STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANAYO JERRY UDENWOKE,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-3268
	)	
PEPSICO, INC.,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on January 15, 2013, in Jacksonville, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Anayo Jerry Udenwoke, pro se
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For Respondent: Dena H. Sokolow, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Pepsico, Inc. ("Pepsi") committed unlawful employment practices contrary to section 760.10, Florida Statutes (2012),[1/] by discriminating against

Petitioner based on his race, color, or national origin by discharging Petitioner from his employment.

PRELIMINARY STATEMENT

On or about April 19, 2012, Petitioner Anayo Jerry Udenwoke ("Petitioner") filed with the Florida Commission on Human Relations ("FCHR") an Employment Complaint of Discrimination against Pepsi. Petitioner alleged that he had been discriminated against pursuant to chapter 760, Florida Statutes, and Title VII of the Federal Civil Rights Act as follows:

> I began employment with Pepsi Cola Bottling on June 16, 2004, and was terminated on February 21, 2012. I worked as a route driver, delivering Pepsi products to different locations. I was paid on a commission basis. I believe that based on the color of my skin (black), and the fact that I am African and was not born in the United States, that I was treated less favorably by my employer. Specifically, I was given less delivery routes, which means that I could never make as much money as the other drivers since I was paid on commission. I was made fun of for my accent. I was terminated on February 21, 2012, for allegedly forging time on my time sheet, however this was false. I gave my time sheet to my supervisor, Christopher Quindoza, who changed the time on the time sheet. He initialed the time sheet where he made changes, however I was terminated on February 21, 2012, by Andrew (I don't know his last name), who was aware of the changes that Christopher made. I believe this was a pretext and that they wanted to fire me based on my skin color, race and ethnicity. There are other employees who faced similar discrepancies in their time sheets who were not terminated. I always did a good job for

> Pepsi and there was no reason for my termination.

The FCHR investigated Petitioner's Complaint. In a letter dated September 27, 2012, the FCHR issued its determination that there was no reasonable cause to believe that an unlawful employment practice occurred.

On October 4, 2012, Petitioner timely filed a Petition for Relief with the FCHR. On the same date, the FCHR referred the case to the Division of Administrative Hearings ("DOAH"). The case was originally scheduled for hearing on December 13, 2012. One continuance was granted. The hearing was ultimately held on January 15, 2013.

At the outset of the hearing, Petitioner stated that he had witnesses to testify on his behalf but that he did not bring them to the hearing because Pepsi had "stopped" him from doing so. Discussion of the matter revealed that counsel for Pepsi had informed Petitioner that she intended to object to his witnesses because Petitioner had failed to disclose their names prior to the hearing. The undersigned explained the discovery rules to Petitioner. Because of Petitioner's misunderstanding of the import of Pepsi's objection, and in an effort to provide Petitioner with every opportunity to present his case fully, the undersigned offered to continue or bifurcate the hearing in order to give Petitioner an opportunity to produce his

witnesses, the only condition being that Petitioner would have to disclose their names to counsel for Pepsi. Petitioner continued to refuse to disclose the names of his witnesses. The undersigned therefore decided that the hearing would go forward as scheduled and that Petitioner would be granted no further opportunity to produce unnamed witnesses.

At the hearing, Petitioner testified on his own behalf. Petitioner's Exhibits 1 through 3 were admitted into evidence. Respondent presented the testimony of Christopher Quindoza, a Pepsi delivery supervisor who was one of Petitioner's direct supervisors, and of Kyle Lowens, the sales operations manager for Pepsi. Respondent's Exhibits 1 through 11 were admitted into evidence.

There was no court reporter present at the hearing, and no transcript of the hearing has been prepared.[2/] The undersigned made a digital recording of the hearing that was used in preparing this Recommended Order. The undersigned offered a copy of the recording to the parties, but neither party filed a request for a copy.

At the close of the hearing, the undersigned informed the parties that they would have ten days in which to submit proposed recommended orders. On January 25, 2013, Respondent timely filed a Proposed Recommended Order. Petitioner did not file a proposed recommended order.

