

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WESTERN ULYSSE,)
)
 Petitioner,)
)
 vs.) Case No. 12-0116
)
 STEAK N SHAKE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on July 27, 2012, in Orlando, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

For Petitioner: Jerry Girley, Esquire
The Girley Law Firm, P.A.
125 East Marks Street
Orlando, Florida 32803

For Respondent: Heather J. Casagrande, Esquire
Ogletree, Deakins, Nash,
Smoak and Stewart, P.C.
Suite 3600
100 North Tampa Street
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Steak N Shake, discriminated against Petitioner, Western Ulysse, on the basis of

his national origin (Haitian), or race (black), in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

Petitioner filed an employment complaint with the Florida Commission on Human Relations dated June 23, 2011. Upon review and consideration of the complaint, the Commission entered a Notice of Determination: No Cause, dated December 15, 2011. Petitioner then filed a Petition for Relief, seeking a de novo formal administrative hearing to contest the finding of No Cause. The Petition was forwarded to the Division of Administrative Hearings (DOAH) on January 10, 2012, and assigned to the undersigned Administrative Law Judge. On July 26, 2012, Respondent filed a Motion for Summary Final Order; the motion was denied on the bases of timeliness and lack of jurisdiction.

A final hearing was held on July 27, 2012, in Orlando, Florida. Petitioner testified on his own behalf and did not offer any exhibits into evidence. Respondent called one witness, Judith Freeman, and introduced the video-taped deposition of one other witness, Lori Briel. Respondent's Exhibits 6, 7, 9, 11, 12, 14, 25, 28 through 30, and rebuttal Exhibit 1 were admitted into evidence. A copy of the video-taped deposition was also made part of the record.

Petitioner objected to the presentation of Ms. Briel's deposition in lieu of attendance at final hearing. Petitioner

argued that there are only limited exceptions in Florida Rules of Civil Procedure 1.330. One of those exceptions, however, is that "the party offering the deposition has been unable to procure the attendance of the witness by subpoena." Fla. R. Civ. P. 1.330(a)(3)(D). Ms. Briel, who purportedly had started a new job just days prior to the final hearing, was subpoenaed by Respondent, but did not appear at final hearing. Thus, it was appropriate to use the deposition transcript in lieu of live testimony. Further, under Florida Administrative Code Rule 28-106.211, the Administrative Law Judge may take whatever action necessary to promote the just, speedy, and inexpensive determination of all aspects of the case. Petitioner was represented by counsel at the deposition of Ms. Briel, thereby alleviating any prejudice which might inure from using her deposition. It is ordered that use of the deposition is consistent with the rules, would promote the just and speedy determination of facts, and is proper in all respects.

At the conclusion of the final hearing, the parties advised that a copy of the transcript would be ordered. By rule, the parties were allowed ten days from the filing of the transcript at DOAH to file their proposed recommended orders (PROs). The Transcript was filed at DOAH on August 3, 2012. Respondent timely filed a PRO, and it was considered in the preparation of this Recommended Order. Petitioner did not file a PRO until

August 20, 2012, some three weeks after it was due. Respondent did not file an objection to Petitioner's late-filed PRO, so both parties' PROs were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a black man, born in Haiti. He was hired by Steak N Shake on April 26, 1998, as a production worker and cook. He was later promoted to a manager position at Store No. 281 in Lake Buena Vista. He worked at that store for about eight years and then transferred to Store No. 280 on West Colonial Drive in Orlando (the "Store") on an unspecified date. The general manager at the Store was Judith Freeman, a white female. There was one other manager at the store, Ilia Velez, a Hispanic woman.^{1/}

2. Petitioner's duties as manager at the Store included providing good service to customers, maintaining an appropriate number of employees each day, ordering food and other supplies for the Store, and ensuring cleanliness and orderliness at the Store. It was also the duty of managers to make bank deposits of daily receipts. Petitioner did not have an exact time for starting work each day, but said he normally started at about noon for the "day shift."

3. Each and every day, managers at the Store would complete a Daily Cash to Account for Form (the "TAF Form"), reflecting the

amount of money collected on each of the three daily shifts. The first shift was late night/early morning; the second shift was the day shift; and the third shift was evening. As day-shift manager, Petitioner would sign the TAF Form for receipts from the night shift. It was then incumbent upon him to deposit the collected monies at the bank. A TAF Form was to be signed by two individuals, one of whom (generally a manager) would indicate by his/her signature that they would be responsible for depositing the receipts.

