

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEU FREYCINET,)
)
Petitioner,)
)
vs.) Case No. 12-0413
)
St. JOHNS RIVER WATER)
MANAGEMENT DISTRICT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 20, 2012, a duly-noticed hearing was held in Ocala, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Brandon Lamour Freycinet
Qualified Representative
254-10 Northern Boulevard, Suite 204
Little Neck, New York 11362

For Respondent: Michael Harrison Bowling, Esquire
Bell and Roper, P.A.
2707 East Jefferson Street
Orlando, Florida 32803

STATEMENT OF THE ISSUE

The issue is whether the Respondent committed an unlawful employment practice under section 760.10, Florida Statutes (2011), by discriminating against Petitioner on the basis of

race, color, sex, or national origin, and if so, what remedy should be ordered.

PRELIMINARY STATEMENT

On June 23, 2011, Petitioner filed a complaint with the Florida Human Relations Commission (Commission), alleging that St. Johns River Water Management District had discriminated against him based upon his race, color, sex and national origin. On December 16, 2011, the Commission issued a Notice of Determination of No Cause, and on January 19, 2012, Petitioner filed a Petition for Relief. On January 26, 2012, the matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was noticed for hearing on April 20, 2012, in Palatka, Florida. Petitioner testified and offered four exhibits, which were admitted without objection. Respondent presented the testimony of five witnesses and offered 17 exhibits, which were admitted without objection. The Transcript of the proceedings was filed with the Division on May 24, 2012. Respondent filed a Proposed Recommended Order on June 5, 2012, which was considered.

FINDINGS OF FACT

1. St. Johns River Water Management District (District) is a regional agency of the State of Florida responsible for

managing water resources. The District employs about 600 employees.

2. Mr. Leu Freycinet is a 46-year-old black African-American male of Haitian descent. He served in the United States Marine Corps for over ten years, where he served as a systems analyst, personnel administration chief, and a legal chief. He was engaged in combat in Somalia. While in the Corps, he received his bachelor's degree in Management in 1998 and his master's degree in Education in 2001. Mr. Freycinet separated from the Marine Corps in 2001 with an 80 percent disability due to various injuries.

3. Moving to Florida from California, he became an Adjunct Instructor teaching business administration systems, torts, and database systems at the City College of Casselberry.

4. Mr. Freycinet was hired in January 2002, as a Data Management Supervisor in the Permit Data Services (PDS) Division of the St. Johns River Water Management District. At this time PDS had its main Service Center at the District's headquarters in Palatka, Florida, and three remote Service Centers located in Altamonte Springs, Jacksonville, and Palm Bay.

5. Mr. Freycinet was placed in charge of the satellite office in Altamonte Springs, at pay grade 22. He directly supervised four or five Data Management Specialists. He was responsible for noticing, permit processing, compliance, and

maintaining system integrity. He was responsible for every facet of data management and the permitting process except for individual permits for large entities, which were issued from the District headquarters.

6. In 2006, Mr. Freycinet received a written reprimand for an incident involving his management of his subordinates in Altamonte Springs. Mr. Freycinet never signed the reprimand and did not agree with the reprimand.

7. In his Annual Performance Evaluation for the period of February 3, 2006, to February 2, 2007, Mr. Freycinet's overall performance was listed as "Rating 2, Generally Meets Performance Standards." This is the middle of the three possible ratings, between "Rating 3, Exceeds Performance Standards" and "Rating 1, Generally Does Not Meet Performance Standards." This rating reflected high achievement in some elements such as "Customer Service" and "Quality and Technical Oversight" while showing shortcomings in some elements involving communication and management. The following comments were made under the "Communications" element: "Improvements are still needed in communications with direct reports. There were some communication issues this past period resulting in the distress of PDS staff in Altamonte service center. I look forward to achieving a better line of communication between Leu and direct reports in the upcoming period. I also look forward to Leu's

adherence to instruction provided by Division Director." Under the "Work Flow Management" element, it was noted, "Leu and his team have done well in meeting load requirements for the group; however, unresolved personality conflicts and leadership issues need to be addressed. His group continues to provide excellent customer service through the use of senior volunteers in the PDS area." Under the "Personnel Management" element, it was noted, "I look forward to improved communication with direct reports to ensure timely and professional discussions of issues before they are out-of-hand."

