-9, 11-14, and 16-18 were received in evidence.

FINDINGS OF FACT

Stipulated Findings of Fact¹

1. Petitioner, [Victor Bracamonte (Petitioner or Mr. Bracamonte)] is an [Hispanic] Peruvian man. His date of birth is September 14, 1955.

2. Petitioner began working for Respondent, [Commercial Interior Contractor Corp. [(Respondent or CIC)] in Spring 2006 [on April 6, 2006] as a Superintendent.

3. Respondent, a Florida corporation, has been in business since 1984. The Company is an interior finishing contractor, assisting private corporations and governmental entities with refinishing, renovations, or other projects.

4. Eloise Gonzalez (Cuban; d/o/b- 8/17/62) is the founder and owner of Respondent.

5. Ms. Gonzalez and three individuals work at Company's corporate office, which is located at 2500 N.W. 39th Street, Suite 100, in Miami. The rest of the Company's employees work at a contract [site] at the Miami International Airport ("MIA").

6. In 2006, Respondent signed a contract with Parsons Odebrecht Joint Venture ("POJV") to perform certain general site requirement work related to the construction of new terminals and concourses at MIA. POJV is the general contractor that MIA assigned the overall task of building the new terminals. Respondent employees have worked on this project from 2006 through the present, acting as a support team for POJV with tasks such as lifting equipment, operating forklifts, and cleaning.

7. Respondent employees at the POJV project are divided into two teams, with each team responsible for a different work area (one team in areas from Terminal B to Terminal C, and the other team in areas from Terminal C to Terminal D). Each team consists of Carpenters and General Laborers and is headed by a

Superintendent. CIC also employs Operators at the POJV project, who drive a sweeper machine around the entire worksite and remove debris.

8. Respondent does not have any employees at MIA who supervise the Superintendents, nor does the Company have anyone at the worksite that instructs the teams what needs to be done each day. The specific work of each of Respondent's teams on the POJV project is directed by management personnel from POJV.

9. Ms. Gonzalez works out of the Company's corporate offices, which are approximately seven miles from MIA, and so she is not there to direct and control the daily activities of personnel on the POJV project. Ms. Gonzalez seldom visits the actual worksite, and estimates that she is there perhaps once every month or so. Ms. Gonzalez visits with POJV corporate personnel two or three times per month at their offices at MIA (which are in trailers at the airport), but this is at a location separate from the actual worksite. The purpose of those visits is to discuss general business items with POJV.

10. Ultimately, Ms. Gonzalez relies on her Superintendents to be her eyes and ears at the worksite, and, of course, on POJV personnel (since they are the client and are directly involved in overseeing the work). As a result, decisions by Ms. Gonzalez to discipline and/or terminate employees are typically based on

the information, recommendations, and/or requests of her Superintendents and/or POJV personnel.

11. Since the POJV project takes place at the airport, employees have to be given clearance to work on the private property of MIA. Each employee must have various badges to access the airport and the project. For example, employees need an MIA Customs Identification badge, which gives them clearance to pass through the security area (. . . a separate commercial security area for workers, airport personnel, and other individuals providing service(s) to the airport), and a North Terminal Development badge, which gives them clearance to access the project itself. A Superintendent also needs a driver's badge, to allow them to drive a vehicle on private airport property. Respondent does not make the decisions about whether to give and/or take away a badge to anyone. The badges are issued by MIA (specifically, the Miami-Dade Aviation Department) and/or U.S. Department of Homeland Security.

12. Respondent's employees meet at the employee parking lot at MIA in the morning, and each team drives to the worksite in a separate Company van. There are only a few Company employees who are allowed to drive the van(s). The vans travel from the parking lot, to the security area, and then to the worksite. Anyone driving the van at any time on airport grounds

or anywhere else is required to follow any and all driving rules, such as following speed limits.

13. On January 22, 2010, Petitioner was arrested at MIA by the Miami-Dade County Police. Petitioner was accused of stealing gas. He signed a Complaint/Arrest Affidavit on that same date.

