STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JIMMY L. MCCLAIN, Petitioner, vs. ST. ANDREWS BAY, Respondent.	)	Case No. 12-1554

RECOMMENDED ORDER

Pursuant to notice a Final Hearing was held in this matter before the Division of Administrative Hearings by Administrative Law Judge Diane Cleavinger, on July 2, 2012, in Panama City, Florida.

APPEARANCES

For Petitioner: Jimmy McClain, pro se
1527 Grace Avenue, Apartment C
Panama City, Florida 32405

For Respondent: Maureen McCarthy Daughton, Esquire
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner was the subject of an unlawful employment practice by Respondent.

PRELIMINARY STATEMENT

On October 3, 2011, Petitioner, Jimmy L. McClain (Petitioner) filed an Employment Complaint of Discrimination against Respondent, Pinnacle Health Facilities XXIV, LP, d/b/a/ St. Andrews Bay Skilled Nursing and Rehabilitation Center (Respondent or St. Andrews Bay), with the Florida Commission on Human Relations (FCHR) alleging discrimination based on race. FCHR investigated the complaint. On February 29, 2012, FCHR issued a determination of cause and advised Petitioner of his right to file a Petition for Relief. Thereafter, on April 27, 2012, Petitioner filed a Petition for Relief with FCHR. The matter was then forwarded to the Division of Administrative Hearings.

At the hearing, Petitioner testified on his own behalf and called two witnesses to testify. Additionally, Petitioner offered Exhibits B, C, D, E, and S into evidence. However, only Exhibit C was admitted. Respondent presented the testimony of one witness and offered 8 exhibits which were admitted into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order on July 16, 2012. Petitioner also filed a Proposed Recommended Order titled Conclusion and Recommending Order on August 9, 2012. Respondent filed its Proposed Recommended Order on August 7, 2012.

<u>FINDINGS OF FACT</u>

1. Respondent, St. Andrews Bay, is a licensed nursing home that provides in-patient care to its residents. Its facility is located in Panama City, Florida.

2. In order to provide its service, Respondent employs a variety of racially diverse personnel, consisting of both permanent and contract employees. Towards that end, Respondent maintains a variety of employment discipline and transfer policies that are contained in the Employee Handbook for St. Andrews Bay.

3. The April 2011 Employee Handbook, which was in effect in August 2011, set forth the policy regarding transfers, as follows, in relevant part:

> Employees who wish to be considered for a transfer or promotion to a vacant position may apply if the employee is of "Good Standing." In addition to being in "Good Standing," the employee must possess the following:
>
> 1. The minimum qualifications for the position:
> 2. <u>Received no progressive disciplinary action within the past six months</u> (emphasis added).

* * *

4. The Employees Handbook, also, provided for progressive discipline. Such discipline included, in ascending order, coaching, first/second written warnings, suspensions, and Performance Improvement Plans.

5. Petitioner is a black male. As such, Petitioner is a protected person under chapter 760, Florida Statutes.

6. In January 2006, Petitioner was employed by Respondent as a Dietary Aide. As an employee, Petitioner received a copy of, or had access to, Respondent's discipline and transfer policies.

7. At some point, tardiness for work became a problem for Petitioner. Indeed, his supervisor considered him a competent employee with some tardiness issues and, on April 6, 2011, disciplined Petitioner with a "coaching" for being two hours late for work without notifying anyone that he would be late.

8. Although the dates are unclear, the evidence showed that Mr. Munn, who is a white male, worked as a laborer for ManPower. Through a contract between ManPower and St. Andrews Bay, Mr. Munn was performing painting, maintenance, and any other work the Maintenance Director assigned, for approximately four to five weeks, beginning sometime in July 2011.

9. Around August 3, 2011, a sign-up sheet was posted at St. Andrews Bay for the position of Maintenance Assistant. The sign-up sheet was posted to notify any current employees of the job opening and allow them to apply for the position by signing the posted sheet.

10. Within less than six months of Petitioner being disciplined, Petitioner, along with two other current employees, indicated their interest in the Maintenance Assistant position by

signing the sign-up sheet. The other two employees who expressed interest in the maintenance position did not testify at hearing and no findings are made regarding their qualifications or, more importantly, Respondent's knowledge regarding their qualifications.

11. Per Respondent's policy, Petitioner did not have to complete an application for the maintenance position since he had two applications, one dated January 4, 2006, and one dated October 24, 2007, on file with the Respondent. Neither of these applications reflected that Petitioner had prior maintenance experience. One application reflects that Petitioner owned a restaurant known as "Daddy's Place." One application reflects that Petitioner was the cook at Daddy's Place. However, neither ownership nor cooking experience indicates maintenance experience and there was no evidence that Respondent knew that Petitioner worked other than as a cook in his restaurant or had any other maintenance experience from such ownership. Moreover, under Respondent's transfer policy, Petitioner was not qualified to sign up for the maintenance position since he had received disciplinary action within six months of this transfer opportunity.

