STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JEFF KLIMCZAK,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-3489
	)	
DIGITAL NOW, INC.,	)	
	)	
Respondent.	)	
	)	

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 January 16, 2013, in Pensacola, Florida.

APPEARANCES

For Petitioner: Tiffany Rousseau Cruz, Esquire
Marie A. Mattox, P.A.
310 East Bradford Road
Tallahassee, Florida 32303

For Respondent: Michael John Stebbins, Esquire
Michael J. Stebbins, P.L.
504 North Baylen Street
Pensacola, Florida 32501

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner was the subject of an unlawful employment practice by Respondent due to his marital status.

PRELIMINARY STATEMENT

On April 30, 2012, Petitioner, Jeff Klimczak, filed an Employment Complaint of Discrimination against Respondent, Digital Now, Inc. (Digital Now), with the Florida Commission on Human Relations (FCHR) alleging discrimination based on marital status. On September 26, 2012, FCHR issued a Notice of Determination, finding that there was no cause to believe that an unlawful employment practice occurred. The Notice of Determination also advised Petitioner of his right to file a Petition for Relief and request a formal administrative hearing. On October 18, 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 one witness to testify. In addition, Petitioner offered Petitioner's Exhibits 1 through 6 into evidence. Respondent called one witness to testify and offered Respondent's Exhibits 1 through 11 into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order on March 7, 2013. Respondent filed an Amended Proposed Recommended Order on March 8, 2013.

FINDINGS OF FACT

1. Respondent is a corporation that sells and services blueprint machines and the supplies needed to operate such machines throughout a multi-regional area in the United States.

2. Pamela Turner was the Director of Operations for Respondent. Her office was in the Pensacola, Florida, branch offices of the Respondent.

3. During 2011, Respondent was looking for a person to fill a field technician position covering parts of Florida and Georgia. At the time, the territory that this position serviced ranged from Tallahassee, Florida, south to Perry, Florida, north to Valdosta and Albany, Georgia, and west to Destin, Florida. Importantly, the technician for the above area did not work out of Respondent's Pensacola office, but was remotely located somewhere within the position's service area. Further, parts and inventory were shipped to the remote location used by the field technician. For that reason, it was required that the field technician for the area possess the utmost honesty and trustworthiness. Additionally, it was very important that Petitioner and, specifically, Ms. Turner have a high degree of confidence in any person selected for the field technician position.

4. In November 2011, Petitioner interviewed for the Field Service Technician position with Respondent. Petitioner

interviewed with Pamela Turner and Michael Miller, the head of the company. Pamela Turner advised the Petitioner that due to the remote location of the job, it required the utmost in terms of honesty and trustworthiness of the person hired since the employee would be unsupervised most of the time and would possess valuable tools, parts and inventory at the employee's remote location.

5. On his application, Petitioner disclosed the address where he lived as 1654 Eagles Watch Way, Tallahassee, Florida. The address on Petitioner's application was his mother's home and was the place where he lived. Petitioner understood that this address also would be considered the address for his office and the address where parts and inventory would be shipped.

6. During Petitioner's interview, Petitioner was never asked any questions by the interviewers about the status of his marriage. The fact that Petitioner was married came up during casual conversation in relation to the travel required for the job. Additionally, during the course of the interview with Ms. Turner, Petitioner told Ms. Turner that Petitioner's wife would like for him to get this job because it meant more time at home with her. However, Petitioner did not inform any interviewer that he was separated from his wife because he did not feel that it had anything to do with his ability to perform the job he was interviewing for. He likewise did not inform any

of the interviewers that he was not living with his wife at her home or that he occasionally stayed at his wife's house because they were trying to work things out between them.

7. Petitioner was never asked specifically during the interview who owned the address that was listed on his application. However, Ms. Turner reasonably assumed that it was Petitioner's and his wife's home.

8. The Petitioner was hired for the position of field service technician on December 12, 2011. His employment contract ran from December 12, 2011, through December 11, 2012.

9. After Petitioner began his employment, Petitioner shared with a co-employee, Paul Springer, that he was separated from his wife. Paul Springer was a church counselor and suggested that he could help Petitioner and his wife by counseling them.

10. In January 2012, while talking with another employee, Pamela Turner learned that Petitioner was living with his mother and that Petitioner was separated from his wife. This information was of concern to Pamela Turner because she questioned where parts Petitioner utilized in the maintenance and repair of customer photocopying machinery were being shipped. She was concerned because she thought this was Petitioner's and his wife's home only to discover that the home did not belong to Petitioner. Ms. Turner felt that Petitioner should have disclosed the fact that the address on his application was not

owned by him and felt that the lack of disclosure was the same as misrepresenting information to her. Further, Ms. Turner, based on her earlier incorrect assumptions about Petitioner's address and living in the marital home, asked Petitioner why he had not told her about the address as it related to the circumstances of Petitioner's marriage. Ms. Turner incorrectly felt that Petitioner had misrepresented the circumstances of his marriage, which called into question the ownership of the address to which parts and inventory were being shipped. As a result, the confidence that Ms. Turner had in Petitioner was undermined.

