STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARNALDO M. GARCIA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-1195
	)	
EMBARQ OF FLORIDA, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on August 9, 2012, by video teleconference at sites in Orlando and Tallahassee, Florida, before Thomas P. Crapps, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Respondent violated the Florida Civil Rights Act of 1992, as alleged in the Employment Charge of Discrimination filed by Petitioner on September 12, 2011.

PRELIMINARY STATEMENT

On September 12, 2011, Petitioner, Arnaldo M. Garcia (Mr. Garcia), filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (FCHR), which alleged that his employer, Respondent, Century Link/Embarq (Embarq), violated section 760.10, Florida Statutes (2010),[1/] by discriminating against him on the basis of age, national origin, and disability.

FCHR investigated the allegations, and on February 27, 2012, issued its Determination that there was no reasonable basis to find that Embarq had committed an unlawful employment practice. Mr. Garcia filed a Petition for Relief on March 25, 2012. FCHR transmitted the case to the Division of Administrative Hearings (DOAH) on April 4, 2012. The case was set for final hearing on June 7, 2012. Embarq filed a motion to continue the hearing, which the undersigned granted, and the final hearing was rescheduled for August 9, 2012.[2/]

At the hearing, Mr. Garcia testified on his own behalf and presented the testimony of Renee Smith (Ms. Smith), Betsy Trinder (Ms. Trinder), Robert Rivera (Mr. Rivera), and James Shaunessy

(Mr. Shaunessy). Mr. Garcia introduced into evidence Exhibits numbered 1 through 4, and Embarq introduced into evidence Exhibits numbered 1 through 3, 6 through 8, 11, 13, 15 through 17, and 26. A two-volume Transcript of the proceeding was filed with DOAH on August 20, 2012. Embarq filed a Proposed Recommended Order, but Mr. Garcia did not file one.

FINDINGS OF FACT

1. The events at issue concern Embarq's termination of Mr. Garcia's employment on September 13, 2010. At the time of his termination, Mr. Garcia was a 45-year-old male. His national origin is Puerto Rico, and he is of Hispanic descent. Further, Mr. Garcia suffered from migraine headaches, which were the result of a work-related injury. He had been an employee of Embarq, and its predecessor companies, since August 10, 1998.

2. Before his termination, Mr. Garcia worked as a technician servicing business and residential customers. His base of operations was at the customer service center located in Winter Park, Florida, referred to by Embarq as the Winter Park "Railroad Avenue" Center. As a service technician, Mr. Garcia would receive his daily customer calls through a computer system that sent out work orders. Mr. Garcia would drive the Embarq vehicle to the customer's house or business to complete the service. The Embarq vehicle was equipped with a global positioning satellite (GPS) monitor tracking the vehicle's

location, including the time the vehicle left and returned to the Embarq office. Finally, Mr. Garcia's work time was recorded by Embarq's computer system, named SAP, in which Mr. Garcia would enter a code indicating the tasks accomplished in customer service, the time when the task began and the time when he completed the task. As a service technician, Mr. Garcia was required to truthfully and accurately enter his time worked into the SAP system.

3. Ms. Smith was Embarq's area operations manager for the Central Florida area, including the Winter Park center where Mr. Garcia worked. In the summer of 2010, Ms. Smith noted that some of the Embarq vehicles were returned to the customer service centers before the end of the work day at 4:30 p.m. Consequently, she asked the customer service center supervisors to examine all employee time records and determine whether or not a problem existed.

4. Ms. Smith learned from Charles Clendenny (Mr. Clendenny), the acting manager for the Winter Park customer service center, that the examination showed some questionable activities. Based on Mr. Clendenny's report, Ms. Smith asked Ms. Trinder to conduct an independent review of all the employees at the Winter Park "Railroad Avenue" center. Ms. Trinder was Embarq's human relations business-partner, and part of her duties involved conducting employee investigations. Ms. Trinder

examined the GPS documentation, the SAP time sheets, and the computer systems work force management assignments for all of the Winter Park "Railroad Avenue" employees. Her examination revealed questionable activities by four employees: Mr. Garcia, Scott Somner, James Shaunessy, and William Allison.

