

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAWN M. SOLE,)
)
 Petitioner,)
)
 vs.) Case No. 10-4985
)
 ADT SECURITY SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,¹ before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on August 17, 2010, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Orion G. Callison, III, Esquire
Silver, Garvett & Hinkel, P.A.
18001 Old Cutler Road, Suite 600
Miami, Florida 33157

For Respondent: Michael Tricarico, Esquire
Ogletree, Deakins, Nask, Smoak
and Stewart, P.C.
701 Brickell Avenue, Suite 2020
Miami, Florida 33131

STATEMENT OF THE ISSUE

Whether Respondent committed the unlawful employment practice alleged in the Charge of Discrimination filed with the Florida Commission on Human Relations (FCHR) and, if so, what relief should Petitioner be granted.

PRELIMINARY STATEMENT

On or about December 21, 2009, Petitioner filed a Charge of Discrimination (Complaint) with the FCHR, alleging that Respondent had unlawfully, based on her gender, failed to promote her to a Core Commercial Sales Manager position for which she had applied (as an internal candidate). Her Complaint contained the following "particulars":

I am a full time employee of ADT Security Services, Inc. ("ADT") in its Miramar, Florida office in Broward County, Florida. In June of 2009 I timely applied for a position as a Core Commercial Sales Manager for Miami-Dade County, Florida. The position was posted on ADT's website as being open. I was qualified for the position. However, I was not considered for the position. I was not interviewed for the position, and I was not given the position because I am a woman. The position was awarded instead to a less qualified male employee in July of 2009. I have been advised by co-workers that the decision not to hire me was based on my gender. Also, statistically ADT hires very few women for the position I was seeking. I complained in July, 2009 to ADT Human Resources that I had been discriminated against on the basis of my gender. ADT failed to investigate or take action on my claim. I was given a pretextual and untrue reason why I was not

considered, interviewed or hired. I have been discriminated against on the basis of my gender.

On June 3, 2010, the FCHR, following the completion of its investigation of the Complaint, issued a Notice of Determination: No Cause. Thereafter, Petitioner, on July 7, 2010, filed with the FCHR a Petition for Relief.

On July 9, 2010, the FCHR referred the matter to DOAH for the assignment of a DOAH administrative law judge to "conduct all necessary proceedings required under the law and submit recommended findings to the [FCHR]."

As noted above, the final hearing in this case was held before the undersigned on August 17, 2010. Five witnesses (Petitioner, Natasha Carosielli, Alan Margulies, Andres Vidales, and Kurtis Sonnenberg) testified at the hearing. In addition, 21 exhibits (Petitioner's Exhibits 1 through 3 and 5 through 15, and Respondent's Exhibits 1 through 7) were offered and received into evidence.

At the close of the evidentiary portion of the hearing, the undersigned, on the record, set an October 11, 2010, deadline for the filing of proposed recommended orders.

On October 4, 2010, Petitioner filed an unopposed motion requesting an extension of time, until October 18, 2010, for the parties to file their proposed recommended orders. The motion was granted by Order issued October 5, 2010.

Petitioner and Respondent timely filed their Proposed Recommended Orders on October 18, 2010.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Respondent (also referred to herein as "ADT") is a provider of electronic security systems and services. It has both residential and non-residential (business and governmental) clients.

2. Petitioner is a 30-year-old female. After graduating from high school, she attended Passaic College in New Jersey, accruing approximately nine fewer credits than she needed to obtain an associate's (two-year) degree in business management.

3. Petitioner is currently ADT's Broward County Residential/Small Business Resale Manager. She started working for ADT in 1999 as a Residential Sales Representative. In 2001, she moved to a Core Commercial Sales Representative position. In May 2005, she voluntarily left the company "[t]o pursue another opportunity," but returned in April 2008 as a Core Commercial Sales Representative, working out of ADT's Miami office (as she had from October 2004 until her departure in May 2005²). She remained a Miami Core Commercial Sales Representative until being promoted to her present position (her first "direct report" managerial position³) on or about

September 26, 2009.⁴ Petitioner has been the recipient of numerous "awards and other types of recognition" from ADT during her employment with the company.

4. Before becoming the Broward County Residential/Small Business Resale Manager, Petitioner had submitted an online application, on June 11, 2009, for another managerial position with ADT, that of Miami Core Commercial Sales Manager (MCCSM Position).⁵ She was neither interviewed, nor selected for the MCCSM Position.