FINDINGS OF FACT

1. Pepsi is an employer as that term is defined in subsection 760.02(7), Florida Statutes. Pepsi manufactures and distributes snack food and beverages throughout the United States.

2. Petitioner, a black male originally from Africa,[3/] was employed by Pepsi as a delivery driver in Jacksonville from June 15, 2004, until February 21, 2012, when Pepsi terminated his employment.

3. At the time he was hired, Petitioner received a copy of Pepsi Bottling Group's "Employee Handbook" and "General Rules of Conduct." Petitioner signed acknowledgements of receipt of each of these documents on June 15, 2004.

4. The General Rules of Conduct provides an express list of actions that are "prohibited and may result in immediate termination," including "misrepresentation of facts or falsification of Company records or other documents."

5. As a delivery driver, Petitioner was responsible for delivering Pepsi products to designated customers on a route provided to him by Pepsi. During the time of Petitioner's employment, all driver delivery routes were dispatched from Orlando.

6. There were approximately 17 routes in the Jacksonville area. The routes were established and modified according to

number of stops, number of cases of product delivered, and the time it took to complete the route. Because the drivers were paid on a commission basis, the dispatchers did what they could to keep the routes roughly equal in terms of stops, cases, and time. Local Jacksonville supervisors consulted with the Orlando dispatchers but had no control over route assignments.

7. Delivery drivers must comply with U.S. Department of Transportation ("DOT) hours of service rules. See 49 C.F.R. part 395. Under the rules, drivers such as Petitioner are allowed to work up to 14 hours in one day and up to 60 hours in a seven-day period. The DOT rules are reviewed with the delivery drivers. In 2008, Petitioner signed an acknowledgement that he was subject to the DOT hours of service rules.

8. Delivery drivers for Pepsi are responsible for clocking in and out of work each day by machine to accurately record their hours of work. They must also manually fill out and submit a DOT-prescribed grid log of their working and driving time.

9. Drivers are also required to submit a hand-written time sheet each week. The driver is not required to manually fill in the time on the time sheet for days when the driver clocked in and out by machine. The driver must manually record his time on the time sheet for those days when the driver failed to clock in or out for some reason.

10. On Friday, February 3, 2012, Petitioner forgot to clock in when he began his route in the morning.

11. Delivery drivers carry handheld computers that contain all of their route information and that record the time at which the driver generates an invoice to the customer at each location on the route. The driver is not able to tamper with or alter the information contained in the handheld computer.

12. According to Petitioner's computer, his last stop on February 3, 2012, was a Pizza Hut on University Boulevard South. The invoice generated by Petitioner indicated that he made the Pizza Hut delivery at 4:40 p.m.

13. After completing the delivery at Pizza Hut, Petitioner returned to the Pepsi facility, where he checked in at the gate at 5:14 p.m. Petitioner then unloaded his truck, performed a post-delivery inspection, and entered the building to do a final accounting of the money he collected on his route that day. Records indicate that Petitioner generated a final settlement report for the day at 5:27 p.m.

14. After generating his settlement report, Petitioner submitted his deposit and weekly paperwork in delivery supervisor Rich Herrmann's office.[4/] The weekly paperwork included Petitioner's handwritten time sheet for the week of January 30 through February 3, 2012, and his DOT grid log.

15. Because he had failed to clock in on the morning of February 3, Petitioner wrote both his time in and time out for the day on his time sheet. Petitioner's handwritten time sheet indicated that he began work at 4:30 a.m. and ended work at 4:30 p.m. Petitioner's DOT grid log also indicated that he worked twelve hours on February 3 and 60 hours for the week of January 30 through February 3.

16. Delivery supervisor Christopher Quindoza testified that he was in his office working when he noticed Petitioner passing by his open door after dropping off his time sheet at Mr. Herrmann's office. Mr. Quindoza testified that it is customary in the office for the supervisor to work on time sheets on Friday afternoon so that the materials will be ready for submission on Monday morning. He had already picked up several time sheets and was working on them when he saw Petitioner pass. Mr. Quindoza went to Mr. Herrmann's office to retrieve Petitioner's time sheet.