8. Mr. Freycinet's performance evaluation for the period February 2, 2007, through February 1, 2008, was similar. He again received an overall evaluation of "Rating 2, Generally Meets Performance Standards." A comment in the "Communications" element stated, "Leu is very articulate and possesses positive communication skills, both written and verbal. As outlined in last year's review, Leu should continue improvements in using his communications skills and judgment when dealing with other staff and upper management. Additionally, Leu can enhance his performance within the division through better adherence to instructions provided by management." Under the "Personnel Management" element, it was noted, "Leu generally meets expectations mentoring and developing staff. He has identified and supported training goals for his staff. Leu could improve

in this area through a more consistent application of these skills for all staff equally. In the future greater emphasis will be placed on a formalized staff training and development plan." A comment under the "Exceptional Development Criteria" element stated, "Leu generally meets our expectations. He takes initiative to improve existing processes while fostering an enthusiastic customer service climate in the Altamonte Service Center. His staff consistently performs at a high level and meets established timeframes. While Leu's initiative is appreciated, his excessive exuberance sometimes causes him to exceed his span of control thus impacting consistent performance within the division."

9. On September 28, 2007, the name of the Permit Data Services Division was changed to the Regulatory Information Management Division.

10. In January 2008, the District eliminated the Data Management Supervisor position at the Altamonte Springs service center. Mr. Freycinet chose to take a lateral move, into a position that was also pay grade 22, to become a Senior Regulatory Information Management (RIM) Specialist at District headquarters in Palatka rather than leave employment with the District. In this new position he was a team leader of three or four team members, but was no longer in a supervisory position. As a Senior RIM Specialist he primarily worked in electronic

mail, processing, and compliance. He worked on both Consumptive Use Permits and Environmental Resource Permits.

11. On February 1, 2008, Mr. Freycinet received a merit increase in his pay in his position as Senior RIM Specialist, remaining a pay grade 22.

12. In 2008, Mr. Freycinet applied for the Processing and Compliance Support Manager's position. He was not given the job. Ms. Robin Hudson, the Human Resources Director for Respondent, testified that she remembered that a comment had been made that Mr. Freycinet's past work history as a supervisor was deficient in some respects.

13. In 2010, Mr. Freycinet applied for a position as RIM Manager, but that job was given to Ms. Maggie Daniels. A few months later, Mr. Freycinet also applied for the District Clerk position, which he believed was either pay grade 25 or 27. This was a job similar to the Regulatory Support positions, but at the District level, maintaining data and files. Mr. Freycinet was not chosen for the Clerk position.

14. Mr. Freycinet was a good employee for the District who performed satisfactorily and met expectations. He had good education credentials, long experience at the District, excellent technical knowledge, and supervisory experience, although not all of it positive.

15. Mr. Mike Register is the Director of the Department of Regulatory Services, which is responsible for all of the regulatory programs of the District, including consumptive use permits, environmental resource permits, and the administrative processing of those permits. He is responsible for the Division of Regulatory Information Management,^{1/} among others.

16. Mr. Register was concerned that the RIM Division was not functioning well. He believed there was a lack of confidence in the Division's work product both inside and outside of the District. He believed that an "adversarial" attitude had developed between the Division and the regulatory staff of the District. He believed there was a lot of inefficiency, a lack of outreach, and an unhelpful attitude in the Division. He wanted to increase the number of applications for permits that were filed electronically, because electronic processing is much more efficient.

17. Mr. Register decided that organizational changes were necessary to address these concerns, and he tasked Mr. Victor Castro, the new Director of the RIM Division, to come up with a plan to do this.