5. The recruiting for the MCCSM Position was handled, not by ADT's local Human Resources office, but by a female independent contractor, Natasha Carosielli.

6. Ms. Carosielli posted the position opening on ADT's internal and external websites. The posting contained the following information about the position:

Commercial Sales Manager

Job description:

The ADT Commercial Sales Manager is the leader of the commercial sales team in one of ADT's field offices. This role is responsible for building a team of highly productive sales representatives that can meet and exceed revenue expectations, as well as the needs of our existing and potential customers. The Commercial Sales Manager[s] [are] responsible to drive ADT's Corporate Sales and Marketing initiatives through the territories for which they are responsible. These include business and customer development, territory management,

data mining, professional presentation and product sales. Additionally, this individual is responsible for job and channel profitability, revenue per user ("RPU") growth of our customers, and retention of both customers and sales representatives. This position requires a strong, principle centered leader.

Duties and Responsibilities:

1. Model and champion ADT values. Create a safe environment for the discussion and resolution of values-related issues and concerns.
2. Plan, coordinate and implement Commercial sales operations. This would include business and customer development and territory management.
3. Attain budgeted revenue expectations. Assure the profitability of the channel is met.
4. Build and retain an effective team of sales representatives. Lead, coach and motivate team to achieve pre-established goals.
5. Set sales territory expectations for each of ADT's sales representatives including customer touch expectations, as well as quota achievement. Direct territory activities of sales staff.
6. Measure the activities of each sales representative to assure that their marketing activities will produce intended sales production.
7. Implement and execute the company's marketing strategy and business plans.
8. Work in concert with other department and business segment leaders to assure congruence with sales operations,

representing the voice of the department, the customer and the interests of the sales team.

9. Work with National Account Managers to secure National Account business.

Requirements:

Education:

- College Degree in Business, Marketing or other related field.

Experience:

- Minimum of 5 years sales experience, including 3 years of field sales management experience in a business to business environment, or successful management of another sales channel.

Skills:

- Excellent oral and written communication skills
- Proven ability to effectively interact with internal organization and customer organizations both at the senior executive and field level
- Functional/Technical Skills in leading a sales organization
- Action Oriented
- Business Acumen
- Drive for Results
- Managing & Measuring Work
- Customer Focus
- Building Effective Teams

- Motivating Others
- Organizational Agility
- Interpersonal Savvy
- Conflict Management
- Learning/Change Agility
- Managing Vision & Purpose
- Managerial Courage
- Managing Diversity
- Developing Direct Reports & Others

Other:

Ability to travel nights and weekends to accommodate the customer's agenda.

This language is boilerplate that ADT uses, nationwide, whenever it advertises an opening for a Core Commercial Sales Manager position.⁶

7. Ms. Carosielli reviewed the applications/resumes submitted in response to the posting, screened applicants (by speaking to them over the telephone), and then forwarded to the hiring manager (that is, the ADT employee responsible for making the hiring decision) the resumes of those applicants, and only those applicants, she deemed to be qualified for the position. "All of the applications[/resumes] [went] through [Ms. Carosielli]," and Ms. Carosielli alone. Those she did not forward were not seen by the hiring manager.

8. April 30, 2009, was the date "when the original posting went up" advertising the MCCSM Position opening. At that time, Jerry Weaver was the hiring manager. Mr. Weaver was then, and still is, ADT's Southeast Region Group Director for Commercial Sales.

9. Among Mr. Weaver's "direct reports" is ADT's Southeast Area Commercial Sales Manager, to whom, in turn, the MCCSM reports.⁷

10. As of April 30, 2009, the Southeast Area Commercial Sales Manager position was vacant, and no one had yet been selected by Mr. Weaver to fill the position.

11. Mr. Weaver subsequently offered the Southeast Area Commercial Sales Manager position to an internal candidate, Kurtis Sonnenberg, who was then ADT's Director of Custom Home Services.

12. Mr. Sonnenberg assumed the job responsibilities of the Southeast Area Commercial Sales Manager on June 1, 2009 (although it was not until a month later, on July 1, 2009, that he "officially" became the Southeast Area Commercial Sales Manager⁸). Among these responsibilities was serving as the hiring manager for the open MCCSM Position. Mr. Weaver directed Mr. Sonnenberg to make the filling of this open position (which had already been advertised for two months) Mr. Sonnenberg's "first and foremost . . . priority."