4. According to Steak N Shake policy, deposits had to be made at the bank by a manager "and one other Steak N Shake employee. NO ONE GOES TO THE BANK ALONE." That policy was in place at the Store when Petitioner served as manager. However, it was common practice at the Store for Petitioner or another manager to go to the bank alone. Petitioner knew the policy and knew that his employment could be terminated for violating the policy. He explained that sometimes on first shift there were only two people at the store in the morning, so he had to go to the bank alone. Steak N Shake policies allow for a police officer to substitute as one of the two required persons. Further, an employee who cannot comply with the policy is supposed to contact the district manager as soon as possible. Nonetheless, the policy was routinely ignored by managers at the Store during the 2011 time-frame.

5. It was also policy for the bank deposit to be made before 11:00 a.m. for the previous night's receipts. Petitioner did not explain how he complied with that requirement when he normally arrived at work at noon. He apparently worked earlier shifts some days and day shifts other days, but there is insufficient evidence in the record to substantiate that presumption.

6. On May 24, 2011, however, Petitioner testified that he arrived at work around 7:00 a.m. At approximately 10:41 a.m., Petitioner signed the TAF Form from the previous day, indicating a deposit amount of \$770.47 (the "Deposit"). Petitioner signed the TAF Form on the line of the form designated "Witnessed By" when, in fact, he, as manager, should have signed on the line designated "Deposited By." On this particular form, it appears the manager and the other employee signed on the wrong lines. Regardless of that scrivener's error, Petitioner became responsible for taking the Deposit to the bank once he signed the TAF Form.

7. Petitioner said there were only two people working that morning, but the work schedule for the Store indicates at least five other persons were on the schedule for that morning. None of the workers was called to testify at final hearing, but the general manager, Ms. Freeman, said she believed they were all working that day. Ms. Freeman was also scheduled to work that

day, but was taking part in management training outside the store.

8. Petitioner did not notify the district manager that he could not comply with the banking policy.

9. The Deposit was never received by the bank. Petitioner said at final hearing that he did not go to the bank with the Deposit, even though he had signed for it. He believes he sent another manager with the Deposit because it was very busy that morning, and there were not enough employees available to handle the work. His testimony in that regard is not persuasive, because the bank deposit slip for May 24, 2011, was signed by Petitioner.

10. On June 9, 2011, the general manager, Ms. Briel, was told that the Deposit had never been made at the bank. She contacted the Store's general manager, Ms. Freeman, and asked her to investigate. Ms. Freeman did so, but could not locate the missing money. The bank also tried, but failed to locate the missing money.

11. Ms. Freeman then contacted Petitioner to let him know the Deposit he had signed for was missing. Petitioner was given the opportunity to replace the missing money from his own funds to prevent termination of his employment, but said he did not have sufficient money in his account to do so. After completing her investigation, Ms. Freeman met Ms. Briel at a site away from

the Store and disclosed her findings. Per protocol, the police were called to investigate the missing funds. No arrest was ever made, however.

12. Ms. Briel considered Ms. Freeman's findings, consulted with the division president, the human resources department, and legal counsel and decided to terminate Petitioner's employment with Steak N Shake. Ms. Briel also issued counseling statements to Ms. Freeman and Ms. Velez relating to their failure to strictly adhere to the banking policies. Ultimately, Ms. Freeman was demoted to restaurant manager and transferred to another store due, in large part, to the violation of company policies relating to bank deposits.

13. Petitioner had been counseled several times for shortcomings, but none of the violations were related to banking policies. Nonetheless, Petitioner was made aware that further disciplinary action against him for any issue may result in the termination of his employment.

14. Petitioner feels he was treated differently than Ms. Velez, who he maintains also lost a deposit. However, Ms. Velez's deposit was ultimately accounted for by the bank, which had made a mistake. Petitioner's deposit was never accounted for by the bank or by anyone else. Ms. Velez's employment with Steak N Shake was ultimately terminated for "performance issues."