5. The record showed that Mr. Somner is an African American and was approximately 48 years old at the time; that Mr. Shaunessy is a Caucasian, age in his sixties; and that Mr. Allison is an African American, age in his twenties. Of the four employees, only two were terminated, Mr. Garcia and Mr. Somner. Ms. Trinder and Ms. Smith credibly testified that during the interviews, they had learned that Mr. Shaunessy and Mr. Allison had received approval from their prior supervisor, Joe Venezia, to leave work early on the specific dates. Further, the data from the three computer systems confirmed Mr. Shaunessy's and Mr. Allison's explanations for leaving work early for the specific dates. Both Mr. Shaunessy and Mr. Allison were given training by Ms. Smith and Ms. Trinder concerning Embarq's work attendance polices.

6. As to Mr. Garcia, Ms. Trinder's examination showed that Mr. Garcia had falsified his time records, and that he had unscheduled work absences. At the conclusion of the interview, Ms. Trinder typed a statement of Mr. Garcia's interview. The statement indicates that Mr. Garcia stated he did not know why he

had entered that he had worked on two unscheduled work days, July 2, 2010, and July 14, 2010, and that he had mistakenly entered 4.75 hours as worked on an August 3, 2010, a date he actually took unscheduled time off. The result of these time entries was that Mr. Garcia was paid for work days on which he did not work, and that he avoided discipline for missing work. The Embarq employee handbook shows that employees are subject to discipline, if the employee misses work on a scheduled work day. The record shows that Mr. Garcia had previously been trained by his supervisor about the problem of missing work without providing the required 24-hour notice.

7. On September 10, 2010, Ms. Smith sent a request to Ms. Susan Sarna, vice president/general manager, recommending that Mr. Garcia be terminated. Similarly, Ms. Trinder sent a recommendation to her supervisor recommending Mr. Garcia's termination.

8. On September 13, 2010, Mr. Garcia was terminated as an Embarq employee.

9. Mr. Garcia clearly testified that even though he had migraines that he had not requested any type of accommodation from his supervisors or from Embarq.

10. Mr. Garcia did not bring forward any evidence, either direct or indirect, showing that Embarq's termination of his employment was the result of an unlawful employment practice.

11. Mr. Garcia did not bring forward any evidence showing that Embarq's offered explanation that it terminated Mr. Garcia for attendance and time falsification was pretextual.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has subject matter and personal jurisdiction over the parties pursuant to sections 120.569 and 120.57, Florida Statutes (2011).

13. Mr. Garcia alleges that Embarq engaged in an unlawful employment practice by terminating his employment based on national origin, age, and disability; thus, violating the Florida Civil Rights Act, as amended, chapter 760, Florida Statutes.

14. Section 760.10(1)(a) provides it is an unlawful employment practice for an employer to discharge or otherwise discriminate against an individual on the basis of national origin, age, or handicap.

15. Mr. Garcia has the burden of proving by a preponderance of the evidence that Embarq committed an unlawful employment practice. See St. Louis v. Fla. Int'l Univ., 60 So. 3d 455, 458-59 (Fla. 3d DCA 2011); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Boland v. Div. of Emerg. Mgmt./ Younger v. Div. Emerg. Mgmt., Case Nos. 11-5198, 11-5199 (Fla. DOAH Jan. 26, 2012; FCHR Jun. 27, 2012).

16. Because the Florida Civil Rights Act of 1992, sections 760.01 through 760.11, is patterned after Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. section 2000e-et seq., the Florida courts look to federal case law in interpreting and applying the Florida law. Valenzuela v. GlobeGround N. Am., LLC, 18 So. 3d 17, 21 (Fla. 3d DCA 2009)(omitting string citations). Evidence of an unlawful employment practice may be established by either direct evidence of discrimination or through circumstantial evidence, which is evaluated within the framework of the burden-shifting analysis set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny.

17. "Direct evidence of discrimination is evidence which, if believed, would prove the existence of a fact in issue without inference or presumption. Only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of the protected characteristic constitute direct evidence of discrimination." Bass v. Bd. of Cnty Comm'rs, Orange Cnty., Fla., 256 F.3d 1095, 1105 (11th Cir. 2001).

18. Because direct evidence of discriminatory intent is often unavailable, persons who claim that they are victims of intentional discrimination "are permitted to establish their cases through inferential and circumstantial proof." Kline v.

Tennessee Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997); Shealy v. City of Albany, 89 F.3d 804, 806 (11th Cir. 1996). As stated earlier, the analytical framework for establishing intentional discrimination through inferential and circumstantial evidence is the shifting-burden analysis established by the United States Supreme Court in McDonnell Douglas.