13. Upon assuming his new responsibilities, Mr. Sonnenberg spoke with Ms. Carosielli and told her that he was hoping to fill the MCCSM Position with an individual who, among other things, was bilingual (English/Spanish speaking) and had experience in the electronic security systems and services industry managing a large team of sales representatives (who were "direct reports"), preferably in a "turnaround" situation.⁹ He also expressed his desire to obtain from Ms. Carosielli a "diverse group of candidates."

14. On or about June 4, 2009, Mr. Sonnenberg was approached by Andres Vidales, who was then ADT's Sales Manager for Custom Home Services in South Florida (a managerial position with 15 to 17 "direct reports"). Mr. Vidales, who is bilingual and had previously "worked for" Mr. Sonnenberg "in a couple of different management capacities, all of which were in a turnaround situation," informed Mr. Sonnenberg that he was interested in the MCCSM Position. Mr. Sonnenberg responded by telling Mr. Vidales that he "needed to go through the proper channels" and "apply online."

15. Mr. Vidales, sometime later that day (June 4, 2009), "appl[ied] online" for the MCCSM Position, as Mr. Sonnenberg had suggested he do.

16. After reviewing Mr. Vidales' application/resume and then speaking to him over the telephone, Ms. Carosielli

determined that Mr. Vidales was qualified for the MCCSM Position.¹⁰ She therefore forwarded Mr. Vidales' resume to Mr. Sonnenberg.

17. That same day (June 4, 2009), Mr. Sonnenberg interviewed Mr. Vidales (by telephone) for the MCCSM Position. During the interview, Mr. Vidales mentioned to Mr. Sonnenberg that he was pursuing other employment opportunities, in addition to the MCCSM Position.

18. Mr. Vidales was, in Mr. Sonnenberg's opinion, "an extremely qualified candidate" who possessed the attributes he was looking for.

19. Mr. Sonnenberg "wanted . . . another opinion," however, to either "validate his belief" that Mr. Vidales was the right person for the MCCSM Position or to "point out something that [Mr. Sonnenberg] may have missed." He thus asked Mr. Weaver to interview Mr. Vidales, which Mr. Weaver did (by telephone) on June 5, 2009.

20. Mr. Weaver agreed with Mr. Sonnenberg's assessment of Mr. Vidales' suitability for the MCCSM Position, and he so informed Mr. Sonnenberg.

21. The afternoon of June 5, 2009, Mr. Sonnenberg verbally offered Mr. Vidales the MCCSM Position, and Mr. Vidales accepted the offer.

22. Later that afternoon (June 5, 2009), Mr. Sonnenberg informed Ms. Carosielli of this development.

23. From that point forward (on June 5, 2009), Ms. Carosielli took no further action to recruit for the MCCSM Position: she reviewed no more applications/resumes, interviewed no more applicants, and forwarded no more resumes to Mr. Sonnenberg, the hiring manager.

24. It is Ms. Carosielli's standard practice to "leave [a job opening posting] up until someone [actually] assumes the [advertised] position." She does this in order to "have a pool of applicants" available if "anything falls through." Consistent with this practice, she did not, after learning of Mr. Vidales' acceptance of the MCCSM Position, immediately remove the online postings for the position. Instead, she waited until Mr. Vidales was actually in the position¹¹ to take them down.

25. After June 5, 2009 (the date Ms. Carosielli was informed of Mr. Vidales' acceptance of the MCCSM Position and she stopped her recruiting efforts), ADT received an additional 46 applications for the position, including Petitioner's. Of these 46 applications, 41 were submitted by men and five by women. All 46 applicants, regardless of their gender, were treated the same: their applications were not reviewed, and they were neither interviewed nor otherwise considered for the

MCCSM Position. Petitioner was treated no differently than the 41 men who, like her, applied after June 5, 2009. Her gender had nothing to do with her not getting the position. Her application was not considered simply because of when it was submitted.

26. Petitioner believed, when she applied for the MCCSM Position on June 11, 2009, that her application would be given consideration. Inasmuch as the online postings for the position were still up and she had been told that the position was open by "several people" connected with the company who had encouraged her to apply,¹² Petitioner had no reason to believe otherwise. Moreover, the automatic e-mail reply that she received at 2:32 p.m. on June 11, 2009, confirming ADT's receipt of her application, which read as follows, stated that her application was being "review[ed]":

Thank you for your interest in working at
ADT Security Services, Inc.