18. In response, Mr. Castro talked generally with the Division employees to find out what each of them did, and how that work matched up with what the Division needed to be doing. He talked with Ms. Daniels, who by this time had been promoted

to Assistant Director of the Division, and with other divisions to understand the needs that they had. He then came up with a new organizational chart that contained positions and descriptions for the work that needed to be done, without consideration of any particular individuals.

19. Mr. Castro next worked with the Human Resources Department, which helped him determine what level the new positions should be and conducted a market analysis for the appropriate pay grade for each position. The pay grades for each position in the new structure were recommendations from Human Resources. The recommended structure was then presented to Mr. Register.

20. Subsequently, Mr. Castro considered which people currently employed in the RIM Division would be best suited for each position within the new structure, beginning with the manager positions, and returned to Mr. Register with that staffing plan. The plan did not include any new people from outside the Division, and did not include the termination of any individuals working at the Division. However, under the reorganization plan, some people would be promoted, and others would be demoted. Some changes involved only pay grade changes, adjusting the applicable pay range and the maximum pay ceiling, while other changes actually increased or reduced the current salaries of those involved.

21. Mr. Castro did not interview the Division employees for specific positions in the new structure before preparing the new staffing plan. He based the staffing plan on his general experience during the short time he had been Division Director and his discussions with Mr. Register, Ms. Daniels, and others who had been there longer and were familiar with the staff.

22. Mr. Castro determined that Ms. Shannon Barican should be placed as the manager for the Electronic Processing Group.

23. Ms. Barican does not have a college degree, and has no formal supervisory experience. She began working for the St. Johns River Water Management District on April 9, 1990. She began as a Records Technician at pay grade 10 in what was then the Records Division, filing and dealing with information requests. She prepared files for microfilm.

24. Ms. Barican later rode with field representatives, issuing citations. Sill later, she moved to permitting prior to the time that it was divided into groups, where she worked with all types of applications. She gained experience with technical staff reports and compliance issues. She later prepared requests for additional information and sent them to applicants, a job now performed by reviewers. In recent years she has worked with noticing.

25. Mr. Register has known Ms. Barican at the District for about 20 years and has had the opportunity to directly observe her performance. Ms. Barican has an outstanding ability to work as a team leader on projects. She is a very good communicator, both with her team and with customers. She is very outgoing with her outreach in trying to find new ways to do the job better.

26. Ms. Barican received an overall assessment of "3, Exceeds Performance Expectations" on her Annual Performance Evaluation for the period February 3, 2006, to February 2, 2007.

27. In February, 2007, Ms. Barican was recommended for a cash bonus award of \$1,000.00.

28. On July 6, 2007, Ms. Barican's pay grade was increased from a pay grade 14 to a pay grade 16. This action did not include any change in her salary, but permitted her to receive pay raises in the future, since she had reached the maximum level of pay allowed for pay grade 14.

29. Ms. Barican received an overall assessment of "3, Exceeds Performance Expectations" on her Annual Performance Evaluation for the period February 2, 2007, to February 1, 2008.

30. Ms. Barican received a merit pay increase in her position of Data Management Specialist II on February 1, 2008.

31. Ms. Barican was recommended for a cash bonus award of \$1,500.00 in February 2008.

32. On February 28, 2008, Ms. Barican's position was reclassified from a Data Management Specialist II to a Regulatory Information Management Specialist II. This was a name change following the Division's name change a few months before, and involved no change in pay.

33. Ms. Barican received an overall assessment of "3, Exceeds Performance Expectations" on her Annual Performance Evaluation for the period January 31, 2008, to January 30, 2009. It was noted under the "Exceptional Development Criteria" element that, "Shannon has done very well taking initiative and demonstrating leadership within the group. Shannon has great potential. Over the next year I am encouraging Shannon to take a more active role in developing other staff and assisting with the process documentation and improvement efforts."

34. Ms. Barican received a merit pay increase in her position of Regulatory Information Management Specialist II on January 30, 2009.

35. Ms. Barican received an overall assessment of "3, Exceeds Performance Expectations" on her Annual Performance Evaluation for the period February 1, 2009, to September 30, 2009.