19. Under the McDonnell Douglas framework, a claimant bears the initial burden of establishing a prima facie case of discrimination. If the claimant establishes a prima facie case, the claimant raises a presumption of discrimination against the employer. Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)("Demonstrating a prima facie case is not onerous; it requires only that the plaintiff establish facts adequate to permit an inference of discrimination."). See also Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S. Ct. 1089, 1093-94, 67 L. Ed. 2d 207 (1981)("The burden of establishing a prima facie case of disparate treatment is not onerous. 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.").

20. In order to establish a prima facie case under the McDonnell Douglas framework, a claimant must show that: (1) he

or she is a member of a protected class; (2) he or she was qualified for the position; (3) he or she was subjected to an adverse employment action; and (4) similarly situated employees outside the employee's protected class were treated more favorably than the claimant. See McDonnell Douglas, supra; Burke-Fowler v. Orange Cnty., 447 F.3d 1319, 1323 (11th Cir. 2006); Maynard v. Bd. of Regents of the Div. of Univs. of the Fla. Dep't of Educ., 342 F.3d 1281 (11th Cir. 2003).

21. If the claimant establishes a prima facie case, the burden shifts to the employer to articulate a legitimate, non-discriminatory explanation for the adverse employment action. McDonnell Douglas, supra; Dep't of Corr. v. Chandler, 582 So. 2d 1183, 1186 (Fla. 1st DCA 1991).

22. If the employer produces evidence showing a legitimate, non-discriminatory reason for the employment decision, then the burden shifts to the claimant to establish that the employer's proffered reason is merely a pretext for discrimination. McDonnell Douglas, supra; St. Mary's Honor Ctr., et al., v. Hicks, 509 U.S. 502 at 516-518, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). In order to satisfy this final step of the process, claimants must "show directly that a discriminatory reason more likely than not motivated the decision, or indirectly by showing that the proffered reason for the employment decision is not worthy of belief." Chandler, 582

So. 2d at 1186, citing Burdine, 450 U.S. at 252-256. See also, Holifield, 115 F.3d at 1565. A claimant may establish that an employer's offered explanation is pretext for discrimination by offering sufficient evidence showing inconsistencies, implausibilities, or contradictions in the employer's offered explanation. See Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. N.J. 1994)("the non-moving plaintiff must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them 'unworthy of credence,' (citing Ezold v. Wolk, Block, Schorr, and Solis-Cohen, 983 F.2d 509, 531 (3d Cir. 1992)), and hence infer "that the employer did not act for [the asserted] non-discriminatory reasons." (footnote omitted)).

23. Finally, it bears repeating that the law is not concerned with whether an employment decision is fair or reasonable, but only with whether it was motivated by unlawful discriminatory intent. An "employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." Nix v. WLCY Radio/Rahall Commc'ns, 738 F.2d 1181, 1187 (11th Cir. 1984). In a proceeding under the Civil Rights Act, the courts "are not in the business of adjudging whether employment decisions are prudent or fair.

Instead, our sole concern is whether unlawful discriminatory animus motivates a challenged employment decision." Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1361 (11th Cir. Ct. 1999).

24. Applying the rules of law to the facts here, Mr. Garcia failed to establish a prima facie case of discrimination because he failed to bring forward evidence showing that similarly situated employees, who were not members of his protected class, were treated more favorably than him. Moreover, even if Mr. Garcia met his initial burden, he failed to ultimately prove that Embarq terminated his employment based on an unlawful employment practice. Embarq brought forward evidence showing legitimate, non-discriminatory reasons for Mr. Garcia's termination. Mr. Garcia, however, failed to show that Embarq's offered reasons were pretext for intentional discrimination.

25. At the onset, there is no direct evidence of discrimination in this case. Consequently, the analysis case proceeds under the McDonnell Douglas framework.

26. Turning to the issue of a prima facie case, Mr. Garcia entered evidence showing that he was a member of a protected class for each of his claims;[3/ 4/ 5/] that he was qualified for the position that he had held;[6/] and that his termination was an adverse employment action. Mr. Garcia, however, failed to bring

forward evidence showing that similarly situated employees, who were not members of his protected class, received more favorable treatment than him.

27. In proving his prima facie case of discrimination, Mr. Garcia was required to show that similarly situated employees, who were not members of his protected class, were treated more favorably than him. In order to meet this burden, a claimant "must show that he and the employees are similarly situated in all relevant respects." Holifield, 115 F.3d at 1562, quoting Smith v. Stratus Computer, Inc., 40 F.3d 11, 19 (1st Cir. 1994)(additional string citations omitted). In determining whether employees are similarly situated for purposes of establishing a prima facie case, it is necessary to consider whether the employees are involved in or accused of the same or similar conduct and are disciplined in different ways. Holifield, 115 F.3d at 1562 (citing Williams v. Ford Motor Co., 14 F.3d 1305, 1309 (8th Cir.1994)).