15. Other managers have lost deposits and/or stolen money from Steak N Shake. In every instance, the offending manager's employment was terminated. There is zero tolerance at Steak N Shake for misappropriation of money.

16. Petitioner cannot recite any incident of discrimination against him by Steak N Shake on the basis of his race or national origin. Petitioner did not ever avail himself of the procedures for issuing a complaint based on discrimination while he was employed at Steak N Shake.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over this matter pursuant to section 120.57 and 120.569, Florida Statutes.^{2/}

18. Petitioner claims discrimination under the Florida Civil Rights Act, sections 760.01 through 760.11, Florida Statutes. Section 760.10(1) states that it is unlawful for an employer to discharge or otherwise discriminate against an employee on the basis of, inter alia, his or her place of national origin or race.

19. Petitioner has the burden of proving by a preponderance of the evidence that Steak N Shake committed an unlawful employment practice. Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Petitioner is claiming

intentional discrimination by Steak N Shake, an unlawful employment practice.

20. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

21. "'Direct evidence' is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." Schoenfeld v. Babbitt, supra. There is no direct evidence of discrimination in this case.

22. Absent direct evidence, a person who claims to be a victim of intentional discrimination may "establish their case through inferential and circumstantial evidence." Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997). When attempting to prove a case through circumstantial evidence, the shifting burden analysis set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973), should be applied. Under this analysis, the charging party bears the initial burden of establishing a prima facie case of discrimination. If proven, then the burden would shift to the employer to articulate a legitimate, non-discriminatory

explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991). The employer has a burden of production, not persuasion, and need only present evidence that the decision was non-discriminatory. Id.

23. It is up to the employee to then present evidence to demonstrate that the reasons given by the employer for its actions are a pretext for discrimination. Schoenfeld v. Babbitt, supra, at 1267. The employee must directly show that a discriminatory reason more likely than not motivated the decision or, in the alternative, show that the proffered reason for the employment decision is not worthy of belief. Dep't of Corr. v. Chandler, supra, at 1186; Alexander v. Fulton Cnty., 207 F.3d 1303 (11th Cir. 2000).

24. This shifting burden of proof and production does not change the fact that the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains with the employee. EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002).

25. In order for Petitioner in this action to establish his prima facie case, he must show that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he was subjected to an adverse employment action; and (4) his employer treated similarly-situated employees, outside of his protected class, more favorably than he was treated. See

McDonnell, supra; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2204); Maynard v. Bd. of Regents of the Div. of Univs. of the Fla. Dep't of Educ., 342 F.3d 1281 (11th Cir. 2003); Dep't of Child. and Fams. v. Garcia, 911 So. 2d 171 (Fla. 3d DCA 2005).

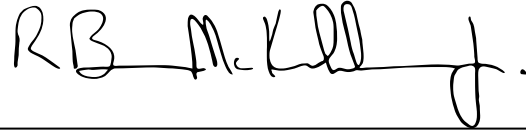
26. Clearly Petitioner in the instant action is a member of a protected class, specifically his Haitian national origin and his race, which he described as "black." He was also qualified for his position, having served several years as a store manager. The adverse employment action taken by the employer was discharge of Petitioner from his position. However, there is no showing, whatsoever, that Steak N Shake treated similarly-situated employees outside Petitioner's protected class more favorably than he was treated.

27. There is no evidence of discrimination in this case. The termination of Petitioner's employment by Respondent was based on Petitioner's loss of Steak N Shake revenues for which he was responsible.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Florida Commission on Human Relations denying Western Ulysse's Petition for Relief.

DONE AND ENTERED this 28th day of August, 2012, in
Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
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 28th day of August, 2012.

ENDNOTES

^{1/} There is a hierarchy of management at Steak N Shake. A "manager" is the lowest level of management, followed by a restaurant manager, a general manager, and then a district manager.

^{2/} Unless specifically stated otherwise herein, all references to the Florida Statutes will be to the 2012 version.

COPIES FURNISHED:

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

Lawrence F. Kranert, Jr., General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Jerry Girley, Esquire
The Girley Law Firm, P.A.
125 East Marks Street
Orlando, Florida 32803

Heather J. Casagrande, Esquire
Ogletree, Deakins, Nash,
Smoak and Stewart, P.C.
Suite 3600
100 North Tampa Street
Tampa, Florida 33602

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.