36. Ms. Barican was recommended for a cash bonus award of \$1,000.00 in September 2009.

37. Ms. Barican received an overall assessment of "3, Exceeds Performance Expectations" on her Annual Performance Evaluation for the period October 1, 2009, to September 30, 2010.

38. In 2010, Ms. Barican was nominated as Employee of the Year for the District.

39. At the time of the reorganization, Ms. Barican was a Regulatory Information Management Specialist II, with primary responsibility over noticing. She had previously filled in for her lead, Ms. Minor, when Ms. Minor was on vacation and when she was out for surgery for a couple of months.

40. Mr. Castro knew that Ms. Barican had often worked with other departments of the District and was excellent in coordinating work with others and in providing customer service. He believed that Ms. Barican could use those skills to increase electronic filing to improve the efficiency of the Division. He testified that he considered her the best candidate for the job by far.

41. Mr. Castro testified that on one occasion, when there was a meeting discussing better ways to improve the processing of letter modifications (a type of permit application) that Ms. Barican had several immediate suggestions even though that was not her area of expertise. She also volunteered to coordinate a solution with others and come back with a proposal

that everyone agreed to. In a couple of weeks she came back with a new process completely ready to implement, with everything well documented. The new procedures were successfully implemented and everyone was happy to follow them. In developing the proposal, Ms. Barican had worked with Mr. Freycinet, who was very helpful to her. Mr. Castro said that Ms. Barican's success with this project was one of the deciding factors for him in choosing her for the management position. He did not review Ms. Barican's performance reports before making his decision to promote her.

42. Mr. Castro also considered Mr. Freycinet and Ms. Lynn Minor for manager of the Electronic Processing Group. He testified he did not offer Ms. Minor the position. He did not feel that Mr. Freycinet was a good fit for the job because of concern with Mr. Freycinet's ability to work with others. He was concerned about how Mr. Freycinet coordinated work. Mr. Castro believed that Mr. Freycinet's demeanor toward his coworkers was not ideal for a manager. Mr. Castro noted as an illustration that Mr. Freycinet would be talking with Mr. Castro, and if a question came up that needed to be answered, Mr. Freycinet would just scream over the top of the cubicle and tell the person to come immediately, rather than excusing himself to go get the proper person to answer the question. Mr. Castro did not review Mr. Freycinet's performance

reports before deciding Mr. Freycinet would not be a good fit. He did discuss Mr. Freycinet with Ms. Daniels, who was aware of Mr. Freycinet's performance reports, and with Mr. Register.

43. Mr. Register believed that Ms. Barican possessed the critical skills he deemed necessary for the manager's role. He believed that she had the ability to work well with others, to outreach and communicate well both internally and with the public, and would have the skills to coordinate work within her group and coordinate with other groups. He also believed that she had a good understanding of both the technology involved and where he wanted to take the Division.

44. In contrast, Mr. Register testified that Mr. Freycinet's reputation as a worker and employee was that he was abrasive, that he tended to be abrupt and a little rough when talking to people. Mr. Register testified that based upon his personal observation he did not believe Mr. Freycinet was very efficient with his work.

45. Mr. Castro discussed his choice of Ms. Barican to be the manager of the Electronic Processing Group with Ms. Daniels, who, based upon her experience with the people in the Division, agreed that Ms. Barican would be the best choice. Mr. Castro also discussed his choice with other groups such as the Information Technology Department, who also agreed with the selection of Ms. Barican. Mr. Castro testified that every time

he asked anyone what they thought about Ms. Barican, that he always received positive remarks.

46. A college education and some supervisory experience were listed among the job qualifications for the management positions. District policy provided a process whereby other skills and experience could be substituted for such qualifications, and this process was followed in the case of Ms. Barican. On May 6, 2011, Mr. Castro requested Mr. David Fisk, Assistant Executive Director of the District, to approve Ms. Barican's 20 years of experience at the Division as a substitute for the college education and one year of supervisory experience necessary to qualify as a Regulatory Support Manager over the Electronic Processing Group. Ms. Barican was qualified for the manager position.