14. Petitioner's airport work badges were taken away by MIA as a result of his arrest.

15. Petitioner has not worked for Respondent since the date of his arrest.

16. Of the 24 current employees of Respondent, 10 of them are over the age of 40. Of these current employees, three of them are older than Petitioner: (1) Pedro Araujo (d/o/b - 6/7/54); (2) Moises Herrer (d/o/b - 7/11/53); and (3) Isidro Lopes (d/o/b - 7/6/48). One additional employee is only eight days younger than Petitioner: Edwin Torres (d/o/b - 9/22/55).

17. Between Spring 2006 and January 2009 (the period of Petitioner's employment), the only other Peruvian employee terminated by Respondent was Marco Samanamud, whose employment was terminated in November 2008.

Additional Findings of Fact²

18. Petitioner alleged that, in addition to discriminating against him based on age, Ms. Gonzalez discriminated against him because he is from Peru. He said he earned \$25.32 an hour, when

the prevailing rate for a superintendent was \$31. Wages were set by the MIA aviation authority in the contract for services with CIC, not by Ms. Gonzalez. She has had contracts for work at the airport for twenty years.

19. Before he worked for Respondent, Petitioner was employed by prior airport subcontractors doing the same kind of work for ten years. To explain why Ms. Gonzalez hired him but discriminates against Peruvians, Petitioner alleged that hiring him helped her get the contract for CIC.

20. On November 18, 2008, Marco Samanamoud, who was also Peruvian, drove Petitioner in a CIC van, to a 1:30 p.m., eye doctor's appointment because he was going to have his pupils dilated.

21. While he was still at the doctor's office, Petitioner received a call from Ms. Gonzalez who wanted to know who was driving the van. He told her that it was Marco Samanamoud. Marco Samanamoud, who is also Peruvian, was the only employee on their crew, other than Petitioner, who was allowed to drive the 12-passenger van.

22. The van was equipped with a GPS e-mail alert notification system that had reported by e-mail that the van was going 88 and 95 miles an hour in streets that had a 60-mile-per-hour speed limit.

23. Petitioner called Mr. Samanamoud who said he was back at work at MIA and denied that he had been speeding. Both he and the Petitioner questioned the accuracy of the GPS e-mail alerts because both were received at 2:16 p.m., from two different locations. They had no knowledge, however, about the frequency of the e-mail alert transmissions.

24. Petitioner and Mr. Samanamoud both testified that they each tried to tell Ms. Gonzalez that it was a mistake and the GPS system could not be correct. Both said that, when they talked to her, she made derogatory comments about Peruvians, including having said something about not wanting to work with Peruvians, about being fed up with Peruvians, and that Peruvians had caused her too many problems.

25. Based on Mr. Samanamoud's prior record of speeding and reckless driving, Ms. Gonzalez told Petitioner to fire Mr. Samanamoud. Petitioner refused Ms. Gonzalez' directive to terminate Mr. Samanamoud's employment with CIC until she prepared a written warning and threatened to fire both of them. Petitioner said he had no choice but to fire Mr. Samanamoud even though he believed that to be an unlawful act of discrimination based on national origin.

26. CIC employees routinely borrowed gasoline-powered saws from other companies working at the airport. On January 22, 2009, the foreman for one of the companies called Petitioner and

requested the return of one of the saws. Petitioner instructed a CIC employee, Roberto Santiesteban, who was driving the CIC van, to go outside the airport check point to return the saw.

27. After he returned the saw, Mr. Santiesteban received a radio call from Petitioner telling him to pick up six POVJ workers to bring them to their work site. Petitioner said POVJ wanted the workers inside as quickly as possible because they were "already on the clock" earning \$31.00 an hour.

28. Mr. Santiesteban, who had returned the gas saw on the fifth level of the employee's parking deck, supposedly replied that he did not have room in the van for six workers who had tool boxes and ladders. Petitioner then told him to make room by taking Petitioner's car keys from the van, opening the trunk of Petitioner's personal vehicle and leaving the gasoline there.

29. Petitioner's vehicle was parked in a remote area of the fourth deck where employees' cars were not supposed to be parked.

30. When Petitioner was arrested on January 22, 2009, the police confiscated his MIA employee badges. Initially sympathetic to him, Ms. Gonzalez subsequently received an e-mail and read the police report that made her believe that Petitioner had been stealing gasoline for some time.

31. After Petitioner was unable to work and was discharged, he was replaced by a person who is Cuban.

32. After Petitioner's case was nolle prossed in April 2010, he asked Ms. Gonzalez to initiate an ID confiscation hearing to help him get the badges and she refused.