17. Mr. Quindoza saw that Petitioner's time sheet stated that he had worked until 4:30 p.m. He knew that this was incorrect. He stepped into the settlement room to confer with a few drivers there as to the time, then crossed out "4:30" on Petitioner's time sheet and wrote in "6:10," the time when Petitioner actually stopped work. He initialed the amendment

and then signed the time sheet as Petitioner's approving supervisor.

18. Mr. Quindoza testified that he amended the time sheet to ensure that Petitioner would be paid correctly and so that it would be correct for DOT reporting.

19. If the time had been calculated as Petitioner submitted it, he would have been recorded as having worked exactly 60 hours for the week. Petitioner in fact worked more than 14 hours on February 3, 2012, which pushed his time for the week over the 60-hour limit imposed by DOT rule.

20. Mr. Quindoza reported the discrepancies to his supervisor, Sales Operations Manager Kyle Lowens, who in turn notified Human Resources Manager Alex Pullen. Guided by the General Rules of Conduct and company precedent, Mr. Lowens instructed Mr. Quindoza to write up the incident as a termination of Petitioner's employment, pending approval from the human resources department.

21. A meeting was convened on February 10, 2012. Present at the meeting were Petitioner, Mr. Quindoza, Mr. Lowens, and Mr. Pullen. Petitioner was presented with the incorrect time sheet and DOT grid log he submitted and was asked to explain why he had falsified his time records. Petitioner admitted that he did so to avoid exceeding the 60-hour DOT limit.[5/]

22. In 2007, Petitioner had received a written warning for exceeding the DOT guidelines when he worked 62.25 hours in one week. At the February 10 meeting, it was explained to Petitioner that if he had submitted his time correctly, he would have merely received another written warning or a verbal coaching for exceeding the 60-hour requirement. Petitioner was told that submitting fraudulent documents was a much more serious offense.

23. On February 13, 2012, Petitioner was notified that he was suspended pending further investigation by the Pepsi human resources department.

24. On February 21, 2012, Petitioner's employment was terminated for violation of the company's Rules of Conduct.

25. At the hearing, Petitioner contended that he simply made a mistake on his time sheet and should have been allowed to correct it. He claimed that other drivers make mistakes "all the time," and that the practice had always been to give them a blank time sheet and tell them to fill it out correctly.

26. Mr. Lowens has worked 18 years for Pepsi and has been sales operations manager for the last three. He testified that he was unaware of drivers frequently submitting incorrect time sheets and that it has never been the practice of Pepsi to do anything other than terminate employees for turning in false documents. He personally knew of two employees besides

Petitioner who had been fired for submitting false time sheets. One of the fired employees was a black male, the other a white male.

27. Petitioner's testimony regarding company practices as to errors on submitted time sheets was not credible. Mr. Lowens' testimony on that point is credited.

28. At the hearing, Petitioner testified that Pepsi had long wanted to fire him. He claimed that a supervisor wanted to terminate him so that his route could be given to a white driver. No evidence of this conspiracy was presented beyond Petitioner's bare assertion.

29. There was no credible evidence that Pepsi had been seeking a reason to fire Petitioner. To the contrary, in December 2010, a customer complained to Pepsi about Petitioner and requested that he not be allowed to deliver products to her place of business again. The customer complained that Petitioner had indulged in a long, loud rant against the Bush administration and the Iraq war in the presence of her own customers.

30. Mr. Lowens testified that it is a terminable offense for a delivery driver to be banned from a customer's premises. However, he decided to first visit with the customer and try to persuade her to allow Petitioner back onto the account. Mr. Lowens and Mr. Herrmann met with the customer, who

acknowledged that Petitioner did a good job and agreed to let Petitioner return to her premises provided he stop talking politics. The fact that Mr. Lowens went out of his way to save Petitioner's job indicates there was no plan afoot to terminate his employment.

31. Petitioner claimed that Pepsi drove down his commissions by giving him more stops with fewer cases of products on his route. Also, for some reason, Pepsi did not want him to attend college, and gave him more stops to prevent him from getting off work early to attend class. He claimed that Pepsi would allow white employees to take off early for their classes. Again, Petitioner's bare assertions were unsupported by other testimony or documentary evidence.