11. Petitioner explained to Ms. Turner that he and his wife were working on things and he was between his wife’s residence and his mother’s residence, but that he was not telling different stories. Further, the evidence demonstrated that Petitioner did not actively misrepresent anything to Respondent.

12. However, Ms. Turner honestly felt that she could no longer trust Petitioner and honestly believed through her worldview that Petitioner had misrepresented himself to her. On January 30, 2012, she advised Petitioner that he was being terminated for misrepresentation. Given Ms. Turner's honest beliefs, Respondent's rationale for terminating Petitioner was not a pretext for discrimination. More importantly, given these honest beliefs, the evidence did not demonstrate that Petitioner's termination was based on Petitioner's separated

marital status, but on the lack of trust that Petitioner's supervisor had in him.

13. After the termination, Petitioner made no report of the alleged discrimination pursuant to the Respondent's written Problem Resolution policy and/or Equal Employment Opportunity policy both of which provided a problem and discrimination complaint process within Respondent's company.

14. Petitioner was aware of these policies. However, Petitioner did not utilize these complaint processes because there was no one to escalate the complaint to since his supervisor, Pamela Turner, and the head of the company, Michael Miller, were both involved in the decision to terminate Petitioner. Therefore, Petitioner's lack of use of Respondent's discrimination and problem complaint processes was reasonable under the circumstances.

15. Further, no adverse action has been taken against any employee of Respondent due to that employees' marital status. Thus, there are no similarly situated employees outside Petitioner's protected class to which Petitioner can be compared. Moreover, Petitioner offered no evidence at the hearing on January 16, 2013, that he lost any wages due to the alleged discrimination. Ultimately, however, the evidence was insufficient to demonstrate that Petitioner was terminated due to his separated marital status. As indicated, Ms. Turner honestly

felt she could not trust Petitioner in a position that required her to have the highest confidence in that employee. Therefore, based on these facts, Respondent did not discriminate against Petitioner based on his marital status and the Petition for Relief should be dismissed.

CONCLUSIONS OF LAW

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

17. Sections 760.01 through 760.11, Florida Statutes, are known as the Florida Civil Rights Act (FCRA). Subsection 760.10(1)(a) of the Act 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 such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

18. 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, FCHR and Florida courts have determined federal case law interpreting Title VII is applicable to cases arising under the FCRA. See Valenzuela v. GlobeGround North America, LLC, 18 So. 3d 17 (Fla. 3d DCA 2009); 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); Brand v. Fla. Power Corp., 633 So. 2d 504, 509 (Fla. 1st DCA 1994).

19. In the instant case, Petitioner alleged in the Employment Complaint of Discrimination that he filed with FCHR that Respondent discriminated against him on the basis of his marital status when it terminated his employment.

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

21. "Direct evidence is composed of 'only the most blatant remarks, whose intent could be nothing other than to discriminate' on the basis of some impermissible factor." Schoenfeld v. Babbitt, supra. Herein, Petitioner presented no direct evidence of discrimination based on his marital status.

22. However, since "[d]irect evidence of intent is often unavailable," those who claim to be victims of intentional discrimination may establish their cases through inferential and circumstantial proof. Shealy v. City of Albany, Ga., 89 F.3d

804, 806 (11th Cir. 1996); Kline v. Tenn. Valley Auth., 128 F.3d 337, 348 (6th Cir. 1997).

23. Where a complainant attempts to prove intentional discrimination using circumstantial evidence, the shifting burden analysis established by the United States Supreme Court in McDonnell Douglas v. Green, 411 U.S. 792 (1973), and Texas Department of Community. Affairs v. Burdine, 450 U.S. 248 (1981), is applied. Under this well-established model of proof, the complainant bears the initial burden of establishing a prima facie case of discrimination. When the charging party, i.e., Petitioner, is able to make out a prima facie case, the burden to go forward with the evidence shifts to the employer to articulate a legitimate, non-discriminatory explanation for the employment action. See Dep't of Corr. v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991) (court discusses shifting burdens of proof in discrimination cases). The employer has the burden of production, not persuasion, and need only present the finder of fact with evidence that the decision was non-discriminatory. Id. See also Alexander v. Fulton County, Georgia, 207 F.3d 1303 (11th Cir. 2000). The employee must then come forward with specific evidence demonstrating that the reasons given by the employer are pretexts for discrimination. Schoenfeld v. Babbitt, supra at 1267. The employee must satisfy this burden by showing 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. Dep't of Corr. v. Chandler, supra at 1186; Alexander v. Fulton County, Ga., supra.