47. As the new structure was the result of reorganization, the allocation of duties into reclassified positions did not need to be advertised. The reclassified positions would be filled solely from existing employees and no new employees were being recruited.

48. Prior to the reorganization, the Division of Regulatory Information Management consisted of between 30 and 35 people, of whom only Mr. Freycinet and the Division Director, Mr. Castro, were male. Mr. Freycinet was the only black male.

The Division had four filled management positions: the Division Director; an Assistant Division Director, Ms. Daniels; a Project Manager, Ms. Mary McKinney, serving at pay grade 26 and reporting to Ms. Daniels; and a RIM Manager, Ellie Miller, serving at pay grade 25 and also reporting to Ms. Daniels.

49. The subunits of the Division were headed by team leaders, which were not supervisory positions. Ms. Minor was the team leader over the "Applications" group and Mr. Freycinet was the team leader over the "Compliance" group. Ms. Minor and Mr. Freycinet were each Senior RIM Specialists, at pay grade 22. There were three other Senior RIM Specialists in the Division, Ms. Joann Fuqua, Ms. Nancy Tatum, and Ms. Linda Oggero, all serving at pay grade 22, but not serving as team leaders. Ms. Barican was a RIM Specialist II, pay grade 16, responsible primarily for permit noticing, and reporting to Ms. Minor in the "Applications" subunit.

50. Under the reorganized structure, three manager positions were to report to Ms. Daniels as Assistant Director of the Division of Regulatory Support. Ms. Barican was made the manager of the Electronic Processing Group, Ms. McKinney was made the manager for the Permits Group, and Ms. Miller was made the manager for the Quality Assurance Group. Ms. Sara Mullis, the Electronic Content Management Coordinator, also was moved to report directly to Ms. Daniels, although she was not a manager.

51. As part of the reorganization plan, Ms. Barican was to be upgraded from pay grade 16 to pay grade 25. She would receive a salary increase of \$9,131.20 for a total annual salary of \$49,462.40, representing a 22.64% increase. It is uncommon at the District to have a promotion from pay grade 16 directly to pay grade 25. Ms. McKinney's pay grade would be downgraded from pay grade 26 to pay grade 25, but her annual salary of \$69,971.20 would be unchanged. Ms. Miller would remain at pay grade 25, with no change in her \$60,340.80 annual salary.

52. The new managers were not the only ones to be subjected to personnel actions. Ms. Mullis was to be upgraded from pay grade 16 to pay grade 20. She would receive a salary increase in the amount of \$8,340.80, bringing her salary to \$29,099.20 annually, a 28.66% increase. Mr. Freycinet was to be downgraded from pay grade 22 to pay grade 20, but his annual salary of \$53,747.20 would remain unchanged. In addition to Mr. Freycinet, Ms. Minor, Ms. Joann Fuqua, Ms. Nancy Tatum, and Ms. Vicki Young were all to be downgraded from pay grade 22 to pay grade 20. The salary of Ms. Minor at \$56,014.40 annually, and the salary of Ms. Fuqua at \$51,469.20 annually would remain unchanged. The salary of Ms. Tatum was to be reduced by \$291.20, bringing her salary to \$56,160.00, a 0.52% reduction. The salary of Ms. Young was to be reduced by \$4,430.40, bringing her salary to \$56,160.00, a 7.31% reduction. Ms. Linda Oggero

would be downgraded from pay grade 22 to pay grade 18, with no change in her \$42,494.40 annual salary. Three other employees, Ms. Lisette Bonilla, Ms. Marianella Pacheco, and Ms. Carrie Mizell, were to receive salary increases of about 5%, without any change in their pay grade.

53. On the afternoon of Monday, May 9, 2011, a mandatory meeting was held for all Division personnel. The meeting was conducted by Mr. Castro and Ms. Daniels to explain and describe the "redeployment" of the Division of Regulatory Information Management personnel into the reorganized unit to be known as the "Division of Regulatory Support" which was to be effective on May 20, 2011. The meeting was only announced a couple of hours before it took place.