We have received your application for the position [of] Commercial Sales Manager and are currently reviewing your experience and qualifications. Please be advised that, due to the volume[] of applications received, we are only able to move forward with those candidates, whose skills and experience most closely reflect our requirements.

We encourage you to access and update your online profile, on a regular basis, so that we may notify you when jobs matching your skills and interests become available. To

apply to new opportunities, visit us at
www.careersatadt.com.

We thank you for your interest in ADT
Security Services, Inc. and wish you the
best of luck in your future endeavors.

Best regards,

ADT Security Services Recruitment.

In actuality, neither her application, nor any other application
for the MCCSM Position, was then being "review[ed]," but
Petitioner did not know this.

27. In mid-to-late July of 2009, Mr. Vidales received a
written "offer letter," with a specific "start date," concerning
the MCCSM Position.¹³ After learning that Mr. Vidales had been
"awarded" the position, Petitioner sent the following e-mail,
dated July 24, 2009, to the local ADT Human Resources Manager,
Ms. Maia:

I hope all is well by you. It was confirmed
that Andres Vidales is now the Miami
Commercial Sales Manager. I was wondering
why I did not receive an interview?

I feel ADT did not handle the process
correctly and I was overlooked.

I have always been a top performer during
all my years here at the company and last
year I was at 109% and that was just for
half of the year since I started in April
(218% if I was there the whole year). Not
to mention I have over 8 years with the
company (6 in Commercial Sales always above
100%). I feel my qualifications fit the
criteria for the Commercial Sales Manager
position and I should have at least received

an interview. I on the other hand was not notified about anything, not in person or by email etc.

I remember you approaching me two times to ask if Kurt [Mr. Sonnenberg] had contacted me to schedule an interview and I said that he did not. Also, you mentioned to me that he had my resume^[14] and you would also forward another copy because you would be speaking to him so he could set up an interview. After the first time you contacted me about 2-3 weeks went by and you had asked me again if Kurt contacted me and I said no and you had said that you did not know why he hadn't reached out to me yet and you would again speak to him. Quite, honestly, I feel like I was overlooked because I am a female.

Have a great day and I look forward to hearing from you.

28. Ms. Maia contacted Ms. Carosielli and told her about Petitioner's July 24, 2009, e-mail. The two of them then spoke with Petitioner on a conference call, during which Ms. Carosielli apologized to Petitioner for "overlooking" her resume and suggested that Petitioner apply for another ADT Core Commercial Sales Manager position that was then open in Kentucky.¹⁵ At the time she made this apology, Ms. Carosielli had "not researched when Petitioner [had] applied" for the MCCSM Position, and she was operating under the erroneous assumption that Petitioner's application had been submitted "prior to [Mr. Vidales'] being offered the position."

29. Ms. Maia also contacted Mr. Sonnenberg after receiving Petitioner's e-mail. She made Mr. Sonnenberg aware that Petitioner "was upset that her application had not been considered" for the MCCSM Position. When told this, Mr. Sonnenberg advised Ms. Maia that he had been "unaware that [Petitioner] had an interest in the position" inasmuch as her resume had never been forwarded to him.¹⁶ Ms. Maia then asked Mr. Sonnenberg to meet with Petitioner "to review her qualifications," which Mr. Sonnenberg agreed to do. The meeting between Mr. Sonnenberg and Petitioner took place a day or two later. At the meeting, Petitioner showed Mr. Sonnenberg her resume. This was first time that he had seen it. Mr. Sonnenberg went through Petitioner's resume with her and made suggestions as to what Petitioner could do to "position herself for the future to be able to obtain a position [in] management at ADT." He mentioned, in his discussion with Petitioner, that he did not "typically like to hire someone [for a managerial position where that person was] going to [be] manag[ing] [his or her] former peers."¹⁷ At the time of the meeting, Mr. Sonnenberg "did not know the date that [Petitioner had] applied" for the MCCSM Position.

30. By letter dated September 14, 2009, Petitioner, through her attorney, advised ADT that she "intended to file a claim for employment discrimination with the Equal Employment

Opportunity Commission and the Florida Commission on Human Relation about compensation to her for [Respondent's] unlawful employment practices" in connection with her having been "passed over for the position of Core Commercial Sales Manager." The concluding paragraph of letter read as follows:

Ms. Sole has been a dedicated ADT employee for many years, and continues to be one of ADT's top performers. She is qualified for the position she sought, and is significantly more qualified than the male employee who was given the job. For Ms. Sole to be passed over for an employment position simply because she is a woman is both unlawful and unconscionable, and these events have been deeply upsetting to her. Ms. Sole's multiple written claims to ADT Human Resources of employment discrimination have shockingly gone uninvestigated and unanswered. At this juncture, Ms. Sole has authorized this firm to negotiate a pre-suit resolution of her claims so that restitution may be made to her. I invite you or ADT's legal representative to contact me within ten (10) days of your receipt of this letter, absent which Ms. Sole will conclude that you have no interest in attempting any amicable resolution and will proceed with filing a charge of gender discrimination.

