STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDWARD RHOADES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 10-2679
	)	
SWIFT TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A final hearing was held in this matter before W. David Watkins, Administrative Law Judge with the Division of Administrative Hearings, on October 5, 2010, in Cross City, Florida.

APPEARANCES

For Petitioner: Edward Rhoades, pro se
7470 Northwest 167th Place
Trenton, Florida 32693

For Respondent: Ignacio J. Garcia, Esquire
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STATEMENT OF THE ISSUE

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

PRELIMINARY STATEMENT

A formal administrative hearing in this matter was held on October 5, 2010, in Cross City, Florida. At the hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1A, and 1 through 7 were received in evidence. Respondent presented the telephonic testimony of Scott Maldonado, and its Exhibits 1 through 5 were received in evidence.

At the conclusion of the hearing the parties stipulated that proposed recommended orders would be due 21 days following the filing of the final hearing transcript. The Transcript was filed with the Division on October 28, 2010. However, on November 16, 2010, Respondent filed an Unopposed Motion for Extension of Time, seeking an extension until November 30, 2010, for the parties to submit their proposed orders. By Order dated November 17, 2010, the requested extension was granted. On November 24, 2010, Petitioner filed a Post-Hearing Brief, and on November 30, 2010, Respondent filed its Proposed Recommended Order. Both post-hearing filings have been given due consideration in the preparation of this Recommended Order.

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

FINDINGS OF FACT

1. Petitioner, Edward Rhoades, applied for employment as a commercial truck driver with Respondent in early February 2009.

2. Respondent, Swift Transportation Co. of AZ, LLC. ("Swift"), is a nationwide truckload carrier, using over 14,000 trucks and employing approximately 18,000 drivers. Swift is an equal employment opportunity employer and has adopted written policies which prohibit discrimination based upon, among other things, disability.

3. In the section of the Swift application relating to employment history, Petitioner wrote the following: "[H]aven't worked since 1985 due to injuries. Have doctor releases for injuries." Petitioner's injuries were sustained in 1976 when a log dropped on his back. Petitioner also has contracted Hepatitis C, although there is no evidence of record as to what disabilities, if any, have resulted from the disease.

4. Notwithstanding the "injuries" listed on his application, at hearing Petitioner testified that the only disability he had at the time of filing his application with Swift was "a skip of the heart." Petitioner further testified that he did not have any physical limitations due to this condition.

5. In December 2008, Petitioner successfully completed training to become a semi-tractor-trailer driver at the Truck

Driver Institute, Inc. ("TDI"), located in Sanford, Florida. TDI assisted Petitioner in his efforts to find employment as a truck driver by faxing his application to Swift on or about February 1, 2009.

6. Petitioner's faxed application was incomplete. Omitted were Petitioner's social security number, date of birth, employment declaration, references, and signature.

7. Swift internally tracks the status of driver applications by the use of Lotus Notes software. February 10, 2009, entries made regarding Petitioner's application noted the absence of the personal information listed above. In addition, the notations "need proof of injury" and "faxed conditional pre-hire to TDI, Sanford" were entered in the Swift record.

8. Although the exact date is not reflected in this record, sometime soon after the faxed submittal of Petitioner's paper application Petitioner decided to submit an on-line application to Swift using the Swift website. A copy of that application was not introduced into this record. However, when asked on the application to identify his goals, Petitioner testified that he wrote: "to get off disability and pay off my family loans."

9. As reflected in the Swift Lotus Notes, on February 10, 2009, Swift faxed its standard "conditional pre-hire letter" to

Petitioner via TDI. The letter declared in large bold font: "Congratulations, the student/driver listed below has been approved to join the Swift Team!" The letter further stated: "Swift Transportation Co., Inc. agrees to hire the above referenced student/driver subject to the following conditions:" Thereafter followed a list of 11 conditions prerequisite to hiring by Swift, one of which was "pass Swift Transportation's road test."

10. Scott Maldonado, Swift's National Director of Recruiting and Training, testified that Swift had no record of Petitioner's on-line application. He noted that during the four to five months preceding the hearing Swift had received over 60,000 applications through its website.