Ultimate Findings of Fact

33. The evidence supports a finding that Petitioner, Mr. Bracamonte, was ordered to terminate the employment of Mr. Samanamoud not because he was Peruvian, but because Ms. Gonzalez had a legitimate business interest in avoiding liability for his speeding and reckless driving.

34. The evidence supports a finding that Petitioner, Mr. Bracamonte, was not the victim of discrimination based on age based on Stipulated Finding of Fact, paragraph 16.

35. The evidence supports a finding that Petitioner, Mr. Bracamonte, was terminated from employment because he could not work on the MIA project after his badges were confiscated, not because of his age or because of his national origin.

36. The evidence supports a finding that Ms. Gonzalez was not willing to help Petitioner get the badges necessary to work at MIA because she received information after his arrest that tended to convince her that Petitioner had been stealing gasoline over a period of time.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties and subject matter to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.³

38. Petitioner has the burden of proving he was victim of discrimination and retaliation as alleged in his Complaint. See Department of Banking and Finance Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue.").

39. The Florida Civil Rights Act of 1992 (FCRA) is codified in Sections 760.01 through 760.11, Florida Statutes. The Act, as amended, was patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq.

40. Section 760.10(1)(a) defines an unlawful employment practice as follows:

(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.

41. The "anti-retaliatory provisions" of the Act are found in subsection 760.10(7), Florida Statutes, which provides as follows:

It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization 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.

42. The provisions of the FCRA are almost identical to the federal counterpart, 42 U.S.C. 2000e; therefore, Florida Courts follow federal law when examining discrimination and retaliation claims. Carter v. Health Management Associates, 989 So. 2d 1258 (Fla. 2d DCA 2008).

43. "Discriminatory [or retaliatory] intent may be established through direct or indirect circumstantial evidence." Johnson v. Hamrick, 155 F. Supp. 2d 1355, 1377 (N.D. Ga. 2001); see also United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 714 N.3 (1983) ("As in any lawsuit, the plaintiff [in a Title VII action] may prove his case by direct or circumstantial evidence").

44. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory [or retaliatory] intent without resort to inference or presumption." King v. La Playa-

De Varadero Restaurant, No. 02-2502, slip op. at 15 n.9 (Fla. DOAH February 19, 2003) (Recommended Order); see also Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination [or retaliation]." Maynard v. Board of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003). In this case, Petitioner has not offered direct evidence of discrimination or retaliation.

45. Courts have recognized that direct evidence of intent is often unavailable. Shealy v. City of Albany, Ga., 89 F.3d 804, 806 (11th Cir. 1996). For this reason, those who claim to be victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v. Tennessee Valley Authority, 128 F.3d 337, 348 (6th Cir. 1997).

46. In this case, the testimony that Ms. Gonzalez made comments that indicated that she would does not like Peruvians is rejected as not convincing. Alternatively, if true, that evidence is insufficient to support a finding that Ms. Gonzalez actions were discriminatory or retaliatory.

47. In this case, even if Petitioner had established a prima facie case of discrimination, Respondent showed legitimate business reasons for terminating Mr. Samanamoud for speeding,

and Petitioner for theft and an inability to access the work site. Ballard v. The Southland Corporation- Seven Eleven Stores, Case No. 85-2754, 1986 Fla. Div. Adm. Hear. LEXIS 4341 (Recommended Order January 10, 1986).

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 in this case.

DONE AND ENTERED this 29th day of December, 2010, in Tallahassee, Leon County, Florida.



ELEANOR M. HUNTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of December, 2010.

ENDNOTES

1/ Findings of Fact 1-17 are taken verbatim, except words in brackets, from the Pre-hearing Stipulation filed September 21, 2010.

2/ Additional Findings of Fact are based on the record from the final hearing.

3/ References to Florida Statutes are to the 2010 version, unless otherwise indicated.

COPIES FURNISHED:

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Zandro E. Palma, Esquire
Zandro E. Palma, P.A.
3100 South Dixie Highway, Suite 202
Miami, Florida 33133

Aaron Reed, Esquire
Littler Mendelson, P.C.
One Biscayne Tower
Two South Biscayne Boulevard, Suite 1500
Miami, Florida 33131

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.