31. Petitioner's attorney and Respondent's attorney subsequently exchanged correspondence, but there was no "amicable resolution." The instant litigation ensued.

CONCLUSIONS OF LAW

32. The Florida Civil Rights Act of 1992 (Act) is codified in Sections 760.01 through 760.11, Florida Statutes, and Section 509.092, Florida Statutes.

33. "The Act, as amended, was [generally] patterned after Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000, et seq., as well as the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 623. Federal case law interpreting [provisions of] Title VII and the ADEA is [therefore] applicable to cases [involving counterpart provisions of] the Florida Act." Florida State University v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); see also Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000) ("The [Act's] stated purpose and statutory construction directive are modeled after Title VII of the Civil Rights Act of 1964."); Valenzuela v. GlobeGround North America, LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009) ("Because the FCRA is patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-2000e-17, we look to federal case law."); City of Hollywood v. Hogan, 986 So. 2d 634, 641 (Fla. 4th DCA 2008) ("Federal case law interpreting Title VII and the ADEA applies to cases arising under the [Act]."); and School Board of Leon County v. Hargis, 400 So. 2d 103, 108 n.2 (Fla. 1st DCA 1981) ("Florida's job discrimination statute is patterned on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.").

34. Among other things, the Act makes certain acts "unlawful employment practices" and gives the FCHR the authority, if it finds following an administrative hearing

conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, that such an "unlawful employment practice" has occurred, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay."¹⁸ §§ 760.10 and 760.11(6), Fla. Stat.

35. To obtain such relief from the FCHR, a person who claims to have been the victim of an "unlawful employment practice" must, "within 365 days of the alleged violation," file a complaint ("contain[ing] a short and plain statement of the facts describing the violation and the relief sought") with the FCHR, the EEOC, or "any unit of government of the state which is a fair-employment-practice agency under 29 C.F.R. ss. 1601.70-1601.80." § 760.11(1), Fla. Stat. This 365-day period within which a complaint must be filed is a "limitations period" that can be "be equitably tolled, but . . . only [based on the] acts or circumstances . . . enumerated in section 95.051," Florida Statutes. Greene v. Seminole Electric Co-op., Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997).

36. "[T]o prevent circumvention of the [FCHR's] investigatory and conciliatory role, only those claims that are fairly encompassed within a [timely-filed complaint] can be the subject of [an administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes]" and any

subsequent FCHR award of relief to the complainant. Chambers v. American Trans Air, Inc., 17 F.3d 998, 1003 (7th Cir. 1994).

37. In the instant case, Petitioner alleged in the employment discrimination complaint that she filed with the FCHR on December 1, 2009, that ADT "discriminated against [her] on the basis of [her] gender" when it failed to select her to fill the Core Commercial Sales Manager position for which she had applied (as an internal candidate seeking a promotion).

38. To deny an employee a promotion because of the employee's gender, as Petitioner claims ADT has done in the instant case, is an "unlawful employment practice" in violation of Section 760.10(1)(a), which provides as follows:

It is an unlawful employment practice for an employer:[¹⁹]

(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.

39. Petitioner had the burden of proving, at the administrative hearing held in this case, that she was the victim of such discriminatorily motivated action. 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."); Florida Department of Health and Rehabilitative Services v. Career Service Commission, 289 So. 2d 412, 414 (Fla. 4th DCA 1974) ("[T]he burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'"); and Mack v. County of Cook, 827 F. Supp. 1381, 1385 (N.D. Ill. 1993) ("To prevail on a racially-based discriminatory discharge claim under Title VII, Mack must prove that she was a victim of intentional discrimination.").

40. "Discriminatory 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 (1983) ("As in any lawsuit, the plaintiff [in a Title VII action] may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves.").