54. Mr. Freycinet felt humiliated, degraded, and embarrassed when he learned that Ms. Barican had been promoted to be his supervisor. He believed the new management position was essentially in charge of exactly the things that his subunit had been doing before the reorganization when he was its team leader, and that he was the best qualified person for the new position. Although his salary had not been cut, the demotion to a lower pay grade could eventually have the effect of limiting his ability to get raises, once he achieved the maximum pay for that grade. Mr. Freycinet was substantially affected by the

reorganization and the District's decisions not to promote him to the new management position and to reduce his pay grade.

55. In his new position Mr. Freycinet was expected to be involved with input and management of complex hydrology data, with which his team had never worked in the past. He believed it required some knowledge of the methodology of hydrology, for which he had not been trained, and that he was not being compensated fairly for performing this new function.

56. On May 13, 20, 2011, Mr. Freycinet filed an affidavit with the Florida Commission on Human Relations alleging discrimination on the basis of race, color, sex, and national origin. The petition was amended on June 23, 2011, through the filing of the FCHR Charge Form. Mr. Freycinet alleged that he had been denied a promotion, demoted, and subjected to different terms and conditions of employment.

57. Mr. Freycinet's employment with the District ended on July 14, 2011.

58. On December 16, 2011, the Florida Commission on Human Relations determined that there was no reasonable cause to believe an unemployment practice occurred. On January 19, 2012, Mr. Freycinet filed a Petition for Relief against Respondent for an unlawful employment practice, which was referred to the Division of Administrative Hearings on January 26, 2012.

CONCLUSIONS OF LAW

59. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties in this case under sections 120.569 and 120.57(1), Florida Statutes.

60. The Florida Civil Rights Act, sections 760.01-760.11 and 509.092, Florida Statutes (2010), is patterned after federal law contained in Title VII of the Civil Rights Acts of 1964, and Florida courts have determined that federal discrimination law should be used as guidance when construing its provisions. See Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

61. Section 760.11(1) provides that an aggrieved person may file a complaint with the Commission within 365 days of the alleged violation. If the Commission determines that there is not reasonable cause to believe that a violation has occurred, a request for an administrative hearing may be made within 35 days of the date of the Commission's determination. § 760.11(7), Fla. Stat. Petitioner timely filed his affidavit, which met all requirements for a complaint, and following the Commission's initial determination, timely filed his Petition for Relief requesting this hearing.

62. Respondent St. Johns River Water Management District is an employer as that term is defined in section 760.02(7).

63. Petitioner has the burden to prove by a preponderance of the evidence that the Respondent committed an unlawful employment practice. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

64. Section 760.10(1)(a) provides that it is an unlawful employment practice for an employer 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."

65. Discrimination can be established through direct, circumstantial, or statistical evidence. U. S. Postal Serv. Bd. of Gov'nrs v. Aikens, 460 U.S. 711, 714 (1983); 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. Wilson v. B/E Aero., Inc., 376 F.3d 1079, 1086 (11th Cir. 2004); Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

66. Petitioner sought to prove discrimination through circumstantial evidence of disparate treatment. In McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court established the analysis to be used in cases alleging claims under Title VII that rely on circumstantial evidence to

establish discrimination. This analysis was later refined in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

67. Under McDonnell-Douglas, Petitioner has the burden of establishing by a preponderance of the evidence a prima facie case of unlawful discrimination. If a prima facie case is established, Respondent has the burden of articulating some legitimate, non-discriminatory reason for the action taken against Petitioner. It is a burden of production, not persuasion. If a non-discriminatory reason is offered by Respondent, the burden shifts back to Petitioner to demonstrate that the offered reason is merely a pretext for discrimination. As the Supreme Court stated, before finding discrimination "[t]he factfinder must believe the plaintiff's explanation of intentional discrimination." Hicks, 509 U.S. at 519.