32. Petitioner never complained of discriminatory treatment or harassment to any supervisor at Pepsi.

33. Petitioner offered no credible evidence disputing the legitimate, non-discriminatory reasons given by Pepsi for his termination. He simply asserted that he made a "mistake" on his time sheet that he should have been allowed to correct. The weight of the evidence is consistent with the finding that Petitioner's false time sheet was not a "mistake" but an intentional act, an attempt to dodge the disciplinary consequences of having worked more than 60 hours in one week.[6/]

34. Petitioner offered no credible evidence that Pepsi's stated reasons for his termination were a pretext for race discrimination, national origin discrimination, or discrimination because of Petitioner's color.

35. Petitioner offered no credible evidence that Pepsi discriminated against him because of his race, color or national origin in violation of section 760.10, Florida Statutes.

CONCLUSIONS OF LAW

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

37. The Florida Civil Rights Act of 1992 (the "Florida Civil Rights Act" or the "Act"), chapter 760, Florida Statutes, prohibits discrimination in the workplace.

38. Subsection 760.10, Florida Statutes, states the following, in relevant part:

> (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.

39. Pepsi is an "employer" as defined in subsection 760.02(7), Florida Statutes, which provides the following:

> (7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

40. Florida courts have determined that federal case law applies to claims arising under the Florida's Civil Rights Act, and as such, the United States Supreme Court's model for employment discrimination cases set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), applies to claims arising under section 760.10. See Paraohao v. Bankers Club, Inc., 225 F. Supp. 2d 1353, 1361 (S.D. Fla. 2002); Fla. State Univ. v. Sondel, 685 So. 2d 923, 925 n.1 (Fla. 1st DCA 1996); Fla. Dep't of Cmty. Aff. v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991).

41. Under the McDonnell analysis, in employment discrimination cases, Petitioner has the burden of establishing by a preponderance of evidence a prima facie case of unlawful discrimination. If the prima facie case is established, the burden shifts to the employer to rebut this preliminary showing by producing evidence that the adverse action was taken for some legitimate, non-discriminatory reason. If the employer rebuts the prima facie case, the burden shifts back to Petitioner to show by a preponderance of evidence that the employer's offered reasons for its adverse employment decision were pretextual.

See Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

42. In order to prove a prima facie case of unlawful employment discrimination under chapter 760, Florida Statutes, Petitioner must establish that: (1) he is a member of the protected group; (2) he was subject to adverse employment action; (3) Pepsi treated similarly situated employees outside of his protected classifications more favorably; and (4) Petitioner was qualified to do the job and/or was performing his job at a level that met the employer's legitimate expectations. See, e.g., Jiles v. United Parcel Service, Inc., 360 Fed. Appx. 61, 64 (11th Cir. 2010); Burke-Fowler v. Orange Cnty., 447 F. 3d 1319, 1323 (11th Cir. 2006); Knight v. Baptist Hosp. of Miami, Inc., 330 F.3d 1313, 1316 (11th Cir. 2003); Williams v. Vitro Servs. Corp., 144 F.3d 1438, 1441 (11th Cir. 1998); McKenzie v. EAP Mgmt. Corp., 40 F. Supp. 2d 1369, 1374-75 (S.D. Fla. 1999).

43. Petitioner has failed to prove a prima facie case of unlawful employment discrimination.

44. Petitioner established that he is a member of a protected group, in that he is a black man from Africa. Petitioner was subject to an adverse employment action in that he was terminated from his position as delivery driver with Pepsi. Petitioner was qualified to perform the job of delivery

driver attendant. The evidence established that Petitioner's job performance had been generally satisfactory prior to February 3, 2012.