41. "Direct evidence is evidence that, if believed, would prove the existence of discriminatory 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) ("Direct evidence is 'evidence, that, if believed, proves [the] existence

of [a] fact without inference or presumption.'"). "If the [complainant] offers direct evidence and the trier of fact accepts that evidence, then the [complainant] has proven discrimination." Maynard v. Board of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

42. "[D]irect evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate [or retaliate]' on the basis of some impermissible factor. . . . If an alleged statement at best merely suggests a discriminatory motive, then it is by definition only circumstantial evidence." Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Likewise, a statement "that is subject to more than one interpretation . . . does not constitute direct evidence." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).

43. "[D]irect 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).

44. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the "shifting burden framework established by the [United States] Supreme

Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973) and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981)" is applied. "Under this framework, the [complainant] has the initial burden of establishing a prima facie case of discrimination. If [the complainant] meets that burden, then an inference arises that the challenged action was motivated by a discriminatory intent. The burden then shifts to the employer to 'articulate' a legitimate, non-discriminatory reason for its action.^[20] If the employer successfully articulates such a reason, then the burden shifts back to the [complainant] to show that the proffered reason is really pretext for unlawful discrimination." Schoenfeld v. Babbitt, 168 F.3d at 1267 (citations omitted.).

45. "To establish a prima facie case of gender discrimination based on a failure to promote, [a complainant] must demonstrate (1) she is a member of a protected class; (2) she was qualified and applied for a promotion to an available position; (3) she was rejected; and (4) a similarly situated employee, not part of the protected group, was promoted instead." Ottman v. City of Independence, 341 F.3d 751, 756-757 (8th Cir. 2003). Absent a showing that the promotional position sought was available at the time of the complainant's application, the complainant cannot even establish a prima facie

case of discrimination. See Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination."); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 n.44 (1977) ("Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one."); Guimaraes v. NORS, 366 Fed. Appx. 51, 55 (11th Cir. Fla. 2010) (same); Morgan v. Federal Home Loan Mortgage Corp., 328 F.3d 647, 652 (D.C. Cir. 2003) ("Having thus failed to raise a genuine issue that the Business Support position for which he applied was one 'for which the employer was seeking applicants,' . . . Morgan failed to establish a prima facie case of either discrimination or retaliation, and summary judgment on this claim was therefore appropriate."); Pierce v. F.R. Tripler & Co., 955 F.2d 820, 824

(2d Cir. 1992) ("Hartmarx claims that in order to be held liable for age discrimination for failing to promote Pierce to General Manager, that position must have been available at the time Pierce applied for it. This unremarkable proposition is clearly correct."); and Pledger v. Mayview Convalescent Home, Inc., No. 5:07-CV-235-F, 2009 U.S. Dist. LEXIS 33198 **35-36 (E.D. N.C. April 14, 2009), aff'd, 374 Fed. Appx. 431 (4th Cir. 2010) ("Pledger also claims that she applied for the position of Assistant Director of Nursing but was not promoted. She is unable, however, to show a prima facie case of discrimination with respect to this position: the undisputed evidence is that this position was filled on April 24, 2006, and that Pledger did not apply for this position until May.").

46. Under no circumstances is proof that, in essence, amounts to no more than mere speculation and self-serving belief on the part of the complainant concerning the motives of the employer sufficient, standing alone, to establish a prima facie case of intentional discrimination. See Byers v. Dallas Morning News, Inc., 209 F.3d 419, 427 (5th Cir. 2000) ("Byers has failed to produce any direct evidence of discriminatory intent by Brown or TDMN or sufficient evidence indirectly demonstrating discriminatory intent. Instead, Byers urges this Court to rely on his subjective belief that Brown discriminated against him because he was white. This Court will not do so."); Mitchell v.

Toledo Hospital, 964 F.2d 577, 585 (6th Cir. 1992) ("Even if the Court were to consider the Affidavit, the statements contained therein are nothing more than rumors, conclusory allegations and subjective beliefs which are wholly insufficient evidence to establish a claim of discrimination as a matter of law."); Little v. Republic Refining Co., Ltd., 924 F.2d 93, 96 (5th Cir. 1991) ("Little points to his own subjective belief that age motivated Boyd. An age discrimination plaintiff's own good faith belief that his age motivated his employer's action is of little value."); Elliott v. Group Medical & Surgical Service, 714 F.2d 556, 567 (5th Cir. 1983) ("We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief."); and Shiflett v. GE Fanuc Automation, 960 F. Supp. 1022, 1031 (W.D. Va. 1997) ("[A]ll too many leaps and unjustifiable inferences must be made before one can reasonably conclude that any causal connection exists between plaintiff's termination and his disability. Nothing in the record, apart from plaintiff's private speculation, provides any reason to believe there is such a connection. But '[m]ere unsupported speculation, such as this, is not enough to defeat a summary judgment motion.'").