24. Notably, "although the intermediate burdens of production shift back and forth, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the [Petitioner] remains at all times with the [Petitioner]." EEOC v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1273 (11th Cir. 2002); see also Byrd v. RT Foods, Inc., 948 So. 2d 921, 927 (Fla. 4th DCA 2007) ("The ultimate burden of proving intentional discrimination against the plaintiff remains with the plaintiff at all times.").

25. To establish a prima facie case, Petitioner must prove that (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 are not members of the protected class, more favorably; and (4) he was qualified for the job or benefit at issue. See McDonnell, supra; Gillis v. Ga. Dep't of Corr., 400 F.3d 883 (11th Cir. 2005); Rice-Lamar v. City of Ft. Lauderdale, 232 F.3d 842-843 (11th Cir. 2000).

27. However, "establishing the elements of the McDonnell Douglas framework is not, and never was intended to be, the sine qua non for a plaintiff to survive a summary judgment motion in

an employment discrimination case . . . [and] the plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case." Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011); see also Chapter 7 Trustee v. Gate Gourmet, Inc., 683 F.3d 1249, 1255 (11th Cir. 2012) (quoting Lockheed-Martin). Rather, as the Supreme Court acknowledged:

> Our decision in [McDonnell Douglas] however, did not purport to create an inflexible formulation. We expressly noted that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from (a plaintiff) is not necessarily applicable in every respect to differing factual situations." The importance of McDonnell Douglas lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion . . .

Int'l Bd. of Teamsters v. U. S., 431 U.S. 324, 358 (1977) (internal citations omitted). Further, the "methods of presenting a prima facie case are not fixed; they are flexible and depend to a large degree upon the employment situation." Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1087 (11th Cir. 2004). If the plaintiff cannot produce a comparator, he "will always survive [summary judgment] if he presents circumstantial evidence that creates a triable issue concerning the discriminatory intent." Lockheed-Martin at 1328 (citing

Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997)). See also Hamilton v. Southland Christian Sch., Inc., 680 F.3d 1316, 1320 (11th Cir. 2012) (citing Lockheed-Martin). In order to survive summary judgment, the circumstantial evidence creates a triable issue if it, "viewed in a light most favorable to the plaintiff, presents 'a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination by the decision-maker." Lockheed-Martin at 1328 (quoting Silverman v. Bd. of Educ., 637 F.3d 729, 734 (7th Cir. 2011)); see also Rioux v. City of Atlanta, 520 F.3d 1269, 1277 (11th Cir. 2008) (holding that plaintiff submitted sufficient circumstantial evidence of discrimination to meet elements of prima facie case even though no comparator produced); Holland v. Gee, 677 F.3d 1047, 1062 (11th Cir. 2012) (holding plaintiff submitted sufficient circumstantial evidence for jury to find termination motivated by discrimination).

28. In the instant case, the lack of evidence regarding similarly situated employee comparators is not fatal to Petitioner's case. However, this proceeding was not halted based on a summary judgment, but was fully tried before the Division of Administrative Hearings. Where the administrative law judge does not halt the proceedings for "lack of a prima facie case and the action has been fully tried, it is no longer relevant whether the [Petitioner] actually established a prima facie case. At that

point, the only relevant inquiry is the ultimate, factual issue of intentional discrimination. . . . [W]hether or not [the Petitioner] actually established a prima facie case is relevant only in the sense that a prima facie case constitutes some circumstantial evidence of intentional discrimination." Green v. Sch. Bd. of Hillsborough Cnty., 25 F.3d 974, 978 (11th Cir. 1994); Beaver v. Rayonier, Inc., 200 F. 3d 723, 727. (11th Cir. 1999). See also U. S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 713-715 ("Because this case was fully tried on the merits, it is surprising to find the parties and the Court of Appeals still addressing the question of whether Aikens made out a prima facie case. We think that by framing the issue in these terms, they have unnecessarily evaded the ultimate question of discrimination vel non. . . . [W]hen the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact-finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage, the McDonnell-Burdine presumption 'drops from the case,' and 'the factual inquiry proceeds to a new level of specificity.'").

29. In this case, the evidence demonstrated that Petitioner is a member of a protected class for purposes of his marital status discrimination claim. It is also undisputed that

Petitioner was qualified for the Field Service Technician position, and that Petitioner suffered an adverse employment action when he was terminated from that position.

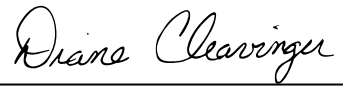
30. The evidence also showed that the proffered reason for Petitioner's termination was not a pretext for marital status discrimination, but was based on Ms. Turner's perception of Petitioner's misrepresentation and dishonesty.

31. Even if Ms. Turner's misperceptions were wrong and based on assumptions she made, such perceptions were legitimate and honest on her part. On balance, the evidence demonstrated that Respondent's basis for terminating Petitioner was legitimate and not a pretext for discrimination based on Petitioner's marital status. Further, the evidence did not demonstrate that Petitioner was terminated based on his marital status. 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 17th day of April, 2013, in Tallahassee, Leon County, Florida.



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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.