28. The facts here showed that Embarq terminated two employees and retained two employees for time discrepancies. As to the age discrimination claim, the facts showed that one retained employee was older than Mr. Garcia, and that other retained employee was younger. As to the national origin claim, the record showed that both retained employees were from different ethnic backgrounds. Finally, as to the disability

claim, there was no evidence about whether or not the retained employees suffered from any disability. On the face of these facts, one might conclude that Mr. Garcia had established that similarly situated employees, who were not a member of his protected class, were treated more favorably than him. The record, however, showed a key difference between Mr. Garcia and the two retained employees. The key difference was that Embarq retained employees who had permission from their manager to leave work early. In contrast, the record shows that the terminated employees did not have permission to leave work early or to have unauthorized leave. Mr. Garcia did not show that the two retained employees were involved in the same conduct as himself. Therefore, Mr. Garcia did not bring forward evidence showing that the two retained employees were involved in conduct that was similar to his own. Arguably, the only similarly situated employee is Mr. Scott Somner, whom Embarq also terminated.

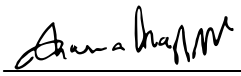
29. Next, even assuming that Mr. Garcia had established a prima facie case, he still failed in his ultimate burden of showing that his termination was based on discrimination. The record clearly established Embarq's reasons for terminating Mr. Garcia. The record showed that Embarq terminated Mr. Garcia for his false time entries for work and unauthorized absences. Mr. Garcia did not introduce any evidence showing that Embarq's

explanation contained contradictions, or that it was inconsistent, implausible, or incoherent in any way. Consequently, Mr. Garcia did not meet his burden of proving that his termination was unlawful.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that Petitioner failed to show that Respondent engaged in an unlawful employment practice in violation of the Florida Civil Rights Act, and dismissing the Petition for Relief.

DONE AND ENTERED this 11th day of September, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of September, 2012.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2010 version.

[2/] Respondent filed a response indicating that Embarq of Florida, Inc., had been erroneously identified by the Petitioner as Century Link/Embarq, and that Embarq of Florida, Inc., was the proper name of the Respondent. Based on the Respondent's filing, the undersigned entered an oral Order recognizing that the Respondent's proper designation would be Embarq of Florida, Inc., and has directed the Clerk for the Division of Administrative Hearings to correct the case style.

[3/] Gandia v. Walt Disney World, No. 07-4147, 2008 Fla. Div. Adm. Hear. LEXIS 147 (Fla. Div. Adm. Hear. Mar. 13, 2008)(recognizing national origin of Puerto Rico as a protected class)(FCHR May 8, 2008).

[4/] Bratcher v. City of High Springs, Case No. 11-2999 (Fla. D. Adm. Hear. Sept. 28, 2011), FCHR Order 11-091, 2011 Fla. Div. Adm. Hear. LEXIS 358 (Fla. Div. Adm. Hear. Dec. 7, 2011)(stating that "Commission panels have concluded that one of the elements for establishing a prima facie case of age discrimination under the Florida Civil Rights Act of 1992 is a showing that individuals similarly-situated to Petitioner of a 'different' age were treated more favorably, and Commission panels have noted that the age '40' has no significance in the interpretation of the Florida Civil Rights Act of 1992. See, e.g., Downs v. Shear Express, Inc., FCHR Order No. 06-036 (May 24, 2006), and cases and analysis set out therein; see also Boles v. Santa Rosa Cnty Sheriff's Office, FCHR Order No. 08-013 (February 8, 2008), and cases and analysis set out therein.)"; but see Miami-Dade Cnty v. Eghbal, 54 So. 3d 525, 526 (Fla. 3d DCA 2011)(protected class at least 40 years of age).

[5/] Rivero v. Miami-Dade Cty, Case No. 02-2311, 2002 Fla. Div. Adm. Hear. LEXIS 1444 (Fla. Div. Adm. Hear. Nov. 12, 2002)(migraine headache recognized as a handicap as defined by the FCHR); FCHR Feb. 21, 2003).

[6/] See Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d at 1360 (" . . . plaintiffs, who have been discharged from a previously held position, do not need to satisfy the McDonnell Douglas prong requiring proof of qualification . . . [I]n cases where a plaintiff has held a position for a significant period

of time, qualification for that position sufficient to satisfy the test of a prima facie case can be inferred.")(citations and internal quotation marks omitted).

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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.