45. As to the question of disparate treatment, the applicable standard was set forth in Maniccia v. Brown, 171 F.3d 1364, 1368-1369 (11th Cir. 1999):

> "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." Jones v. Bessemer Carraway Med. Ctr., 137 F.3d 1306, 1311 (11th Cir.), opinion modified by 151 F.3d 1321 (1998) (quoting Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). "The most important factors in the disciplinary context are the nature of the offenses committed and the nature of the punishments imposed." Id. (internal quotations and citations omitted). We require that the quantity and quality of the comparator's misconduct be nearly identical to prevent courts from second-guessing employers' reasonable decisions and confusing apples with oranges. See Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989) ("Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples."). (Emphasis added.)[7/]

46. Petitioner offered no direct evidence of disparate treatment. He asserted that he was fired so that his route could be given to a white driver, but offered no evidence beyond his bare assertion. He made assertions that some white

employees were allowed to leave work early to attend college classes while the company purposely prevented him from going to classes. However, Petitioner offered no specifics regarding the identities of these white employees or any other evidence to support his claim. As to the circumstances of Petitioner's firing, Pepsi demonstrated that it had fired two other employees, one a black male and one a white male, for the same offense committed by Petitioner.

47. Having failed to establish this element, Petitioner has not established a prima facie case of employment discrimination.

48. Even if Petitioner had met the burden, Pepsi presented evidence of legitimate, non-discriminatory reasons for Petitioner's termination. Pepsi Bottling Group's General Rules of Conduct stated that "misrepresentation of facts or falsification of Company records or other documents" was punishable by immediate termination. Petitioner admitted that he violated that rule with the express intent to falsify his hours so as not to run afoul of DOT's 60-hour rule.

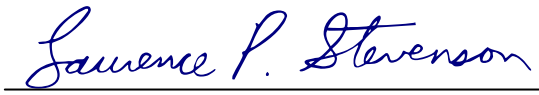
49. The question of Petitioner's race, color or national origin was never an issue until he made his allegations of discrimination after the fact.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations issue a final order finding that Pepsico, Inc. did not commit any unlawful employment practices and dismissing the Petition for Relief filed in this case.

DONE AND ENTERED this 2nd day of April, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of April, 2013.

ENDNOTES

[1/] Citations shall be to Florida Statutes (2012) unless otherwise specified. Section 760.10, Florida Statutes, has been unchanged since 1992.

[2/] The Notice of Hearing dated October 18, 2012, contained the following language:

> Notwithstanding the requirements of section 120.57(1)(g), Florida Statutes, and Florida

> Administrative Code Rule 28-106.214, the Florida Commission on Human Relations has ceased providing a court reporter to preserve the testimony at a final hearing. Although the Judge will use a tape recorder at the hearing to assist the Judge in preparation of the recommended order following the hearing, that recording is not expected to suffice for preparation of the transcript required for filing exceptions to the recommended order or for any subsequent appeal. If any party to this proceeding intends to provide a certified court reporter to record the final hearing at that party's own expense so that there can be an official transcript, that party shall advise all other parties and the Judge no later than 48 hours prior to the final hearing.

Neither party provided a "certified court reporter to record the final hearing."

[3/] Petitioner did not specify his national origin.

[4/] Rich Herrmann and Christopher Quindoza were the delivery supervisors for the Jacksonville Pepsi facility. They would alternate shifts: one week, Mr. Herrmann would work the early shift, and the next week Mr. Quindoza would work the early shift. On February 3, 2012, Mr. Quindoza was on the evening shift. An inbox on Mr. Herrmann's office door was the drop-off point for employees' time sheets on Fridays, regardless of which supervisor was on duty.

[5/] Both Mr. Quindoza and Mr. Lowens testified as to this explicit admission. Petitioner made a general assertion that the testimony of both men contained lies, but he did not expressly deny having admitted his reason for falsifying the time sheet.

[6/] One might question whether Petitioner's act merited dismissal, given that he was an eight-year employee with only one real blemish on his record. However, termination was well within Pepsi's discretion under its General Rules of Conduct. The purpose of this proceeding is to determine wither Pepsi

discriminated against Petitioner, not to second guess Pepsi's legitimate reasons for dismissing him.

[7/] The Eleventh Circuit has questioned the "nearly identical" standard enunciated in Maniccia, but has recently reaffirmed its adherence to it. Escarra v. Regions Bank, 353 Fed. Appx. 401, 404 (11th Cir. 2009); Burke-Fowler, 447 F. 3d at 1323 n.2.

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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.