47. "Although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the

[complainant] remains at all times with the [complainant]."
EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir.
2002); see also Byrd v. BT Foods, Inc., 948 So. 2d 921, 927
(Fla. 4th DCA 2007) ("The ultimate burden of proving intentional
discrimination against the plaintiff remains with the plaintiff
at all times."); and Brand v. Florida Power Corp., 633 So. 2d
504, 507 (Fla. 1st DCA 1994) ("Whether or not the defendant
satisfies its burden of production showing legitimate,
nondiscriminatory reasons for the action taken is immaterial
insofar as the ultimate burden of persuasion is concerned, which
remains with the plaintiff.").

48. Where the administrative law judge does not halt the
proceedings "for lack of a prima facie case and the action has
been fully tried, it is no longer relevant whether the
[complainant] actually established a prima facie case. At that
point, the only relevant inquiry is the ultimate, factual issue
of intentional discrimination. . . . [W]hether or not [the
complainant] actually established a prima facie case is relevant
only in the sense that a prima facie case constitutes some
circumstantial evidence of intentional discrimination." Green
v. School Board of Hillsborough County, 25 F.3d 974, 978 (11th
Cir. 1994) (citation omitted); see also Aikens, 460 U.S. at 713-
715 ("Because this case was fully tried on the merits, it is
surprising to find the parties and the Court of Appeals still

addressing the question whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non. . . . [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection [as a candidate for promotion], the factfinder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.' After Aikens presented his evidence to the District Court in this case, the Postal Service's witnesses testified that he was not promoted because he had turned down several lateral transfers that would have broadened his Postal Service experience. The District Court was then in a position to decide the ultimate factual issue in the case. . . . Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence it needs to decide whether 'the defendant intentionally discriminated against the plaintiff.'" (citation omitted); Wallace v. Louisiana Board of Supervisors for the Louisiana State

University Agricultural & Mechanical College, 364 Fed. Appx. 902 (5th Cir. 2010) ("Because this case was tried on the merits, we are not concerned with the adequacy of the parties' showing under McDonnell Douglas and instead review the district court's finding on the ultimate factual issue of discrimination vel non for clear error."); Beaver v. Rayonier, Inc., 200 F.3d 723, 727 (11th Cir. 1999) ("As an initial matter, Rayonier argues it is entitled to judgment as a matter of law because Beaver failed to establish a prima facie case. That argument, however, comes too late. Because Rayonier failed to persuade the district court to dismiss the action for lack of a prima facie case and proceeded to put on evidence of a non-discriminatory reason--i.e., an economically induced RIF--for terminating Beaver, Rayonier's attempt to persuade us to revisit whether Beaver established a prima facie case is foreclosed by binding precedent."); and Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1129 (11th Cir. 1984) ("The plaintiff has framed his attack on the trial court's findings largely in terms of whether the plaintiff made out a prima facie case of discrimination. We are mindful, however, of the Supreme Court's admonition that when a disparate treatment case is fully tried, as this one was, both the trial and the appellate courts should proceed directly to the 'ultimate question' in the case: 'whether the defendant intentionally discriminated against the plaintiff.'").

49. The instant case was "fully tried," with Petitioner and ADT having both presented evidence.

50. A review of the evidentiary record reveals no persuasive proof of prohibited intentional gender discrimination on Respondent's part in its handling of Petitioner's application for the MCCSM Position. Indeed, although not required to do so, ADT affirmatively established through its evidentiary presentation (which included the credible testimony of individuals directly involved in the recruiting and hiring process) that the lack of consideration Petitioner's application received was solely the product of when (not by whom) it was filed, and her gender played no role whatsoever in her not being selected to fill the position.

51. In light of the foregoing, Petitioner's employment discrimination complaint must be dismissed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding ADT not guilty of the unlawful employment practice alleged by Petitioner and dismissing Petitioner's employment discrimination complaint.

DONE AND ENTERED this 27th day of October, 2010, in
Tallahassee, Leon County, Florida.



STUART M. LERNER
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of October, 2010.

ENDNOTES

¹ All references to Florida Statutes in this Recommended Order are to Florida Statutes (2010).