11. Unfortunately, when Petitioner submitted his application in early 2009, the national economy was in the throes of a serious recession, resulting in a significant decline in the need for commercial truck drivers. For example, in 2008, Swift hired 18,957 drivers, while in 2009, only 9,713 drivers were hired by Swift.[1/] Consequently, Respondent was able to be much more selective in the drivers it chose to hire.

12. Due to the location from which he applied, Petitioner would have been assigned to Respondent's Ocala facility. In

February of 2009, Respondent hired only eleven drivers for placement in its Ocala terminal, and all of those drivers were graduates of Swift's driving academy located in Millington, Tennessee.[2/]

13. Swift's historical data has shown that drivers hired from one of its academies are safer drivers and have more of a long-term commitment to Swift. Because of this, Swift has a company-wide goal of hiring graduates strictly from one of its driving academies if at all possible. Unfortunately for graduates of other academies, such as TDI, Swift was in a position to selectively hire only Swift academy graduates in early 2009.

14. When Petitioner attempted to arrange to take the Swift driving test (through his contacts at TDI) he was informed of the Swift hiring freeze on all non-Swift academy graduates. Accordingly, Petitioner was never offered an appointment to take the Swift driving test.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat (2010).

16. Section 760.10, Florida Statutes (2010), provides that:

> (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.

17. To establish a prima facie case of discrimination, Petitioner must prove by a preponderance of the evidence: (1) that he is a handicapped person within the meaning of Subsection 760.10(1)(a); (2) that he is a qualified individual; and (3) that Respondent discriminated against him on the basis of his disability. See Earl v. Mervyns, 207 F.3d 1361, 1365 (11th Cir. 2000); Pritchard v. S. Co. Servs., 92 F.3d 1130 (11th Cir.1996); and Byrd v. BT Foods, Inc., 948 So. 2d 921 (Fla. 4th DCA 2007).

18. The term "handicap" in the Florida Civil Rights Act is treated as equivalent to the term "disability" in the Americans with Disabilities Act. See Ross v. Jim Adams Ford, Inc., 871 So. 2d 312 (Fla. 2d DCA 2004).

19. The ADA defines a "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(1). "Major life activities" include, but are not limited to, caring for oneself, performing manual tasks,

seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C. § 12102(2)(A); Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998).

20. In Sutton v. United Air Lines, Inc., 527 U.S. 471, 119 S. Ct. 2139, 144 L.Ed. 450 (1999) the Supreme Court declared that whether a person is disabled under the ADA is an "individualized inquiry." It stated:

> The definition of disability . . . requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the major life activities of such individual.' Thus, whether a person has a disability under the ADA is an individualized inquiry.
> Id. at 484.

21. 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).

22. 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.

23. 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 (Fla. 1996) (citing Arnold v. Burger Queen Sys., 509 So. 2d 958 (Fla. 2d DCA 1987).

24. 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.

25. 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.

26. 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-[disabled] employees who engaged in similar conduct, but were neither disciplined nor terminated."). Petitioner did not establish that at the time of his application he suffered from a disability, nor did he present credible evidence that Swift perceived him to be disabled and discriminated against him on that basis. Rather, the evidence established that no graduates of non-Swift driving schools, whether or not they were disabled, were hired during the period at issue.

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 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 unrebutted evidence of record established that Respondent had legitimate, non-discriminatory reasons for not hiring Petitioner, or for that matter, any other graduates of non-Swift driving academies. Indeed, the evidence established that graduates of the Swift academies tended to be safer drivers, and were more likely to become long-term Swift employees, than graduates of other schools.[3/]

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 Eleventh 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 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 29th day of December, 2010, in Tallahassee, Leon County, Florida.

W. DAVID WATKINS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of December, 2010.

ENDNOTES

[1/] Illustrative of the economic slowdown, during 2009 over 200 Swift drivers were idled while awaiting trucking assignments.

[2/] Swift operates five driver academies nationally.

[3/] It is unfortunate that Petitioner was sent a congratulatory "pre-hire letter" at a time when Swift had adopted a hiring

freeze on applicants that had not graduated from one of the Swift driving academies.

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.