12. On the other hand, the evidence showed that Mr. Munn applied for the position of floor tech at St. Andrews Bay in December of 2010, but was not hired for that position. Unlike Petitioner, and in addition to Mr. Munn's current maintenance work

experience at Respondent's facility, Mr. Munn's application reflected some experience in maintenance, albeit not extensive experience. However, like Petitioner, Mr. Munn's application for employment was already on file. Therefore, it was not necessary for Mr. Munn to fill out a second employment application for the position of Maintenance Assistant. Petitioner's policy regarding on-file applications is reasonable and was applied to both black and white applicants in this case. There was no competent evidence that demonstrated this policy was a pretext for discrimination.

13. Petitioner was not interviewed for the position. However, the evidence did not show that anyone was formally interviewed for the maintenance position. On these facts, lack of formal interviews does not demonstrate discrimination by Respondent against Petitioner since Respondent was already familiar with the two applicants at issue in this case.

14. On August 8, 2011, Wesley Munn was selected for the Maintenance Assistant position by the maintenance supervisor, Mr. Emmanuel. Although somewhat unclear, the evidence demonstrated that Mr. Munn's selection was approved by the then Administrator of St. Andrews Bay, Tunecia Sheffield, who is black. Neither of these two individuals testified at hearing. However, the evidence at the hearing did not demonstrate that Respondent discriminated against Petitioner when it hired Mr. Munn for the

maintenance position. Conversely, the evidence at hearing demonstrated that Mr. Munn's hiring had a reasonable basis since Mr. Munn had some maintenance experience and was already performing the duties for which he was hired. There was no competent evidence that demonstrated Respondent's reasons for hiring Mr. Munn to be a pretext for discrimination. Therefore, given these facts, the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569, 120.57(1) and 760.11, Fla. Stat. (2012).

16. Sections 760.01 through 760.11 are known as the Florida Civil Rights Act (FCRA). Section 760.10(1)(a) states as follows:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

17. The Florida Civil Rights Act was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000, et seq. As such, Federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Green v. Burger King Corp.,

728 So. 2d 369, 370-371, (Fla. 3d DCA 1999); Fla. State Univ. v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1996).

18. Under FCRA, Petitioner has the burden to prove by a preponderance of the evidence that Respondent discriminated against him. See Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). Towards that end, Petitioner can establish a case of discrimination through direct evidence or circumstantial evidence. See Holifield v. Reno, 115 F.3d 1555, 1561-1562 (11th Cir. 1997).

19. Direct evidence consists of "only the most blatant remarks, whose intent could be nothing other than to discriminate" on the basis of some impermissible factor. Evidence that only suggests discrimination, or that is subject to more than one interpretation, is not direct evidence. See Carter v. Three Springs Residential Treatment, 132 F.3d 635, 462 (11th Cir. 1998). In this case, there was no direct evidence of discrimination.

20. On the other hand, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-805 (1973), established that an employment discrimination case based on circumstantial evidence involves the following burden-shifting analysis: (a) the Employee must first establish a prima facie case of discrimination; (b) the employer may then rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for the employment action in question; and (c) the employee then bears the ultimate burden of persuasion

to establish that the employer's proffered reason for this action is merely pretext for discrimination. See also Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

21. Petitioner must establish a prima facie of discrimination by demonstrating that: (a) he is a member of a protected class; (b) he was subjected to an adverse employment action; (c) his employer treated similarly situated employees outside of his protected class more favorably; and (d) he was qualified for the job at issue. See Rice-Lamar v. City of Ft. Lauderdale, 232 F.3d 842-843 (11th Cir. 2000).

22. Importantly, proof that amounts to no more than mere speculation and self-serving belief on the part of the Petitioner concerning the motives of the Respondent is insufficient, standing alone to establish a prima facie case of intentional discrimination. See Lizardo v. Denny's Inc., 270 F.3d 94, 104 (2d. Cir. 2001)("The record is barren of any direct evidence of racial animus. Of course, direct evidence of discrimination is not necessary . . . . However, a jury cannot infer discrimination from thin air. Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. That is not sufficient.").

23. In this case, the evidence demonstrated that Petitioner is a member of a protected class for purposes of his racial discrimination claim. The evidence did not demonstrate, however,

that he was qualified to be considered for the Maintenance Assistant position. Petitioner was not eligible to be considered for the position of Maintenance Assistant due to the fact that he had received progressive discipline within the last six months.

24. Petitioner also failed to present any evidence that a similarly situated employee of another race was treated more favorably under the same circumstances. Wesley Munn was not similarly situated since he had no prior disciplinary issue which disqualified him from consideration. Additionally, Mr. Munn had maintenance experience while, as far as Respondent knew, Petitioner had none.

25. Finally, Petitioner did not establish by a preponderance of the evidence that he was treated differently than comparable non-minority applicants, that his failure to be interviewed was based on his race or that the reasons given were a pretext for discrimination. Therefore, the Petition for Relief should 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 dismissing the Petition for Relief.

DONE AND ENTERED this 31st day of August, 2012, in Tallahassee, Leon County, Florida.

DIANE CLEAVINGER
Administrative Law Judge
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Filed with the Clerk of the
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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.