68. Petitioner first alleges that he was subjected to different terms and conditions of employment based on the fact that Ms. Minor was first offered the management position, and he was not.

69. In order to establish a prima facie case, Petitioner must prove: (1) he is a member of a protected class; (2) he was subject to an adverse employment action; (3) his employer treated similarly-situated employees who were not members of the protected class more favorably; and (4) he was qualified for the

job or job benefit at issue. Gillis v. Ga. Dep't of Corr., 400 F.3d 883, 887 (11th Cir. 2005).

70. An adverse employment action exists if plaintiff undergoes a "materially adverse change" in the terms and conditions of employment. Galabya v. New York City Bd. of Educ., 202 F.3d 636, 640 (2d Cir. 2000). A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices unique to a particular situation. Crady v. Liberty Nat'l Bank & Trust Co., 993 F.2d 132, 136 (7th Cir. 1993).

71. No finding was made that Ms. Minor was ever offered the management position. In fact, Mr. Castro testified that he did not offer the job to Ms. Minor. While there was some hearsay testimony which suggested that Ms. Minor had been offered the job, no competent evidence was introduced upon which such a finding could be made.

72. Additionally, there was no evidence to establish that initially offering Ms. Minor the new management position while not offering it to Petitioner would itself have been a materially adverse change in the terms and conditions of Petitioner's employment.

73. With respect to the alleged offering of the managerial position to Ms. Minor, Petitioner failed to prove either that he was subject to an adverse employment action or that Respondent treated similarly situated employees who were not members of the protected class more favorably than they treated him.

74. Petitioner also alleges that he was discriminated against by being demoted. In order to establish a prima facie case, Petitioner again must prove: (1) he is a member of a protected class; (2) he was subjected to an adverse employment action; (3) his employer treated similarly-situated employees outside the protected class more favorably; and (4) he was qualified for the job. Hanford v. GEO Group, Inc., 345 Fed. Appx. 399, 404 (11th Cir. 2009); Burke-Fowler v. Orange Cnty., Fla., 447 F.3d 1319, 1323 (11th Cir. 2006).

75. Petitioner is a black African-American male of Haitian descent, and is a member of a protected class.

76. Assuming demotion without a pay reduction is an adverse employment action, Petitioner still offered no evidence of the third element. In fact, the only evidence is to the contrary, that is, that all other similarly-situated personnel were also demoted. All were white women, and in fact some actually were subjected to salary reductions, while petitioner was not.

77. Petitioner failed to prove a prima facie case of discrimination with respect to his demotion.

78. Finally, Petitioner alleges that he was discriminated against when he was not promoted. In order to establish a prima facie case, Petitioner must prove: (1) he is a member of a protected class; (2) he was qualified for and applied for the new position; (3) despite his qualifications, he was not selected; and (4) the position was filled with a person who was not a member of the protected class. Denney v. City of Albany, 247 F.3d 1172, 1183 (11th Cir. 2001); Lee v. GTE Fla., Inc., 226 F.3d 1249, 1253 (11th Cir. 2000).

79. Petitioner is a member of a protected class.

80. Petitioner was qualified for the manager position. Petitioner's college degrees, long experience, and service as a Team Leader over a group performing substantially the same duties as were to be performed under the newly created Electronic Processing Group made him qualified for the position. He was not a perfect candidate, exhibiting some personality traits that might not be desirable for such a position, and with a marred history in his prior supervisory role with the District, but these flaws were not enough to disqualify him. While Petitioner did not "apply" for the position, neither did Ms. Barican. Under the circumstances of the reorganization, the position was never open for any "applications."

81. It is undisputed that Petitioner was considered, but not selected, for the management position, and that Ms. Barican, a white female, was given the position.

82. While it might not be necessary to decide, Petitioner did demonstrate a prima facie case of discrimination on the basis of race, color, gender, or national origin. USPS Bd. of Governors v. Aikens, 460 U.S. 711, 713-714 (1983)(no purpose served in considering whether or not a prima facie case was made out when case was fully tried on the merits). The relevant inquiry is the ultimate, factual issue of discrimination. Green v. School Bd., 25 F.3d 974, 978 (11th Cir. 1994). However, it is helpful to follow the McDonnell-Douglas structure and next consider the factors Respondent relied upon in making its promotion selection.