² Prior to October 2004, Petitioner had worked out of ADT's Totowa, New Jersey office.

³ As a Core Commercial Sales Representative, Petitioner had been a "team leader," but she never had had any "direct reports."

⁴ In their Joint Pre-Hearing Stipulation, the parties stipulated that "[Petitioner] became the Broward County Residential/Small Business Resale Manager on or about Sept 26, 2009."

⁵ The MCCSM Position is one of seven ADT Core Commercial Sales Manager positions located in Florida (all of which currently have male occupants).

⁶ If a particular situation dictates, ADT will be "flexible in terms of selection criteria" and hire an individual not meeting all of the "[r]equirements" listed in this "[j]ob [d]escription."

⁷ The six other Commercial Sales Managers in Florida also report to the Southeast Area Commercial Sales Manager.

⁸ From June 1, 2009, to July 1, 2009, Mr. Sonnenberg was "transitioning out" of his position as the Director of Custom Home Services.

⁹ At the time, the commercial sales team in ADT's Miami office, as a group, was "performing below . . . standards."

¹⁰ Although Mr. Vidales did not yet have a "College Degree in Business, Marketing or other related field," he was "very close" to earning a bachelor's degree in finance from Florida International University. (It was only six months later that he was awarded such a degree.)

¹¹ Mr. Vidales did not "assume" the MCCSM Position until sometime in "late August," following extended "negotiat[ions]" with Tim McKinney, the supervisor to whom Mr. Vidales reported in his capacity as the Sales Manager for Custom Home Services in South Florida. Mr. McKinney initially was "not willing to release" Mr. Vidales, but subsequently relented after Mr. Vidales filed a complaint with ADT's local Human Resources office.

¹² These "several people" were Daniel Bruison, Mario Santana, Aaron Solomon, and Theresa Maia. Apparently, all of them, including Ms. Maia, the local ADT Human Resources Manager, had been unaware, at the time they had spoken with Petitioner, that Mr. Vidales had already accepted the position and that, as a result, the application review process had come to a halt.

¹³ Mr. Vidales did not receive a formal "offer letter" sooner because his "start date" was being "negotiated" and had not been finalized. (ADT does not send out "offer letters" before a "start date" is determined.)

¹⁴ In fact, at no time prior to this e-mail had Mr. Sonnenberg been in possession of Petitioner's resume.

¹⁵ Petitioner did not want to move to Kentucky, so she did not apply for this position.

¹⁶ He was being truthful in making this assertion.

¹⁷ Mr. Sonnenberg has deviated from this practice in the past, on occasion, when circumstances have warranted.

¹⁸ The FCHR, however, has no authority to award monetary relief for non-quantifiable damages. See City of Miami v. Wellman, 976 So. 2d 22, 27 (Fla. 3d DCA 2008) ("[N]on-quantifiable damages . . . are uniquely within the jurisdiction of the courts."); and Simmons v. Inverness Inn, No. 93-2349, 1993 Fla. Div. Adm. Hear. LEXIS 5716 *4-5 (Fla. DOAH October 27, 1993) (Recommended Order) ("In this case, petitioner does not claim that she suffered quantifiable damages, that is, damages arising from being terminated from employment, or from being denied a promotion or higher compensation because of her race. Rather, through argument of counsel she contends that she suffered pain, embarrassment, humiliation, and the like (non-quantifiable damages) because of racial slurs and epithets made by respondents. Assuming such conduct occurred, however, it is well-settled in Florida law that an administrative agency (as opposed to a court) has no authority to award money damages. See, e. g., Southern Bell Telephone & Telegraph Co. v. Mobile America Corporation, Inc., 291 So. 2d 199 (Fla. 1974); State, Dept. of General Services v. Biltmore Construction Co., 413 So. 2d 803 (Fla. 1st DCA 1982); Laborers International Union of N.A., Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989). This being so, it is concluded that the Commission cannot grant the requested relief, compensatory damages.").

¹⁹ An "employer," as that term is used in the Act, is defined in Section 760.02(7), Florida Statutes, as "any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person."

²⁰ "To 'articulate' does not mean 'to express in argument.'" Rodriguez v. General Motors Corporation, 904 F.2d 531, 533 (9th Cir. 1990). "It means to produce evidence." Id.; see also Mont-Ros v. City of West Miami, 111 F. Supp. 2d 1338, 1349 (S.D. Fla. 2000) ("This burden is merely one of production, not persuasion, and is exceedingly light.").

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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.