83. Respondent articulated a legitimate non-discriminatory reason for not promoting Petitioner into the management position. Respondent met that burden of production with the testimony of several witnesses indicating that Respondent believed the most important qualification for the management position was the ability to work with people, and that with respect to that particular skill, Ms. Barican was superior to Petitioner.

84. Petitioner offered no evidence to suggest that Respondent's reason for not moving Petitioner was simply a

pretext for unlawful discrimination. See Young v. Gen. Food Corp., 840 F.2d 825, 830 (11th Cir. 1988)("Once a legitimate, nondiscriminatory 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.").

85. Even if it was determined that Petitioner was objectively more qualified for the manager's position than Ms. Barican, that would not meet Petitioner's burden to show pretext. Petitioner must do more than show that the employment decision was mistaken; he must show that it was motivated by unlawful animus. Lee v. GTE Fla., Inc., 226 F.3d 1249, 1253 (11th Cir. Fla. 2000). A petitioner does not establish that an employer's proffered reason is pretextual merely by questioning the wisdom of the employer's reasons, at least not where the reason is one that might motivate a reasonable employer." Combs v. Plantation Patterns, 106 F.3d 1519, 1543 (11th Cir. 1997), cert. denied, sub nom., Combs v. Meadowcraft Co., 522 U.S. 1045 (1998).

86. The evidence showed that Petitioner had been the team leader of the group responsible for the most of the duties to be performed by the new Electronic Processing Group. He had college degrees, had many years of experience, had met expectations as an employee, and had been in supervisory

positions before. He received only a couple of hour's notice of the meeting at which the reorganization was announced, by which time all of the personnel decisions had already been made.

Petitioner subsequently learned that he would not be promoted, that his pay grade--though not his salary--would be reduced, and that his new supervisor was someone from another group, formerly with a pay grade below his.

87. Under these circumstances, Petitioner's humiliation and embarrassment might well be expected. However, Respondent presented a plausible business reason for the decision to promote Ms. Barican to the manager's position. Correctly or not, Respondent believed that while technically proficient, Petitioner's personality was not conducive to good management, while Ms. Barican, though without college education or supervisory experience, was better able to communicate with both employees and outsiders to perform the leadership tasks they valued for the position. There was no evidence that this reason was pretextual. The decision to choose Ms. Barican rather than Petitioner may have been wrong, or even unfair, but there was no evidence that Respondent's decision not to promote Petitioner had anything to do with his race, color, gender, or national origin.

88. Similarly, Respondent's technique of drawing out a table of organization on paper and then demoting long term

employees so they would fit neatly within the criteria dictated by those little boxes might seem an approach completely at odds with the professed desire for a management that worked well with its employees. However, the evidence was clear that four white females were subjected to exactly the same demotion as Petitioner, and one was demoted still lower. Two of these women received an actual salary cut as well. There was no evidence that this technique was simply a pretext with respect to Petitioner, or that Petitioner's demotion had anything to do with his race, color, gender, or national origin.

89. As stated in Chapman v. AI Transport, 229 F.3d 1012, 1030 (11th Cir. 2000) in a similar context, "[C]ourts do not sit as a super-personnel 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." (quoting Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991)).

RECOMMENDATION

Upon consideration of the above findings of fact and conclusions of law, it is

RECOMMENDED:

That the Florida Commission on Human Relations enter a final order dismissing Petitioner's complaint.

DONE AND ENTERED this 22nd day of June, 2012, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of June, 2012.

^{1/} The titles of these District subunits have since been changed. The former Department of Regulatory Services is now evidently the Division of Regulatory Services, while the former Division of Regulatory Support is now the Bureau of Regulatory Support. In light of the numerous other name changes which took place during the events relevant to this case, the older names are used throughout to avoid additional confusion.

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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.